

Privileges Committee

**A memorandum of
understanding with the
NSW Police Force relating
to the execution of search
warrants on members'
premises**

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Terms of reference

1. That this House notes that in December 2009, the President of the Legislative Council, the Speaker of the Legislative Assembly 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'.
2. That the Privileges Committee inquire into and report on:
 - (a) the development of a Memorandum of Understanding between the President and Commissioner of Police covering the execution of search warrants by the NSW Police Force on the premises of members, and
 - (b) whether it would be appropriate to enter into a similar Memorandum of Understanding with any other relevant agency.
3. That the Committee report by the last sitting day in September 2010.
4. That a message be forwarded to the Legislative Assembly informing it of the terms of reference agreed to by the House, and requesting that the Legislative Assembly Privileges and Ethics Committee be given a similar reference.

These terms of reference were referred to the Committee by the House.

LC Minutes (22/4/2010) 1759

Committee membership

The Hon Kaye Griffin MLC	Australian Labor Party	<i>Chair</i>
The Hon Jenny Gardiner MLC	The Nationals	<i>Deputy Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	
The Hon Don Harwin MLC	Liberal Party	
Revd the Hon Fred Nile MLC	Christian Democratic Party (Fred Nile Group)	
The Hon Mick Veitch MLC	Australian Labor Party	
The Hon Ian West MLC	Australian Labor Party	

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Chair's foreword

This report is the latest in a series of inquiries conducted by the Privileges Committee over the past seven years concerning the execution of search warrants on members' premises. The previous inquiries concerned the seizure of documents from the office of the Hon Peter Breen MLC by the Independent Commission Against Corruption (ICAC) (2003), a disputed claim of privilege by Mr Breen arising from the seizure of those documents (2004), the development of a draft protocol for the execution of search warrants by law enforcement and investigatory agencies (2006), and the development of a Memorandum of Understanding between the Presiding Officers and the Commissioner of the ICAC concerning the execution of search warrants by the ICAC at Parliament House (2009).

In this report, the Committee examines the development of an appropriate memorandum of understanding on the execution of search warrants in the premises of members of the New South Wales Parliament between the Presiding Officers and the Commissioner of Police. Along with the ICAC, the NSW Police Force is the agency most likely to seek to execute a search warrant in the premises of members. The report also considers the development of similar memorandums with other agencies that may seek to execute a search warrant in the premises of members.

The Committee recommends that the House resolve that the President enter into the 'Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly' set out in Appendix 9 of this report. The Committee does not see the need for the President to enter into a similar memorandum with any other agency at this time.

The Committee would like to thank the Commissioner of Police for assisting with the development of the Memorandum recommended for adoption in this report.

I would like to thank my fellow Committee members for their constructive participation in this inquiry, the Chair and members of the Legislative Assembly Privileges and Ethics Committee for collaborating with the Committee in the development of the Memorandum recommended for adoption in this report, and the members of the Committee Secretariat for their support of the Committee.

The Hon Kaye Griffin MLC
Chair

Summary of recommendations

Recommendation 1

9

That the House resolve that the President enter into the ‘Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly’ set out in Appendix 9 of this report.

Recommendation 2

9

That the House send a message to the Legislative Assembly requesting the Assembly to authorise the Speaker to join with the President in entering into the ‘Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly’ set out in Appendix 9 of this report.

Chapter 1 Introduction

- 1.1 This chapter provides an overview of parliamentary privilege as it relates to search warrants, a summary of events over the past six years leading to the current inquiry, a discussion of developments concerning parliamentary privilege and search warrants in other jurisdictions, and a description of the establishment of this inquiry.

The application of parliamentary privilege to search warrants

- 1.2 This report is the latest in a series of inquiries conducted by the Privileges Committee over the past seven years concerning the execution of search warrants in members' premises.
- 1.3 The central issue arising from the execution of search warrants in any premises occupied or used by a member of the New South Wales Parliament is the preservation of parliamentary privilege. In Chapter 2 of its November 2009 report entitled *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices* (Report No. 47), the Committee discussed at length the nature of parliamentary privilege and its application to search warrants.¹ The Committee does not intend to reiterate that material in detail here. Suffice to say that a search warrant, if otherwise valid, can be executed over premises occupied or used by a member of Parliament, including the Parliament House office of a member, the ministerial office of a member (if applicable), the electorate office of a member and the residence of a member. Documents cannot be placed beyond the reach of a person executing a valid search warrant simply because they are held by a member or are on premises occupied or used by a member. However, documents and other material in the possession of a member are immune from seizure if their compulsory disclosure would involve impermissible inquiry into 'proceedings in Parliament' under Article 9 of the *Bill of Rights 1689*.² Members are protected – absolutely – not only from being sued or prosecuted for their participation in 'proceedings in Parliament', but also from being forced to disclose, by way of the production of documents, their activities as part of 'proceedings in Parliament'.

Background to this inquiry

The Breen matter

- 1.4 On 3 October 2003, the Independent Commission Against Corruption (ICAC) executed a search warrant on the office of a member of the Legislative Council, the Hon Peter Breen MLC, during which certain documents were seized.
- 1.5 In two subsequent inquiries by this Committee into the matter, the first in 2003 and the second in 2004, the Committee found that the seizure under warrant of documents which fall within the scope of 'proceedings in Parliament' for the purposes of Article 9 of the *Bill of*

¹ See also the discussion in Chapter 2 of the Committee's December 2003 report entitled *Parliamentary privilege and seizure of documents by ICAC* (Report No. 25).

² Article 9 applies in New South Wales by virtue of section 6 and schedule 3 of the *Imperial Acts Application Act 1969*.

Rights 1689 constitutes a breach of the immunities of the House. The Committee also recommended that the House refer to it a further inquiry into the development of a protocol for the future execution of search warrants on members' offices.³

- 1.6 In accordance with this recommendation, in April 2005, the House referred to the Committee an inquiry into appropriate protocols for the execution of search warrants on members' offices to be adopted by law enforcement agencies and investigatory bodies, with particular reference to the procedures to be followed when obtaining and executing a search warrant, for making a claim of privilege, and for resolving any dispute concerning that claim of privilege.⁴
- 1.7 The Committee reported in February 2006.⁵ The report recommended the adoption of a draft protocol, developed by the Committee in consultation with various investigatory bodies, including the ICAC. The draft protocol comprised elements of:
- the protocol followed by the Australian Federal Police for the execution of search warrants on the offices of members of the Commonwealth Parliament,
 - the procedure adopted by the Legislative Council in 2003 for determining the claim of privilege by the Hon Peter Breen over certain documents seized by the ICAC, and
 - the test developed by the Privileges Committee for determining whether a member's document falls within the scope of 'proceedings in Parliament'. This test was adopted by the Committee in its second report arising from the Breen matter in 2004.
- 1.8 Of particular note, the recommended protocol incorporated procedures to be followed in cases where an investigatory agency executes a search warrant on the premises of a member, the member claims that certain documents in his or her possession are immune from seizure by virtue of the protection of parliamentary privilege, and the investigatory agency disputes that claim.

The ICAC Memorandum of Understanding

- 1.9 Following the resolution of the Breen matter, the ICAC adopted new practices to deal with issues of parliamentary privilege where they arise in the execution of search warrants at Parliament House. Section 10 of Procedure 9 of the Commission's Operations Manual, entitled 'Procedures for obtaining and executing search warrants', now outlines the ICAC procedure for the execution of a search warrant on a parliamentary office.
- 1.10 On 10 September 2009, following questions raised by the Committee on the ICAC in relation to the operation of the ICAC's new search warrants procedures, the Chair of the Privileges Committee moved a motion in the House to establish an inquiry into the development of a

³ Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No. 25, December 2003; Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No. 2*, Report No. 28, March 2004.

⁴ *LC Minutes* (6/4/2005) 1313.

⁵ Privileges Committee, *Protocol for execution of search warrants on members' offices*, Report No. 33, February 2006.

appropriate memorandum of understanding between the President and the Commissioner of the ICAC covering the execution of search warrants by the ICAC on the Parliament House offices of members. The Legislative Assembly subsequently referred the same inquiry to the Legislative Assembly Privileges and Ethics Committee.⁶

- 1.11** Following consultation with the ICAC, the Committee tabled its report on 24 November 2009. The Committee found that Procedure 9 of the Commission's Operations Manual, and in particular section 10, provided a suitable basis for the execution of search warrants on members' offices by the ICAC. Accordingly, the Committee recommended that the House resolve that the President enter into the 'Memorandum of Understanding with the ICAC Commissioner concerning the execution of search warrants on members' offices' set out in the Committee's report.⁷ A message to the Legislative Assembly requesting the Assembly to authorise the Speaker to join with the President in entering into the Memorandum of Understanding was sent the next day, 25 November 2009.⁸
- 1.12** On 26 November 2009, the Legislative Assembly Privileges and Ethics Committee tabled its report on the matter in the Legislative Assembly in which it recommended that the House resolve that the Speaker enter into the 'Memorandum of Understanding with the ICAC Commissioner concerning the execution of search warrants on members' offices', as set out in the Legislative Council's message dated 25 November 2009.⁹ A message to the Council to that effect followed on 3 December 2009.¹⁰
- 1.13** The 'Memorandum of Understanding on the Execution of Search Warrants in the Parliament House Office of Members of the New South Wales Parliament between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly' was signed by the President and the Commissioner of the ICAC on 11 December 2009, and by the Speaker on 16 December 2009.
- 1.14** The adoption of this Memorandum of Understanding with the ICAC, coming several years after the original Breen matter in 2003, was a significant advance for the Parliament in managing the execution of search warrants at Parliament House by the ICAC. It brought a degree of certainty and predictability to such processes which did not exist before.

Developments in other jurisdictions

- 1.15** The Committee notes that a number of other Parliaments both in Australia and internationally have moved to adopt protocols covering the execution of search warrants over the premises of their members. The Committee examined this issue in both its February 2006 report (Report No. 33), and also at length in Chapter 3 of its November 2009 report (Report No.

⁶ *LC Minutes* (10/9/2009) 1364-1365; (22/9/2008) 1387-1388.

⁷ Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, Report No. 47, November 2009, pp 21-22, 24-25, appendix 7.

⁸ *LC Minutes* (25/11/2009) 1153-1154.

