



21 November 2025

Ms Fiona Murphy
Secretary
Joint Standing Committee on Integrity
Parliament House
HOBART 7000

Integrity@parliament.tas.gov.au

Dear Ms Murphy

Thank you for the opportunity to attend the Committee's hearing on 14 November 2025. In response to your questions -

1. Please find attached our notes as background information to assist the Committee's deliberations.
2. In terms of whether there are any existing precedents of the use of ex officio independent arbiters (i.e. persons appointed to other roles who may also act as a privilege arbiter), or the like, used in protocols between parliaments and integrity entities, we are unaware of any such arrangements in other jurisdictions. As a general comment, it would be a matter for the officer concerned as to whether they could undertake the functions of arbiter as defined in any protocol, in addition to their other duties.

We trust this assists and would be pleased to brief the Committee further should you wish to clarify anything.

Yours sincerely

A black rectangular box redacting the signature of Catherine Vickers.

Catherine Vickers
Clerk of the Legislative Council

A black rectangular box redacting the signature of Laura Ross.

Laura Ross
Clerk of the House of Assembly

Enc.

Opening Comments

Thank you for an opportunity to provide a submission and evidence.

We would like to make an opening statement and highlight aspects of our written submission.

In particular we would like to cover some detail in respect to the following matters:

- a) Our role as Clerks of the Houses and the role of Presiding Officers for context;
- b) some information about the Integrity Commission and the *Integrity Commission Act 2009*;
- c) What is parliamentary privilege and its importance in our democratic system; and
- d) Some key considerations from our perspective in developing a memorandum of understanding.

We do not recommend one model over another but are able to answer questions about aspects of various models.

The role of the Clerk

The Clerk of each House is the most senior parliamentary official in their respective Houses. We are separately appointed by the Governor as the Monarch's representative to serve the Members, the House and as custodians of the institution of Parliament.

It is a dual-natured position with both legal and constitutional and leadership and managerial responsibilities.

- The Clerk serves the House and all Members as the principal adviser to the Presiding Officers and Members on parliamentary law, practice and procedure, and is the keeper of the formal records of the Houses;
- The Clerk is akin to the chief executive officer or head of agency responsible for the administration and services of the House and the parliamentary support department that supports Members in the discharge of their parliamentary duties and the functioning of the Houses and committees, in our case jointly responsible for the Legislature General.

In Tasmania the Clerk is appointed by Letters Patent. Letters Patent are a type of legal instrument issued by the Monarch formally granting a title, right or status to a person to a public office. Note the terms of the instrument.



Charles the Third, by the Grace of God
King of Australia and His other Realms
and Territories, Head of the
Commonwealth.

To All to whom these presents shall come -

Greeting:

Know Ye, that We, having taken into Our Royal consideration the loyalty, integrity and ability of Our trusty and well-beloved

CATHERINE LOUISE VICKERS

do constitute and appoint her to be the Clerk of the Legislative Council of Our State of Tasmania and its Dependencies in the Commonwealth of Australia to have, hold, exercise and enjoy the said Office and Place on and from the twentieth day of July Two thousand and twenty-three during Our Pleasure and her actual residence within Our said State - together with all the Rights, Privileges and Advantages thereunto belonging or appertaining. Provided always that the said Catherine Louise Vickers, except in the case of sickness or other incapacity, do exercise the said Office in her own person.

In Testimony whereof, We have caused these Our Letters to be made Patent and the Public Seal of Our said State of Tasmania and its Dependencies to be hereunto affixed.



WITNESS Our trusty and well-beloved The Honourable Barbara Baker, Companion of the Order of Australia, Governor in and over the State of Tasmania and its Dependencies in the Commonwealth of Australia at Hobart in Tasmania this twentieth day of July Two thousand and twenty-three and in the first year of Our reign.

By Her Excellency's Command,



ACTING PREMIER

GOVERNOR

The following text is highlighted in respect to both our appointments.

Know Ye, that We, having taken into Our Royal consideration the loyalty, integrity and ability of Our trusty and well-beloved

Catherine Louise Vickers/Laura Elizabeth Ross

Do constitute and appoint her to be the Clerk of the Legislative Council/House of Assembly

The Clerks are entrusted with a significant degree of public trust and are expected to act in the public interest, the interests of justice and to protect and preserve the parliamentary institution. The Clerk cannot be dismissed by a Government, which is a reflection of the Clerk's impartiality and service to the Parliament and its Members.

