



## Practical Guide on ACT Parliamentary Privilege and Executing Search Warrants or Interviewing ACT MLAs

### 1. Disclosure and compliance

This document is classified **AFP-IN-CONFIDENCE** and is intended for internal AFP use.

Disclosing any content must comply with Commonwealth law and the [AFP National Guideline on disclosure of information](#).

#### Compliance

This instrument is part of the AFP's professional standards framework. The [AFP Commissioner's Order on Professional Standards \(CO2\)](#) outlines the expectations for appointees to adhere to the requirements of the framework. Inappropriate departures from the provisions of this instrument may constitute a breach of AFP professional standards and be dealt with under Part V of the [Australian Federal Police Act 1979](#) (Cth).

### 2. Acronyms

<b>ACT</b>	Australian Capital Territory
<b>AFP</b>	Australian Federal Police
<b>DPP</b>	Director of Public Prosecutions
<b>MLA</b>	Member of the Legislative Assembly

### 3. Definitions

Proceedings in parliament - defined in the [Parliamentary Privileges Act 1987](#) to mean words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee.

### 4. Authority

- a. This practical guide is issued by the Chief Police Officer using power under [s. 37\(1\) of the Australian Federal Police Act 1979](#) (Cth) as delegated by the Commissioner under s. 69C of the Act.

## 5. Introduction

- a. This guideline is designed to ensure that AFP officers execute search warrants in a way which does not amount to a contempt of the Assembly and which gives a proper opportunity for claims for privilege to be raised and resolved.
- b. This guideline sets out procedures to be followed where the AFP proposes to carry out an investigation involving a Member of the ACT Legislative Assembly (MLA), including the execution of a search warrant on premises occupied or used by the MLA or conducting a record of interview with the MLA. The guideline applies to any premises used or occupied by a MLA, including the Legislative Assembly office of a MLA, the electorate office of a MLA and the residence of a MLA.
- c. The guideline is designed to ensure that search warrants are executed without improperly interfering with the functions of the Assembly and that MLA's and their staff are given a proper opportunity to raise claims of parliamentary privilege or public interest immunity in relation to documents or other things that may be on the search premises or in relation to questions they are asked.

## 6. Application of the guideline

- a. The guideline applies, subject to any overriding law or legal requirement in a particular case, to any premises used or occupied by a MLA including:
  - The Legislative Assembly office of a MLA
  - The electorate office of a MLA
  - Any other premises used by a MLA for private or official purposes on which there is reason to suspect that relevant material may be located.
- b. The guideline should also be followed, as far as possible, if a search warrant is being executed over any other premises and the occupier claims that documents on the premises are covered by parliamentary privilege.
- c. The guideline should also be followed, as far as possible, when a MLA is participating in a record of interview or being otherwise questioned in relation to an offence.
- d. If a **MLA raises a claim for legal professional privilege** (sometimes called client legal privilege) in respect of a document, the executing officer should follow the normal procedure that applies in cases where a claim for legal professional privilege is made in respect of a document that is on premises other than those of a lawyer, law society or like institution. The fact that legal professional privilege has been claimed by a person who is a MLA does not alter the normal rules that apply in such cases.

## 7. Legal Background

- a. A search warrant, if otherwise valid, can be executed over premises occupied or used by a MLA. Evidential material cannot be placed beyond the reach of the AFP simply because it is held by a MLA or is on premises used or occupied by a MLA.
- b. However, it can be a **contempt** of the Assembly for a person to improperly interfere with the free performance by a MLA of that person's duties as a MLA, although the Legislative

Assembly does not have the power to imprison or fine people who commit such contempt.