⁹ Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Memorandum of Understanding – Execution of Search Warrants by the Independent Commission Against Corruption on Members Offices*, November 2009, p 5.

¹⁰ *LC Minutes* (3/12/2009) 1616.

47). Once again, the Committee does not intend to reiterate that material in detail here. In summary of the information, as updated:

- In 2005, the Commonwealth Government and the Presiding Officers of the Commonwealth Parliament agreed on the procedures to be followed by the Australian Federal Police when executing search warrants on premises occupied or used by senators or members.¹¹ The Presiding Officers of the Commonwealth Parliament are seeking to extend similar arrangements to other state and territory police services.
- In October 2006, the Speaker of the House of Representatives of New Zealand entered into an interim agreement with the Commissioner of the New Zealand Police concerning the execution of search warrants.¹² A final protocol is due to be considered by the New Zealand Parliament Privileges Committee, but has been delayed as the matter that led to the adoption of the interim agreement is the subject of police charges in the courts.
- In May 2007, the Speaker of the ACT Legislative Assembly tabled a 'Memorandum of Understanding between the Speaker and the Australian Federal Police' covering the execution of search warrants at the ACT Legislative Assembly.¹³
- In December 2008, following the execution by the Metropolitan Police of a search warrant in the Palace of Westminster, the Speaker of the British House of Commons issued a protocol concerning the execution by the Police of search warrants in the precincts of the House of Commons.¹⁴ This protocol, and the events leading up to its adoption, was subsequently the focus of an inquiry by the House of Commons Committee on Issues of Privilege, which endorsed the protocol.¹⁵ The House of Lords has also adopted a new protocol of its own.¹⁶

¹¹ See the *Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of Parliament between the Attorney-General, the Minister for Justice and Customs, the Speaker of the House of Representatives and the President of the Senate*, 2005. The agreed procedures are set out in the Australian Federal Police's *National guideline for execution of search warrants where parliamentary privilege may be involved*.

¹² *Execution of Search Warrants on Premises Occupied or Used by Members of Parliament, An Agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of the New Zealand*.

¹³ The Memorandum provides that police search warrants within the precincts of the Assembly are to be carried out in accordance with an ACT 'Policing Practical Guide' entitled *Execution of Search warrants where parliamentary privilege may be applied – execution of search warrants and interviews with members of the Legislative Assembly*. The ACT Guide closely follows the Australian Federal Police National guideline.

¹⁴ *Mr Speaker's protocol on the execution of a search warrant in the precincts of the House of Commons*.

¹⁵ House of Commons Committee on Issues of Privilege, *Police Searches on the Parliamentary Estate*, 15 March 2010, cited at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmmispriv/62/62.pdf>, p 67.

¹⁶ *Protocol on police requests for access to the precincts of the House of Lords with a view to arresting a Member or searching a Member's office*.

- In June 2009, the Scottish Parliament agreed to a Memorandum of Understanding concerning the execution of search warrants in members' offices with the Procurator Fiscal and the Crown Office and the Borders and Lothian Police.¹⁷

1.16 It is notable when considering these various protocols both in Australia and internationally that they generally concern the execution of search warrants by the police. Currently, the New South Wales Parliament, while having finalised a protocol with the ICAC, does not have a similar agreement with the NSW Police Force.

Establishment of this inquiry

1.17 On 20 April 2010, following the finalisation of the Memorandum of Understanding with the ICAC in December 2009, the Committee met and resolved to seek a reference from the House for a new inquiry into finalisation of a similar memorandum of understanding with other agencies, notably the NSW Police Force, but also possibly agencies such as the Australian Federal Police and the NSW Crime Commission. The Committee took this step in recognition that there remained unfinished business in relation to the search warrants issue.

1.18 In accordance with the Committee's resolution, on 22 April 2010, the Deputy Chair of the Committee, in the absence of the Chair, moved a motion in the House to establish this inquiry, with a reporting date of the last sitting day in September 2010. On the motion being agreed to, a message was sent to the Legislative Assembly conveying the terms of reference and requesting that similar terms of reference be given to the Legislative Assembly Privileges and Ethics Committee.¹⁸

1.19 The Legislative Assembly responded by message of 11 May 2010, advising that on 23 April 2010, similar terms of reference had been referred to the Legislative Assembly Privileges and Ethics Committee.¹⁹

¹⁷ *Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of the Scottish Parliament at Holyrood between the Crown Office and Procurator Fiscal Service, Lothian and Borders Police and the Scottish Parliament.*

¹⁸ *LC Minutes* (22/4/2010) 1759-1760.

¹⁹ *LC Minutes* (11/5/2010) 1772-1773.

Chapter 2 A memorandum of understanding with the NSW Police Force

- 2.1** In this chapter, the Committee examines the adoption of a memorandum of understanding between the President of the Legislative Council, the Speaker of the Legislative Assembly and the Commissioner of Police concerning the execution of search warrants by the NSW Police Force on the premises of members of Parliament, in accordance with part 2(a) of the Committee's terms of reference.

The development of a memorandum of understanding

- 2.2** As a first step towards the development of a memorandum of understanding with the Commissioner of Police for the purposes of this inquiry, the Committee prepared a draft memorandum of understanding for consultation. This draft memorandum was based on the form and wording of both the December 2009 Memorandum of Understanding with the ICAC, and the 2005 Memorandum of Understanding between the Presiding Officers of the Commonwealth Parliament and the Commonwealth Government concerning the execution of search warrants by the Australian Federal Police. The draft memorandum is at Appendix 1.
- 2.3** Significantly, in developing the draft memorandum, the Committee specifically applied it to all premises used or occupied by a member of the New South Wales Parliament, including the Parliament House office of a member, but also the ministerial office of a member (if applicable), the electorate office of a member and the residence of a member. To this end, the draft memorandum included separate procedures to be followed for the execution of search warrants on the Parliament House and non-Parliament House offices of members. The draft memorandum also included a more extensive statement of the nature of parliamentary privilege than that adopted in the Memorandum of Understanding with the ICAC.
- 2.4** At a meeting of the Committee on 12 May 2010, the Committee resolved that it write to the Commissioner of Police, forwarding the draft memorandum of understanding prepared by the Committee and seeking the comments of the Commissioner. Subsequently, the Committee also agreed to a proposal by the Chair of the Legislative Assembly Privileges and Ethics Committee that the Chairs of both Committees write jointly to the Commissioner of Police concerning the matter. Given this collaborative approach, the Committee amended its draft memorandum to list both the President of the Legislative Council and the Speaker of the Legislative Assembly as parties to the memorandum.
- 2.5** On 20 May 2010, the draft memorandum was forwarded to Mr Andrew P Scipione APM, Commissioner of Police in a joint letter from the Chair of the Committee and the Chair of the Legislative Assembly Privileges and Ethics Committee. A copy of this letter is at Appendix 2.
- 2.6** The Commissioner replied by correspondence dated 30 June 2010. A copy of this letter is at Appendix 3.
- 2.7** In his letter, the Commissioner raised a number of issues. These issues, and the Committee's response, are discussed in detail at Appendix 4. However, of note:

- The Commissioner's letter raised the issue of waiving of parliamentary privilege by the Presiding Officers. In response, the Committee noted that the Presiding Officers do not have the power to waive parliamentary privilege.
- The Commissioner's letter suggested that proposed clauses 4 to 6 of the draft memorandum, concerning the processes for the issuing of search warrants (drawn from the Memorandum of Understanding with the ICAC), were unnecessary, on the basis that such matters are dealt with in the *Law Enforcement (Powers and Responsibilities) Act 2002*. In response, the Committee noted that the *Law Enforcement (Powers and Responsibilities) Act 2002* does not spell-out specific operating procedures to be followed by the NSW Police when applying for and conducting a search warrant, and proposed the inclusion of a new Clause 4: 'Procedure prior to obtaining a search warrant'. This clause would place two significant requirements on officers of the NSW Police Force prior to obtaining a search warrant: that the application for a warrant should have the approval of the Commissioner or the Commissioner's delegate; and that the warrant should not cover a wider range of material than is necessary to advance the relevant investigation. This new Clause 4 was based on a similar clause in the 2005 Memorandum of Understanding between the Presiding Officers of the Commonwealth Parliament and the Commonwealth Government concerning the execution of search warrants by the Australian Federal Police, and was previously endorsed by both the Committee and the NSW Police Force in the 2006 report of the Committee (Report No. 33).
- The Commissioner's letter raised the complexity confronted by NSW Police Force officers when searching documents stored on computers, and recommended that a technical information expert be permitted to attend the execution of search warrants on members' premises. The Committee agreed.

2.8 Based on the Commissioner's letter of 30 June 2010 and the response outlined above and in Appendix 4, the Committee developed a second draft memorandum, a copy of which is at Appendix 5. The Committee also took the opportunity in this second draft to simplify the clauses dealing with the execution of search warrants in the Parliament House and non-Parliament House premises of members. On 16 July 2010, this second draft memorandum was forwarded to Mr Andrew P Scipione APM, Commissioner of Police, in a second joint letter from the Chair of the Committee and the Chair of the Legislative Assembly Privileges and Ethics Committee. A copy of this letter is at Appendix 6.

2.9 The Commissioner replied by correspondence dated 17 September 2010. A copy of this letter is at Appendix 7.

2.10 In his letter, the Commissioner addressed the issues raised by the Committee and raised a further issue of his own. These issues and the Committee's responses are discussed in detail at Appendix 8. However, of note, the Commissioner's letter questioned the need for the new Clause 4, as cited above. While not opposing the inclusion of the clause, the Commissioner noted again that 'the *Law Enforcement (Powers and Responsibilities) Act 2002* ... is the proper source of police procedures for obtaining lawful search warrants in NSW, and that the appropriate focus for this draft MoU is the interface between the NSWPF and Parliament during the execution of a search warrant'.

- 2.11** While acknowledging the Commissioner's position, the Committee nevertheless remains committed to the inclusion of this clause in the memorandum, based on the need to ensure that search warrants are executed without improperly interfering with the functioning of Parliament, and noting that in the past both in the New South Wales and Commonwealth Parliaments, material has been seized during the execution of search warrants that went beyond the terms of the warrants. This is discussed in more detail in the Committee's response to the Commissioner's letter in Appendix 8.
- 2.12** Based on the Commissioner's letter of 17 September 2010 and the response outlined above and in Appendix 8, the Committee developed a final 'Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly', a copy of which is at Appendix 9.

