

## STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

### *Committee*

The President (Hon Kate Doust) in the chair.

**The PRESIDENT:** I do not know whether Hon Simon O'Brien wants to read out every word of the recommendations that are listed on paper. I will leave that up to you.

*Fifty-fifth Report — "A Refusal to Comply with a Summons to Produce Documents" —  
Recommendation 1 — Motion*

**Hon SIMON O'BRIEN:** Thank you, Madam President. By way of a brief response, order of the day 1 relates of course to the fifty-fifth report of the Standing Committee on Procedure and Privileges that contains four recommendations, which it is proposed we now deal with in seriatim. My primary motion, which I will move in turn, is that the recommendations be adopted and agreed to. Perhaps at that point, the Chair may wish to read the text of that motion because I have already presented them in the notice paper. With that in mind, I move without notice —

That recommendation 1 be adopted and agreed to.

**The PRESIDENT:** Hon Simon O'Brien has moved that recommendation 1 be adopted and agreed to. Recommendation 1 states —

That the Legislative Council refer the following matter to the Standing Committee on Procedure and Privileges for investigation and report:

In relation to the refusal by Ms Emily Roper, the Acting Director General of the Department of the Premier and Cabinet, to comply with a summons to attend and produce documents at 9.00am on Friday, 9 August 2019, issued by the Legislative Council Standing Committee on Procedure and Privileges, and the events leading up to that non-compliance:

- (1) Did Ms Emily Roper, or any other person or body, commit a contempt of the Legislative Council or any breach of its privileges?
- (2) If the Committee so finds that any contempt of the Legislative Council has been committed, or that any of the privileges of the Legislative Council have been breached, then what penalty, if any, should the Legislative Council impose for each contempt or breach?

**Hon SUE ELLERY:** This is an unusual set of circumstances. If Madam President will agree, I want to set out the government's position in respect of each of the four matters at the outset. I appreciate that the chamber will make a decision on each one as they are put, but they form a package and I will set out the government's position as a whole. Given we are doing 10 minutes at a time, that might mean that I will jump up and seek the call. If people will grant me that, I would appreciate it.

In the fifty-fifth report, the committee made four recommendations. The government opposes each of the recommendations. Recommendations 1 and 2 seek the referral of certain matters to the committee for investigation and report on whether there has been a contempt of the house or a breach of its privileges, and, if it has, what penalties should be imposed. As Erskine May's *Parliamentary Practice* observes at paragraph 15.32 in relation to the House of Commons, the house's penal jurisdiction should be exercised —

as sparingly as possible, and (ii) only when satisfied that to do so was essential in order to provide reasonable protection for the House, its Members or its officers from improper obstruction or attempt at or threat of obstruction causing, or likely to cause, substantial interference with the performance of their respective functions.

In this case, Ms Roper and Mr Foster have done everything they reasonably can to protect parliamentary privilege and comply with the committee's requirements whilst also complying with their obligations under the Corruption, Crime and Misconduct Act 2003—which hereafter I will refer to as the CCM act—and cooperating appropriately with the Corruption and Crime Commission's investigation. I do not say this as a criticism, but the positions taken by the CCC and the committee place them in a position in which no matter what they did in good faith, they faced adverse consequences. No-one should be placed in that position, much less punished for it. These are not appropriate cases for referral to the committee for investigation and report. Madam President, at this point I want to read in and then table a letter from the Corruption and Crime Commissioner to the Attorney General. I have copies that could start being photocopied while I read it. This is from Commissioner John McKechnie, QC, to the Attorney General dated 14 August. It states —

### SUMMONS TO THE PRIVILEGES COMMITTEE OF THE LEGISLATIVE COUNCIL

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

As you are the Minister responsible for the administration of the Corruption Crime and Misconduct Act it is appropriate to advise you I have been summoned to a private hearing of the Procedure and Privileges Committee of the Legislative Council at 2.00pm on Friday 16 August 2019.

I understand that Mr Foster, Director General of the Department of the Premier and Cabinet has been summoned to attend before that Committee at 10.00am on Friday.

### **Background**

The Commission is undertaking an investigation into allegations of serious misconduct including allegations relating to former members. Of course no conclusions as to misconduct have been drawn at this stage.

As part of the investigation the Commission served a notice on Mr Foster pursuant to the CCM Act s 95 for named email accounts held by DPC on behalf of members of parliament. Necessarily the terms were wide and cover a period from 2014 to 2017.

Mr Foster, who has acted very professionally and cooperated with the Commission to the fullest extent, raised the question that some of the documents might contain parliamentary material which was privilege.

As a result I attended on the President of the Legislative Council with Clerk and Deputy Clerk to outline the position. I advised them that from the Commission's point of view we had no interest in and did not wish to see anything which was privileged but under the CCM Act s 95 we were entitled to all documents that are not privileged and I expected those to be delivered.

The Committee took the view that it would decide what matters were privileged before releasing to the Commission. In my respectful opinion this exceeded the breadth of Parliamentary privilege. Although I am sure it is not the intention of the Committee to impede or obstruct the Commission's investigation that would be the effect. For example a suggestion was made that it might be necessary to allow the affected members the opportunity to inspect all the documents for a claim of privilege. The Committees tentative proposals for dealing with in excess of 4 terabytes of data were, with all respects unworkable.

...

My view ... is that Mr Foster was lawfully required to and did comply with the notice issued to him under CCM Act s 95. The Commission has not breached parliamentary privilege in receiving, retaining and analysing the documents (which comprise more than 4 terabytes) and will continue its investigation.

Yours sincerely

John McKechnie QC

**COMMISSIONER**

Madam President, I table that document.

[See paper 2938.]

**Hon SUE ELLERY:** Recommendations 3 and 4 seek to reinforce orders already made by the committee with orders by this chamber. Those orders should not be made because they may further compromise the Corruption and Crime Commission's investigation or in the case of recommendation 4, are beyond the power of not only the committee but also the chamber. Before referring to the committee's report and the specific recommendations contained in it, I am advised that a fundamental issue needs to be addressed. The committee's report assumes that parliamentary privilege is applicable without verifying that assumption. However, that point needs to be tested—it should not be assumed. In WA, subject to specific provisions of the Parliamentary Privileges Act 1891, the Legislative Council and the Legislative Assembly and their members and committees have and may exercise the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989. That is section 1 of the Parliamentary Privileges Act. There is a question as to whether parliamentary privilege applies to protect material that demonstrates criminal or serious misconduct from disclosure in response to the exercise of compulsory investigative powers by the executive government. That question must be resolved by reference to the extent of parliamentary privilege in the House of Commons on 1 January 1989. There are no specific provisions of the Parliamentary Privileges Act 1891 that address this issue. The question is therefore whether, as at 1 January 1989, there were any applicable privileges, immunities and powers by custom, statute or otherwise that established such a privilege would be available to protect from disclosure material that demonstrates criminal or serious misconduct in response to the exercise of compulsory investigative powers by the executive government.

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

I refer to the 2012 *R v Chaytor* decision of the Supreme Court, the highest court in the United Kingdom, relating to the prosecution of parliamentarians involved in travel rorts. In his judgement, Lord Phillips, the most senior judge, said that the House of Commons —

... does not assert an exclusive jurisdiction to deal with criminal conduct, even where this relates to or interferes with proceedings in committee or in the House.

Lord Phillips also said that when it is necessary to investigate facts and obtain evidence of criminal misconduct, Parliament permits the police to carry out their investigations within the precincts. Although he did not elaborate, Lord Phillips mentioned that in the course of a criminal prosecution—but did not say “investigation”—issues might arise involving areas of inquiry precluded by parliamentary privilege. Seven other judges all expressly concurred with Lord Phillips. These observations demonstrate that in the United Kingdom House of Commons, parliamentary privilege has never been an impediment to the investigation of criminal misconduct and that the UK Parliament has permitted such investigations to occur. The 2008 protocol issued by the Speaker of the House of Commons for execution of search warrants acknowledges this. It is set out in that case at paragraph 85. In paragraph 3, the Speaker of the House of Commons said —

It is no part of my duties as Speaker to impede the proper administration of justice ...

Paragraph 5 of the 2008 protocol states that the Speaker might require a record of what has been seized and attach conditions to the police handling of the material —

**The PRESIDENT:** Leader of the House.

**Hon SUE ELLERY:** — until any issue of parliamentary privilege is resolved. This statement acknowledges that the police may seize even privileged documents and that the police could handle these documents subject to conditions. As a matter of principle, investigation of criminal or serious misconduct is a particular category of case that raises different considerations from those in civil cases. That is because there is no reason why parliamentarians should be treated differently from other citizens for the purposes of investigating criminal or serious misconduct. It can hardly be suggested that any form of criminal or serious misconduct will ever be so connected with the proceedings of Parliament or parliamentary work as to attract the legitimate protection of parliamentary privilege. However, there may be particular reasons why in civil cases some aspects of proceedings in Parliament or parliamentary work should not be disclosed. The position of the House of Commons applies in Western Australia by virtue of section 1 of the Parliamentary Privileges Act; that is, there was an established custom or practice that existed on 1 January 1989 in the United Kingdom House of Commons that Parliament would permit an investigation into criminal misconduct by police. Conversely, there was no established custom or practice evident from any decided case or parliamentary precedent that Parliament would rely upon parliamentary privilege to impede an investigation.

I have been told that the copy of the letter that I tabled did not have a second page. I will now read the second page of the letter that I have already tabled into *Hansard*. It states —

In due course I understand that DPC took legal advice from the State Solicitors Office. That office then conducted a search of all the requested documents, after the Commission refined its search parameters. Documents which may be subject to parliamentary privilege were removed. The balance of the documents were delivered to the Commission where they are being analysed.

In an effort to reach a solution I proposed to the Committee that when we had isolated the documents that may be produced to persons examined by the Commission, or which may be referred to in a report, we would give copies to the Committee so that they may satisfy themselves that they were not privileged. I have had no response to this proposal.

### **Current Developments**

This morning Commission Officers acting under warrants issued by a Supreme Court Judge executed them at a number of premises. Although there is no memorandum of understanding with the House, the Commission has adopted a procedure similar to a federal protocol for matters involving possible privilege.

On Friday morning the Commission will hold public examinations of two witnesses. Neither of the witnesses are focus of the investigation but can give important evidence to the Commission in relation into electoral allowances.

Counsel assisting the Commission will make opening remarks concerning the investigation which will also be in public.

The broad nature of the summons suggests that I may be asked questions which would require me to breach the CCM Act by disclosing official information. It may also disclose information on a current investigation.

In my view the Committee cannot compel the disclosure of official information but I acknowledge the Committee may have a different view.

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

I have no intention of breaching the CCM Act and will not do so.

I am concerned that the Committee may institute proceedings for contempt of Parliament. In that event I will seriously consider my future leadership as I put the interest of the Commission well above my own. It would be wrong for the Commission to be vilified for fearlessly carrying out its functions.

The aforementioned constitutes official information and is disclosed for you. I certify that this disclosure is necessary in the public interest in order for you to give advice to the Premier and to the Government if necessary as the events I have described may have a constitutional impact. I draw your attention to *Corruption Crime and Misconduct Act s 153*.

I am personally concerned following the Committees earlier correspondence that I may be found in contempt of the House. Before such an event I would of course reflect on my ability to continue to lead the Commission.

I have read out the final part of that letter. I apologise to the chamber for the confusion in that.

**The PRESIDENT:** Minister, can you table that document again in its entirety so that it can be reprinted so there is no confusion as to which document people will have put in front of them.

**Hon SUE ELLERY:** I think that is the best thing to do.

**The PRESIDENT:** That document is tabled.

[See paper 2939.]