- c. It is also clear that a document or other thing which attracts **parliamentary privilege** cannot be seized under the authority of a search warrant unless the Act under which the search warrant was issued expressly overrides such privilege. No current Commonwealth or ACT Acts with provision for search warrants expressly override parliamentary privilege. The same principle applies to police questioning of a MLA in relation to privileged information.
- d. The ACT does not have legislation specifically setting out the powers and immunities of the Legislative Assembly. The source of the Legislative Assembly's powers and immunities is in the [Australian Capital Territory \(Self-Government\) Act 1988](#)(Cth).
- e. Section 24 of that Act provides that the Assembly may make laws declaring its powers (including privileges and immunities but not legislative powers) and that until the Assembly makes such laws, it has the same powers as the powers for the time being of the **House of Representatives**.
- f. In the absence of specific legislation, the principles of **Parliamentary privilege** in regards to the House of Representatives, as set out in the [Parliamentary Privileges Act 1987](#)(Cth), currently apply to the Legislative Assembly.
- g. These principles are designed to protect **proceedings in Parliament** (or the Assembly) from being questioned in courts but also have the effect that documents (or information) and other things which attract parliamentary privilege cannot be seized under a search warrant or elicited during police questioning.
- h. **Parliamentary privilege** applies to any document (or information) or other thing which falls within the concept of 'proceedings in parliament'. That phrase is defined in the [Parliamentary Privileges Act 1987](#) to mean words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee. It includes evidence given before a committee, documents presented to a House or a committee, documents prepared for the purposes of the business of a House or committee and documents prepared incidentally to that business. It also includes documents prepared by a House or committee. The courts have held that a document sent to a Senator, which the Senator then determined to use in a House, also fell within the concept of proceedings in Parliament.
- i. It is not always easy to determine whether a particular document (or information) falls within the concept of **proceedings in parliament**. In some cases the question will turn on what has been done with a document, or what a Member intends to do with it, rather than what it contains or where it was found.
- j. It is also possible that a document (or information) held by a Member will attract **public interest immunity** even if it is not covered by parliamentary privilege. The High Court has held that a document which attracts public interest immunity cannot be seized under a search warrant (*Jacobsen v Rogers* (1995)127ALR159).
- k. **Public interest immunity** can apply to any document (or information) if the contents of the document are such that the public interest in keeping the contents secret outweighs the public interest in investigating and prosecuting offences against the criminal law. Public interest immunity can arise in any situation, but it is more likely to arise in relation to

documents held by a Minister than by a MLA who is not a Minister.

- i. Further information in relation to the legal principles which apply in these cases can be found in the [Commonwealth DPP Search Warrants Manual](#).

47G(1)(b)

47G(1)(b)

## 8. Procedure Prior to Obtaining a Search Warrant

- a. An AFP officer who proposes to apply for a search warrant in respect of premises used or occupied by a MLA will seek approval at a senior level within ACT Policing (if possible from the Chief Police Officer or the Deputy Chief Police Officer) before applying for the warrant.
- b. If approval is given, the officer should consult the office of the appropriate Director of Public Prosecutions (DPP) before applying for a search warrant. In cases involving alleged offences against Commonwealth law, the appropriate DPP is the Commonwealth DPP. In cases involving alleged offences against ACT law, the appropriate DPP is the ACT DPP. The appropriate DPP can provide assistance to draft the affidavit and warrant and can provide any legal advice required in relation to the execution of the warrant.
- c. 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.

## 9. Procedure Prior to Executing the Search Warrant

- a. If the premises that are to be searched are in the Legislative Assembly, the executing officer should contact the Clerk of the Assembly before executing the search warrant and notify that Officer of the proposed search. If the Clerk is not available, the executing officer should notify the Deputy Clerk of the Assembly or where a Committee's documents may be involved, the Manager Committees.
- b. The executing officer should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the MLA or a senior member of that MLA's staff, prior to executing the warrant with a view to agreeing on a time for execution of the search warrant so as to minimise potential interference with the performance of the MLA's duties.

## 10. Executing the Search Warrant

- a. If possible, the executing officer should comply with the following procedures, unless compliance would affect the integrity of the investigation:
  - A search warrant should not be executed over premises in the Legislative Assembly on an Assembly sitting day
  - A search warrant should be executed at a time when the MLA, or a senior member of their staff, is present
  - The MLA, or a member of their staff, should be given reasonable time to consult the Speaker, a lawyer or other person before the warrant is executed.
- b. If the MLA, or a senior member of their staff, is present when the search is conducted, the executing officer should ensure that the MLA, or member of staff, has a reasonable

opportunity to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises.

- c. There is a public interest in maintaining the free flow of information between constituents and their Assembly representatives. Accordingly, even if there is no claim for privilege or immunity, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search.
- d. As part of that process, the executing officer should consider inviting the MLA, or a senior member of their staff, to identify where in the premises those documents which fall within the scope of the search warrant are located.