Recommended Memorandum of Understanding

- 2.13** The Committee believes that there would be considerable merit in the Presiding Officers and the Commissioner of Police entering into a memorandum of understanding concerning the execution of search warrants by the NSW Police Force in the premises of members of the New South Wales Parliament. Along with the ICAC, the NSW Police Force is the agency most likely to seek to execute a search warrant in the premises of a member. Should this ever occur, it should be properly regulated.
- 2.14** The 'Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly' set out in Appendix 9 of this report is an appropriate Memorandum for this purpose, and should be entered into by the Presiding Officers and the Commissioner of Police.

Recommendation 1

That the House resolve that the President enter into the 'Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly' set out in Appendix 9 of this report.

Recommendation 2

That the House send a message to the Legislative Assembly requesting the Assembly to authorise the Speaker to join with the President in entering into the 'Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly' set out in Appendix 9 of this report.

Chapter 3 A memorandum of understanding with other relevant agencies

3.1 In this chapter, the Committee examines the appropriateness of the development and adoption of a memorandum of understanding between the President of the Legislative Council, the Speaker of the Legislative Assembly and the heads of various other agencies concerning the execution of search warrants in the premises of members, in accordance with part 2(b) of the Committee's terms of reference.

Agencies contacted during the Committee's 2005-2006 Inquiry

3.2 During the Committee's 2005-2006 Inquiry into a protocol for the execution of search warrants on members' offices, the Committee contacted 10 different agencies for comment on various aspects of the protocol.²⁰ Those agencies were:

- The Australian Crime Commission;
- The Australian Federal Police;
- The Auditor-General;
- The Australian Taxation Office;
- The Director of Public Prosecutions;
- The Independent Commission Against Corruption;
- The NSW Crimes Commission;
- The NSW Law Reform Commission;
- The NSW Police Service; and
- The Police Integrity Commission.

3.3 Subsequently, in its February 2006 Report,²¹ the Committee made the following observation concerning the responses of those agencies:

A range of responses were provided in the submissions. The Audit Office and Australian Taxation Office advised that they do not execute search warrants. The NSW Law Reform Commission and the NSW Crime Commission did not wish to comment on the Draft Protocol. The Australian Crime Commission expressed support for the Protocol with one qualification. The Special Minister of State advised that the Government takes the view that there should be individual arrangements with each particular agency rather than a standard protocol across the board. The ICAC and NSW Police commented on various aspects of the Protocol. The ICAC also provided its own suggested alternative procedure. The Australian Federal Police noted

²⁰ The Committee also contacted members of the Legislative Council, the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, the Council for Civil Liberties and the Hon John Hannaford.

²¹ Privileges Committee, *Protocol for execution of search warrants on members' offices*, Report No. 33, February 2006.

that the draft Protocol reflects AFP policy and the guidelines which apply in the federal Parliament, and expressed strong support for the Protocol, with minor qualifications.²²

Agencies again contacted by the Committee

- 3.4 Based on the response of the agencies listed above to its 2005-2006 Inquiry, the Committee resolved at its meeting on 12 May 2010 as part of this inquiry to write to the heads of the following agencies seeking their views about the likelihood of their agency executing a search warrant on the premises of members and the value of entering into a search warrants protocol with the Parliament:
- The Australian Federal Police;
 - The NSW Crime Commission;
 - The NSW Law Reform Commission; and
 - The Australian Crime Commission.
- 3.5 The Committee subsequently again agreed to a proposal by the Chair of the Legislative Assembly Privileges and Ethics Committee that the Chairs of both Committees write jointly to the heads of the above agencies.

Agency responses

The Australian Federal Police

- 3.6 In correspondence to the Committee dated 18 June 2010, the Acting National Manager of Policy and Governance with the Australian Federal Police (AFP), Mr Chris Black, indicated that AFP responsibilities are generally the investigation of Commonwealth criminal offences, and that there are likely to be few occasions where evidence relevant to such investigations is located on the premises of a member of the New South Wales Parliament. However, he did not rule out the possibility.
- 3.7 Accordingly, Mr Black submitted that if an instance should arise where the AFP seek to execute a search warrant on the premises of a member of the New South Wales Parliament, the 2005 Memorandum of Understanding between the Presiding Officers of the Commonwealth Parliament and the Commonwealth Government concerning the execution of search warrants by the Australian Federal Police would be an appropriate framework for dealing with claims of parliamentary privilege. In support, Mr Black noted that the AFP Memorandum and associated procedures have to some degree operated as a model for the development of similar protocols in other jurisdictions. Mr Black concluded:

... there does not appear to be any pressing requirement for the AFP to enter into an additional Protocol with NSW or other State Parliaments covering the same issues

²² *Ibid*, p 19.

that are currently dealt with in the AFP MOU. However, the AFP would be happy to give further consideration to this proposal if it was recommended by the Inquiry.

- 3.8** A copy of Mr Black's letter is at Appendix 10.
- 3.9** The Committee notes that the key differences between the AFP Memorandum and the draft memorandum with the Commissioner of the NSW Police Force recommended by the Committee in the previous chapter are in the processes to be followed where a claim of privilege is made over documents discovered as part of the execution of a search warrant.
- 3.10** Under the AFP Memorandum, such documents are to 'be delivered into the safekeeping of a neutral third party, who may be the warrant issuing authority or an agreed third party'. A member may then seek a ruling 'from a court or the relevant House'.
- 3.11** By contrast, the draft memorandum with the Commissioner of the NSW Police Force recommended by the Committee in the previous chapter contemplates such documents being delivered to the possession of the Clerk of the House, with any dispute over a claim of privilege ultimately being determined by the relevant House (but not the courts).
- 3.12** In the Committee's opinion, these differences are not significant. On the first point of difference, the delivery of disputed documents to a 'third party' in the AFP Memorandum, this provision may in fact be interpreted as delivery of the documents to the Clerk of the House, as is the proposal in the draft memorandum with the Commissioner of the NSW Police Force. On the second point of difference, the determination of any claim of privilege by 'a court or the relevant House', while the House would be highly unlikely to accept any dispute over a claim of privilege ever being determined by the courts, this could presumably be made clear by resolution of the House should the matter ever arise.²³
- 3.13** Moreover, the written commitment of the AFP to follow the processes set out in the AFP Memorandum is a welcome one. With this written commitment on the public record, and the small likelihood of such a matter ever arising, there does not appear to be any pressing requirement for NSW Parliament to enter into an additional memorandum of understanding with the AFP.

The other agencies

- 3.14** The Committee did not receive a submission from the NSW Law Reform Commission. However, in verbal advice, Mr Paul McKnight, Executive Director of the Commission, indicated that it would be highly unlikely that circumstances would ever arise in which the Commission would have occasion to execute a search warrant on the premises of a member of the New South Wales Parliament.
- 3.15** In correspondence to the Committee dated 31 July 2010, Mr John Lawler APM, CEO of the Australian Crime Commission, indicated that the Commission would not be able to provide a

²³ At paragraph 4.20 of its November 2009 report entitled *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices* (Report No. 47), the Committee noted that in 2003 and 2004 in relation to the Breen case, the resolutions of the House affirmed that the House is the appropriate forum for the resolution of issues of parliamentary privilege concerning the seizure of members' documents.

submission to the Committee's inquiry due to the Federal election, and the caretaker convention which prevented him from obtaining the necessary ministerial endorsement for a submission.

3.16 The NSW Crime Commission did not make a submission to the inquiry.

3.17 In view of the above responses, the Committee does not believe that it is necessary at this time for the Presiding Officers to seek to enter into a memorandum of understanding with any agency other than the NSW Police Force concerning the execution of search warrants on the premises of members of the New South Wales Parliament.

Appendix 1 Draft ‘Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly’

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

1. Preamble

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

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

2. Execution of Search Warrants

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

3. Promulgation of this Memorandum of Understanding

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

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

4. Variation of this Memorandum of Understanding

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

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

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

Revocation of agreement to this Memorandum of Understanding

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

Signatures

Mr Andrew P Scipione APM
Commissioner

/ / 2010

The Hon Amanda Fazio MLC
President

/ / 2010

The Hon Richard Torbay
Speaker

/ / 2010

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

1. Purpose of these procedures

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

2. Application of these procedures

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

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

3. Parliamentary privilege

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

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

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

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

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

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

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

4. Search warrants issued in New South Wales to the NSW Police Force

(see note below)

5. Procedure prior to applying for a warrant

(see note below)

6. Applying for a warrant

(The protocol between the NSW Parliament and the ICAC includes under Procedure 9 general procedures dealing with the types of search warrants issued in NSW, applying for a warrant, and other guidelines in relation to warrants. These matters are clearly within the expertise of the NSW Police Force rather than the NSW Parliament. Accordingly the above sections have been left blank, for the NSW Police Force to advise on the appropriate structure and wording. The headings may also change as appropriate.)

7. Execution of a warrant

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

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

1. A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. The (Officer of NSW Police Force) will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. If the Presiding Officer is not available the (Officer of NSW Police Force) will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.

3. To minimise the potential interference with the performance of the member's duties the (Officer of NSW Police Force) should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.
4. The (Officer of NSW Police Force) will allow the member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.
5. The (Officer of NSW Police Force) will assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.
6. On arrival at Parliament House the Search Team Leader (or other Officer of NSW Police Force) and assigned lawyer should meet with the Clerk of the House and member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the member's office and the relevance of that material to the investigation.
7. The Search Team Leader (or other Officer of NSW Police Force) is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
8. The Search Team Leader (or other Officer of NSW Police Force) should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.
9. Documents over which parliamentary privilege is claimed should be placed in a Property bag (or other means?). A list of the documents will be prepared by the (Officer of NSW Police Force) with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.
10. The Search Team Leader (or other Officer of NSW Police Force) should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.
11. At the conclusion of the search the Search Team Leader (or other Officer of NSW Police Force) should provide a receipt recording things seized. If the member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.
12. The Search Team Leader (or other Officer of NSW Police Force) should inform the member that the NSW Police Force will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties.
13. Any claim of parliamentary privilege will be reported by the Search Team Leader (or other Officer of NSW Police Force) to the (Officer of NSW Police Force) who will consider the matter in conjunction with the (Officers of NSW Police Force) the Deputy Commissioner and the Commissioner for the purpose of determining whether the NSW Police Force will object to such a claim.