**The PRESIDENT:** If members would like to wait for a minute for that to be photocopied and distributed before they make comment on it. Leader of the House, do you want to continue making your comments while you wait for that document?

**Hon SUE ELLERY:** Yes. Thank you, Madam President.

My question to the house is on that threshold question: what parliamentary or other precedent does the committee rely upon to protect material which demonstrates criminal or serious misconduct from disclosure in response to the exercise of compulsory investigative powers by executive government? The house and the committee must identify that precedent before it can get to the stage of asking who may determine the existence of parliamentary privilege before material is disclosed to the executive pursuant to the exercise of compulsory powers. Nothing in the summary of advice of Mr Bret Walker, SC, suggests that this issue was considered by him.

There is another point. The committee's report relies heavily on article 9 of the Bill of Rights 1689 and section 16 of the Parliamentary Privileges Act 1987. The decision of Justice French, later Chief Justice of Australia, in *Crane v Gething* held that these provisions are essentially concerned with interactions between parliamentary and judicial proceedings. They have little direct relevance to the situation here, which concerns the exercise of compulsory investigative powers by the executive and do not yet raise any question of judicial intervention—yet the house is asked to consider referring a matter of contempt for investigation and report to the committee. The house needs to consider this very carefully. The house should decline to act without proper bases being advised on that issue for the house to consider. At the most, the house should refer this issue to the committee to consider before taking any other steps.

I want to make a couple of observations about the Corruption and Crime Commission's powers and how events unfolded, before I turn to the particular recommendations. The CCC is established and operates under the Corruption, Crime and Misconduct Act 2003. One of the purposes of the act is to improve continuously the integrity of and to reduce the incidence of misconduct in the public sector; that is at section 7A. The report tells us that this starts with an inquiry by the CCC as to whether two, possibly three, former members of Parliament committed serious misconduct. That is not disputed; the committee sets that out in its report.

The house has taken very seriously the issue of the trust in which members of Parliament must act. There is an issue of trust here. If MPs do not hold themselves to the highest standard in their conduct, their use of their resources and the allowances that are at their disposal, Parliament has already determined that the government of the day can take serious action against them, and that is what is set out in the Corruption, Crime and Misconduct Act. The establishment of the CCC is the primary way in which that purpose is to be achieved. Parliament has entrusted the CCC with an important function—ensuring that an allegation about or information or matter involving serious misconduct is dealt with in an appropriate way. It is important to remember what we are talking about when we talk about serious misconduct. If members do not have the act in front of them, I take them to the Corruption, Crime and Misconduct Act at sections 3(1) and 4(a), (b) and (c). We are talking about corruption. We are talking about serious offences. It is a serious misconduct for a public officer such as a member of Parliament to corruptly act or fail to act in the performance of the functions of her or his office.

**The PRESIDENT:** Leader of the House.

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

**Hon SUE ELLERY:** It is serious misconduct for a public officer to corruptly take advantage of his or her office as a public officer to obtain a benefit for himself, herself or another person, or to cause a detriment to any person. It is a serious misconduct for a public officer to commit an offence punishable by two or more years' imprisonment while acting or purporting to act in her or his own official capacity.

One of the ways in which the CCC can ensure that an allegation of serious misconduct is dealt with appropriately is to investigate the allegation itself. Parliament has given the CCC strong investigative powers for that purpose and the CCC is conducting its own investigation in this case. One of the CCC's powers is to give someone a section 95 notice requiring that person to produce documents to the CCC at a specified time and place. A person who fails without reasonable excuse to comply with a section 95 notice is in contempt. A contempt of the CCC may be punished as a contempt of the Supreme Court. That is obviously a very serious consequence of noncompliance.

The CCM act does not affect the operation of the Parliamentary Privileges Act 1891. In addition, the powers, rights and functions conferred by the CCM act are not to be exercised if or to the extent that that exercise would relate to a matter determinable by Parliament. However, no-one is suggesting that the CCC cannot investigate allegations of serious misconduct by members of Parliament. No-one is suggesting that the CCC cannot give a section 95 notice to obtain documents that are not subject to parliamentary privilege. It appears agreed by everyone, including the committee, that the CCC should be given access to the documents it sought under the section 95 notices as soon as possible.

As the committee revealed in its report, the CCC gave two section 95 notices to Mr Foster as director general of the Department of the Premier and Cabinet. The CCC's first section 95 notice came to the attention of Mr Foster on 15 April 2019 with an original date for producing the documents of 29 April 2019. With the Easter and Anzac Day public holidays, this left only six clear working days to respond to the section 95 notice. Time for complying with the notice was extended at Mr Foster's request to 17 May 2019.

The first section 95 notice included a section 99 notation. The effect of a section 99 notation is to prohibit disclosure of the section 95 notice or any investigation to which the notice relates except in strictly limited circumstances. Disclosure of information contrary to a section 99 notation is punishable by imprisonment for up to three years and a fine of \$60 000. The purpose of a section 99 notation is to prevent disclosure which might prejudice —

- (i) the safety or reputation of a person; or
- (ii) the fair trial of a person who has been or may be charged with an offence; or
- (iii) the effectiveness of an investigation;

The CCC investigation —

or

- (b) might otherwise be contrary to the public interest.

In some cases, the CCC is required to include a section 99 notation on a section 95 notice. The section 99 notation on the first section 95 notice prevented Mr Foster from disclosing the existence of the notice or the CCC's investigation to you, Madam President, or to any member of Parliament or parliamentary officer. Given that some of the documents required to be produced under the first section 95 notice were likely to be subject to parliamentary privilege, this presented an obstacle to Mr Foster responding appropriately to the notice.

On 3 May, this issue was first raised with the CCC by the State Solicitor's Office by telephone. On 10 May 2019, the State Solicitor's Office wrote to the CCC on Mr Foster's behalf requesting an extension of time and a variation of the section 99 notation to permit consultation about the notice with you, Madam President. The CCC declined to vary the notice and instead undertook itself to brief you, Madam President, on the first section 95 notice. Time for complying with the notice was extended to 31 May 2019 accordingly. It is apparent from paragraphs 2.13 to 2.18 in the committee's report that this briefing occurred. After the briefing, the CCC varied the section 99 notation on the first section 95 notice on 20 May 2019. The effect of the variation was to permit Mr Foster or his representatives to disclose the first section 95 notice and the CCC's investigation to you, Madam President, as well as the Clerk and the Deputy Clerk of the house. Time for compliance with the first section 95 notice was also further extended to 14 June 2019. As the committee's report reveals at paragraphs 2.19 to 2.30, further communications occurred between the committee and the CCC about how to deal with the issues of parliamentary privilege raised by the first notice to produce.

*Sitting suspended from 1.00 to 2.00 pm*

**Hon SUE ELLERY:** Before the break, I noted that there had been further communication, which is detailed in paragraphs 2.19 to 2.30, between the Standing Committee on Procedure and Privileges and the Corruption and Crime Commission about how to deal with the issues of parliamentary privilege.

On 7 June 2019, time was further extended for complying with the first section 95 notice, at the request of the Clerk of the house, until 5 July 2019. The CCC stated that it had granted this extension on the basis of the Clerk's

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

advice to the CCC that there was a reasonable prospect that in the interim the committee would have resolved the issue as to the treatment of records subject to parliamentary privilege. The CCC also advised that it did not intend to grant any further extensions of time for complying with the first notice.

On 11 June 2019, the CCC gave Mr Foster a second section 95 notice, with a section 99 notation. The CCC brought that notice to the committee's attention. On 25 June 2019, after further consultation with the CCC, the committee adopted the process that it wished to have followed to ensure that documents subject to parliamentary privilege were not produced to the CCC under either of the section 95 notices. That process involved, amongst other things, Mr Foster formally producing the documents sought by the notices to the CCC officers, but only for the purpose of the documents being handed to the Clerk of the house in order for the committee's process to be followed. That process was communicated to the CCC, which wrote to the committee on 26 June 2019 in the terms set out in the committee's report at paragraph 2.31. The CCC's letter could, with respect, have been clearer, but that is not the fault of Mr Foster or Ms Roper.

It is suggested that there should be no impediment to Mr Foster complying with the notices by 5 July 2019 when the committee's process provided for only formal production of the documents to the CCC and not for the documents to be retained by the CCC instead of being put through the committee's process. By 28 June 2019, however, it became clear that the CCC would not accept only formal production of the documents, and any doubt on that point was removed. This created an obvious difficulty for Mr Foster. The State Solicitor's Office had not reviewed the documents, the subject of the section 95 notices, for parliamentary privileges at this point because it had been clear, at least since the end of May 2019, that the committee wished to make its own arrangements for undertaking that review. Mr Foster did not wish to proceed in a manner contrary to the process being developed by the committee. His preference was, and remains, to comply with the section 95 notice seeking the documents of members of Parliament under a process agreed between the committee and the CCC. However, one week from the date on which documents had to be produced under the first section 95 notice, it became clear that the CCC would not agree to provide sufficient time for the committee's process to be followed. The CCC had indicated when it last extended time to produce the documents that it did not intend to further extend time for publication. I want to table another document.

**The PRESIDENT:** Can you cite what that document is, please?

**Hon SUE ELLERY:** Yes, I will. This is a letter from the CCC to Mr Craig Bydder, Deputy State Solicitor, dated 22 July 2019.

[See paper 2940.]

**Hon SUE ELLERY:** The letter states —

Dear Mr Bydder

**Notices to Produce NPR 00615-2019-4614 and NPR 00615-2019-4647**

I refer to our telephone conversation this morning in relation to this matter, in which you sought clarification as to:

1. whether there is an agreed procedure in place between the Commission and the Procedure and Privileges Committee (PPC) in relation to assessing documents to be produced under the above Notices for parliamentary privilege; and
2. whether the proposed process of physically handing the records to be produced under the above Notices to the Commission's exhibit officer, before that officer immediately passes the records to the PPC, would satisfy production under the Notices.

**Is there an agreed procedure in place between the Commission and the PPC?**

The Commission has not agreed a procedure with the PPC.

The Commissioner's letter of 26 June 2019 noted the PPC had 'finalised its procedure for dealing with the Commission notices'.

While the Commission has conferred with the PPC (and with the DPC) with a view to offering technical assistance, the Commissioner's clear position at all times has been that the Commission cannot approve or agree to a process. That is a matter for the PPC, not the Commission.

The Commission's position was confirmed most recently verbally and in writing by the Commission's Director of Operations, Mr David Robinson, to Mr Nigel Pratt on 3 and 5 July 2019 respectively.

**Would handing the records to be produced under the Notices to the Commission's exhibit officer, before passing immediately to the PPC, satisfy production under the Notices?**

As previously confirmed in writing to your office, the answer to this question is 'no'.

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

This was previously conveyed to Mr Pratt in a telephone conversation with Commission lawyer, Ms Kirsten Nelson, on 28 June 2019. It was subsequently confirmed verbally and in writing to Mr Pratt by Mr David Robinson on 3 and 5 July 2019.

The Commission reiterates that it is only seeking production of material which is not the subject of parliamentary privilege.

The Commission is pleased with the cooperation being received from the Director General of the Department of the Premier and Cabinet in seeking to resolve the issue of parliamentary privilege, so that privileged materials remain protected and the Commission may carry out its investigative statutory functions in a timely manner.

The Commission has no objection to this letter being released to the PPC if it would assist to amicably progress compliance with the Notices.