In summary the Clerk's duties include:

- We are accountable to the House for the effective functioning of the House and must ensure that all matters that are brought before the House are dealt with according to law and the procedures and custom and practice of the House.
- We act as principal adviser to the Presiding Officer, the Chair of Committees, the Leader of the Government and Ministers and all Members on issues of parliamentary law, procedure and practice and on the statutory and inherent powers and functions of the House.
- We serve with absolute impartiality, integrity, reliability and validity and therefore have an important role in any processes relating to investigations and expert advice as to parliamentary privilege.

The role of Presiding Officers

The Parliament of Tasmania is a bicameral parliament. There are two Presiding Officers, the President of the Legislative Council and the Speaker of the House of Assembly. The Speaker is elected by the House of Assembly at the commencement of each new Parliament. Because of the periodic nature of Council elections, the post of President does not fall vacant when there is a dissolution of the House of Assembly and general election. A new President is elected when the former President retires or following the periodic election for the electorate of the Member who has held the office of President. Unlike in the House of Assembly, Members of the Legislative Council usually meet in private to determine by secret ballot who should become the next President.

A Presiding Officer's role has a number of aspects. Primarily, the Presiding Officer maintains order during debates by enforcing standing and sessional orders, and acts as a neutral authority figure who interprets rules, deals with points of order and Members' chamber conduct where necessary in accordance with standing orders and the conventions of the Houses. They are elected to serve their respective Houses, not partisan interests.

The role also includes ceremonial duties and representing the Parliament to safeguard its authority and protect its Members. The President transmits ordinary Bills to the Governor for the Royal Assent and the Speaker transmits money Bills to the Governor for the Royal Assent. Both Presiding Officers by convention Chair the Standing Orders and Privileges committees.

Importantly, it should be noted that the Presiding Officers are responsible for not only maintaining order in the Houses, but the security and management of the parliamentary precinct, including Members' Offices. It is for this reason that Presiding Officers often have a role under relevant Memorandums of Understanding.

The Integrity Commission

We do not intend to comment on the operations of the Integrity Commission, but will note some aspects of the current legislation as it relates to the Parliament.

Firstly, we recognise that the Integrity Commission as established by statute performs a number of important functions in relation to raising standards, education and investigating, reporting on and preventing misconduct.

We note that unlike other integrity bodies the Integrity Commission does not have the power to prosecute or sanction individuals. However, the Integrity Commission can make reports as to the conduct or misconduct of public officers and make adverse findings.

To support those functions, the *Integrity Commission Act 2009* gives the Integrity Commission the power to receive, assess and investigate complaints about alleged misconduct. In conducting an investigation, the Integrity Commission may require individuals, including Members and former Members of Parliament and the Clerks, to attend and give evidence and provide information and produce documents. The Integrity Commission also has the power to search premises, seize information and take possession of records. In matters involving serious misconduct the Integrity Commission may apply for a warrant to utilise surveillance devices.

The Integrity Commission Act defines privileges and parliamentary proceedings in section 4

‘privilege’ includes any of the following:

- a) all the privileges set out in Part 10 of Chapter 3 of the *Evidence Act 2001*;
- b) the privileges of spouses and others set out in sections 18 , 19 and 20 of the *Evidence Act 2001*;
- c) the privileges of the Parliament;

‘proceeding in Parliament’ means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House of Parliament or of a committee, and, without limiting the generality of the foregoing, includes –

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

Section 100 provides that nothing in this Act is taken, or held or construed, directly or indirectly, by implication or otherwise, to affect, in any manner any power or privilege possessed by either House of Parliament before the passing of this Act.

The terms of definition are consistent with the way the 'proceedings of parliament' are described in other jurisdictions in both statute and common law.

Section 92 of the Act provides the mechanism and processes in which privilege may be raised and dealt with, including a mechanism to apply to the Supreme Court to determine whether the material requested is privileged etc. Note that section 92(7) provides that -

The Supreme Court may determine that the answer, information or material is –

- a) privileged; or
- b) not privileged; or
- c) partly privileged.