14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the member, the Clerk and a representative of the NSW Police Force will jointly be present at the examination of the material. The member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.
15. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the NSW Police Force representative.
16. Any material not listed as falling within the scope of proceedings in Parliament will immediately be made available to the NSW Police Force.
17. In the event the NSW Police Force dispute the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

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

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

1. A search warrant should be executed on premises used or occupied by a member at a time when the member, or a senior member of his or her staff, will be present, unless the Commissioner is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. To minimise the potential interference with the performance of the member's duties the (Officer of NSW Police Force) should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant.
3. The (Officer of NSW Police Force) will allow the member a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.
4. The (Officer of NSW Police Force) will assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.
5. On arrival at the premises, the Search Team Leader (or other Officer of NSW Police Force) and assigned lawyer should meet with the member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the member's office and the relevance of that material to the investigation.
6. The Search Team Leader (or other Officer of NSW Police Force) is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
7. The Search Team Leader (or other Officer of NSW Police Force) should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.

8. Documents over which parliamentary privilege is claimed should be placed in a Property bag (or other means?). A list of the documents will be prepared by the (Officer of NSW Police Force) with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.
9. At the conclusion of the search the Search Team Leader (or other Officer of NSW Police Force) should provide a receipt recording things seized. If the member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.
10. The Search Team Leader (or other Officer of NSW Police Force) should inform the member that the NSW Police Force will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties.
11. The Search Team Leader (or other Officer of NSW Police Force) should deliver any documents over which parliamentary privilege is claimed to the Clerk of the House.
12. Any claim of parliamentary privilege will be reported by the Search Team Leader (or other Officer of NSW Police Force) to the (Officer of NSW Police Force) who will consider the matter in conjunction with the (Officers of NSW Police Force) the Deputy Commissioner and the Commissioner for the purpose of determining whether the NSW Police Force will object to such a claim.
13. Where a ruling is sought as to whether documents are protected by parliamentary privilege the member, the Clerk and a representative of the NSW Police Force will jointly be present at the examination of the material. The member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.
14. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the NSW Police Force representative.
15. Any material not listed as falling within the scope of proceedings in Parliament will immediately be made available to the NSW Police Force.
16. In the event the NSW Police Force disputes the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

**Appendix 2 Letter from the Chair of the Committee
and the Chair of the Legislative Assembly
Privileges and Ethics Committee to Mr
Andrew P Scipione APM, Commissioner of
Police, dated 20 May 2010**



NSW LEGISLATIVE COUNCIL PRIVILEGES COMMITTEE
NSW LEGISLATIVE ASSEMBLY STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

20 May 2010

Mr Andrew P Scipione APM
Commissioner of Police
Police and Emergency Services NSW
Locked Bag 5102
PARRAMATTA NSW 2124

Dear Commissioner

Inquiry into a memorandum of understanding with the NSW Police Force concerning the execution of search warrants on the premises of members of Parliament

On 22 April 2010 the Legislative Council referred to the Legislative Council Privileges Committee the following terms of reference concerning a memorandum of understanding with the NSW Police Force covering the execution of search warrants on the premises of members of Parliament:

1. That this House notes that in December 2009, the President of the Legislative Council, the Speaker of the Legislative Assembly 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'.
2. That the Privileges Committee inquire into and report on:
 - (a) the development of a Memorandum of Understanding between the President and Commissioner of Police covering the execution of search warrants by the NSW Police Force on the premises of members, and
 - (b) whether it would be appropriate to enter into a similar Memorandum of Understanding with any other relevant agency.
3. That the Committee report by the last sitting day in September 2010.
4. That a message be forwarded to the Legislative Assembly informing it of the terms of reference agreed to by the House, and requesting that the Legislative Assembly Privileges and Ethics Committee be given a similar reference.

On 23 April 2010 the Legislative Assembly referred similar terms of reference to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.

As noted in paragraph 1 of the terms of reference, in December 2009 the Presiding Officers of the Parliament entered into a Memorandum of Understanding with the Commissioner of the Independent Commission Against Corruption (ICAC) concerning the execution of search warrants in the Parliament House offices of members. The adoption of this Memorandum followed a series of inquiries by the Parliament's Privileges Committees concerning the execution of search warrants on members' offices arising from the seizure of documents from a member's office in 2003.¹

The rationale for such a memorandum of understanding is that it puts in place procedures to ensure that documents which may be subject to parliamentary privilege can be identified and protected from seizure, leaving other documents available to investigating officers and the usual processes of the law. While members of Parliament have no immunity from compulsory processes such the execution of search warrants, documents or other material which is subject to parliamentary privilege are immune from seizure by virtue of article 9 of the *Bill of Rights 1689* which applies in NSW.

As you would be aware, there is currently no memorandum of understanding between the NSW Parliament and the NSW Police Force concerning the execution of search warrants in premises used by members of Parliament. As a result, there are currently no agreed procedures in place to ensure such powers are exercised in a manner which takes proper account of the requirements of parliamentary privilege.²

Pursuant to the terms of reference, the Legislative Council Privileges Committee has prepared a draft memorandum of understanding between the President of the Legislative Council, the Speaker of the Legislative Assembly and the Commissioner of Police, concerning the execution of search warrants by the NSW Police Force on the premises of members of Parliament. This draft memorandum is modelled on the terms of the Memorandum of Understanding with ICAC referred to earlier, and the Memorandum of Understanding which governs the execution of search warrants by the Australian Federal Police (AFP) in premises of members of the Federal Parliament. The draft memorandum with the NSW Police Force, as prepared by the Legislative Council Privileges Committee, is provided at Attachment 1. The existing Memoranda of Understanding with ICAC and the AFP on which the draft memorandum is based are provided at Attachments 2 and 3.

The Legislative Council Privileges Committee and Legislative Assembly Privileges and Ethics Committee invite you to comment on the draft memorandum of understanding contained in Attachment 1. In particular, parts of the draft memorandum have deliberately been left blank where they concern matters that are the expertise of the NSW Police Force or matters concerning the internal operation of the Police.

¹ Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No. 25, December 2003; Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No. 2*, Report No. 28, March 2004; Privileges Committee, *Protocol for execution of search warrants on members' offices*, Report No. 33, February 2006. Legislative Council, Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, Report No. 47, November 2009; Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Report on a memorandum of understanding with the Independent Commission Against Corruption*, November 2009.

² A Memorandum of Understanding with the Commissioner of Police dated 3 December 2004 includes provision for police to obtain authorisation from the Presiding Officers before executing any process in the parliamentary precincts (including a search warrant), but does not include procedures to be followed to allow for issues of parliamentary privilege to be raised. Similarly, a Memorandum of Agreement with the Commissioner of Police concerning security services for the Parliament dated 2009 provides for relevant protocols to be observed before entry to a member's office is allowed, but does not set out any relevant steps to be followed to ensure that parliamentary privilege is preserved.

The Committees would be grateful to receive your comments by Friday 18 June 2010. Comments should be sent to both:

The Clerk to the Committee
New South Wales Legislative Council Privileges Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

The Clerk to the Committee
New South Wales Legislative Assembly Privileges and Ethics Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

If you would like to discuss any aspect of this matter, please contact the Clerk to the Legislative Council Privileges Committee and Deputy Clerk of the Legislative Council, Mr David Blunt on 9230 2323 or david.blunt@parliament.nsw.gov.au, or the Clerk to the Legislative Assembly Privileges and Ethics Committee and Clerk Assistant (Procedure) of the Legislative Assembly, Ms Ronda Miller, on 9230 2225 or ronda.miller@parliament.nsw.gov.au.

Yours sincerely



Hon Kayee Griffin MLC
Chair
Legislative Council
Privileges Committee



Mr Paul Pearce MP
Chair
Legislative Assembly
Privileges and Ethics Committee

**Appendix 3 Letter from Mr Andrew P Scipione APM,
Commissioner of Police, to the Chair of the
Committee and the Chair of the Legislative
Assembly Privileges and Ethics
Committee, dated 30 June 2010**



NSW Police Force
www.police.nsw.gov.au

OFFICE OF THE COMMISSIONER

The Honourable Kayee Griffin MLC
Chair, Legislative Council
Privileges Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Mr Paul Pearce MP
Chair, Legislative Assembly
Privilege and Ethics Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

D/2010/85861

Dear Chairs,

I refer to your letter dated 20 May 2010, requesting the NSW Police Force (NSWPF) provide comment on a draft *Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of the NSW Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly* (the draft MoU).

Upon review of the draft MoU, the following comments and recommendations are provided for your consideration.

Clause 7 (1) of the draft MoU concerning the execution of a warrant on the Parliament House Office of a member and clause 7 (1) concerning the execution of a warrant on premises used or occupied by a member (not being at Parliament House) refer to the role of the Commissioner.

It is recommended that these clauses be amended to refer to the *Commissioner or the Commissioner's delegate*.

As acknowledged in your letter, it is imperative that the agreed procedures for the execution of search warrants on the premises of members of the NSW Parliament both ensure documents subject to parliamentary privilege are identified and protected from

Recognising that the parliamentary privilege afforded the Parliament is unquestionable, it is the case that the Speaker may waive the exercise of parliamentary privilege in relation to the whole or any part of a search warrant. In this regard, I make the following recommendation for amendment to clause 7 of the draft MoU.

Clause 7 (4) of the draft MoU concerning the execution of a warrant on the Parliament House Office of a member provides that:

The (Officer of the NSW Police Force) will allow the member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.

Similarly, clause 7 (3) of the draft MoU concerning the execution of warrants on premises used or occupied by a member (not being at Parliament House) provides that:

The (Officer of the NSW Police Force) will allow the member a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.

It is recommended that the above clauses be expanded upon to provide that, whenever possible, the search warrant, or a draft, be provided to the Speaker in advance in order that the Speaker may, on legal advice if necessary, consider waiving parliamentary privilege in respect of the execution of the whole or any part of the search warrant.

Clause 7 (5) of the draft MoU concerning the execution of a warrant on the Parliament House Office of a member and clause 7 (4) concerning the execution of a warrant on premises used or occupied by a member (not being at Parliament House) provide that the (Officer of the NSW Police Force) will assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.