Yours sincerely

Wendy Endebrock-Brown

**Director Legal Services**

After waiting as long as possible for a process to be agreed under which he could comply with the section 95 notices in a way that was accepted by both the committee and the CCC, despite the committee's understanding, no process had been agreed. In practical terms, Mr Foster now had two options: firstly, he could refuse to produce the documents, except under the process adopted by the committee, which might cause him to be in contempt of the CCC and would further delay the CCC's investigation; secondly, he could produce the documents to the CCC under a process that followed as closely as possible the process adopted by the committee, which might cause him to be in contempt of the house. After taking advice, Mr Foster decided to produce the documents to the Corruption and Crime Commission. His reasons for taking that course were given to the committee in writing on 4 and 11 July 2019. Those letters are reproduced in the committee's report at pages 86 and 87 and 91 to 94. It is clear from those letters that Mr Foster did not take his decision lightly. He did everything he reasonably could to protect parliamentary privilege in the documents as effectively and in a way as close as possible to the process adopted by the committee. There is no proper basis for asserting Mr Foster may be in contempt of Parliament or have breached its privileges.

I want to continue my remarks in respect of the committee's recommendations. I want to deal with recommendation 2 before recommendation 1 because recommendation 2 deals with earlier events. Recommendation 2 refers to the actions of Mr Foster in producing documents to the CCC without following the procedure authorised to the committee as the basis on which his conduct should be referred to the committee for investigation and report. The committee expressed the view in correspondence that it was for this house to determine whether any documents were subject to parliamentary privilege and that its procedure was the only one that should be followed. However, the committee's resolution, communicated to Mr Foster and Ms Roper before the documents were produced, refers only to the production of documents that were proceedings in Parliament as a basis for Mr Foster breaching the privileges or being in contempt of the house.

Mr Foster's process was directed to ensuring, as far as possible, that no documents that were proceedings in Parliament would be produced to the CCC. Mr Foster's process followed the committee's process as closely as possible. Mr Foster describes how similar the two processes were in his letter of 11 July 2019, which is found at page 93 of the report. In some cases, the processes were materially identical. For example, Mr Foster states in his letter —

Under the PPC's process, the PPC would adopt the advice of the external party it had appointed rather than form an independent view on which of the documents are subject to parliamentary privilege. Under the process I have adopted, I will adopt the advice of the State Solicitor's Office rather than form my own view. This aspect of the processes is materially identical.

The differences between the committee's process and Mr Foster's process, as Mr Foster points out in his letter, were dictated by the need for the CCC to be able to undertake its investigation efficiently, and the need to avoid exacerbating the delays that had already occurred.

With respect, it is also incorrect for the committee to assert that it is "only" for this house to determine whether any particular document constitutes proceedings in Parliament. Although courts are reluctant to do so, they will rule on questions of parliamentary privilege if necessary in the exercise of their general jurisdiction and in regulating their own proceedings. As the Full Court of the Supreme Court of Western Australia recognised in *Halden v Marks*, a decision cited by the committee in its report, there are cases in which a question of parliamentary privilege is raised in a court about what a party wishes to do—for example, when a party wishes to rely on something said in Parliament and the court must decide whether that action would breach parliamentary privilege.

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

In *R v Chaytor and others*, a 2010 decision of the United Kingdom Supreme Court—which is also cited by the committee in its report—the position is put more explicitly at paragraph 15. Referring to a letter that had received the approval of the House of Lords' Committee for Privileges, the judgement states —

“Article 9 limits the application of parliamentary privilege to ‘proceedings in Parliament.’ The decision as to what constitutes a ‘proceeding in Parliament’, and therefore what is or is not admissible as evidence, is ultimately a matter for the court, not the House.”

This statement was correct. It applies as much to the House of Commons as to the House of Lords ...

The committee's resolution that the question of whether documents or data within the scope of the notice to produce is proceedings in Parliament is a matter for determination by the Legislative Council. It is inconsistent with these authorities and, with the greatest of respect, is incorrect. Although Mr Foster is obviously not a court, it cannot be a breach of privilege or contempt for him or his advisers to determine that a document does not constitute proceedings in Parliament any more than it can be a breach of privilege for a court to do so. It was necessary and appropriate for that to be done in order for him to comply with the section 95 notices. In light of that position and the fact that everyone agrees that the CCC was entitled to have produced to it those documents that are not subject to parliamentary privilege, Mr Foster could not refuse to produce documents that were not subject to parliamentary privilege on the basis that he had a reasonable excuse. If he did so, he faced the likelihood of being in contempt of the CCC.

The committee also refers to Mr Foster as its agent in relation to documents. With respect, there is no basis for that assertion. Further, he has possession of the documents and can lawfully be subject to a section 95 notice requiring him to produce.

The privileges of this house, or of the other place, and the privileges of the House of Commons on which the privileges of both are based, have never been used to impede or frustrate the investigation of an alleged offence of misconduct. I do not suggest that is why the committee has taken this approach; however, in making recommendation 2, the committee is suggesting that Mr Foster's conduct in complying with the section 95 notices and thereby facilitating the CCC's investigation could in some way amount to a breach of the privileges or a contempt of the house.

**The PRESIDENT:** Leader of the House.

**Hon SUE ELLERY:** For the reasons I have given, it could not be such a breach or contempt. Mr Foster's conduct was an appropriate response to section 95 notices, with which he was required to comply. The conduct occurred in circumstances in which the committee and the CCC could not reach agreement on a process that Mr Foster could follow to comply with those notices, and he was exposed to the risk of contempt of Parliament and the CCC. There is no basis for referral, as recommended by committee recommendation 2.

I turn to recommendation 1. As the committee reported at paragraph 1.9, late in the afternoon of Friday, 2 August, the Usher of the Black Rod served a summons to produce documents on Ms Roper. The summons was served on Ms Roper in her capacity as acting director general of the Department of the Premier and Cabinet because the director general, Mr Darren Foster, was on leave until his return to duty on Monday, 12 August 2019. The summons required Ms Roper to produce to the committee at 9.00 am on Friday, 9 August, firstly, all the documents that the CCC had identified as being relevant to its investigation; secondly, all the documents that had been identified as being subject to parliamentary privilege; and, thirdly, all the documents that were produced to the CCC in compliance with the CCC's two notices to produce.

The summons also required Ms Roper to produce the documents to the committee personally, rather than through someone acting on her behalf. Inquiries made to the committee on Ms Roper's behalf pointed out that she would be out of the state on 9 August 2019. The response to those inquiries was that Ms Roper had been summonsed and that she would have to attend. Ms Roper was interstate on 9 August 2019 because she was required, in her capacity as acting director general of the Department of the Premier and Cabinet, to advise the Premier at a Council of Australian Governments meeting in Cairns. It is not apparent, with respect to the committee, why Ms Roper was required to produce the documents personally, rather than through an officer of the department or other representative. Given the reason Ms Roper was unavailable on the day, it is also unclear why the committee would wish to insist on Ms Roper producing the documents in person, when the consequence would be that the Premier would be deprived of her advice while representing Western Australia at COAG.

Several members interjected.

**The PRESIDENT:** Order!

**Hon SUE ELLERY:** None of this is to deny that the committee had the power to make such an order, and Ms Roper did not deny that in her letter. However, it is necessary to emphasise that the subject matter of recommendation 1 is not a simple refusal to produce documents. The committee wished to insist on Ms Roper personally delivering documents in Perth when she was required to assist the Premier at a COAG meeting in Cairns. Ms Roper's query



**Extract from Hansard**

[COUNCIL — Thursday, 15 August 2019]

p5608a-5630a

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

about whether the CCC had been consulted is not a simple matter of refusal to produce documents, nor is it a cavalier disregard of the committee's lawful right to those documents. Ms Roper was raising a matter with the Standing Committee on Procedure and Privileges that went to the integrity of the Corruption and Crime Commission investigation. There was plainly a risk that producing the documents in compliance with the order could disclose information about the CCC's investigation. It is common ground that steps should not be taken that would impede or impair that investigation.

There was a further issue that Ms Roper had to consider. Each of the notices to produce was subject to a section 99 notation. As I have already observed, a section 99 notation prohibits disclosure of a section 95 notice or the investigation to which the notice relates except in limited circumstances. Mr Foster and Ms Roper had been authorised to disclose that information to Madam President, as well as to the Clerk and the Deputy Clerk of the house; they had not been authorised to disclose that information to anyone else on the committee. I note from paragraph 1.19 of the committee's report that important details about the notices and the CCC's investigation had indeed been kept from other committee members. Production of the documents to the committee could have resulted in the disclosure of information contrary to the section 99 notation. Consultation with the CCC, which Ms Roper raised in her letter to the committee, would have permitted the issues that caused the CCC to include a section 99 notation to be addressed in an informed way that protected the CCC investigation.

The committee has said that it sought the documents for audit purposes. Although the committee was of course under no obligation to do so, Ms Roper was not made aware that the documents were required for that purpose and therefore could not take that into account in responding to the summons and considering these issues. This is not a case in which the reasonable protection of the house or its members or officers required a referral to the committee; this is a case in which Ms Roper was unable to comply with the summons due to her obligations as the acting director to advise the Premier and raise with the committee the matter that went to the integrity of the CCC investigation and involved issues of compliance with a section 99 notation. Recommendation 1 should not be accepted by the house.

I turn to recommendations 3 and 4. These recommendations seek to support orders the committee has already made with the orders by the house, and we do not support them for the following reasons. As to recommendation 3, the issues Ms Roper raised in response to the committee's summons remain. The section 99 notations remain in place, and there does not appear to have been any consultation with the CCC to address those issues and ensure that producing documents as recommended would not impede or impair the CCC's investigation. The utility of the audit is unclear. The process adopted by the committee would see the committee accepting the opinion of an independent party without the committee inspecting or forming its own views on the documents. That process is subject to the risk that the committee might have taken a different view on a document from that of the independent party if the committee had inspected the document itself, just as the process adopted by Mr Foster carried that same risk. If the independent party came to a view on certain documents that differed from the State Solicitor's view, that would not establish that documents had been produced that were subject to parliamentary privilege; it would establish only that on the document, different views were held by two different reviewers. Given the difficulty that the committee acknowledges exists about determining what constitutes proceedings in Parliament, a difference of opinion on some documents would not be surprising. Given the lack of apparent utility of the proposed audit and the possible risk to the CCC's investigation of making the proposed order, recommendation 3 should not be accepted.

As to recommendation 4, this should not be accepted because it amounts to making an order that may direct Mr Foster to break the law. Mr Foster should not be ordered to refrain from producing any document to the CCC or another investigative agency irrespective of whether it is subject to parliamentary privilege or the legislation under which Mr Foster is ordered to produce the document. To do so may place Mr Foster in the position of having to decide whether to break the law or contravene this house's order. Mr Foster also should not be ordered to produce the documents to the committee when to do so may contravene a section 99 notation. Once again, to do so may place Mr Foster in a position of having to decide whether to break the law or contravene the order of this house. Both orders also raise the risk of impeding or impairing investigations by the CCC. The house should not be making orders that may have this effect or it should be common ground that investigations into criminal behaviour or misconduct should be facilitated, not frustrated.

I want to make a couple of extra points. The committee says at paragraph 1.19 that it presented its report to the house at the first available opportunity. The committee also acknowledges that its decision to present its report will result in the wide publication of the matter and may impact adversely on both the integrity of the CCC investigation and the former members who are the subject of that investigation, yet the committee seeks to blame Ms Roper for its decision to present its report yesterday and for the detailed nature of its report. It is not Ms Roper who made that decision, and the committee relies on section 7 of the Parliamentary Privileges Act and asserts that that section requires immediate

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

reporting to the Legislative Council of any noncompliance with a summons issued by the committee. I say that that is not the case for two reasons, and I want to read out section 7 of the Parliamentary Privileges Act 1891.