The Act and these provisions combined recognise and preserve parliamentary privilege which is a fundamental element of our democracy and Westminster traditions.

Parliamentary privilege – what is it?

Parliamentary privilege concerns the powers, privileges and immunities from aspects of the general law conferred on the Houses of Parliament, their members, officers and committees. It generally refers to a bundle of rights and immunities enjoyed on an individual basis that provide exemptions from the ordinary law and these include:

- Freedom of speech in Parliament, the effect of which is that members are immune from liability for anything they may say or write in the course of parliamentary proceedings.
- By extension there is immunity for parliamentary witnesses from being questioned or impeached by courts or tribunals about evidence given before either House of parliament or any parliamentary committee.
- There is also qualified immunity of members and officers from legal process. For members there is exemption from compulsory attendance before a court or tribunal when Parliament is sitting. Exemption from jury service for members and officers of Parliament is another facet of this immunity. It does also apply to the service of legal processes on sitting days within the parliamentary precinct.

Those rights and powers enjoyed by the Houses of Parliament on a collective or corporate basis include:

- The power to control publication of debates and proceedings and Presiding Officers have the right to exclude strangers from the Chamber.
- The power to regulate internal affairs and procedures, which refers to the power of the House to control its own agenda and proceedings. This includes

- the inherent right to discipline members and extends to the power to expel those guilty of conduct unworthy of a member of Parliament.
- The power to conduct inquiries and order production of documents, which means that witnesses before parliamentary committees (or, more unusually, before either House of Parliament) can be compelled to attend, that the production of documents can be ordered and that evidence can be taken under oath.

The justification for parliamentary privilege is that the freedom to control their own proceedings and the freedom of speech in Parliament are necessary if the Houses of Parliament are to perform their constitutional functions effectively - that is, to inquire, debate and legislate and hold the government to account.

In Australia (including states, territories and the commonwealth), parliamentary privilege originates from common law and Article 9 of the Bill of Rights 1689 (UK), which states:

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

The immunity extends beyond the courts to include executive inquiries such as those made by integrity agencies and other investigatory bodies. It is also noted

“The courts and Parliament are both astute to recognize their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.” [reference *Prebble v Television New Zealand Ltd* [1995] 1 AC 321]

Except for New South Wales and Tasmania, Australian jurisdictions have given statutory force to parliamentary privilege by allowing Parliament to define parliamentary privilege in legislation.

The New South Wales constitutional legislation, most recently the Constitution Act 1902 (NSW), is silent on parliamentary privilege and the definition and scope of privilege has evolved through common law.

Tasmania supplemented some of Parliament’s powers through its general legislative power. See the Parliamentary Privilege Acts of 1858, 1885 and 1957. However, the *Constitution Act 1934* (Tas) is silent on parliamentary privilege, except with respect to money Bills and the provision to declare absent Members’ seats vacant. It is well accepted that any hiatuses in parliamentary privilege, for example the power to expel Members or define the parliamentary precincts, is derived from common law.

The application of Article 9 ‘That freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’ includes application to investigatory bodies like the Integrity Commission. This is because an investigation or inquiry conducted by the Integrity Commission is an

administrative inquiry that may result in the making of findings regarding the conduct of public officers and the publication of reports containing those findings. Members of Parliament are public officers for this purpose. The Integrity Commission is, therefore, a place in which the proceedings of Parliament may potentially be impeached or questioned.

Justice Hall's reasoning in *The President of the Legislative Council of Western Australia v Corruption and Crime Commission* [No 2] [2021] WASC 223 at [149] per Hall J. is worthy of reproduction:

‘... In the context of court proceedings it is readily understandable that a distinction could be made between production of documents and their use. Documents could be produced under subpoena which would require them to be provided to the court. However, their use to impeach or question the proceedings in Parliament would arguably not occur until such time as they were referred to in the course of proceedings or tendered in evidence. Such a distinction is not meaningful in the case of administrative bodies such as the CCC.

Inquiries conducted by the CCC are unlike court proceedings in that there is no decision maker independent of the parties. The CCC is both an investigative body and a determinative one. Furthermore, in a CCC investigation there is no initiating process or pleadings that define the nature of the proceedings and no necessity to hold hearings either private or public. Nor is there an existing forum in which objection to use of privileged material can be taken and ruled upon before any such use occurs. The CCC may conduct an investigation and produce a report entirely upon investigations conducted without hearings.