To provide the necessary flexibility for the execution of search warrants, it is suggested these clauses be amended to provide that the NSWPF *may* assign a lawyer to attend.

Proposed clauses 4, 5 and 6 of the draft MoU concern search warrants issued in NSW to the NSWPF; procedures prior to applying for a warrant; and applying for a warrant respectively. In the highlighted notes of the draft MoU it is suggested the NSWPF provide the content for these clauses; outlining relevant NSWPF procedures or guidelines.

Given the NSWPF procedures with respect to applying for search warrants in NSW are prescribed by the *Law Enforcement (Powers and Responsibilities) Act 2002*, it is suggested that proposed clauses 4, 5 and 6 are unnecessary inclusions in this MoU.

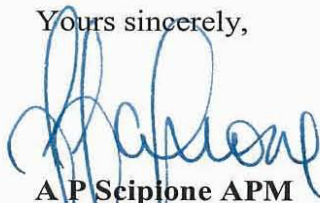
A modern complexity experienced by the NSWPF in the execution of search warrants is the electronic storage of documentation. In the context of this MoU, the identification of documents and other material attracting parliamentary privilege which are, for example, stored in a computer along with other documents not attracting parliamentary privilege,

To ensure the integrity of criminal investigations it is imperative that electronically stored documents attracting parliamentary privilege are identified and separated, allowing police access to the remaining documents and material within the scope of the search warrant. In these circumstances, a technical information expert may be required to attend the search and I suggest that consideration be given to whether it is necessary to amend the draft MoU accordingly.

Finally, highlighted references to the *Officer of the NSW Police Force* may be amended to the *Search Team Leader* throughout and it appears the word *phase* in clause 3, paragraph 4 is a typographical error.

I look forward to receiving your feedback on these recommendations. Should you have any queries concerning the comments provided, please do not hesitate to contact Ms Letitia Davy, Office of the Commissioner, on (02) 8263 6361 or email davy11et@police.nsw.gov.au

Yours sincerely,



A P Scipione APM
Commissioner of Police

30 JUN 2010

Appendix 4 Committee's response to the issues raised in the letter of Mr Andrew P Scipione APM, Commissioner of Police, dated 30 June 2010

NSW Police Force suggestion	Response
Clause 7(1) of the draft MoU concerning the execution of a warrant on the Parliament House Office of a member and clause 7(1) concerning the execution of a warrant on premises used or occupied by a member (not being at Parliament House) refer to the role of the Commissioner. It is recommended that these clauses be amended to refer to the <i>Commissioner or the Commissioner's delegate</i>.	Agreed. An amendment has been made in the revised draft. In addition, as referred to in the suggestion opposite, it is noted that the previous draft had the following somewhat confusing structure: 7. Execution of a warrant <u>Execution of a warrant on the PH office of a member</u> ... <u>Execution of a warrant on premises used or occupied by a member (not being at Parliament House)</u> ... For ease of reference, that structure has been simplified in the revised draft as follows: 5. Execution of a warrant on the Parliament House Office of a member ... 6. Execution of a warrant on premises used or occupied by a member (not being at Parliament House) ...
As acknowledged in your letter, it is imperative that the agreed procedures for the execution of search warrants on the premises of members of the NSW Parliament both ensure documents subject to parliamentary privilege are identified and protected from seizure and preserve the integrity of criminal investigations. Indeed, it is in the interests of all parties that the agreed procedures be sufficiently rigorous and beyond reproach. Recognising that the parliamentary privilege afforded the Parliament is unquestionable, it is the case that the Speaker may waive the exercise of parliamentary	Not supported. It is not the case that the President of the Legislative Council or the Speaker of the Legislative Assembly may waive privilege. The privilege that attaches to 'proceedings in Parliament', as provided for in statute through the adoption of the <i>Bill of Rights 1689</i> under the <i>Imperial Acts Application Act 1969</i>, cannot be waived either by an individual member (including the Presiding Officers) or by the Houses. It may only be waived by express statutory provision.

privilege in relation to the whole or any part of a search warrant. In this regard, I make the following recommendation for amendment to clause 7 of the draft MoU.

Clause 7 (4) of the draft MoU concerning the execution of a warrant on the Parliament House Office of a member provides that:

The (Officer of the NSW Police Force) will allow the member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.

Similarly, clause 7 (3) of the draft MoU concerning the execution of warrants on premises used or occupied by a member (not being at Parliament House) provides that:

The (Officer of the NSW Police Force) will allow the member a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.

It is recommended that the above clauses be expanded upon to provide that, whenever possible, the search warrant, or a draft, be provided to the Speaker in advance in order that the Speaker may, on legal advice if necessary, consider waiving parliamentary privilege in respect of the execution of the whole or any part of the search warrant.

Clause 7 (5) of the draft MoU concerning the execution of a warrant on the Parliament House Office of a member and clause 7 (4) concerning the execution of a warrant on premises used or occupied by a member (not being at Parliament House) provide that the (Officer of the NSW Police Force) will assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.

To provide the necessary flexibility for the execution of search warrants, it is suggested these clauses be amended to provide that the NSWPF may assign a lawyer to attend.

Agreed. It is noted that the Federal MoU does not require the presence of a legal officer from the Police. The revised draft MoU also provides a safeguard at clauses 5(4) and 6(3) that the member and the Clerk may seek legal advice in relation to the search warrant prior to its execution, and that the member may arrange for a legal adviser to be present during the execution of the warrant.

Accordingly, clauses 5(5) and 6(4) in the revised draft now provide:

The Search Team Leader may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege ...

In addition, clauses 5(6) and 6(5) in the revised draft

have also been amended to provide:

On arrival at the premises, the Search Team Leader and assigned lawyer (if present) ...

Proposed clauses 4, 5 and 6 of the draft MoU concern search warrants issued in NSW to the NSWPF; procedures prior to applying for a warrant; and applying for a warrant respectively. In the highlighted notes of the draft MoU it is suggested the NSWPF provide the content for these clauses; outlining relevant NSWPF procedures or guidelines.

Given the NSWPF procedures with respect to applying for search warrants in NSW are prescribed by the *Law Enforcement (Powers and Responsibilities) Act 2002*, it is suggested that proposed clauses 4, 5 and 6 are unnecessary inclusions in this MoU.

The *Law Enforcement (Powers and Responsibilities) Act 2002* does not spell-out specific operating procedures to be followed by the NSW Police when applying for and conducting a search warrant. By contrast, the ICAC MoU does spell out the internal ICAC procedures for applying for a warrant at some detail.

Without going to the detail of the ICAC MoU, which is an internal matter for the NSW Police Force, it is proposed that the following clause be inserted in the revised draft, replacing the former clauses 4, 5 and 6:

4. Procedure prior to obtaining a search warrant

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

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

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

This new proposed section is drawn from paragraphs 5.1 – 5.3 of the *AFP National Guidelines for Execution of Search Warrants where Parliamentary Privilege may be involved*, as adopted as part of the Memorandum of Understanding which governs the execution of search warrants by the Australian Federal Police (AFP) in premises of members of the Federal Parliament (please see attached).

This proposed section was also discussed at paragraphs 4.6 – 4.8 of the 2006 report of the Legislative Council Privileges Committee entitled *Protocol for execution of search warrants on members' offices* (please also see attached). It is understood that this proposal, as amended, was acceptable to the NSW Police Force at the time.

The proposed new clause would place two significant requirements on officers of the NSW Police Force when obtaining a search warrant:

- that the application for a warrant should have the approval of the Commissioner or the Commissioner's delegate.
- that the warrant does not cover a wider range of material than is necessary to advance the relevant investigation.

It is considered that these are worthwhile and practical provisions to ensure that the use of search warrants is restricted to appropriate circumstances.

A modern complexity experienced by the NSWPF in the execution of search warrants is the electronic storage of documentation. In the context of this MoU, the identification of documents and other material attracting parliamentary privilege which are, for example, stored in a computer along with other documents not attracting parliamentary privilege, presents practical challenges.

To ensure the integrity of criminal investigations it is imperative that electronically stored documents attracting parliamentary privilege are identified and separated, allowing police access to the remaining documents and material within the scope of the search warrant.

In these circumstances, a technical information expert may be required to attend the search and I suggest that consideration be given to whether it is necessary to amend the draft MoU accordingly.

Agreed. Clauses 5(5) and 6(4) in the revised have been further amended as follows:

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

Finally, highlighted references to the Officer of the NSW Police Force may be amended to the Search Team Leader throughout and it appears the word phase in clause 3, paragraph 4 is a typographical error.

Reference to an 'Officer of the NSW Police Force' has been changed to a 'Search Team Leader' throughout. However, clauses 5(13) and 6(12) in the revised draft continue to include reference to an 'Officer of the NSW Police Force' or 'Officers of the NSW Police Force'. It would be appreciated if the NSW Police Force could nominate appropriate officers.

The word 'phase' in Paragraph 3 has been corrected to 'phrase'.

Appendix 5 Second draft ‘Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly’

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

REVISED DRAFT AS AT 16 JULY 2010

1. Preamble

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

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

2. Execution of Search Warrants

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

3. Promulgation of this Memorandum of Understanding

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

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

4. Variation of this Memorandum of Understanding

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

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

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

Revocation of agreement to this Memorandum of Understanding

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

Signatures

Mr Andrew P Scipione APM
Commissioner

/ / 2010

The Hon Amanda Fazio MLC
President

/ / 2010

The Hon Richard Torbay
Speaker

/ / 2010

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

1. Purpose of these procedures

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

2. Application of these procedures

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

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

3. Parliamentary privilege

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

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

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

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

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

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

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

4. Procedure prior to obtaining a search warrant

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

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

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

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

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

1. A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner or the Commissioner's delegate is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. The Search Team Leader will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. If the Presiding Officer is not available the Search Team Leader will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.
3. To minimise the potential interference with the performance of the member's duties the Search Team Leader should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.