**The PRESIDENT:** Leader of the House.

**Hon SUE ELLERY:** Section 7, “Objection to answer questions or produce documents to be reported to House”, states —

If any person ordered to attend or produce any paper, book, record, or other document to either House, or to any Committee of either House, shall object to answer any question that may be put to him, or to produce any such paper, book, record, or other document on the ground that the same is of a private nature and does not affect the subject of inquiry, the President, or Speaker, or Chairman of the Committee, as the case may be, shall report such refusal, with the reason thereof, to the House, who shall thereupon excuse the answering of such question, or the production of such paper, book, record, or other document, or order the answering or production thereof, as the circumstances of the case may require.

Section 7 is concerned not with noncompliance, but with reporting to the house an objection to produce a document. Section 7 is about the right of objection on a very specific ground rather than noncompliance, and that is also recognised in standing order 181(d). That is not to say at all that noncompliance cannot be reported to this house—of course it can—but that, as a matter of privilege under standing orders, is not required by way of report under section 7 of the Parliamentary Privileges Act. The second reason is that although section 7 says that the chair of the committee shall report the refusal, with the reason thereof, to the house, it does not say that it must be done immediately. Clearly, the committee took the view that “shall” means that it must be done immediately. Nor does the section say that the report must be made at the first available opportunity, as the committee did in this case. It requires a report of the objection, not of noncompliance, within a reasonable time.

Section 7 of the Parliamentary Privileges Act also does not require the level of detail in the committee’s report. That was a decision made by the committee. For example, the committee included in its report the period of time—specific dates—within which the CCC required access to emails, narrowing the number of former members who could be the subject of that inquiry by identifying the specific period that they served. The widespread publicity of the committee’s report, with all the potential adverse consequences for the CCC investigation and those being investigated, are not the responsibility of Ms Roper. It is a matter of some concern that it is sheeted home to Ms Roper for making that decision.

I want to make a couple more points. The committee provides for us a summary of the legal advice provided by Bret Walker, SC. From memory, the practice of the committee on most occasions in the past has been to attach the advice of Senior Counsel, and the committee regularly uses the services of Bret Walker, SC. For example, his advice was attached as appendix 6 to the forty-fourth report of the Standing Committee on Procedure and Privileges. I am interested in knowing why in this case the house has not been provided with the full advice from Mr Walker.

I want to make one final point. I appreciate the house’s indulgence in letting me address across-the-board issues before we go through the report recommendation by recommendation. We have been in this position before, honourable members, whereby the Corruption and Crime Commission and parliamentary privilege have butted up against each other, and we have been required to make decisions. The Standing Committee on Procedure and Privileges has been required to consider similar matters. Most recently, that was an inquiry recorded in the Standing Committee on Procedure and Privileges’ forty-fourth report on a matter that I referred to the committee in my capacity as the then Leader of the Opposition. One of the recommendations out of that report was that the President, the Speaker and the CCC develop an agreed memorandum of understanding about conflicting obligations and managing matters of privilege. That was in November 2016. Hon Alison Xamon asked a question in the house in, I think, February this year that indicated that there had been a significant period of inactivity on the development of that memorandum of understanding. I am advised that there has been further activity since then and that in June this year, a draft was provided by Parliament to the CCC for consideration; however, that draft does not go to the matters before the house today.

We have been here before and it was predictable. Indeed, it was foreseen in the recommendations in the forty-fourth report that we need to find a way to deal with this issue because what we have now is unacceptable. It is unacceptable that two senior public servants have been put in a position whereby they are caught between having to make a decision about which law they break. That is unacceptable.

**Hon Michael Mischin:** To whom?

**Hon SUE ELLERY:** I would think it would be unacceptable to any reasonable person.

Several members interjected.

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

**The PRESIDENT:** Order, members! This debate is to be conducted in a very respectful way; each speaker who has the call will be heard in silence. It is a very significant issue and should be treated as such, so no interjections. Thank you very much.

**Hon SUE ELLERY:** Madam President, I thank you for your assistance.

I make the point that it is for us as parliamentarians to resolve this issue. It is not for us to blame two senior public servants who effectively have to choose which law they will break in order to satisfy the conditions that have been asked of them. For those reasons, Madam President, the government will not be supporting any of the four recommendations.

**Hon SIMON O'BRIEN:** The motion before the Committee of the Whole House and the several other motions that will follow in due course flow from the Standing Committee on Procedure and Privileges' report that inter alia it appears that there have been possible breaches of parliamentary privilege prima facie. Therefore, those matters having been reported to the chamber, as required, we need the direction of the chamber on whether further inquiries should be made by the procedure and privileges committee to establish whether a contempt or contempts have been committed, and to advise the chamber accordingly. Perhaps that is the place for a detailed debate to occur and information such we have just received to be contemplated. I say to the Committee of the Whole House with the greatest possible respect that my motion is essentially procedural to give effect to that course of action and it does not seek any judgement on the finality of the findings that may in due course arise. Rather than drag on for a very long time, I offer that observation to assist the Committee of the Whole House to focus on what we need to do today.

I am also authorised by the committee to provide some documents to the Committee of the Whole House. These documents flow from comments made just now and are contained in a paper to be tabled—a letter from John McKechnie, QC, Corruption and Crime Commissioner, dated 14 August and addressed to the Attorney General. The entire letter was read in for the record by the Leader of the House just now. The letter states a number of things but inter alia in advice to the addressee it states —

... I have been summoned to a private hearing of the Procedure and Privileges Committee of the Legislative Council at 2.00pm on Friday 16 August 2019.

The balance of that document talks about what may ensue flowing from that hearing. The documents I am authorised by the Standing Committee on Procedure and Privileges to draw to the chamber's attention are these. The first is a letter from the Corruption and Crime Commissioner to the President, Hon Kate Doust, MLC, as Chair of the Standing Committee on Procedure and Privileges, dated 25 July 2019, which is contained as one of the appendices in the committee's fifty-fifth report. I draw members' attention to the penultimate paragraph, which reads —

I recognise the Committee supports the Commission in the exercise of this functions and does not wish to hinder or cause further delay to the investigation. Accordingly, I am keen to meet with you to discuss other ways in which this matter may be cooperatively managed moving forward, which will provide assurance to the Committee that parliamentary privilege is being upheld.

The second paper, which I now provide with the authority of the committee, is a letter dated 9 August 2019 to Mr McKechnie from the Chair of the Standing Committee on Procedure and Privileges in response to that letter in these terms —

Dear Commissioner,

Thank you for your letter dated 25 July 2019.

I confirm your attendance before the Committee at a private hearing at 2.00pm on Friday, 16 August 2019 at the Legislative Council Committee Office, Ground Floor, 18/32 Parliament Place, West Perth.

The Committee looks forward to meeting with you to discuss matters relating to your current and proposed further inquiries.

**The PRESIDENT:** Member, before you table that first letter, you might need to take a bit of advice. I think there is at least one or possibly two lines in that first letter that will need to be redacted so that it mirrors the letter that is currently located in our report. If you look to the third paragraph on page 99 of the report, you will see the first line and a half of the letter will need to be redacted.

**Hon SIMON O'BRIEN:** Madam President, I thank you for drawing that to my attention.

I refer members to pages 98 and 99 of the committee's report, where they will find the full version of the letter I have just referred to with its redaction. I seek now to table the other document, which is Madam President's letter dated 9 August 2019. In examining those documents, I hope the chamber is reassured that the meeting proposed for tomorrow afternoon was at the commissioner's initiative and accepted in cordial terms by Madam President on behalf of the committee.

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

Leave granted. [See paper 2941.]

**Hon NICK GOIRAN:** I was going to commence my remarks by indicating that in the brief opportunity that I have had to consider this matter, there strikes me as being two inexplicable things, but following Hon Simon O'Brien's contribution, I feel compelled to mention that I would like to speak to three inexplicable things at this moment in time, especially as we consider the question that is before the chamber, which is recommendation 1. The three things I would like to speak to at this moment is that firstly, the response provided by Ms Roper about the summons is inexplicable; secondly, the government's response to oppose all four recommendations from the Standing Committee on Procedure and Privileges is inexplicable; and, thirdly, the latest information reveals that it would appear that the Leader of the House has unintentionally misled the house by reading into the record the letter from Mr McKechnie, the Corruption and Crime Commissioner to the Attorney General stating that he has been summoned to a hearing by the Standing Committee on Procedure and Privileges, when it appears that that is false. I do not want to dwell on that third matter because in the scheme of everything going on at the moment, that is probably the least significant of all the things occurring. I will start with the matter before us, which is recommendation 1.

I cannot fathom how senior members in government have come to the conclusion that they will oppose recommendation 1. I would call on cooler, calmer heads within government to take a moment and reflect on this, just for a minute. The recommendation has been put to us by the Standing Committee on Procedure and Privileges, the committee that I have previously described as the most senior committee of the Legislative Council, a committee that composes the President, the Deputy President and always consists of three experienced members of Parliament. A report has been tabled by them and there is a duty on all members here to be across reports tabled by the procedure and privileges committee, especially when, in respect to recommendation 1, the President yesterday tabled the report and stated —

Ms Roper's response to the committee's order has shocked and appalled all members of the committee for its cavalier disregard of the committee's lawful right to those documents.

That was a damning statement made yesterday by none other than the President of the Legislative Council and that alone should put members on red alert when it comes to this report. I say that I cannot fathom why the government would oppose recommendation 1, because when I look at recommendation 1 I see that all the committee is asking the chamber to do is to entrust and empower the committee to look into why Ms Roper chose not to comply with a summons from the Legislative Council. Under the hand of the Clerk of the Legislative Council, a person in Western Australia has been summonsed and has refused to comply, and the government does not want the Standing Committee on Procedure and Privileges to look into it. I cannot fathom how cooler, calmer heads in government have come to the conclusion that under no circumstances do they want a failure to comply with the summons to be looked at by the procedure and privileges committee. If a person is summonsed to a court in Western Australia and they fail to attend, the normal course of action is for the judicial officer to issue a bench warrant for their arrest. That is a normal process; there is nothing strange, there is no bizarre convention there, and rightly so, because a summons from a court in Western Australia should have significant gravitas. A summons from Parliament should also have the same standing. For a senior public servant in response to this matter to indicate that they refuse to comply is absolutely worthy of investigation.

We are not being asked this afternoon to determine the outcome of that investigation, all we are being asked to do is to empower and entrust the Standing Committee on Procedure and Privileges, the most senior committee in this Parliament, to look into that matter. I draw to members' attention to page 47 of the report that was tabled yesterday, the response from Ms Roper, dated 8 August 2019. We should pause to consider why she refused to comply with the summons. She did respond, but she did not comply. The response is in this letter and I quote —

... it would not be appropriate for me to produce the documents required under the summons when the Committee does not appear to have consulted the [CCC] and I am not aware of the outcome of any such consultation.

The very first question I would ask Ms Roper is: under what law of Western Australia is that a criteria on whether to comply with a summons from the Legislative Council? I am not aware and in all of the lengthy speech that was delivered by the Leader of the House on behalf of the government, not once was I drawn to a particular part of the law of Western Australia that allows a person, including any of us in future, to respond in such a fashion to say that we are not aware of any consultation that may have occurred between the committee and the commission. Who cares whether there has been any consultation between the committee and the commission? That is utterly irrelevant to whether someone complies with a summons that has been provided to them. It is worse to then say that they are not going to comply because they are not aware of any consultation, and they do not know the outcome of the consultation. Who is Ms Roper to think that she is entitled to know firstly, whether there was any consultation, and secondly, whether she is entitled to know the outcome of that consultation? If there is to be any consultation, that is entirely in the jurisdiction and the province of the committee and the commission. It is not

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

a matter for the acting director general of the Department of the Premier and Cabinet to determine whether they are going to comply with a summons or not.

The second thing that I draw to members' attention in this letter, from 8 August this year, is this comment —

Consequently, I respectfully advise that no documents will be produced in answer to the summons this Friday.