...

Since production of documents to the CCC enables those documents to be immediately used in a way that could have adverse consequences for a member of Parliament, it must be accepted that the point at which parliamentary privilege would be breached would be at the point of production.’

Importance of parliamentary privilege

As noted, parliamentary privilege is concerned with the freedom of speech of members of Parliament. It achieves this by protecting the proceedings of Parliament from being questioned or impeached in any court or other place.

Parliamentary Privilege refers to the special rights and immunities that are reasonably necessary and considered essential for the operation of the Parliament, that is to enable the Parliament to operate unobstructed. Parliamentary privilege is absolutely fundamental to the Parliament's ability to fulfil its functions of scrutiny, inquiry, law making, taxation and appropriation of money.

Parliamentary privilege, in particular article 9 and freedom of debate, protects the Houses of Parliament and participants in parliamentary proceedings from things said or done in connection with those proceedings. It also protects advice provided to Members and ‘whistle-blowers’ who may reveal information to Members for use in parliamentary debates.

As the High Court of Australia noted in *Crime and Corruption Commission v Carne* [2023] HCA 28; (2023) 97 ALJR 737 at [106] per Gordon and Edelman JJ (citations omitted):

Parliamentary privilege is a “bulwark of representative government”. It has long antecedents. It allows Parliament to perform its functions without obstruction. Parliamentary privilege shields certain areas of legislative activity from judicial or executive review, thereby giving “the legislative branch of government the autonomy it requires to perform its constitutional functions”. Parliamentary privilege operates to ensure that a person who participates in parliamentary proceedings can do so knowing, at the time of that participation, that what they say cannot “later be held against them in the courts”, thereby ensuring that such a person is not inhibited in providing information to the Parliament or in otherwise participating in parliamentary proceedings. This is the “basic concept underlying article 9” of the Bill of Rights 1688.

Further we quote from Hall J in the decision of the President of the Legislative Council of Western Australia v CCC [No 2] [2021] WASC 223 at [5] who neatly summarised the points we wish to make in relation to the relationship between ‘parliamentary privilege’ and integrity agency [or law enforcement authority] investigations.

‘For the reasons detailed in this judgment, I have come to the following conclusions:

1. Parliamentary privilege is concerned with the freedom of speech of members of Parliament. It achieves this by protecting the proceedings of Parliament from being questioned or impeached in any court or other place.
2. The proceedings of Parliament are the debates, passage of legislation and other matters that occur when either house is in session and matters incidental thereto. It also includes the transaction of business by Committees of either house and joint Committees, including hearings conducted by those Committees. Documents that are tabled in Parliament or tendered in evidence in Committees form part of the proceedings of Parliament.
3. Other documents that are closely connected to proceedings in Parliament are also protected by privilege. Whether documents have the necessary connection to proceedings will depend on the circumstances of their

creation and use. It is not enough that documents merely relate to proceedings. The connection must be such that use of the documents could potentially involve questioning or impeachment of the proceedings of Parliament.

4. The nature of the privilege is such that it is directed to the use to which evidence of proceedings may be put. Unlike legal professional privilege it is not concerned with maintaining confidentiality. It is, in essence, a privilege from prohibited use, not a privilege from disclosure. It is only where disclosure also necessarily involves prohibited use of documents that the privilege will protect from production.
5. Prohibited use (that is, the questioning or impeachment of proceedings) includes using evidence of proceedings to support a case that could result in adverse consequences for a member. Such adverse consequences may be findings of criminal or civil liability. It may also include adverse findings as to credibility, character or conduct.
6. The privilege protects proceedings from being questioned or impeached in courts, but also in other places. That protection, therefore, extends to bodies established by the executive for the purpose of conducting inquiries and reporting on the findings of such inquiries, at least where those findings can be adverse to individuals.
7. An investigation conducted by the CCC is an administrative inquiry that may, but does not necessarily, involve formal hearings. It may also result in the making of findings regarding the conduct of public officers and the publishing of reports containing those findings. Members of Parliament are public officers for this purpose. The CCC [Integrity Commission] is, therefore, a place in which the proceedings of Parliament may potentially be impeached or questioned.
8. The powers of the CCC are subject to parliamentary privilege and cannot be exercised if, or to the extent that, the exercise would relate to a matter determinable by a House of Parliament – s 3(2) Corruption, Crime and Misconduct Act 2003 (WA)[Note the subsection reads Nothing in this Act affects, or is intended to affect, the operation of the *Parliamentary Privileges Act 1891* (WA) or the *Parliamentary Papers Act 1891* (WA) and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable by a House of Parliament]. The effect of this is to impose a limitation on any exercise of power, but only to the extent that that exercise would impinge upon parliamentary privilege.
9. Use of information by the CCC occurs at that time when the information is obtained for use in an investigation (that is, produced for examination). That is because the CCC is not merely an investigative body but a

