CORRUPTION, CRIME AND MISCONDUCT AMENDMENT BILL 2017

Second Reading

Resumed from 12 February.

HON MARTIN ALDRIDGE (Agricultural) [2.00 pm]: Although it is a pleasure to resume my comments from earlier in the week, I had only just started to talk about some of the history to this point. It is a relatively recent history from 2014, when the amendments were made to the Corruption, Crime and Misconduct Act, to the amendments now before us in the Corruption, Crime and Misconduct Amendment Bill 2017. On the last occasion I spoke, I drew some comments from the Corruption and Crime Commissioner's speech of 7 March to Curtin University as part of its Eminent Speaker Series, titled "The role of a corruption commission within the Constitution". That speech was made only a few days prior to the 2017 general election when we were only a few days away from a change of government and in caretaker mode. Later in that same month, there was a front-page story in *The West Australian* of 20 March 2017, which I think was largely borne from the commissioner's speech. It was titled "Untouchables — State MPs grant themselves 'immunity' from corruption investigations". It was an exclusive in *The West Australian* and its author was Daniel Emerson. I want to reference some of the quotes from this article, which states —

> Under its original model, if the CCC received a complaint about an MP it would refer it to the Speaker or President who would notify the relevant procedure and privileges committee, which would send it back to the CCC for investigation.
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> But under the 2015 structural reform aimed primarily at transferring low-level misconduct from the CCC to the Public Sector Commission, Parliament "reaffirmed exclusive jurisdiction over its own".
>
> He said MPs were protected from scrutiny unless Parliament made a referral to a privileges committee, which lacked the CCC's full suite of powers, including covert operations.

The article went on to say —

> Mr McKechnie cited a recent example in which the CCC, while investigating former treasurer Troy Buswell's traffic crashes, uncovered false answers to the Legislative Council prepared by former government staffers Rachael Turnseck and Stephen Home.
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> Despite being unaware of the breach and handing contempt findings to the staff, Parliament took the CCC to task in November for straying outside its jurisdiction after a committee decided the answers had been covered by parliamentary privilege.
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> "I will adopt a prudent, some might say timorous course in future on any matter which could conceivably fall within parliamentary privilege," Mr McKechnie said.

This article raised much concern and I think it did a pretty good job at sensationalising the issue. Of course, the article failed to recognise that matters of these substances could still be referred to the Western Australia Police Force. It also made incorrect reference to the Corruption and Crime Commission providing its report to Parliament, which is not factually correct. It provided its report to the executive and the executive tabled that report in Parliament, which is an interesting turn of events. Nevertheless, the story was run on the front page of *The West Australian*. I was in this place in 2014. I was involved with the forty-fourth report of the Standing Committee on Procedure and Privileges, which was about a matter of privilege raised by Hon Sue Ellery. I do not recall a time during the course of the debate on the 2014 bill, or indeed any time since, apart from the two speeches that I have referenced, when the Corruption and Crime Commissioner formally engaged in any way with me or, indeed, the Parliament. Perhaps there was some formal engagement with the government and perhaps there was some formal engagement with the Joint Standing Committee on the Corruption and Crime Commission. Perhaps those sorts of things will be worthy of further examination when we get to clause 1 of the bill. Nevertheless, it seems to me that if there was such a concern and such an issue, there would have been greater direct engagement with the Parliament on these matters.

The commissioner in his speech of 7 March 2017 stated —

> However, the Commission is restrained from reporting about members of parliament. Members of parliament are public officers as defined in the Criminal Code. However, members of parliament are not subject to investigation by the Commission or anyone else in respect of minor misconduct.
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> Nor can members of parliament be subject to investigation for serious misconduct. Such an investigation may offend the principles of parliamentary privilege, in particular Article 9 of the *Bill of Rights 1688* (UK):
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> > *'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'*.