That needs to be investigated. It is not acceptable for anyone in Western Australia, a senior public servant or otherwise, to respond in such a fashion and I wholeheartedly support recommendation 1. I will have more to say on the other recommendations when we get to them, but I make this point: recommendation 1 is simply empowering and entrusting the Standing Committee on Procedure and Privileges to look further into this extraordinary response by Ms Roper and the decision to not comply with a summons from the Legislative Council.

**Hon MICHAEL MISCHIN:** I rise to make a few observations and support the recommendations of the Standing Committee on Procedure and Privileges on this matter. I listened with interest to the comments of the Leader of the House representing the government's position. I entirely agree that it is unfortunate that senior public servants—anyone—might be torn between conflicting obligations and responsibilities. What has been put to us by the government does not surprise me, regrettably, but it does disappoint me. It is recommended that the committee be empowered by this house to investigate and report back to this house on what is prima facie a contempt of this Parliament. No conclusion is being demanded and there will be no vote on whether there has been—simply an investigation. The executive is telling us that its servants, who have prima facie defied the will of this Parliament, albeit on behalf of the executive, have done nothing wrong because the executive says so. That is an astonishing proposition.

I turn to Ms Roper's role in this issue. It is not just about producing documents; it is about attending and producing documents. What did she say about it in her letter of 8 August, as set out on page 47 of the report? I will not go over the same ground as Hon Nick Goiran and others. It states —

I also note that the summons requires my personal attendance to produce the documents. While it is of course a matter for the Committee, it is not apparent with respect why it is necessary for me to attend personally in order to produce the documents to the Committee.

Why is that? She continues —

In any event, as has been advised to the Usher of the Black Rod I could not personally produce the documents this Friday as I have accompanied the Hon Premier to ...

She accompanied the Premier to the Council of Australian Governments meeting. It is fascinating to read of a decision made by a senior public servant to defy the committee in that way. She did not ask permission to be excused and perhaps to put it off to another day because she had a conflicting obligation to the Premier. She simply implied, "I do not see the point of attending, and I am somewhere else anyway, or going to be, so I am just not going to do it."

Hon Nick Goiran spoke about the consequences of refusing to obey a summons by a court. It is often said that Parliament is the superior court in this and other jurisdictions where we have a parliamentary democracy. The very idea that a witness can say to, say, the Supreme Court, "I've got a subpoena to turn up but I don't actually see the point; besides, I'm going to be somewhere else doing something for someone else, my employer, whether it is the Premier or some other organisation, or simply because I am self-employed and I just don't want to do it, goodbye Supreme Court", would be met with, as Hon Nick Goiran has pointed out, a bench warrant for that person's arrest, to be brought before the court and the matter investigated. For the government to say that this is the cavalier approach that its servants, the servants of the executive, ought to take towards the Parliament, just astonishes me.

We have had an awful lot of self-justification. We have had special pleading by the Leader of the House setting out a justification for all the things that have been raised by the committee report. I do not know where the truth lies and whether there is any merit in this. Maybe there is. It is obviously based on something other than simply an opinion by the government; obviously, legal advice underpins this.

We had the spectacle in about October 2017 when the Attorney General proposed amendments to the Corruption, Crime and Misconduct Act 2003 to ensure that members of Parliament could be investigated by the Corruption and Crime Commission. It was really important to allege that, unless it was agreed by the opposition, we would be trying to prevent corruption being investigated. He made a lot of play about that, as he often does. He originally introduced it as part of a bill to deal with another bill as well—legislation relating to the confiscation of the proceeds of crime investigations. Reluctantly, he split them, and they proceeded separately. We dealt with the investigation by the Corruption and Crime Commission into the proceeds of crime and unexplained wealth. The other bit has been set aside. We last saw it in this place in March 2019. We have not seen it since but it raises implications about how the government really approaches these issues.

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

I fully support the idea that we need to look into this matter. The Attorney General tabled legal advice during his promotion of that bill back in the day from the Solicitor General to say how it was necessary to make those amendments. Perhaps we could see the legal advice upon which the government's position is based so we can assess whether that is sound, and that can be produced to the committee as well. It seems to me that the approach that has been taken is that the government has investigated its own actions and decided that there is nothing to see here and it is entirely justified, so the Parliament ought to take that on spec rather than look into it itself. I think that is wholly unsatisfactory. I do not know what the concern is here. Maybe it relates to the complicity of other members of government in what has been done and what has been shown as a contempt of this Parliament. Maybe that is the problem. I do not know whether the Premier or the Attorney General have had something to do with this.

Certainly the conduct of these two senior members of the executive towards this Parliament needs to be looked at; it needs to be investigated and assessed and then reported back so we can see whether not just section 7, but also section 8 of the Parliamentary Privileges Act 1891 comes into play and what ought to be done about it.

We also have a Joint Standing Committee on the Corruption and Crime Commission. It seems to me that this matter would at least excite the interest of that committee, to see how the CCC has approached the task and whether things can be improved. I look forward to that committee also considering this matter adequately. At this stage, I signal my support for the recommendations that have been so carefully prepared and formulated.

**Hon RICK MAZZA:** I rise to make a couple of comments on recommendation 1 in the fifty-fifth report of the Standing Committee on Procedure and Privileges. The two things I got from the government response on this is that the PPC got it wrong and that the public servants involved in this matter have nothing to answer to, particularly given that they would be in breach of section 95 of the Corruption, Crime and Misconduct Act 2003 for not producing those documents and that they could be prosecuted if they did not. Paragraph 2.4 on page 7 of the PPC report refers to section 158 of the Corruption, Crime and Misconduct Act, stating —

A person who —

- (a) fails, without reasonable excuse, to comply with a notice ...

Was there a reasonable excuse to not comply with a notice? That is why recommendation 1 should be supported. We can then thrash that out and find out whether there was a lawful excuse and whether a contempt of Parliament was committed. We should never underestimate the importance of parliamentary privilege as a fundamental pillar of our democracy when it comes to these sorts of matters. With those few words, I will certainly be supporting recommendation 1.

**Hon MARTIN ALDRIDGE:** I rise to say a few words on behalf of the Nationals WA on the recommendations before the house and indicate, given that we are considering recommendation 1 of the fifty-fifth report of the Standing Committee on Procedure and Privileges at the moment, that we will be supporting recommendation 1.

I want to address a few of the issues that have been raised. I will certainly examine much more closely one important point that was not raised in the Leader of the House's very long address. I agree with Hon Simon O'Brien that, with the benefit of *Hansard*, that will occur. One issue that was not raised is section 3(2) in the Corruption, Crime and Misconduct Act 2003, which states —

Nothing in this Act affects, or is intended to affect, the operation of the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891* 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.

I did not hear the Leader of the House in her lengthy address mention section 3(2). I apologise in advance if she did, and I will further examine her contribution in due course. But that really is a key part of the CCM act, and it goes to the issue that Hon Rick Mazza mentioned about establishing a lawful excuse to the Department of the Premier and Cabinet director general and, at the time, the acting director general with respect to the issue that they faced.

I want to talk a little about the application of privilege. Again, I have not had a chance to consider in full the letter that was tabled by the Leader of the House today. It is dated 14 August 2019—that is, yesterday—and I assume it was transmitted on that date. A couple of things come to mind. The Corruption and Crime Commissioner stated —

The Committee took the view that it would decide what matters were privileged before releasing to the Commission. In my respectful opinion this exceeded the breadth of Parliamentary privilege.

I turn to page 52 of the fifty-fifth report of the Standing Committee on Procedure and Privileges that was presented by Madam President yesterday. I refer to the first letter of the commissioner that is addressed to the President of the Legislative Council, dated 13 May 2019. On page 52, which is the third page of that letter, it states —

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

Clearly, the documents of interest to the Commission need to be inspected by Parliament or its designate so that a claim of privilege might properly be made in respect of documents.

That was a letter from Commissioner John McKechnie to the President of the Legislative Council on 13 May. On page 76 of the report in a letter to Hon Kate Doust, President of the Legislative Council, dated 26 June 2019, from Commissioner John McKechnie, the third paragraph states —

Of course, the Commission unreservedly accepts it is for the House to determine whether a particular document or communication is subject to privilege. I am confident that, likewise the House would agree that if the House determines that the document or communication is not subject to parliamentary privilege, the Commission is lawfully entitled to that document.

I agree with the commissioner 100 per cent in those two letters to the President of the Legislative Council. My concern is that yesterday the commissioner wrote to the Attorney General in these terms —

The Committee took the view that it would decide what matters were privileged before releasing to the Commission. In my respectful opinion this exceeded the breadth of Parliamentary privilege.

I am concerned about the letter that has now been tabled in this house by the Leader of the House, and I think that this matter in particular needs further examination. Clearly, this is a case of the commissioner telling the committee one thing and the government another, and that is something that ought to be considered by the inquiry, which my party supports. I ask members to keep in mind that this is not something that has just commenced. There is further action afoot, and I will deal with that as we deal with other recommendations in relation to what I would call protection orders for the house to consider. Members will be aware that there is a bill before the house. Originally, it was the Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017, which aimed to do a number of things, including amend section 3(2). I had some concerns about this bill, and in the end the government defeated particular areas of concern in the bill and reintroduced a new bill, which I will talk about in a moment. However, I want to quote some legal advice that I have received, which I think is pertinent to this issue of the application of privilege. I will quote the document and then reveal the source at the end. Under a section titled “Effect on Parliamentary Privilege of the Amendment”, it states —

16. The amendment would leave the powers and privileges of Parliament unaffected. Indeed, the broader purpose of s 3(2) of the *CCM Act* is to ensure that the privileges of Parliament are not affected by the *CCM Act*.
17. For example, the Parliament, and its Privileges Committees, would retain their full authority in relation to the investigation and determination of breaches of the privileges of Parliament, including all of the offences under s 8 of the *Parliamentary Privileges Act* 1891. The amendment does not affect those powers at all.
18. Similarly, Parliamentary Privilege would still have a role to play in the investigation and prosecution of these *Code* offences, whether by the CCC, as part of a misconduct investigation, or an investigation by the police, as part of a criminal investigation. For example, Parliamentary Privilege may preclude the obtaining and adducing of various types of evidence.

I am quoting from legal advice provided to me by Peter Quinlan, SC, Solicitor-General for Western Australia, on 25 August 2017, who members would know is now the Chief Justice of the Supreme Court. That bill was reintroduced with those amendments, which were contentious, as the Corruption, Crime and Misconduct Amendment Bill 2017, and it has been listed as one of the government’s priorities for passage before the end of this calendar year. There is an amendment to this bill standing in the name of the Leader of the House. I am not going to go to the specifics of that, but the amendment relates to allegations about a member of a house of Parliament and is contained in a supplementary notice paper that was issued on 19 February 2019. Again, I have received some legal advice. I will quote one paragraph from this second set of legal advice that I received, and I will cite the source after quoting —

The decision of the Full Court of Western Australia in *Halden v Marks* (1995) 17 WAR 447 also states that there are generally only two types of case in which a Court will involve itself in decisions concerning Parliamentary privilege. The first category of case is where a question of parliamentary privilege is raised in a case already before the Courts. The second category of case is where a court has been asked to review action by Parliament to enforce its proceedings, most commonly where Parliament has, by warrant, sought to subject a citizen to restraint by arrest. Apart from these categories of case, the Full Court indicated that, either as a matter of jurisdiction or propriety, a Court will not consider questions of Parliamentary privilege as these questions are exclusively for Parliament.

I will repeat part of that last sentence —

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

... a Court will not consider questions of Parliamentary privilege as these questions are exclusively for Parliament.

This legal advice was provided to me, prepared by the Solicitor-General of Western Australia, specifically in relation to amendments on the supplementary notice paper by the Leader of the House. This legal advice is not dated or signed, but I assume that it was not by the same Solicitor-General, Quinlan, who I referred to in that first advice that I quoted.