determinative one. Documents obtained by it can be immediately used in making findings as to the conduct of public officers. This is to be contrasted with documents obtained for use in a court, where there may be a distinction between obtaining documents and using them. Use of documents in respect of court proceedings will usually occur where the evidence is tendered or in some other way relied on in court.

10. In the present case it is accepted that the documents sought by the notices included some that relate to the proceedings of Parliament in a broad sense. It is likely that this group includes some documents that are also so closely connected to the proceedings of Parliament that they could be used for a prohibited purpose. It is reasonable to infer that those documents could, therefore, be used to determine whether findings of an adverse nature should be made against former members of Parliament. Such use would involve a prohibited questioning or impeachment of the proceedings. Thus, those documents were protected from production to the CCC by parliamentary privilege.
11. The question of whether some of the documents were privileged was a matter determinable by a House of Parliament. Accordingly, there was no power to require the production of those documents unless and until that question was determined in the negative. Thus, the power to issue the notices was only effective to the extent that it related to other documents.
12. The notices did not relate exclusively to privileged or possibly privileged documents. They extended to a broad class of documents that included only some which were likely to be privileged. The vast majority of the documents could not attract a reasonable claim of parliamentary privilege on any view. It was clearly open for the CCC to exercise its powers to obtain such documents.
13. The notices did not require the immediate production of any of the documents. In each case the compliance date was at a future time. This afforded an opportunity for a claim of parliamentary privilege to be raised in respect of any of the documents covered by the notice in question. Such a claim could be advanced either by seeking a ruling from the relevant House of Parliament, by commencing proceedings in a court for a ruling or by implementing a process approved either by Parliament or a court.
14. In these circumstances the notices were not an invalid exercise of power. They did not, however, lawfully require the production of privileged documents. The exclusion of such documents from the ambit of the notices was an implied limitation in respect of the first three notices and an express limitation in respect of the fourth and fifth notices.
15. The recipient of the notices was under a lawful obligation to produce those documents that were the subject of the notices and that were not

privileged. The recipient of the notices was, equally, lawfully obligated to not produce those documents that were protected by parliamentary privilege. Until a determination of which documents were privileged was made the notices could not be complied with. If a determination could not be made in the time allowed, and an extension was not granted, the recipient would have had a reasonable excuse for not complying with the notices.

16. Whether privilege applied to any particular document was a question to be determined either by Parliament itself or by the courts or by some person authorised to do so by Parliament or a court. The recipient of the notices was not authorised to make a determination of whether parliamentary privilege applied to any of the documents for the purpose of deciding which documents were required to be delivered to the CCC. Nor could the recipient authorise another person or body to do so.
17. The method used to determine privilege in this case was not one in which Parliament or the courts were involved, nor was it authorised by either Parliament or a court. The question of which documents were subject to privilege was not, therefore, lawfully determined. Accordingly, the production of the documents and the receipt of them by the CCC on the incorrect assumption that privilege had been lawfully determined should not have occurred.
18. The documents must be returned to the recipient of the notices or delivered to Parliament to enable a proper determination of privilege to be made. That can occur either by Parliament making a determination or by implementing a method agreed to by Parliament or by instituting proceedings in a court.'

Integrity Commission investigations

It is clear from the above that an investigation conducted by the integrity commission is an administrative inquiry that may, but does not necessarily, involve formal hearings. It may also result in the making of findings regarding the conduct of public officers and the publishing of reports containing those findings. Members of Parliament are public officers for this purpose. The Integrity Commission is, therefore, a place in which the proceedings of Parliament may potentially be impeached or questioned.