I take issue with some of those comments. Obviously, the CCC is not the only investigatory body in Western Australia. We have the WA police and we have the Parliament itself. Members of this house have raised

matters of privilege that have been investigated and reported and, at times, members of the public and members of Parliament have been sanctioned in various ways for their actions. Although I do not think it is fair to say that members of Parliament are not subject to investigation, it would appear to be the case that they were not subject to investigation by the commission with respect to serious misconduct. The commissioner talked about minor misconduct in his speech. Interestingly, this bill before us does not address the issue of minor misconduct investigations because the 2014 bill, which transferred matters of minor misconduct to the Public Sector Commission, specifically excluded the clerks, as well as members of Parliament, from investigation for minor misconduct by the Public Sector Commission. I do not know whether that remains a concern or whether it is even a concern of the Corruption and Crime Commissioner, but it is not something that is being addressed in the bill before us.

I want to point out another interesting matter from that quote because I think it is accurate. Again, I emphasise that the commissioner said —

> Nor can members of parliament be subject to investigation for serious misconduct. Such an investigation may offend the principles of parliamentary privilege, in particular Article 9 of the *Bill of Rights 1688* (UK):

That is not changing. If the commissioner in his speech was arguing that members of Parliament cannot be investigated for serious misconduct because of parliamentary privilege, that will not change, and the report has confirmed that. In fact, the only finding of the PPC's inquiry into this bill was that it will not diminish parliamentary privilege. If we take at face value the commissioner's concern that parliamentary privilege is a barrier for him to investigate serious misconduct, it will continue to be so with the passage of this bill. As I said the forty-eighth report of the Standing Committee on Procedure and Privileges found that to be the case. I think that was the primary concern for referring this Corruption, Crime and Misconduct Amendment Bill, quite rightly, for further examination to the Standing Committee on Procedure and Privileges. Unfortunately, a motion in the other house moved by my colleague the member for Moore did not achieve that same outcome, but I am fortunate that this house saw the way to have that bill referred to the Standing Committee on Procedure and Privileges, which found —

> The Bill will not result in a diminution in the scope or operation of parliamentary privilege.

This bill will reinstate the Corruption and Crime Commission's powers or at least confirm those powers when that concurrent jurisdiction exists. However, it does not allow the CCC to interfere with the privileges of this house. I think the PPC has done an excellent job at confirming those issues concerning privilege and in setting out what I think will be a very good guide into the future for members to understand what parliamentary privilege is and how it operates.

What I think the report of the PPC, of which I was a member, does not achieve is setting out how a member of Parliament or, indeed, a member of the public, interacts with investigatory bodies such as the CCC, which is obviously the matter before us, but it could be police or other investigatory bodies. It could be the federal police or the security and intelligence agencies of the federal government. These bodies have extensive, coercive and at times covert powers to access and uncover information, with good intent, I might add. They have a lawful reason for doing this and, in the case of the CCC, to investigate matters of serious misconduct in the public sector and all matters of misconduct with respect to police.

I ask members of this place to reflect on what they would do if the Western Australia Police Force, the CCC or the federal police were to execute a lawful search warrant on their electorate office or their home or to search their car as they departed the parliamentary precinct, whatever that is, this afternoon. What is the likelihood of an officer of the executive having even a basic understanding of parliamentary privilege, let alone the detail contained within the forty-eighth report of the standing committee?

I draw members' attention, firstly, to section 100 in division 2, "Entry, search and related matters", of the Corruption Crime and Misconduct Act 2003 as it stands today. For the benefit of members who think they have the protection at least of judicial oversight, and believe that surely the CCC cannot wake up one day, break down the doors and take their filing cabinets and computers from their electorate office, section 100, "Power to enter and search premises of public authority or officer", states —

> (1) An officer of the Commission authorised in writing by the Commission may, at any time without a warrant —
>
> (a) enter and inspect any premises occupied or used by a public authority or public officer in that capacity; and
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> (b) inspect any document or other thing in or on the premises; and
>
> (c) take copies of any document in or on the premises.

That is without a warrant. Obviously, other things would lead to the Corruption and Crime Commissioner exercising those powers, but if we think about some of the things that have happened in other jurisdictions, it would be only a matter of time before we have to contemplate this in Western Australia. I think it is far better to

get ahead of that occurring, and make sure that it occurs properly. The flipside is to make sure that people do not conceal themselves behind privilege for the purpose of concealing criminality. That is equally as important.