**The PRESIDENT:** Hon Martin Aldridge.

**Hon MARTIN ALDRIDGE:** Those two legal opinions from, I believe, two different Western Australian Solicitors-General concur with my view, and the view that has been largely adopted across Australian jurisdictions, of the application of privilege. I now take members to another reference, which is a motion moved by Senator Penny Wong, Leader of the Opposition in the Senate, a member of the Australian Labor Party, on Thursday, 6 December 2018. Members may remember that this followed a series of Australian Federal Police raids on public servants, if I am not mistaken, in the ACT. What ensued were a number of investigations by the Senate Standing Committee of Privileges; however, in the interim, the Senate initiated a standing resolution of the house to assert the role of privilege and the importance of privilege in the Australian Senate. I want to read part of this motion, which was moved and unanimously adopted by the Senate on the motion of Senator Wong. It states, from paragraph (c) of the motion moved on 6 December 2018 —

- (c) declares, for the avoidance of doubt:
  - (i) that the right of the Houses to determine claims of privilege over material sought to be seized or accessed by executive agencies adheres regardless of the form of the material, the means by which those agencies seek seizure or access, and the procedures followed, and
  - (ii) in particular, that these rights adhere against the covert use of intrusive powers, by which agencies may seek to seize or access information connected to parliamentary proceedings without the use or presentation of warrants;
- (d) requires the executive and executive agencies to observe the rights of the Senate, its committees and members in determining whether and how to exercise their powers in matters which might engage questions of privilege; and
- (e) calls on the Attorney-General, as a matter of urgency, to work with the Presiding Officers of this the Parliament to develop a new protocol for the execution of search warrants and the use by executive agencies of other intrusive powers, which complies with the principles and addresses the shortcomings identified in reports tabled in the 45th Parliament by the Senate Committee of Privileges and the House of Representatives Committee of Privileges and Members Interests.

That motion was passed unanimously in the Senate in December 2018.

There are many areas of this matter we could discuss, but recommendation 1 of the committee's report goes to whether the committee should conduct an inquiry. I am not sure what grounds there could reasonably be for opposing a motion of inquiry into whether a contempt has been committed against this house—or, indeed, whether there has ever been opposition to such an inquiry. This is a particularly important point. We are not at this point judging anybody or assigning a penalty or a fine; the committee is simply seeking the approval of the chamber to conduct an inquiry into related matters to consider whether a contempt has, indeed, been committed.

The defence made by the Leader of the House was that there is nothing to inquire into. She differentiated between an objection and noncompliance. The Leader of the House focused on Ms Roper not objecting to the summons, but rather not complying with the summons. That is certainly a novel approach to establishing a defence, but the Leader of the House's response largely rested upon the issue of Ms Roper's inability to attend before the committee because she was in Cairns with the Premier.

I draw members' attention to Ms Roper's letter, which appears in the report on pages 46 and 47. Only the last paragraph of this two-page letter refers to her inability to attend before the committee because she was in Cairns with the Premier. If that were the only reason Ms Roper was unable to provide the documents requested for the committee's inquiry, I cannot speak on behalf of the committee, but, certainly, as a member of the committee, I would have no problems accommodating such a request to delay the summons and reissue it on a date on which Ms Roper could attend before the committee. The Leader of the House has selected one paragraph from a two-page letter and has not discussed at any length the preceding paragraphs, which cover Ms Roper's objections to providing the information. Those objections are largely on the grounds that the Standing Committee on Procedure and Privileges ought not to have access to the documents because it would impede the investigation of the Corruption and Crime Commission and give knowledge of that investigation.



President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

Again, that is a rather novel approach because if we consider the model procedure that was first established by the Corruption and Crime Commissioner himself, it involved the house appointing an external party and ultimately making a determination of privilege. I am not sure how that could be done without the documents. It was the Corruption and Crime Commissioner who suggested this approach to the President of the Legislative Council, with regard to the commencement of what a model procedure would look like, given that this was new ground for us and, particularly at that time, that it was a covert operation of the Corruption and Crime Commission, which certainly constrained the committee in its inquiry. The committee was very sensitive to those facts, and this report could in no way have prejudiced that investigation because as we now know, the letter that was tabled by the Leader of the House today confirmed the execution yesterday of judge-issued search warrants, if I am not mistaken. Media reports have also confirmed the same.

It is still unclear to me why this inquiry would be opposed. Section 99 of the Corruption, Crime and Misconduct Act is cited as a defence by the Leader of the House. I think the allegation made was that the committee should not have known about this because the commissioner did not authorise the committee to know about it. Again, section 3(2) provides that nothing in the act interferes with parliamentary privilege. That certainly was not an issue raised by the commissioner in his consultation and negotiations with the committee, as can be seen in the correspondence laid out at appendix 2 of the report.

I will have more to say as we move through the recommendations, but it is certainly a very strange circumstance we find ourselves in—that after some three months of dealing with this matter in a very sensitive nature, the house is faced with opposition from the government with regard to conducting further inquiries on this matter. It is very strange for the government to oppose a further investigation into this matter, and it really begs the question of why that is the case. The explanations that have been given by the Leader of the House could well be considered as part of the inquiry as to whether Ms Roper had a reasonable and lawful excuse for not complying with the summons. I do not think it is something that can be resolved in a detailed and technical way on the floor of the chamber; it is something that would be more appropriately dealt with by the Standing Committee on Procedure and Privileges, with the authorisation of the house, in the conduct of an inquiry.

**Hon ALISON XAMON:** I rise to make some comments and I indicate from the outset that the Greens will support all four of the recommendations. I would like to make some general comments, a bit like the government chose to do. I want to be clear from the outset that I thank the committee for the hard work it has put into this report. I imagine it would have been a quite stressful process to have to bring this to the attention of the house, particularly as it is evident that there have been serious attempts to try to resolve this and to work in close collaboration with the CCC to achieve a favourable outcome. It is most unfortunate that the capacity to be able to resolve the matter effectively was removed from the control of the Standing Committee on Procedure and Privileges.

I want to be very clear—because I am very concerned about some of the narrative that has been aired in the other place and also generally within the media—that this is in no way an attempt by this Parliament to impede an investigation by the CCC of any wrongdoing or corruption by previous members, or even existing members for that matter. I am concerned that some may be mischievously relying on that narrative being the primary narrative that is being circulated, particularly in the media, in order to avoid scrutiny of the genuine issue at play. The genuine issue at play here is the issue of parliamentary privilege, how important it is and what it means to maintain parliamentary privilege. Based on the report that has been presented, it would appear *prima facie* that the Corruption and Crime Commission has been, extraordinarily, acting in bad faith in trying to achieve an outcome in relation to ensuring appropriate access to documents that may be covered by parliamentary privilege. I think, *prima facie*, we are looking at, at least, an appalling lack of judgement by the Department of the Premier and Cabinet, if not a contempt of Parliament. That is why I think we have no choice other than to examine this and find out exactly what has happened. Any attempt to characterise this as somehow trying to cover up corruption is a lie and should be exposed as that.

I am very deeply concerned about the principle that DPC thinks it is appropriate to access and go through any MP's emails. I remind members that we receive—I certainly receive—emails from whistleblowers. My party and people with whom I work send emails that refer to strategic matters and, sometimes, private matters. Regardless, it is not up to public servants employed by the executive to access these documents. I was gobsmacked by some of the commentary made by the Leader of the House in her opening explanation, and in particular her point that not only does Parliament have jurisdiction to determine whether particular documents are privileged, but also a court has that jurisdiction. She then somehow equated the DPC with being a court. The DPC is not a court. It has no authority to determine whether documents are privileged. Obviously, the CCC, judging by the correspondence that has been referenced already, recognised that authority, yet clearly chose to breach that. I think that is an extraordinary act and one that absolutely must be examined.

Of course, as has been mentioned, this is why we need a memorandum of understanding. I have been asking about this issue in Parliament and asking where the MOU is. We need it to be established. It was identified several years

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

ago that we needed that done. Nevertheless, we do not have that, so in the absence of that MOU and with the authority of this place, the Standing Committee on Procedure and Privileges was attempting to put in place that process with the CCC to make sure that we were able to fully comply in a timely way with investigations that the CCC is undertaking without contravening parliamentary privilege. I find it extraordinary that we ended up with this turn of events. It is absolutely critical that we ensure that Parliament is at all times able to maintain its own privileges. I am confident that if these four proposals are upheld by this place, anyone who is to be subject to investigation will be afforded proper procedural fairness. We are, of course, mindful of the caution, which has been given previously by judiciary, that we must always ensure that Parliament does that. I feel confident that our PPC will absolutely do that. As such, I think that it is all the more important that we ensure that that process is undertaken.

This really highlights a broader concern that I have held for a really long time; that is, that DPC, as a government department, should not have access to MP emails. In fact, it should not be able to determine our office or staffing arrangements. These need to go back to being the province of Parliament, just like they are in all other states. I think it is appalling that we are constantly put in this position. I should not have to go hand in glove with whatever the government of the day wants on a range of issues and entitlements that should be independently determined. If anything, this has really highlighted once and for all that we need to ensure that DPC does not have its hands on the activities of Parliament and of members of Parliament.

I also point out that the Corruption and Crime Commission needs to be very careful; it cannot be a law unto itself. This Parliament has the responsibility to oversight the extraordinary powers that have been given to the CCC, and that means that it has an obligation to tread very, very carefully when dealing with the important privileges of this place. I would be concerned if there were any suggestion of the politicisation of CCC activities. That would be of great concern to me and I think should be of great concern to this Parliament. I also caution the government to be very careful about politicising the activities around parliamentary privilege. I make the observation that I suspect that if current government members were faced with the same situation in opposition, they would be losing their minds! This whole issue needs to be put back into the appropriate hands of the PPC, a body that is made up of four different parties from this place. I think it needs to be properly investigated. I am appalled that we have reached this point. To maintain the integrity of this place and Parliament, I think it is absolutely essential that we thoroughly investigate how on earth we got to this situation.

**Hon AARON STONEHOUSE:** I have a fair bit to say about each individual clause, but I will make some comments about the report as a whole to begin with. To my mind, members of Parliament are not particularly popular in the community. We get a lot of flak, and sometimes rightly so, but we hold an important role in democracy—that is, of holding executive government to account. There is a very clear separation of powers. That is a very important role that we play on the floor of Parliament, through question time and debate, and through our role as members of standing and select committees. Most of my concern around parliamentary privilege lies with committees. I am a member of the Standing Committee on Estimates and Financial Operations. I am also a member of the Joint Standing Committee on Audit. The function of both those committees is to oversight the Auditor General. The Treasurer, through the Financial Management Act, has a role in the oversight of the Auditor General, but I, along with other members of Parliament, also have a very important role in the oversight of the Auditor General. It would be incredibly inappropriate for employees of the executive government, who are subject to audits by the Auditor General, to have access to email correspondence between me, as a member of that committee, and the Auditor General. It is important that those communications are protected from prying eyes and members of the executive government, but here we have precisely that type of situation in which employees of executive government in the Department of the Premier and Cabinet and the State Solicitor's Office have effectively pored over emails to determine when parliamentary privilege does and does not apply. That is completely inappropriate.

The Leader of the House raised the question of whether material that demonstrates criminal activity is protected by parliamentary privilege. I do not really take issue with that here. I have no problem with material that proves criminal activity being handed over to the CCC, and I think most members here would agree. The issue is that there is plenty of material that does not demonstrate criminal activity that would then be looked at and examined by executive employees. That is the problem. I think that is what most members take issue with. These recommendations and this report will be clouded by accusations that certain members of Parliament are trying to protect corrupt behaviour or misconduct by former members of Parliament. To my mind, that is not really the key issue.