Use of information by the Integrity Commission occurs at the time when the information is obtained for use in an investigation (that is, produced for examination). That is because the Integrity Commission is not merely an investigative body but a determinative one.

Documents obtained by it can be immediately used in making findings as to the conduct of public officers. This is to be contrasted with documents obtained for use in

a court, where there may be a distinction between obtaining documents and using them. Use of documents in respect of court proceedings will usually occur where the evidence is tendered or in some other way relied on in court.

Accordingly, we contend that in respect to a notice for production or warrant to seize documents should not be produced unless and until that question of parliamentary privilege is determined in the negative.

The question of whether some or all documents are privileged is a matter determinable by a House of Parliament or the Court. As noted above parliamentary privilege belongs to the House, rather than an individual Member; however, a Member may claim parliamentary privilege where to do otherwise would impede the functioning of the House.

Alternatively, the use of a protocol as authorised by the Houses would be another avenue to resolve claims.

The authority to enter into such a protocol or memorandum of understanding cannot be delegated to the Clerk or Presiding Officer it is up to each House to agree upon.

Development of a protocol or Memorandum of Understanding

It is noted that there is an inevitable tension between parliament and law enforcement bodies. The rule of law is a principle under which all citizens, including Members of Parliament, are subject to the same laws that are publicly promulgated and equally enforced. However, in order to effectively discharge their duties and preserve the independence of the legislature from other areas of government, Members of Parliament have special immunities under the law of parliamentary privilege. These special immunities, first enshrined by the Bill of Rights (1688), result in investigative and evidentiary restrictions involving parliamentary proceedings.

Parliamentary privilege can be seen by some as a shield against investigations by restricting access to material when investigating agencies issue notices to produce or execute search warrants, but we contend that is not the case it involves the preservation of the important foundations of parliamentary democracy. [Reference Rebcca Burton Parliamentary Privilege, Search Warrants and Intrusive Powers: Are Memoranda of Understanding Fit for Purpose? <https://www.aspg.org.au/wp-content/uploads/2020/12/Parliamentary-Privilege-Search-Warrants-and-Intrusive-Powers-1.pdf>]

Tasmania like other Australian jurisdictions have grappled with the best way to achieve transparency and preserve the integrity of investigations while upholding parliamentary privilege. We note that some jurisdictions have made efforts to resolve this issue by entering into formal arrangements with law enforcement agencies outlining protocols for the execution of search warrants and things to be considered when determining if material is subject to parliamentary privilege, such as how and who determines claims of parliamentary privilege.

What to consider in the development of a protocol or memorandum of understanding with the Integrity Commission

As noted above, it is recognised that parliamentary privilege cannot be used as a shield or to be used for special treatment, but should be there to preserve the sanctity of the proceedings of parliament and ensure there is no contempt of parliament.

Any proposed processes set out in a protocol should ensure that individuals, including Members and their staff, former Members, and the Clerk, are given proper opportunities to raise claims of parliamentary privilege for the House or authorised person to determine.

The purpose of a protocol in relation to parliamentary privilege is to ensure that investigations are able to be conducted in a way that does not amount to a contempt of parliament, and which gives proper opportunity for Members and others to raise a claim of parliamentary privilege in relation to documents or other things, while ensuring that the relevant integrity agency is able to perform its functions.

Key elements

Some of the key elements that may be included in a protocol include, among other things:

- setting out the legal basis for parliamentary privilege – setting out key principles, existing legislation and relevant parliamentary or common law
- who is notified prior to executing a search warrant
- who is notified of a notice to produce
- consideration of the role of the Clerk as custodian of the records and authoritative adviser and Presiding Officer in role as controller of the precinct
- when and how a warrant or notice to produce may be executed
- how a Member or other person may make a claim of privilege
- the timeframe a Member has to review the material
- what advice the Member may obtain and who from – lawyer, Clerk or other person
- how privileged material will be handled while the claim is assessed – a quarantine process
- who determines the claim of privilege
- any recourse available to a Member for disputing the outcome
- contempt provisions
- scope of investigation and how to set limits to material examined
- identification and handling of material subject to notice
- confidentiality provisions.