4. The Search Team Leader will allow the member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.
5. The Search Team Leader may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege, and a technical information expert to assist with accessing information stored in a computer.
6. On arrival at Parliament House the Search Team Leader and assigned lawyer (if present) should meet with the Clerk of the House and member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the member's office and the relevance of that material to the investigation.
7. The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
8. The Search Team Leader should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.
9. Documents over which parliamentary privilege is claimed should be placed in a Property bag ~~(or other means?)~~. A list of the documents will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.
10. The Search Team Leader should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.
11. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.
12. The Search Team Leader should inform the member that the NSW Police Force will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties.
13. Any claim of parliamentary privilege will be reported by the Search Team Leader to the (Officer of NSW Police Force) who will consider the matter in conjunction with the (Officers of NSW Police Force) the Deputy Commissioner and the Commissioner for the purpose of determining whether the NSW Police Force will object to such a claim.
14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the member, the Clerk and a representative of the NSW Police Force will jointly be present at the examination of the material. The member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.
15. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the NSW Police Force representative.

16. Any material not listed as falling within the scope of proceedings in Parliament will immediately be made available to the NSW Police Force.
17. In the event the NSW Police Force dispute the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

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

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

1. A search warrant should be executed on premises used or occupied by a member at a time when the member, or a senior member of his or her staff, will be present, unless the Commissioner or the Commissioner's delegate is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. To minimise the potential interference with the performance of the member's duties the Search Team Leader should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant.
3. The Search Team Leader will allow the member a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.
4. The Search Team Leader may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege, and a technical information expert to assist with accessing information stored in a computer.
5. On arrival at the premises, the Search Team Leader and assigned lawyer (if present) should meet with the member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the member's office and the relevance of that material to the investigation.
6. The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
7. The Search Team Leader should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.
8. Documents over which parliamentary privilege is claimed should be placed in a Property bag (or other means?). A list of the documents will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.

9. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.
10. The Search Team Leader should inform the member that the NSW Police Force will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties.
11. The Search Team Leader should deliver any documents over which parliamentary privilege is claimed to the Clerk of the House.
12. Any claim of parliamentary privilege will be reported by the Search Team Leader to the (Officer of NSW Police Force) who will consider the matter in conjunction with the (Officers of NSW Police Force) the Deputy Commissioner and the Commissioner for the purpose of determining whether the NSW Police Force will object to such a claim.
13. Where a ruling is sought as to whether documents are protected by parliamentary privilege the member, the Clerk and a representative of the NSW Police Force will jointly be present at the examination of the material. The member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.
14. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the NSW Police Force representative.
15. Any material not listed as falling within the scope of proceedings in Parliament will immediately be made available to the NSW Police Force.
16. In the event the NSW Police Force disputes the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

**Appendix 6 Letter from the Chair of the Committee
and the Chair of the Legislative Assembly
Privileges and Ethics Committee to Mr
Andrew P Scipione APM, Commissioner of
Police, dated 16 July 2010**



NSW LEGISLATIVE COUNCIL PRIVILEGES COMMITTEE
NSW LEGISLATIVE ASSEMBLY PARLIAMENTARY PRIVILEGE AND ETHICS COMMITTEE

16 July 2010

Mr Andrew P Scipione APM
Commissioner of Police
Police and Emergency Services NSW
Locked Bag 5102
PARRAMATTA NSW 2124

Dear Commissioner

**Inquiry into a memorandum of understanding with the NSW Police Force concerning
the execution of search warrants on the premises of members of Parliament**

We refer to your letter of 30 June 2010 in which you provided your comments on the draft *Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly*.

On behalf of the Legislative Council Privileges Committee and Legislative Assembly Privileges and Ethics Committee, we would like to thank you for your comments. Following further consideration of the matter, we believe that finalisation of a Memorandum of Understanding should not prove too difficult.

At Attachment A, we have provided a table in which we list your comments from your letter of 30 June 2010 in the left-hand column, together with our response in the right-hand column.

Based on the matters discussed in Attachment A, we have also developed a revised draft Memorandum of Understanding as at 16 July 2010. I enclose a copy.

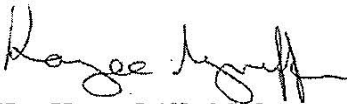
We would again invite your comments on the revised draft Memorandum of Understanding, with a view to settling those matters that remain outstanding from Attachment A. If you could provide a response by Friday, 20 August 2010, that would be appreciated. As before, comments should be sent to both:

The Clerk to the Committee
New South Wales Legislative Council Privileges Committee
Parliament House
Murray Street
Sydney NSW 2000

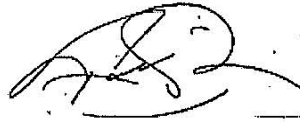
The Clerk to the Committee
New South Wales Legislative Assembly Privileges and Ethics Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

As before, if you would like to discuss any aspect of this matter, please contact the Clerk to the Legislative Council Privileges Committee and Deputy Clerk of the Legislative Council, Mr David Blunt on 9230 2323 or david.blunt@parliament.nsw.gov.au, or the Clerk to the Legislative Assembly Privileges and Ethics Committee and Clerk Assistant (Procedure) of the Legislative Assembly, Ms Ronda Miller, on 9230 2225 or ronda.miller@parliament.nsw.gov.au.

Yours sincerely



Hon Kaye Griffin MLC
Chair
Legislative Council
Privileges Committee



Mr Paul Pearce MP
Chair
Legislative Assembly
Privileges and Ethics Committee

**Appendix 7 Letter from Mr Andrew P Scipione APM,
Commissioner of Police, to the Chair of the
Committee and the Chair of the Legislative
Assembly Privileges and Ethics
Committee, dated 17 September 2010**



NSW Police Force
www.police.nsw.gov.au

OFFICE OF THE COMMISSIONER

The Honourable Kayee Griffin MLC
Chair, Legislative Council
Privileges Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Mr Paul Pearce MP
Chair, Legislative Assembly
Privilege and Ethics Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

D/2010/121264

Dear Chairs,

I refer to your letter dated 16 July 2010, responding to comments provided on the draft *Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of the NSW Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly* (the draft MoU).

Reviewing the feedback provided and drafting revisions, I agree that the finalisation of a Memorandum of Understanding is achievable.

I refer to the following proposed clause 4 to the revised draft MoU (numbering added for review purposes):

4. Procedure prior to obtaining a search warrant

- (1) An officer of the NSW Police Force who proposes to apply for a search warrant in respect of premises used or occupied by a member should seek approval from the Commissioner or the Commissioner's delegate before applying for the warrant.
- (2) If approval is given, the officer should obtain legal advice before applying for a search warrant.
- (3) Care should be taken when drafting a search warrant to ensure that it does not cover a wider range of material than is necessary to advance the relevant investigation

Notwithstanding comments provided to the Privileges Committee in 2006, it is the current position of the NSWPF that the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) is the proper source of police procedures for obtaining lawful search warrants in NSW, and that the appropriate focus for this draft MoU is the interface between the NSWPF and Parliament during the execution of a search warrant.



However, in the interests of progressing the draft MoU, the following revisions are recommended should clause 4 be retained.

In reference to clause 4 (2), whilst legal advice may be obtained in any investigation, this course of action is best informed by the individual circumstances of a particular matter and need not be mandatory. It is proposed that clause 4 (2) either be removed or amended to provide that the officer *may* obtain legal advice before applying for a search warrant.

In reference to clause 4 (3), it is the practice of the NSWPF to draft search warrants in accordance with the statutory requirements of section 62 (3) of LEPRA. As you are aware, section 62 (3) of LEPRA provides that, when determining whether there are reasonable grounds to issue a warrant, the eligible issuing officer is to consider (but is not limited to considering) the following matters:

- (a) the reliability of the information on which the application is based, including the nature of the source of the information,
- (b) if the warrant is required to search for a thing in relation to an alleged offence – whether there is sufficient connection between the thing sought and the offence.

Whilst it is difficult to appreciate what additional protection clause 4 (3) provides, its inclusion places no additional burden on the NSWPF and may remain as drafted.

Clauses 5 (13) and 6 (12) of the revised draft MoU concern reporting claims of parliamentary privilege for the purpose of determining whether the NSWPF will object to such a claim. To provide an appropriate chain of command for this reporting, the following revision is proposed:

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

Practical considerations concerning clauses 5 (8) and (9) have also been identified:

- 5 (8) The Search Team Leader should not seek to access, read or seize any document over which a claim of parliamentary privilege is made
- (9) Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of documents will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.

Where a Search Team Leader complies with clause 5 (8) and does not *access* a document over which a claim of privilege is made, it may be unfeasible for the Search Team Leader to compile a list of documents as required at clause 5 (9). I suggest that a redrafting of this clause, and similarly clauses 6 (7) and (8), may be required to achieve the necessary practical arrangements.

Finally, I accept your advice that parliamentary privilege may only be waived by express statutory provision.

Should you have any queries concerning the comments provided, please do not hesitate to contact Ms Letitia Davy, Office of the Commissioner, on (02) 8263 6361 or email davy11et@police.nsw.gov.au

Yours sincerely,



A P Scipione APM
Commissioner of Police

17 SEP 2010

Appendix 8 Committee's response to the issues raised in the letter of Mr Andrew P Scipione APM, Commissioner of Police, dated 17 September 2010

NSW Police Force suggestion	Response
I refer to the following proposed clause 4 to the revised draft MoU (numbering added for review purposes): 4. <u>Procedure prior to obtaining a search warrant</u> (1) An officer of the NSW Police Force who proposes to apply for a search warrant in respect of premises used or occupied by a member should seek approval from the Commissioner or the Commissioner's delegate before applying for the warrant. (2) If approval is given, the officer should obtain legal advice before applying for a search warrant. (3) Care should be taken when drafting a search warrant to ensure that it does not cover a wider range of material than is necessary to advance the relevant investigation.	The Committee notes that the Commissioner raised the provisions of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> in his previous correspondence of 30 June 2010. The Committee acknowledges that LEPR is the source of the police procedures for obtaining search warrants in NSW. Nevertheless, the Committee remains committed to the inclusion of Clause 4 in the Memorandum. Clause 4 places two significant requirements on officers of the NSW Police Force prior to obtaining a search warrant: that the application for the warrant should have the approval of the Commissioner or the Commissioner's delegate; and that the warrant should not cover a wider range of material than is necessary to advance the relevant investigation. It is appropriate that the decision to apply for a search warrant should be taken by a senior officer of the NSW Police Force –

the Commissioner or the Commissioner's delegate – given the sensitivity of interfering with the operation of Parliament, and that the warrant should be no wider than is necessary to advance the relevant investigation. This latter point is discussed further below.