We have seen, federally, cases in which the federal police have stormed the Senate and confiscated servers and documents. Indeed, if we think of recent months here, if I were to give some similar examples, I contend there are some fairly significant leaks from the government. We have seen information about some very sensitive negotiations that have occurred between the state of Western Australia and BHP end up in the media. We have seen information about sensitive and commercial negotiations between the state and John Holland end up in the media. If it has not already, how long before the state refers those matters to the CCC for investigation? How long will it be until perhaps the media, the opposition or, indeed, the Parliament itself have the CCC or another investigatory body turn up with or without a warrant to search?

I draw members' attention to a question on notice that I became aware of in the other place. It is certainly something that rang alarm bells for me and it was asked by the member for Dawesville on 8 August 2017. It states —

> I refer to the provision of IT services for Members of Parliament by the Department of Premier and Cabinet and ask:
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> (a) Does any officer within the Department have access to the network storage or email systems of Members of Parliament:
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> (i) If so, since 17 March 2017 how many times have these networks been accessed by the Department of Premier and Cabinet and what Member of Parliament's system was access and why;

The answer was —

> (a) Yes. Senior IT support staff responsible for the management of the email and storage systems have administrative access to these systems.
>
> However it is important to note that Parliamentary Electorate Office (PEO) network storage is not retained on any Departmental servers and is stored at the Electorate Office.
>
> (i) Five times. Access was required in each instance following a request by the Member for assistance in resolving IT issues with the account. It is not appropriate to identify specific Members without their permission.

Part (b) of the question was —

> Given the Department hosts the network storage and email systems of Members of Parliament, who is considered the ultimate owner of the information contained or transmitted; …

The answer states —

> (b) The network storage is not hosted nor is backup provided by the Department.
>
> The Department considers the Member to be the ultimate owner of the information.

The final part of the question states —

> (c) If the Director General received subpoena to grant lawful access to the network storage or email system of a Member of Parliament, would access to this information be granted:
>
> (i) If so, would the Director General be obliged under any policy or procedure to inform the Member of Parliament subject to the subpoena?

The answer states —

> (c) Yes.
>
> In such circumstances the Director General would seek legal advice relevant to the specific subpoena and the circumstances of the individual.
>
> (i) No.

I think that is a very interesting question for the Parliament to consider because I think over many, many decades, we have seen, increasingly, executive government providing more and more services to members of Parliament, whereby in other jurisdictions, it might be more reasonably expected that Parliament would provide those services directly to members. If I were to make a distinction between those two things—this is not to reflect poorly on the Department of the Premier and Cabinet—I do not think the Department of the Premier and Cabinet is as concerned about parliamentary privilege as perhaps the houses of Parliament would be if they were to receive a subpoena or a warrant or even a request from the CCC to search.

Given that these days we all have new devices—when they work—increasingly more and more information is stored on them. The number of us who are storing papers in filing cabinets and archive boxes in our electorate offices is probably diminishing. More and more of our documents and communications are in written electronic form, and would be retained in offices owned and controlled by the executive, in devices owned and controlled by the executive and on networks owned and controlled by the executive. Therefore, that parliamentary question, which was asked at the end of 2017, gives me no confidence that we are adequately prepared to deal with the circumstances that will inevitably arise in this state; or, conversely, to ensure that members of Parliament do not conceal criminality under the excuse of parliamentary privilege.

The forty-fourth report of the Standing Committee on Procedure and Privileges recommend that a memorandum of understanding be established between the houses of Parliament and the Corruption and Crime Commission. As I said, I was a member of the committee that made that recommendation. I note that on Tuesday this week, Hon Alison Xamon asked a question without notice about recommendation 5 of that report. In hindsight, I do not think that recommendation went far enough, nor was it the right solution. It has been two years since that report was tabled in this house, and that MOU has not progressed. In defence of the CCC, as we learnt from the question asked by Hon Alison Xamon on Tuesday, the CCC is yet to receive a draft MOU for it to consider. I do not think that a non-binding agreement with an executive agency is the right form; it is grossly inadequate to think that it would be. I also believe that although it might be ideal, it is most unlikely that the Council and the Assembly would agree to the application of privilege at all times and on all matters.