Recommendation 1 deals with potentially contemptuous behaviour by a public sector employee, but even then, I do not really think that that is the underlying issue at play here. I think that, really, the issue is that members and employees of the executive—this is addressed, I think, in recommendation 2 of the committee's report—have accessed MPs' emails and have read through those emails. They may have used some sophisticated software to help them along the way, but, essentially, they read former MPs' emails, many of which would be subject to parliamentary privilege, and they have taken it upon themselves to decide when parliamentary privilege applies. Merely reading those emails, in my mind, constitutes a breach of parliamentary privilege, and I think that that is what is at the heart of this issue. I am sure that no-one in this place or the other place wants to stand in the way of

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

a Corruption and Crime Commission investigation. If there is corruption at play, we want to see that rooted out. We want anyone who has engaged in misconduct or corrupt behaviour exposed, and, if that is the case, have them face the consequences of the law. But in our parliamentary democracy, we cannot have the very people who we are supposed to hold to account in possession of our communications, accessing our communications and deciding for themselves what is and is not protected. It would be akin to a police officer investigating someone and the person who is the subject of the investigation being able to read that police officer's emails. It is unimaginable. I will have some more to say about recommendation 2, because I think that gets to the heart of the issue of the access to emails.

Speaking to recommendation 1, which deals with Ms Roper, the question is whether the Standing Committee on Procedure and Privileges should be instructed by the Legislative Council to investigate whether there was a contempt of Parliament in her refusal to produce documents and appear before the PPC. At this point, I do not know the answer to that; I do not think anyone really does. It is merely an instruction to the PPC to investigate that matter. I think it is worthy of investigation. Previous speakers have gone through the language of her letter. I would like to focus on something that others have not yet and that is the time line of events around her letter. Looking at the information provided in the report, it seems that on 2 August, the summons was issued. It was carried by the Usher of the Black Rod over to Dumas House and given to Ms Roper on 2 August, which was a Friday. That summons, if I am correct, required that she appear before the committee at a private hearing on 9 August. The committee gave a full week's notice. It was not until 8 August, the day before she was to appear before the committee, that she wrote a letter in response—I believe it was even in the afternoon, just before close of business on Thursday—six days after the summons and one day before she was to appear before the committee. To summarise her letter, she said that she was not sure she needed to appear anyway and that she would not be available in any case. She responded a day before she was requested to appear before the committee. I understand that she may have needed to seek some legal advice in drafting her letter; that may be the case. There may be some other reason why there was such a delay, but she then advised that she would not be returning until 10 August due to accompanying the Premier to Cairns for COAG. Not to say anything of the cavalier language used and the cavalier approach taken by her, but that delay in response alone, I think, warrants further investigation. Why did it take her six full days before she finally said no, she would not appear before the committee? It has been noted by previous speakers that she did not suggest an alternative date or suggest to appear before the committee but perhaps without the documents in question. It was merely a refusal to appear, and then tacked on at the end was, "Well, even if I wanted to, I wouldn't be able to because of my duties in accompanying the Premier to COAG." That alone warrants some further investigation and some answers need to be provided.

I will have more to say on the report's other recommendations.

*Division*

Question put and a division taken with the following result —

Ayes (20)

|                     |                    |                     |                                  |
|---------------------|--------------------|---------------------|----------------------------------|
| Hon Martin Aldridge | Hon Diane Evers    | Hon Michael Mischin | Hon Aaron Stonehouse             |
| Hon Jacqui Boydell  | Hon Donna Faragher | Hon Simon O'Brien   | Hon Dr Steve Thomas              |
| Hon Robin Chapple   | Hon Nick Goiran    | Hon Robin Scott     | Hon Colin Tincknell              |
| Hon Tim Clifford    | Hon Colin Holt     | Hon Tjorn Sibma     | Hon Alison Xamon                 |
| Hon Peter Collier   | Hon Rick Mazza     | Hon Charles Smith   | Hon Ken Baston ( <i>Teller</i> ) |

Noes (11)

|                    |                        |                      |                                   |
|--------------------|------------------------|----------------------|-----------------------------------|
| Hon Alanna Clohesy | Hon Laurie Graham      | Hon Martin Pritchard | Hon Darren West                   |
| Hon Stephen Dawson | Hon Alannah MacTiernan | Hon Samantha Rowe    | Hon Pierre Yang ( <i>Teller</i> ) |
| Hon Sue Ellery     | Hon Kyle McGinn        | Hon Dr Sally Talbot  |                                   |

Pairs

|                     |                       |
|---------------------|-----------------------|
| Hon Colin de Grussa | Hon Matthew Swinbourn |
| Hon Jim Chown       | Hon Adele Farina      |

**Question thus passed.**

*Recommendation 2 — Motion*

**Hon SIMON O'BRIEN:** We are considering the fifty-fifth report of the Standing Committee on Procedure and Privileges. I move without notice —

That recommendation 2 be adopted and agreed to.

**The PRESIDENT:** Hon Simon O'Brien has moved that recommendation 2 be adopted and agreed to. Recommendation 2 states —

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

That the Legislative Council refer the following matter to the Standing Committee on Procedure and Privileges for investigation and report:

In relation to the actions of Mr Darren Foster, the Director General of the Department of the Premier and Cabinet, in producing documents to the Corruption and Crime Commission relating to former Members of the Legislative Council without following a procedure that the Legislative Council or the Legislative Council Standing Committee on Procedure and Privileges had authorised for determining issues of parliamentary privilege:

- (1) Did Mr Darren Foster, or any other person or body, commit a contempt of the Legislative Council or any breach of its privileges?
- (2) If the Committee so finds that any contempt of the Legislative Council has been committed, or that any of the privileges of the Legislative Council have been breached, then what penalty, if any, should the Legislative Council impose for each contempt or breach?

**Hon SUE ELLERY:** I indicate that I rely on the remarks that I made earlier when I gave an oversight position that the government will not be supporting the recommendations, including recommendation 2.

**Hon NICK GOIRAN:** I rise to support recommendation 2. I will do so briefly and I indicate that I accept that the matters that would be investigated as a result of recommendation 2 are quite different from the matters in recommendation 1. I might say that the matters in recommendation 2 are more complex. At their heart, they go to the arguable conflict for a witness when seeking to comply with both the Corruption and Crime Commission and the desires of the Standing Committee on Procedure and Privileges of this place. If nothing else, what this particular situation with Mr Foster tells me is that the Corruption and Crime Commission of Western Australia has learnt absolutely nothing from what I refer to as the Turnseck case, and, secondly, has learnt absolutely nothing from the twenty-first report that I tabled in the thirty-eighth Parliament on an investigation by the Parliamentary Inspector of the Corruption and Crime Commission into the CCC's use and consideration of matters under legal professional privilege. It is clear to me that the CCC has learnt nothing from those episodes.

It also tells me, and I associate myself with the remarks given earlier by Hon Alison Xamon, that we are long overdue to have the executive fund Parliament so that it can manage all matters pertaining to MPs, including emails, as per other jurisdictions. I note that in the statement made by the President yesterday, she made this remark with respect to the conduct of Mr Foster —

Undoubtedly, some of those documents are subject to parliamentary privilege.

I will give members two brief examples of precisely what Madam President would have been referring to yesterday. I draw to members' attention that in November 2015—which is in the period that the CCC is seeking to investigate particular matters about which I am unfamiliar, but I know that there is this period of time—I tabled a report as Chair of the Joint Standing Committee on the Corruption and Crime Commission titled “Parliamentary Inspector's Report on Allegations of Misconduct Made Against Officers in the Corruption and Crime Commission's Electronic Collection Unit”. It will not surprise members to know that over the past few Parliaments some former members of Parliament have been on the Joint Standing Committee on the Corruption and Crime Commission. Whether they are former members of Parliament or not is irrelevant; the point is that as it is the committee that oversees the CCC, it is plainly inappropriate for the CCC to have access to emails from the Joint Standing Committee on the Corruption and Crime Commission, including an investigation by the parliamentary inspector into the office of the CCC.

**Hon Alison Xamon:** Hear, hear!

**Hon NICK GOIRAN:** I concur entirely with the remarks made by the President yesterday that “undoubtedly, some of those documents are subject to parliamentary privilege”. As I understand it, my emails are not under investigation and I would not be distressed if they were. But I will say this: it would have been entirely inappropriate for the CCC to have access to any of my emails during my time as Chair of the Joint Standing Committee on the Corruption and Crime Commission.

I draw members' attention to Legislative Council standing order 175. It refers to the status of committee evidence. Committee evidence comprises public evidence, private evidence or in camera evidence. I cannot tell members the circumstances in which I was involved in the collection of in camera evidence, but I can tell them that over the last 10 years I have been involved in the collection of all those forms of evidence at one point in time—public evidence, private evidence and in camera evidence. I simply draw to members' attention that when it comes to in camera evidence, the standing orders plainly say —

*In camera* evidence shall not be disclosed or published by any Committee Member or person unless otherwise ordered by the Council.

That means the CCC cannot have access to in camera evidence that I may have been involved in during the course of my 10 years in Parliament. It simply cannot have that. I am sure the CCC would concede that point, but the point is this: Mr Foster is in no position to determine whether something is in camera evidence or private evidence.

**Extract from Hansard**  
[COUNCIL — Thursday, 15 August 2019]  
p5608a-5630a

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

For those reasons, I indicate this matter needs to be investigated. I support recommendation 2. I do not have enough information at this time to cast judgement on this matter but that is precisely why an inquiry is needed. What Mr Foster did was either unlawful or it was lawful. If it were lawful, plainly there is a case for urgent reform. That reform would need to take place for as long as the government continues to put its foot on the funding hose to Parliament to prohibit it from fulfilling all of the requirements of members of Parliament. I indicate I support recommendation 2.

*Division*

Question put and a division taken with the following result —

Ayes (20)

|                     |                    |                     |                                  |
|---------------------|--------------------|---------------------|----------------------------------|
| Hon Martin Aldridge | Hon Peter Collier  | Hon Rick Mazza      | Hon Charles Smith                |
| Hon Jacqui Boydell  | Hon Diane Evers    | Hon Michael Mischin | Hon Aaron Stonehouse             |
| Hon Robin Chapple   | Hon Donna Faragher | Hon Simon O'Brien   | Hon Colin Tincknell              |
| Hon Jim Chown       | Hon Nick Goiran    | Hon Robin Scott     | Hon Alison Xamon                 |
| Hon Tim Clifford    | Hon Colin Holt     | Hon Tjorn Sibma     | Hon Ken Baston ( <i>Teller</i> ) |

Noes (11)

|                    |                        |                      |                                   |
|--------------------|------------------------|----------------------|-----------------------------------|
| Hon Alanna Clohesy | Hon Laurie Graham      | Hon Martin Pritchard | Hon Darren West                   |
| Hon Stephen Dawson | Hon Alannah MacTiernan | Hon Samantha Rowe    | Hon Pierre Yang ( <i>Teller</i> ) |
| Hon Sue Ellery     | Hon Kyle McGinn        | Hon Dr Sally Talbot  |                                   |

Pairs

|                     |                       |
|---------------------|-----------------------|
| Hon Colin de Grussa | Hon Matthew Swinbourn |
| Hon Dr Steve Thomas | Hon Adele Farina      |

**Question thus passed.**

*Recommendation 3 — Motion*

**Hon SIMON O'BRIEN:** In our consideration of the fifty-fifth report of the Standing Committee on Procedure and Privileges, "A Refusal to Comply with a Summons to Produce Documents", I move without notice —

That recommendation 3 be adopted and agreed to.