The Committee notes that the 2005 Memorandum of Understanding between the Presiding Officers of the Commonwealth Parliament and the Commonwealth Government concerning the execution of search warrants by the Australian Federal Police also includes a clause 'Procedure prior to obtaining a search warrant' in similar terms.

However, in the interests of progressing the draft MoD, the following revisions are recommended should clause 4 be retained.

In reference to clause 4(2), whilst legal advice may be obtained in any investigation, this course of action is best informed by the individual circumstances of a particular matter and need not be mandatory. It is proposed that clause 4(2) either be removed or amended to provide that the officer may obtain legal advice before applying for a search warrant.

Agreed. Clause 4(2) has been deleted.

In reference to clause 4(3), it is the practice of the NSWPF to draft search warrants in accordance with the statutory requirements of section 62(3) of LEPR. As you are aware, section 62(3) of LEPR provides that, when determining whether there are reasonable grounds to issue a warrant, the eligible issuing officer is to consider (but is not limited to considering) the following matters:

The Committee notes section 62(3) of LEPR and the indication of the practise of the NSW Police Force.

Nevertheless, the Committee is concerned to ensure that the terms of a warrant for the search of a premise of a member of the NSW Parliament should not cover a wider range of material than is necessary to advance the relevant investigation.

- (a) the reliability of the information on which the application is based, including the nature of the source of the information,
- (b) if the warrant is required to search for a thing in relation to an alleged offence - whether there is sufficient connection between the thing sought and the offence.

In this regard, the Committee notes that during the ICAC's execution of a search warrant on the office of the Hon Peter Breen in 2003, it transpired that some of the material seized was outside the authorisation of the warrant, notably Mr Breen's laptop and desktop computer hard drives, which it later transpired had been 'imaged' by the ICAC.

Whilst it is difficult to appreciate what additional protection clause 4 (3) provides, its inclusion places no additional burden on the NSWPF and may remain as drafted.

The Committee also understands that during the AFP's execution of a search warrant on the office of Senator Crane in 1998, of the 25,000 pages of documents examined by an independent legal arbiter to determine their

status, only about 1,400 were found to be within the scope of the warrant and not privileged.

Similarly, of 74,000 pages of documents examined following the execution of a search warrant on the office of Senator Harris in 2001, all were found to be outside the authorisation of the warrant.

Given this history, the Committee believes that the inclusion of a requirement that the terms of a search warrant should not cover a wider range of material is necessary is appropriate.

The Committee welcomes the Commissioner's indication that the inclusion of this provision would place 'no additional burden on the NSWPF and may remain as drafted'.

Clauses 5(13) and 6(12) of the revised draft MoD concern reporting claims of parliamentary privilege for the purpose of determining whether the NSWPF will object to such a claim. To provide an appropriate chain of command for this reporting, the following revision is proposed:

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

Practical considerations concerning clauses 5 (8) and (9) have also been identified:

5(8) The Search Team Leader apart from citing and identifying the document may identify and cite should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.

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

Where a Search Team Leader complies with clause 5(8) and does not access a document over which a claim of privilege is made, it may

Agreed. The Committee has changed the use of the word 'their' to 'his or her' in the revised clause.

Following consultation by the Committee Secretariat with the NSW Police Force, the Committee proposes the following amendment to clause 5(8):

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

A similar amendment will be made to clause 6(7).

be unfeasible for the Search Team Leader to compile a list of documents as required at clause 5 (9). I suggest that a redrafting of this clause, and similarly clauses 6 (7) and (8), may be required to achieve the necessary practical arrangements.

Finally, I accept your advice that parliamentary privilege may only be waived by express statutory provision. Acknowledged.

Appendix 9 Final ‘Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly’

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

1. Preamble

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

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

2. Execution of Search Warrants

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

3. Promulgation of this Memorandum of Understanding

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

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

4. Variation of this Memorandum of Understanding

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

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

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

Revocation of agreement to this Memorandum of Understanding

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

Signatures

Mr Andrew P Scipione APM
Commissioner

2010

The Hon Amanda Fazio MLC
President

2010

The Hon Richard Torbay
Speaker

2010

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

1. Purpose of these procedures

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

2. Application of these procedures

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

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

3. Parliamentary privilege

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

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

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

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

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

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

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

4. Procedure prior to obtaining a search warrant

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

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

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

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

1. A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner or the Commissioner's delegate is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. The Search Team Leader will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. The Presiding Officer shall then inform the Clerk or the Deputy Clerk. If the Presiding Officer is not available the Search Team Leader will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.
3. To minimise the potential interference with the performance of the member's duties the Search Team Leader should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.

4. The Search Team Leader will allow the member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.
5. The Search Team Leader may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege, and a technical information expert to assist with accessing information stored in a computer.
6. On arrival at Parliament House the Search Team Leader and assigned lawyer (if present) should meet with the Clerk of the House and member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the member's office and the relevance of that material to the investigation.
7. The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
8. The Search Team Leader, apart from sighting a document over which a claim of parliamentary privilege is made for the purposes of identification and listing as per clause 5(9) below, should not seek to access, read or seize the document.
9. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.
10. The Search Team Leader should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.
11. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.
12. The Search Team Leader should inform the member that the NSW Police Force will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties.
13. Any claim of parliamentary privilege will be reported by the Search Team Leader to his or her Commander who will consider the matter in conjunction with the Commissioner's delegate for the purpose of determining whether the NSW Police Force will object to such a claim.
14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the member, the Clerk and a representative of the NSW Police Force will jointly be present at the examination of the material. The member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.
15. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the NSW Police Force representative.

16. Any material not listed as falling within the scope of proceedings in Parliament will immediately be made available to the NSW Police Force.
17. In the event the NSW Police Force dispute the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

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

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

1. A search warrant should be executed on premises used or occupied by a member at a time when the member, or a senior member of his or her staff, will be present, unless the Commissioner or the Commissioner's delegate is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. To minimise the potential interference with the performance of the member's duties the Search Team Leader should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant.
3. The Search Team Leader will allow the member a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.
4. The Search Team Leader may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege, and a technical information expert to assist with accessing information stored in a computer.
5. On arrival at the premises, the Search Team Leader and assigned lawyer (if present) should meet with the member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the member's office and the relevance of that material to the investigation.
6. The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
7. The Search Team Leader, apart from sighting a document over which a claim of parliamentary privilege is made for the purposes of identification and listing as per clause 6(8) below, should not seek to access, read or seize the document.
8. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.

9. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.
10. The Search Team Leader should inform the member that the NSW Police Force will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties.
11. The Search Team Leader should deliver any documents over which parliamentary privilege is claimed to the Clerk of the House.
12. Any claim of parliamentary privilege will be reported by the Search Team Leader to his or her Commander who will consider the matter in conjunction with the Commissioner's delegate for the purpose of determining whether the NSW Police Force will object to such a claim.
13. Where a ruling is sought as to whether documents are protected by parliamentary privilege the member, the Clerk and a representative of the NSW Police Force will jointly be present at the examination of the material. The member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.
14. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the NSW Police Force representative.
15. Any material not listed as falling within the scope of proceedings in Parliament will immediately be made available to the NSW Police Force.
16. In the event the NSW Police Force disputes the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

**Appendix 10 Letter from Mr Chris Black, Acting
National Manager of Policy and
Governance, Australian Federal Police, to
the Clerk of the Committee, dated 18 June
2010**



OFFICE OF THE NATIONAL MANAGER POLICY & GOVERNANCE

GPO Box 401 Canberra City ACT 2601
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ABN 17 664 931 143

18 June 2010

The Clerk to the Committee
New South Wales Legislative Council
Privileges Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

RECEIVED

23 JUN 2010

LEGISLATIVE
COUNCIL

Dear Sir/Madam

Thank you for your letter dated 20 May 2010 concerning a protocol covering the execution of search warrants on the premises of Members of the New South Wales Parliament.

You have asked for our views on the likelihood of the Australian Federal Police executing a search warrant on premises used by Members of the NSW Parliament. You have also sought our views on the value of the AFP entering into a search warrants protocol with the NSW Parliament.

Because the AFP's responsibilities include the investigation of Commonwealth criminal offences, there may be infrequent occasions where evidence relevant to such investigations is located on the premises of a Member of the New South Wales Parliament. While I would expect these occurrences to be rare, it is not possible to provide definitive views on the likelihood of this situation occurring, due to the unpredictable nature of criminal activity and the diverse range of circumstances that could lead to evidence being located on those search premises.

As you are aware, the AFP currently has a Memorandum of Understanding and agreed procedures in place for the execution of search warrants on premises of Members of the Federal Parliament ('the AFP MOU'). I understand that the AFP MOU and associated procedures have to some degree operated as a model for the development of similar protocols in other jurisdictions.

In my view, the AFP MOU and the associated procedures contained in the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved* represent an appropriate framework for dealing with parliamentary privilege claims and related issues that may arise when

executing a search warrant on premises occupied by a Member of a State Parliament.

The current AFP MOU also provides scope for disputed claims of parliamentary privilege to be resolved on a case by case basis. As you will be aware, there are different views regarding the way parliamentary privilege operates in relation to the seizure of material under a search warrant, so there appears to be value in continuing to deal with such issues in accordance with the procedures set out in the AFP's MOU.

On that basis there does not appear to be any pressing requirement for the AFP to enter into an additional Protocol with NSW or other State Parliaments covering the same issues that are currently dealt with in the AFP MOU. However, the AFP would be happy to give further consideration to this proposal if it was recommended by the Inquiry.

I have sent this same response to the New South Wales Legislative Assembly Privileges and Ethics Committee.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Chris Black', with a stylized flourish at the end.

Chris Black
Performing the Duties of National Manager
Policy & Governance

Appendix 11 Minutes of Proceedings

Note: Asterisks indicate text which has been omitted as not relevant to the current inquiry.

Minutes No. 19

Tuesday 20 April 2010, Members' Lounge, Parliament House at 6.21 pm.

1. **Members present**

Ms Griffin (Chair)
Miss Gardiner (Deputy Chair)
Mr Donnelly
Mr Harwin
Revd Mr Nile
Mr Veitch
Mr West

In attendance: David Blunt, Stephen Frappell, Jenelle Moore.