I appreciate that this will probably add complexity for investigators, particularly when investigating a matter that may involve both houses of this Parliament or members of both houses. There is no doubt in my mind that the CCC breached parliamentary privilege in its investigation of Ms Turnseck and Mr Home. The committee in its report fell short of finding Ms Turnseck and Mr Home in contempt of this house by reason of two facts. It acknowledged, first, that were it not for the CCC investigation, the information would not have been known to us—although that is certainly no excuse. It also acknowledged, more importantly, that the impact of that breach of privilege was relatively insignificant with respect to the other matters that had been raised; or, as perhaps a better way of expressing it, that that breach of privilege did not have a significant impact on the operation of the Parliament.

I turn now to paragraph 9.11 of the forty-fourth report. It states —

> Notwithstanding the breach by the CCC of one of the Legislative Council's important and necessary immunities, the Committee has found that, on this particular occasion, the actions of the CCC did not substantially obstruct the Council, its committees, Members or others involved in parliamentary proceedings in the performance of their functions or have a tendency to do so. The actions by the CCC in assisting the Committee with its inquiry have had a contrary effect to obstruction and its findings of fact relating to Ms Turnseck accord with those of this Committee. However, the Committee notes that the immunity provided by Article 9 of the *Bill of Rights 1688* (UK) is absolute and it is irrelevant whether or not the opinion formed or findings of fact made by the CCC accord with that of this Committee or the Legislative Council. The Committee is of the view that the CCC investigation of this matter should not be treated as precedent. The transgression by the CCC of parliamentary privilege must be avoided in all future investigations by that body.

That was in November 2016. In considering the matter that is before the Council today, namely, how the operations of the CCC intersect with investigations and parliamentary privilege, no more recent report comes to my mind than the forty-fourth report of the procedure and privileges committee.

I now turn to the second reading speech delivered by Hon Sue Ellery on 28 November 2017. I want members to recognise that I am quoting directly from *Hansard*, not the document that is available at the back of the chamber or online. The minister states in the first paragraph of her speech —

> The proposed amendment was previously put before Parliament in the Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017, which was debated in the September sittings of the Legislative Assembly. In the course of the debate on that bill, it became clear that the proposed amendment, which now forms the current bill, was required to be considered in greater detail than the more substantive sections of the bill dealing with powers in relation to unexplained wealth. For that reason, on Wednesday, 7 September 2017, I moved to split the bill in order that the most pressing amendments could be passed without referral to a committee, on the understanding that the amendment now before the house would be introduced in a separate bill.

I raised that so that the record will reflect it. I urge ministers and parliamentary secretaries, in particular those who represent ministers in the other house, to pay far more care and attention to the speeches they provide in this house, especially second reading speeches on bills. This section of the minister's speech does not reflect the facts, nor the actions of the minister who delivered it. I would encourage greater caution in the delivery of second reading

speeches in the future. The executive, courts and future Parliaments will try to interpret our intent, our motivations and our actions according to the words said in this place, and we must get them right. This house has just spent considerable time looking at the intent of the Parliament in 2014 in passing amendments to this act. Imagine if members had to go back in 20, 30 or 50 years and reflect on the words used in this place at this time without the benefit of knowledge about the history around this legislation.

This bill adds one word—"exclusively". This word was removed as a result of amendments to the act in 2014 aimed at moving responsibility for minor misconduct investigations to the Public Sector Commission, allowing the CCC to focus on major misconduct and police misconduct.