## 11. Procedure to be followed if Privilege or Immunity is Claimed

- a. If the MLA, or a member of staff, claims **parliamentary privilege** or **public interest immunity** in respect of any documents or other things that are on the search premises the executing officer should ask the MLA, or member of staff, to identify the basis for the claim. The executing officer is entitled to proceed with the search if satisfied on reasonable grounds that there is no proper basis for the claim.
- b. If the executing officer considers that there is, or may be, a proper basis for the claim the officer should ask the MLA, or member of staff, whether they are prepared to agree to the following procedure to ensure that the relevant documents are not examined until the claim has been resolved:
  - The relevant document or documents should be placed in audit bags in accordance with the AFP national guideline on exhibits and ACT Policing guideline for best practice on property and exhibit handling procedures. A list of the documents should be prepared by the executing officer with assistance from the MLA or member of staff
  - The MLA, or member of staff, should be given an opportunity to take copies of any documents before they are secured. The copying should be done in the presence of the executing officer
  - The items so secured should be delivered into the safekeeping of a neutral third party, who may be the warrant issuing authority, the registry of a relevant court or an agreed third party
  - The MLA has five working days (or other agreed period) from the delivery of the items to the third party to notify the executing officer either that the claim for privilege or public interest immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained. In this respect, it is a matter for the MLA to determine whether to seek that ruling from a court or the Speaker
  - If the executing officer has not heard from the MLA after five working days (or other agreed period), the executing officer and the third party will be entitled to assume that the claim for privilege or public interest immunity has been abandoned and the third party will be entitled to deliver the items to the executing officer.
- c. If the MLA, or member of staff, is not prepared to agree to the procedure outlined above, or to some alternative procedure which is acceptable to the executing officer, the executing officer should proceed to execute the search warrant with all care in the circumstances to minimise the extent to which the members of the search team examine or seize documents which may attract privilege or public interest immunity.
- d. In some cases a MLA, or member of staff, may claim that all the documents on the

relevant premises attract privilege or public interest immunity and on that basis the proposed search should not proceed in any form. If this occurs, the executing officer must consider whether there is a reasonable basis for that claim. If there is a reasonable basis for that claim, it may be necessary for a large number of documents to be placed in audit bags. However if the executing officer is satisfied, on reasonable grounds, that there is no proper basis for the claim they should inform the MLA, or member of staff, that they intend to proceed to execute the search warrant unless the MLA, or member of staff, is prepared to specify particular documents which attract privilege or public interest immunity.

- e. The AFP will notify the ACT Attorney-General, the Minister responsible for policing in the ACT (if different) and the Speaker of the Assembly in any case where a claim of parliamentary privilege has been made by or on behalf of a MLA.

## 12. Obligations at the Conclusion of the Search

- a. The executing officer should provide a receipt recording things seized under the search warrant (whether requested or not). If the MLA does not hold copies of the things that have been seized, the receipt should contain sufficient particulars of the things to enable the MLA to obtain further advice.
- b. The executing officer should inform the MLA that the AFP will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the MLA's duties. The AFP should ensure that access is provided or facilitated on those terms where possible. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.
- c. In all other respects the executing officer and the AFP will comply with the requirements set out in the legislation under which the relevant search warrant was issued.

## 13. Records of Interview/Questioning

- a. An AFP officer who proposes to conduct a record of interview or otherwise undertake questioning of a MLA in respect of an offence will seek approval from their Coordinator if possible.
- b. Where an interview is proposed to take place in the precincts of the Assembly, the officer conducting the interview will ensure that, prior to commencing the interview, the Speaker of the Assembly is notified.
- c. In all cases where a MLA is to undergo a record of interview or other questioning, the investigating AFP officer must comply with the principles and obligations under Part 1C of the [Crimes Act 1914](#)(Cth).

## 14. Further Advice

- a. Any queries relevant to the content of this guideline should be referred to [ACT Policing Governance](#).

## 15. References

[Australian Capital Territory \(Self-Government\) Act 1988](#)

[Crimes Act 1914](#)

[Parliamentary Privileges Act 1987](#)

[Commonwealth DPP Search Warrants Manual](#)