4. **New inquiry – A memorandum of understanding with the NSW Police and any other relevant agency relating to the execution of search warrants on members' premises**

The Committee noted that in December 2009, 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 Committee deliberated on undertaking a new inquiry into finalising a similar memorandum with other agencies, notably the NSW Police, but also possibly agencies such as the Australian Federal Police and NSW Crime Commission.

Resolved, on the motion of Revd Mr Nile: That the Committee seek from the House the following resolution:

1. That this House notes that in December 2009, the President of the Legislative Council, the Speaker of the Legislative Assembly 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'.
2. That the Privileges Committee inquire into and report on:
 - (a) the development of a Memorandum of Understanding between the President and Commissioner of Police covering the execution of search warrants by the NSW Police Force on the premises of members, and
 - (b) whether it would be appropriate to enter into a similar Memorandum of Understanding with any other relevant agency.
3. That the Committee report by the last sitting day in September 2010.

4. That a message be forwarded to the Legislative Assembly informing it of the terms of reference agreed to by the House, and requesting that the Legislative Assembly Privileges and Ethics Committee be given a similar reference.

9. Adjournment

The Committee adjourned at 6.35 pm sine die.

David Blunt
Clerk to the Committee

Minutes No. 20

Wednesday 12 May 2010, Members' Lounge, Parliament House at 1.05 pm.

1. Members present

Ms Griffin (Chair)
Miss Gardiner (Deputy Chair)
Mr Donnelly
Mr Harwin
Revd Mr Nile
Mr Veitch
Mr West

In attendance: David Blunt, Stephen Frappell.

2. Confirmation of minutes of previous meetings

Resolved, on the motion of Revd Mr Nile: That minutes no. 19 be confirmed.

4. Inquiry into a memorandum of understanding with the NSW Police and any other relevant agency relating to the execution of search warrants on the premises of members

The Committee considered a draft protocol between the Presiding Officers and the Commissioner of Police concerning the execution of search warrants on the premises of members, based on the December 2009 ICAC protocol, and the Federal Parliament protocol with the Federal Police.

Resolved, on the motion of Mr West: That the Committee Chair:

- write to the Commissioner of Police, forwarding the draft protocol between the Presiding Officers and the Commissioner of Police for the execution of search warrants on the premises of members, seeking the comments of the Commissioner.
- write to the heads of the following agencies, seeking their views about the likelihood of their agency executing a search warrant on the premises of members, and the value of entering into a search warrants protocol with the Parliament:
 - o The NSW Crime Commission
 - o The NSW Law Reform Commission

- o The Australian Federal Police
- o The Australian Crime Commission.

8. Adjournment

The Committee adjourned at 1.32 pm sine die.

David Blunt

Clerk to the Committee

Minutes No. 22

Thursday 20 May 2010, Members' Lounge, Parliament House at 1.05 pm.

1. Members present

Ms Griffin (Chair)
Miss Gardiner (Deputy Chair)
Mr Donnelly
Mr Harwin
Revd Mr Nile
Mr Veitch

In attendance: David Blunt, Stephen Frappell, Velia Mignacca.

2. Apologies

Mr West

3. Confirmation of minutes of previous meetings

Resolved, on the motion of Mr Veitch: That minutes no. 20 and 21 be confirmed.

5. Inquiry into a memorandum of understanding with the NSW Police and any other relevant agency relating to the execution of search warrants on the premises of members

The Committee noted that the Legislative Assembly Privileges and Ethics Committee had sought the agreement of the Privileges Committee for the Chairs of the two Committees to write jointly to the Commissioner of Police and the heads of the NSW Crime Commission, the NSW Law Reform Commission, the Australian Federal Police and the Australian Crime Commission in relation to the draft memorandum of understanding.

The Committee deliberated.

Resolved, on the motion of Mr Harwin: That the Committee Chair be authorised to write jointly with the Chair of the Legislative Assembly Privileges and Ethics Committee to:

- the Commissioner of Police, forwarding the draft memorandum of understanding between the Presiding Officers and the Commissioner of Police for the execution of search warrants on the premises of members, seeking the comments of the Commissioner.

- the heads of the NSW Crime Commission, the NSW Law Reform Commission, the Australian Federal Police and the Australian Crime Commission seeking their views about the likelihood of their agency executing a search warrant on the premises of members, and the value of entering into a search warrants protocol with the Parliament.

7. Adjournment

The Committee adjourned at 1.06 pm sine die.

David Blunt
Clerk to the Committee

Minutes No. 23

Tuesday 22 June 2010, Members' Lounge, Parliament House at 6.42 pm.

1. Members present

Ms Griffin (Chair)
Miss Gardiner (Deputy Chair)
Mr Harwin
Mr Veitch
Mr West

In attendance: David Blunt, Stephen Frappell.

2. Apologies

Mr Donnelly
Revd Mr Nile

3. Confirmation of minutes of previous meetings

Resolved, on the motion of Mr Harwin: That minutes no. 22 be confirmed.

4. Correspondence

The Committee noted the following item of correspondence received and sent:

Correspondence sent:

- Letter dated 20 May 2010 from the Chair and the Chair of the Legislative Assembly Privileges and Ethics Committee to Mr Andrew P Scipione APM, Commissioner of Police, re the inquiry into a memorandum of understanding with the NSW Police Force concerning the execution of search warrants on the premises of members of Parliament. Similar letters were also sent to Mr John Lawler, Commissioner of the Australian Crime Commission, Mr Tony Negus, Commissioner of the Australian Federal Police, Mr Paul McKnight, Executive Director of the NSW Law Reform Commission, and Mr Phillip Bradley, Commissioner of the NSW Crime Commission (copies of these four additional letters are available from the secretariat on request).

6. Inquiry – A memorandum of understanding with the NSW Police and any other relevant agency relating to the execution of search warrants on members' officers

The Committee noted that the letter from the Chair (and the Chair of the Legislative Assembly Privileges and Ethics Committee) to Mr Andrew P Scipione APM, Commissioner of Police, in relation to the proposed memorandum of understanding concerning search warrants requested a response from the Commissioner by Friday 18 June 2010, but that the Police Commissioner's Office has requested an extension in providing a response to Friday, 25 June 2010.

7. Adjournment

The Committee adjourned at 6.45 pm sine die.

David Blunt
Clerk to the Committee

Minutes No. 24

Thursday 9 September 2010, Members' Lounge, Parliament House at 1.06 pm.

1. Members present

Ms Griffin (Chair)
Miss Gardiner (Deputy Chair)
Mr Donnelly
Mr Harwin
Revd Mr Nile
Mr Veitch
Mr West

In attendance: David Blunt, Stephen Frappell.

2. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Donnelly: That minutes no. 23 be confirmed.

3. Correspondence

The Committee noted the following item of correspondence received and sent:

Correspondence received:

- Letter dated 18 June 2010 from Mr Chris Black, Policy and Governance with the Australian Federal Police, concerning the search warrants inquiry.
- Letter dated 30 June 2010 from Mr Andrew Scipione APM, Commissioner of Police, concerning the search warrants inquiry.
- Email dated 14 July 2010 from the Secretariat to members of the Committee concerning a response to the letter of the Commissioner of Police dated 30 June 2010. A copy of the response and associated attachment is provided in 'Correspondence sent'.

- Letter dated 31 July 2010 from Mr John Lawler APM, CEO of the Australian Crime Commission, concerning the search warrants inquiry.

Correspondence sent:

- Letter dated 16 July 2010 from the Chair and the Chair of the Legislative Assembly Privileges and Ethics Committee to Mr Andrew Scipione APM, Commissioner of Police, concerning the search warrants inquiry.

4. Inquiry – A memorandum of understanding with the NSW Police and any other relevant agency relating to the execution of search warrants on members’ officers

The Committee noted correspondence received in relation to the inquiry from:

- The Australian Federal Police
- The Commissioner of Police
- The Australian Crime Commission.

The Committee also noted that on 16 July 2010, the Chair, in collaboration with the Chair of the Legislative Assembly Privileges and Ethics Committee, responded to the correspondence from the Commissioner of Police with a revised draft memorandum of understanding with the NSW Police concerning the execution of search warrants on the premises of members.

8. Adjournment

The Committee adjourned at 1.19 pm sine die.

David Blunt
Clerk to the Committee

Minutes No. 25

Wednesday 22 September 2010, Members’ Lounge, Parliament House at 2.16 pm.

1. Members present

Ms Griffin (Chair)
 Miss Gardiner (Deputy Chair)
 Mr Donnelly
 Mr Harwin
 Revd Mr Nile
 Mr Veitch
 Mr West

In attendance: Stephen Frappell, Velia Mignacca.

2. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Harwin: That minutes no. 24 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence received and sent:

Correspondence received:

- Letter dated 17 September 2010 from Mr Andrew Scipione APM, Commissioner of Police, concerning the search warrants inquiry.
- Email dated 22 September 2010 from Ms Letitia Davy, Acting Principal Advisor to the Office of the Commissioner of Police, to the Secretariat concerning the wording of the search warrants memorandum.

Correspondence sent:

- Email dated 20 September 2010 from the Secretariat to Ms Letitia Davy, Acting Principal Advisor to the Office of the Commissioner of Police, concerning the wording of the search warrants memorandum

4. Inquiry – A memorandum of understanding with the NSW Police Force and any other relevant agency relating to the execution of search warrants on members' premises

The Committee considered the Chair's draft report.

The report was read.

The Committee deliberated.

Resolved on the motion of Revd Mr Nile: That paragraph 2 of section 5 of the final Memorandum of Understanding appearing at Appendix 9 of the report be amended by inserting after the first sentence: 'The Presiding Officer shall then inform the Clerk or the Deputy Clerk.'

Resolved, on the motion of Revd Mr Nile, that:

1. That the report (as amended) be the report of the Committee and be presented to the House.
2. That pursuant to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and under the authority of Standing Order 223, the Committee authorises the publication of all correspondence and minutes.

Resolved, on the motion of Mr Veitch, that:

1. Following the tabling of the Committee's report, the Chair give a notice of motion in the House to facilitate the implementation of the Committee's recommendation.
2. The Chair's notice of motion incorporate the text of the proposed memorandum of understanding, so as to ensure the full text of the memorandum of understanding is conveyed in the message to the Legislative Assembly.

6. Adjournment

The Committee adjourned at 2.29 pm sine die.

David Blunt

Clerk to the Committee