Section 8 of the Parliamentary Privileges Act 1891 sets out a number of offences whereby the houses of this Parliament are empowered to punish summarily for contempt. These are —

> (a) disobedience to any order of either House or of any Committee duly authorised in that behalf to attend or to produce papers, books, records, or other documents, before the House or such Committee, unless excused by the House in manner aforesaid;
>
> (b) refusing to be examined before, or to answer any lawful and relevant question put by the House or any such Committee, unless excused by the House in manner aforesaid;
>
> (c) assaulting, obstructing, or insulting any member in his coming to or going from the House, or on account of his behaviour in Parliament or endeavouring to compel any member by force, insult, or menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before either House;

That is interesting. I have been insulted a few times by some of my constituents, and next time I might remind my foes that I could raise a matter of privilege. It continues —

> (d) sending to a member any threatening letter on account of his behaviour in Parliament;
>
> (e) sending a challenge to fight a member;

We saw a bit of that in the federal Parliament today. It continues —

> (f) offering a bribe to, or attempting to bribe a member;
>
> (g) creating or joining in any disturbance in the House, or in the vicinity of the House while the same is sitting, whereby the proceedings of such House may be interrupted.

Several of these offences in section 8 of the Parliamentary Privileges Act 1891 reflect similar provisions in the Criminal Code. The committee's report on pages 2 and 3 outlines some of those. They are section 55, "Interfering with legislature"; section 56, "Disturbing Parliament"; section 57, "False evidence before Parliament"; section 58, "Threatening witness before Parliament"; section 59, "Witness not attending or giving evidence before Parliament"; section 60, "Member of Parliament receiving a bribe"; and section 61, "Bribery of member of Parliament". The intersection of these offences results in what the committee report describes as "concurrent jurisdiction" between the Corruption and Crime Commission, police and the Parliament. At least, that was before "exclusively" was removed.

As I said earlier in my contribution, although the CCC lost jurisdiction of these matters as a result of that 2014 amendment—that is what the committee report found and that was also the advice of the Solicitor-General and the expert advice sought by the committee in its investigation—it does not take away from the fact that those things could still be investigated by the Western Australia Police Force. The 2014 amendments to the CCM act did not impact on the police powers of investigation. I was a member of the house in 2014 and I must say that I did not take an active interest in the passage of this bill, but I have reflected on many of the contributions of members, including Hon Adele Farina; Hon Nick Goiran; the shadow Attorney General, Hon Michael Mischin; and others, on the passage of amendments in 2014. I agree with the reference at page 57 of the forty-eighth report, which states —

> It appears to have been the clear intention of the Parliament that from 2014 onwards the Parliament alone would have the power to investigate matters to which parliamentary privilege applied, and that the WA Police alone would be responsible for investigating the Criminal Code offences to the extent which that could be practically done—implied waiver of privilege or not.

I am quite confident that that conclusion is right. When the 2014 bill passed through both houses of Parliament, the explanatory memorandum for the Corruption and Crime Commission Amendment (Misconduct) Bill 2014 referred to clause 6 of the bill, which amended section 3 of the act. A paragraph on section 3(2) states —

> Subsection (2) is amended by deleting the words "exclusively" and "unless that House so resolves". The existing provisions of subsection 3(2) of the Act have been virtually ineffectual in defining the scope of the CCC's jurisdiction with respect to allegations of misconduct against Members of Parliament. This is

> because, despite the *Parliamentary Privileges Act 1891* and the *Parliamentary Papers Act 1891*, there currently exists overlapping regulation of unacceptable activities in Parliament through various offences under the Criminal Code. The current provisions also wrongly imply that Parliament can waive all privilege by resolution.

In my mind, regardless of whether there was awareness of the impact of that provision at the time, I think the explanatory memorandum set out that it was, by design, to clear up the concurrent jurisdiction between the WA police, the CCC and Parliament. Explanations were made during the course of the debate in both houses of Parliament. Certainly, a statement was made in the other place by the then Premier, Hon Colin Barnett, who had carriage of the bill, and the then Attorney General in this place repeated that statement. Part of that statement with respect to section 3(2) states —

> The amendments proposed by clause 6 to section 3(2) have two legal consequences. First, they further clarify and ensure that in relation to matters over which the Parliament has authority pursuant to its privileges, the CCC has no jurisdiction. Second, as a more general principle of statutory interpretation, they clearly place on the public record that this Parliament intends that its privileges are not to be affected by its legislation unless the Parliament itself decides to do so by express words or necessary implication. As honourable members will appreciate, this is very important because parliamentary privilege provides, for example, the capacity for members of Parliament and witnesses before Parliament to say what they think needs to be said in parliamentary proceedings without being questioned in any court or place out of Parliament. This is an essential element of our representative parliamentary democracy.