**Hon SUE ELLERY:** I rely on the comments that I made earlier to indicate that the government will not support this recommendation. However, this gives me an opportunity to put on the record some further information from the Commissioner of the Corruption and Crime Commission. Earlier in the debate, Hon Nick Goiran suggested that I may have, albeit inadvertently, misled the chamber. I certainly did not. I was provided with information by the commissioner of the CCC. I asked advisers to check and I have an email from the Attorney General's office from Wendy Endebrock-Brown at the CCC. I will table it, but it reads —

Colleen,

The Commissioner understands from the letter to him dated 9 August 2019 from the Chair of the Procedure and Privileges Committee that he is **required** to attend to give evidence **at a private hearing**. He did not use the term "summonsed" in the sense of having received a summons in accordance with Standing Order 192.

Kindest Regards,

Wendy

[See paper 2942.]

**Hon NICK GOIRAN:** First of all, I say that I support recommendation 3 and the reason I do so is that there would be no point in the chamber having agreed to recommendations 1 and 2 if we do not agree to recommendation 3, because, in effect, the committee would be unable to fulfil the task it has just been given through recommendations 1 and 2. Secondly, I will leave it for another day to pursue the matter that the Leader of the House has just raised, which is not a matter pertinent to recommendation 3.

**Hon MARTIN ALDRIDGE:** I indicate the support of the National Party for recommendation 3. Recommendation 3 is drafted in similar, if not the same, terms as the summons that was refused by Ms Roper and dealt with earlier in the debate. It is important that the committee have access to the documents in order to conduct and fully discharge its responsibilities in carrying out the inquiry outlined in recommendations 1 and 2, which have now been agreed to by the chamber.

It is also important to note that in the correspondence that was written to the committee, the commissioner of the CCC had no issue with having those documents released into the control of the chamber for its assessment of privilege. There is one thing I would like members to contemplate in considering their support for recommendation 3. Given

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

that the executive has made a determination of privilege on these documents and, therefore, what would be provided to the CCC, I would like members to consider a hypothetical situation. If the person in the executive who has expressed this judgement on whether a document, an email or a piece of data is subject to privilege had taken a more prescriptive view than the chamber would have taken and therefore would have withheld information from a lawful investigation by the CCC, it is clear that on those two occasions that I have already mentioned, the commissioner has asserted the view that it is ultimately up to the chamber to determine the status of privilege. I think recommendation 3 is important to not just the inquiry, but also the commission in ensuring that it can carry out its lawful investigation with all the information that it is lawfully able to access.

**Hon ALISON XAMON:** I of course rise to indicate that we support recommendation 3. I cannot believe that we have a situation whereby a government department and the CCC have been able to get hold of all the information and make a determination on parliamentary privilege, yet this Parliament, with which that privilege lies, still has to go through this process to try to get hold of that exact same information. I find that extraordinary.

**The PRESIDENT:** Members, we are dealing with recommendation 3, which states —

That the Legislative Council order:

That Mr Darren Foster, Director General, Department of the Premier and Cabinet, or any person acting in that capacity, is hereby ordered:

1. to attend before the Legislative Council Standing Committee on Procedure and Privileges to produce the documents listed below at the Legislative Council Committee Office, Ground Floor, 18–32 Parliament Place, West Perth at 9.00am on Friday, 23 August 2019; and
2. to continue in attendance until released by order of the Committee;

**DOCUMENTS TO BE PRODUCED:**

In relation to Corruption and Crime Commission (CCC) Notices to Produce Nos. NPR 00615–2019–4614 and NPR 00615–2019–4647, or any further notice issued to the Director General, Department of the Premier and Cabinet:

- (a) all documents that were identified as relevant to the CCC investigation, together with a list of those documents;
- (b) all documents that were identified as being subject to parliamentary privilege, together with a list of those documents; and
- (c) all documents that were produced to the CCC in compliance with each of the CCC Notices to Produce, together with a list of those documents.

*Division*

Question put and a division taken with the following result —

Ayes (20)

Hon Martin Aldridge  
Hon Jacqui Boydell  
Hon Robin Chapple  
Hon Jim Chown  
Hon Tim Clifford

Hon Peter Collier  
Hon Diane Evers  
Hon Donna Faragher  
Hon Nick Goiran  
Hon Colin Holt

Hon Rick Mazza  
Hon Michael Mischin  
Hon Simon O'Brien  
Hon Robin Scott  
Hon Tjorn Sibma

Hon Charles Smith  
Hon Aaron Stonehouse  
Hon Colin Tincknell  
Hon Alison Xamon  
Hon Ken Baston (*Teller*)

Noes (11)

Hon Alanna Clohesy  
Hon Stephen Dawson  
Hon Sue Ellery

Hon Laurie Graham  
Hon Alannah MacTiernan  
Hon Kyle McGinn

Hon Martin Pritchard  
Hon Samantha Rowe  
Hon Dr Sally Talbot

Hon Darren West  
Hon Pierre Yang (*Teller*)

Pairs

Hon Colin de Grussa  
Hon Dr Steve Thomas

Hon Matthew Swinbourn  
Hon Adele Farina

**Question thus passed.**

*Recommendation 4 — Motion*

**HON SIMON O'BRIEN:** I move without notice —

That recommendation 4 be adopted and agreed to.

This is a time-sensitive and urgent matter, and I ask that the all members vote in the affirmative. I will reserve any further remarks that I may be required to give to a later time.

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

**Hon SUE ELLERY:** I rely on the remarks that I made earlier outlining the reasons the government will not be supporting this recommendation.

**Hon NICK GOIRAN:** I will be supporting recommendation 4. I hasten to add that recommendation 4 is quite a significant matter and substantially different from the three recommendations debated earlier. Recommendations 1 and 2 simply ask the chamber to empower and entrust the Standing Committee on Procedure and Privileges to conduct inquiries that plainly needed to be done. Recommendation 3 assists the committee to facilitate that process. I would describe recommendation 4 as somewhat unusual, but I am supporting it because this episode has shown me that, unfortunately, these individuals cannot be trusted. I said earlier that the Corruption and Crime Commission has form with respect to the Turnseck matter and legal professional privilege, and now we have this particular episode as well. Until such time as this matter is resolved to the satisfaction of this chamber on the recommendation of the Standing Committee on Procedure and Privileges, I regret that we have no option other than to make this order.

**Hon MARTIN ALDRIDGE:** I rise to support recommendation 4. Earlier in my remarks I referred to recommendation 4 as a protection order. It is clear from Corruption and Crime Commissioner McKechnie's correspondence on page 99 of the report that he is seeking to access a further 400 to 600 terabytes of data and millions of email documents. At the moment, it is unclear what has been provided by the Department of the Premier and Cabinet to the commission. I want to put on the record, once again, that it is not my interest in any way to impede a lawful investigation by the Corruption and Crime Commission; indeed, I want to do everything possible within my power to support such an investigation as long as it is conducted lawfully. This is one of many steps that we will need to take into the future; this order by the chamber will ensure that future requests placed on the Department of the Premier and Cabinet by the CCC, or indeed any other investigative agency, must follow a proper process in accordance with this chamber, which ultimately is the arbiter and protector of privilege.

I point out that the CCC has extraordinary powers. Its powers are more extraordinary than those of Western Australia Police Force. In fact, as public officers they do not even need a judge-issued warrant to enter or to seize information from a person's possession. It is important that the chamber assert and defend its privilege. This order will hopefully go some way to asserting to the executive that privilege is not something that we are prepared to waive or have diminished in the way that it has been thus far.

**The PRESIDENT:** Members, we are dealing with the motion moved by Hon Simon O'Brien to adopt recommendation 4, which states —

That the Legislative Council order:

That Mr Darren Foster, Director General, Department of the Premier and Cabinet (**Department**), or any person acting in that capacity, is hereby ordered:

1. to not produce to the Corruption and Crime Commission or any other investigative agency in answer to any further compulsory process or otherwise any document or data in the Department's possession, custody or power that was created or received by a current or former member of the Legislative Council or their staff; and
2. to produce any documents or data that is the subject of any further compulsory process immediately to the Legislative Council Standing Committee on Procedure and Privileges at the Legislative Council Committee Office, Ground Floor, 18–32 Parliament Place, West Perth, pursuant to the provisions of the *Parliamentary Privileges Act 1891* for that Committee to determine whether:
  - (a) its description falls within the lawful scope of any warrant, notice to produce, or other similar power granted to an investigative agency under a written law; and
  - (b) the documents or data is not proceedings in Parliament within the meaning of Article 9 of the *Bill of Rights 1688* or does not otherwise fall within the scope of parliamentary privilege.

*Division*

Question put and a division taken with the following result —

Ayes (20)

Hon Martin Aldridge  
Hon Jacqui Boydell  
Hon Robin Chapple  
Hon Jim Chown  
Hon Tim Clifford

Hon Peter Collier  
Hon Diane Evers  
Hon Donna Faragher  
Hon Nick Goiran  
Hon Colin Holt

Hon Rick Mazza  
Hon Michael Mischin  
Hon Simon O'Brien  
Hon Robin Scott  
Hon Tjorn Sibma

Hon Charles Smith  
Hon Aaron Stonehouse  
Hon Colin Tinknell  
Hon Alison Xamon  
Hon Ken Baston (*Teller*)

**Extract from *Hansard***  
[COUNCIL — Thursday, 15 August 2019]  
p5608a-5630a

President; Hon Simon O'Brien; Hon Sue Ellery; Hon Nick Goiran; Hon Michael Mischin; Hon Rick Mazza; Hon Martin Aldridge; Hon Alison Xamon; Hon Aaron Stonehouse

---

Noes (11)

Hon Alanna Clohesy  
Hon Stephen Dawson  
Hon Sue Ellery

Hon Laurie Graham  
Hon Alannah MacTiernan  
Hon Kyle McGinn

Hon Martin Pritchard  
Hon Samantha Rowe  
Hon Dr Sally Talbot

Hon Darren West  
Hon Pierre Yang (*Teller*)

---

Pairs

Hon Colin de Grussa  
Hon Dr Steve Thomas

Hon Matthew Swinbourn  
Hon Adele Farina

**Question thus passed.**

**Progress reported, on motion by Hon Simon O'Brien.**

*Report*

**HON NICK GOIRAN (South Metropolitan) [4.09 pm]:** I move —

That the report of the Committee of the Whole House be adopted.

*Division*

Question put and a division taken with the following result —

Ayes (20)

Hon Martin Aldridge  
Hon Jacqui Boydell  
Hon Robin Chapple  
Hon Jim Chown  
Hon Tim Clifford

Hon Peter Collier  
Hon Diane Evers  
Hon Donna Faragher  
Hon Nick Goiran  
Hon Colin Holt

Hon Rick Mazza  
Hon Michael Mischin  
Hon Simon O'Brien  
Hon Robin Scott  
Hon Tjorn Sibma

Hon Charles Smith  
Hon Aaron Stonehouse  
Hon Colin Tincknell  
Hon Alison Xamon  
Hon Ken Baston (*Teller*)

---

Noes (11)

Hon Alanna Clohesy  
Hon Stephen Dawson  
Hon Sue Ellery

Hon Laurie Graham  
Hon Alannah MacTiernan  
Hon Kyle McGinn

Hon Martin Pritchard  
Hon Samantha Rowe  
Hon Dr Sally Talbot

Hon Darren West  
Hon Pierre Yang (*Teller*)

---

Pairs

Hon Colin de Grussa  
Hon Dr Steve Thomas

Hon Matthew Swinbourn  
Hon Adele Farina

**Question thus passed.**

**Report adopted.**

**The PRESIDENT:** We are dealing with the TAB (Disposal) Bill 2019 and the Betting Control Amendment (Taxing) Bill 2019. The question is that the bills be read a second time.