Search warrants

In terms of search warrants it is important to consider the following:

- ensure search warrants are approved internally by the most senior person in the agency

- ensure all parties present when the search warrant is executed are aware of any agreements in place and that they act in accordance with the agreement
- consider gathering evidence via requests for information (or notice to produce) rather than search warrant – to narrow the focus of the warrant
- who needs to be present at the time of search – the Member, the Clerk or other person
- the conduct of thorough pre-search warrant inquiries, including ensuring the specified subject matter of the search warrant does not in its own right impinge upon parliamentary privilege.

Large volumes of material, data and metadata

In addition, there are the challenges of how to deal with large volumes of records and information and these should be addressed in a protocol with consideration being given as to:

- Should there be a process to extract data and not review contents, i.e. quarantine material for a Clerk or other authorised person to assess
- This process may require the presence of the Clerk as well as a ‘forensic officer’ (not the investigator)
- A forensic officer may be an IT specialist who can capture or digitally collect records/metadata through a key word search and produce a report of tagged or identified material to be set aside for preliminary or further assessment
- The segregation of data or information from investigator in presence of Clerk or person nominated by the Clerk
- Tagged or identified material should be subject to access logs which provide a level of protection - the Clerk or adjudicator then do a more thorough screening of tagged data
- Timeframes for assessment of material or thorough screening to occur
- Consider what is reasonable given amount of material and resources available to the Clerk or assessor
- Ensure processes allow the data in such a way that any materials that are privileged or potentially privileged are capable of being identified by the Clerk and excluded from production
- Where appropriate, there may need to be further or final screening by the Clerk at critical points in the investigation of a matter to mitigate the risk of potentially privileged material being utilised or introduced in subsequent proceedings.

Set out test to be applied

In undertaking the screening process, the Clerk would apply the Breen test, which has also been adopted by the Australian Senate. The test involves an assessment of the purposes for which the document was created or retained by a Member:

‘Step 1: Were the documents brought into existence in the course of, or for purposes of or incidental to the transacting of business of a House or a committee?’

YES → falls within ‘proceedings in Parliament’.

NO → move to step 2.

Step 2: Have the documents been subsequently used in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?

YES → falls within 'proceedings in Parliament'.

NO → move to step 3.

Step 3: Is there any contemporary or contextual evidence that the documents were retained or intended for use in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?

YES → falls within 'proceedings in Parliament'.

NO → report that there are documents which fail all three tests.

Note: Individual documents may be considered in the context of other documents.'

Material falling within these categories may be subject to parliamentary privilege and will not be produced to the integrity Commission.

Independent adjudicator/assessor/privilege determinator*

If there is provision for the establishment of an independent adjudicator the protocol should

- ensure the adjudicator is notified at the outset of any investigation into a Member or where a Member is involved, that they are informed at each stage of the investigation and that they are satisfied there is no infringement upon parliamentary privilege
- Set out qualifications for independent adjudicator for example -
 - a. Must be an Australian lawyer of at least seven years' standing; and
 - b. Must not be a Member or former Member of an 'Australian Parliament'.

*(Term to be defined)

Covert and intrusive investigative techniques

Special consideration may need to be given to the use of covert and intrusive investigative technique. These techniques refer to surveillance devices such as a listening device. Note section 53 of the Integrity Commission Act. Things to consider include -

- Who should be advised and what advice should the investigative authority undertake e.g. consult with the Clerk, before seeking a warrant to use a surveillance device
- Consider a caveat clause where material subject to parliamentary privilege is inadvertently produced to an investigative body, the protection afforded by parliamentary privilege will continue to apply to the material
- This caveat should apply to any inadvertent disclosure in the production of documents pursuant to a statutory notice or summons does not and cannot constitute a waiver of privilege, and that the documents will remain privileged notwithstanding their disclosure.