This bill has certainly had a longer gestation than I am sure the government would have liked, but I thank the former Solicitor-General and now Chief Justice of the Supreme Court of Western Australia, Peter Quinlan, SC, for his briefing. I acknowledge that he, acting on behalf of the government, released his legal opinion on this matter, which goes to show that when the government is willing, it will provide us with legal advice. The legal advice provided by the then State Solicitor, Peter Quinlan, SC, concurs with the expert advice of Mr Bret Walker, SC, whose opinion was sought by the Standing Committee on Procedure and Privileges for the forty-eighth report and played a significant role in determining the findings of the committee.

On page 69 of the report is some of the key advice from Mr Walker, and I will quote from paragraphs 10 and 11. Mr Walker said —

> I agree with the opinion of the Solicitor General that, whether intended or not, whilst the word "exclusively" does not appear in s 3(2) of the CCC Act, the CCC is precluded from inquiring into those *Criminal Code* offences that are congruent with the 'contempt' offences listed in s 8 of the *Parliamentary Privileges Act 1891*. This is necessarily the case as the investigation of a Criminal Code offence that was similar to a *Parliamentary Privileges Act 1891* offence would plainly relate to a matter "determinable by a house of Parliament".
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> In my view clause 3(2) of the CCC Act preserves parliamentary privilege and the proposed amendment will not alter this position. The only likely impact on parliamentary privilege of the proposed amendment is that it will give rise to some incidental issues relating to the identification of parliamentary privilege and the proper use of evidence in the course of the CCC's exercise of its investigative function.

That is where I started, or restarted, my contribution earlier this afternoon. It is with some concern about that latter part. I know that amendments are foreshadowed on the supplementary notice paper for when we get to the committee stage of this bill. I think some further work is being done behind the Chair with the government and across Parliament to try to map a way through an amendment that might be acceptable to the government and to the house.

Earlier today, it was certainly my intention to ask a question without notice of which some notice had been given, because I thought that it would be relevant when we reached the committee stage of the bill. Unfortunately, I will now have to defer those considerations to the committee stage of the bill. At 96 minutes before today's deadline for submitting questions without notice of which some notice is given, we received advice that the Attorney General would be travelling on parliamentary business and therefore would be unavailable to provide any answers to questions without notice today. I am not sure how far we will be able to progress this bill today if the Attorney General is not able to provide answers.

Hon Sue Ellery: Do you know there has been a discussion behind the Chair that I might not give my reply today, to allow those discussions behind the Chair to continue?

Hon MARTIN ALDRIDGE: I was not aware of that, but I thank the Leader of the House for clarifying that. Some of the questions I seek answers to , if not through question time on Tuesday, through the committee stage of the bill, include: If this matter is such a gross error and of such significant urgency, on how many occasions since the passage of amendments to the act in 2014 has the commission received an allegation against a public officer but has been prevented from commencing an investigation due to the removal of the word "exclusively" from

section 3(2)? When exercising the commission's power to enter and search a premise, with or without a warrant, if it is likely to encounter material subject to parliamentary privilege, what is the commission's procedures or guidelines with respect to notification of persons and with respect to the conduct of the search? When a claim of parliamentary privilege is made in the course of a lawful search undertaken by the commission, what procedures or guidelines are relevant in determining such a claim so as to avoid a contempt of Parliament? They are key questions that need to be answered as we navigate potential amendments, or the bill unamended.

I notice other jurisdictions have some greater clarity on these matters, and I think that has been through necessity. Other jurisdictions have already encountered the circumstances that I described earlier; that is, they have not been able to avoid the issue because there has been some type of search undertaken by the executive, whether it is police or some type of corruption commission, and when parliamentary privilege has been encountered. I ask members to keep in mind that the forty-fourth report of the Standing Committee on Procedure and Privileges sets out very clearly that it is not just members of Parliament who possess privileged material, it is the Parliament itself—its committees, its staff and its clerks. It is the executive. The executive contain quite significant privileged materials; materials protected by the privileges of the houses, as we have found in the forty-fourth report. Obviously members can see from that very significant report that there was clearly a difference in view between that of the Corruption and Crime Commission and that of the Legislative Council about what materials were and were not protected by parliamentary privilege. There is no better illustration of the need to ensure that we improve those circumstances.