These examples have been derived from various reports from NSW Parliament about parliamentary privilege and the use of investigative and intrusive powers. References include:

Standing Committee on Parliamentary Privilege and Ethics Interim Report: Adequacy of Current Procedures to Protect Parliamentary Privilege (Law Enforcement and Investigative Bodies)[https://www.parliament.nsw.gov.au/ladocs/inquiries/3010/Interim%20Report%20-%20Adequacy%20of%20current%20procedures%20to%20protect%20parliamentary%20privilege law%20enforcement%20and%20investigative%20bodies%20-%20tabled%2020%20March%202024.pdf](https://www.parliament.nsw.gov.au/ladocs/inquiries/3010/Interim%20Report%20-%20Adequacy%20of%20current%20procedures%20to%20protect%20parliamentary%20privilege%20law%20enforcement%20and%20investigative%20bodies%20-%20tabled%2020%20March%202024.pdf)

Parliamentary Privilege Developments Since 2019 and Current Issues, paper prepared by Mr Stephen Frappell for a Legalwise Seminar 2 November 2022
<https://www.parliament.nsw.gov.au/lc/articles/Documents/Parliamentary%20privilege%20-%20Developments%20since%202019%20-%202022%20November%202022.pdf>

Resourcing

A protocol will inevitably have resourcing implications for the Parliament, whichever model is adopted. Costs including independent expert/adjudicator or arbiter fees (if applicable) and internal costs of considering and dealing with material would need to be quantified and funding provided to the Parliament for this purpose.

The Parliament does not have the capacity to absorb costs associated with these processes. We refer the Committee to the independent review of the structure of the Parliament, commissioned by the Joint Sessional Committee on Workplace Culture Oversight as part of the implementation of the Motion for Respect Report, which identifies structural and resourcing issues in relation to the Parliament. To date, the Parliament has received no additional funding to progress structural reform. The Parliament is not in a position to take on further unfunded work.

Reference Workplace Research Associates Report on the Structure of Tasmanian Parliamentary Services February 2024
[5.2a-WRA-Report-Review-of-the-Structure-of-the-Tasmanian-Parliamentary-Services-Final-26-Feb-2024.pdf](#)

The 2023 draft protocol

In 2023, the Integrity Commission approached the Clerks and Presiding Officers requesting assistance in negotiating a protocol between the Parliament and the Integrity Commission.

With the authorisation of the (then) Presiding Officers, we undertook preliminary negotiations with the Integrity Commission to finalise a draft version of the protocol that was suitable for consultation with Members.

As parliamentary privilege belongs to each of the Houses, the Integrity Commission was informed that consideration of and approval of any protocol of this nature is properly a matter for the respective Houses and that neither the Clerks nor the Presiding Officers have authority to unilaterally enter into such a protocol.

Following a preliminary negotiation process with the Integrity Commission, the Presiding Officers wrote to Members of their individual Houses with a copy of the draft protocol, noting that the adoption of such a protocol would be a matter for each House.

To date, no motion has been moved in either House in relation to the adoption of a protocol.

Since the 2023 negotiations, the Committee has commenced this inquiry. We have provided in our submission, at page 6, an analysis of the 2023 draft protocol, including identifying matters that the Committee and ultimately Houses may wish to consider. Further, we have made a couple of suggestions for refinement of this draft, based on developments in other jurisdictions since those negotiations took place.

If the Committee wishes to explore this model further, or other models or provisions of a protocol we are available for advice in relation to those proposals.

Conclusion

The development of a protocol may incorporate many elements and there are several options available for the Parliament to utilise. There is currently a mechanism in the legislation, and this could coexist with a protocol or memorandum of understanding.

Any protocol is a matter for the Houses to enter into; it cannot be delegated to the Presiding Officers or a committee. It is therefore up to the House as to who makes such any interim or final determination.

In conclusion we wanted to end with a quote from Senator Penny Wong (as Opposition Leader in the Senate) commenting on report of the Senate's Privileges Committee Status of material seized under warrant, Preliminary Report, 163rd Report December 2016:

“Fundamentally, parliamentary privilege is designed to protect the rights of the legislature from incursion by the executive and by the judiciary. It ensures that all of us enjoy a right to freedom of speech in the debates and proceedings in parliament that ought not to be impeached or questioned in any court or place out of the parliament. It is a fundamental right that ensures that all of us can raise issues in this place and hold the government to account without fear of reprisal, without fear of arrest and without fear of prosecution. It is a right that has been jealously guarded for a very long time, and rightly so, by all members and senators — indeed, by all members of parliaments in the Westminster tradition. Without this right, this parliament would be a facade of democracy, and it is for this reason that this Senate has always carefully guarded its privileges”