I turn now to the *New South Wales Legislative Council Practice*. I want to read from a particular section. As I said, other jurisdictions have learnt the hard way because they have had to react to a situation rather than anticipate a situation occurring. In Hon Adele Farina's contribution to the 2014 amendments, she basically said that Parliament needs to hurry up and get organised because this is coming. I think her comments related to establishing a parliamentary precinct, which, as I understand it, has not progressed as well as the memorandum of understanding. Nevertheless, on page 73 of the *New South Wales Legislative Council Practice* there is a section related to the execution of search warrants. Obviously, parliamentary privilege is quite wide and varied, but I am focusing at the moment on searches because the CCC has some quite extraordinary powers, and powers which, if members thought it had judicial oversight in convincing a judicial officer of the necessity to search, they would be wrong. A member of Parliament is a public officer for the purposes of section 1 of the Criminal Code; therefore, a member is a public officer for the purposes of the Corruption, Crime and Misconduct Act. Under the heading "The execution of search warrants", it is stated —

> A different, yet related, issue is the statutory power of law enforcement and investigative agencies to conduct searches of members' offices at Parliament House.

Keep in mind that the New South Wales upper house does not have electoral offices; it has only a parliamentary office within the parliamentary precinct. There is a distinction. The paragraph continues —

> Generally, the execution of a search warrant by enforcement and investigative agencies within the precincts of Parliament only occurs with the consent of the relevant Presiding Officer.
>
> On 3 October 2003 officers of the Independent Commission Against Corruption executed a search warrant at the Parliament House office of the Hon Peter Breen, a member of the Council. During the execution of the warrant, the officers seized a quantity of documents, as well as two computer hard drives and Mr Breen's laptop computer. It became evident later that, despite section 122 of the *Independent Commission Against Corruption Act 1988* which expressly preserves parliamentary privilege, and assurances from the officers themselves that they would respect that privilege, some of the material seized was outside the authorisation of the warrant and some was immune from seizure by virtue of parliamentary privilege. This included at least one document, as well as Mr Breen's laptop and desktop computer hard drives, which it later transpired had been 'imaged' by the Independent Commission Against Corruption.
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> Following recommendations of the Standing Committee on Parliamentary Privilege and Ethics which inquired into the incident, the House adopted a resolution to resolve the matter to the following effect:
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> - The seized material was to be returned to the President of the House, and retained in the possession of the Clerk, until the issue of parliamentary privilege had been determined.
> - The member, the Clerk of the House, and a representative of the Commission were to 'jointly be present at' the examination of the material.
> - The member and the Clerk were to identify any items claimed to be within the scope of 'proceedings in Parliament', according to a definition of that expression which was stated in the resolution, in the same terms as the definition contained in the *Parliamentary Privileges Act 1987* (Cth).

- The Commission was to have the right to dispute any such claims, and to provide reasons; the member was to have the right to provide reasons in support of any disputed claim.
- Any items that the House determined as within the scope of 'proceedings in Parliament' were to remain in the custody of the Clerk until the House otherwise decided, with a copy to be made available to the member.
- Any items that the House determined were not privileged, or in respect of which a claim of privilege was not made, were to be returned to the Commission.

> This episode highlighted the difficulty of an investigating body such as the Independent Commission Against Corruption, with extensive statutory powers of entry, inspection and subsequent seizure of documents, in dealing with parliamentary privilege.
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> The procedure followed in the Breen case differs from the procedure followed in similar cases in the Australian Senate, where an independent 'legal arbiter' has been appointed to review material seized under warrant, and make an assessment as to whether any of the material was immune from seizure. In particular, the procedure in the Breen case included steps to enable the particular documents in dispute to be identified, allowing undisputed documents to be returned to the Commission at an early stage, and provided for the question of immunity from seizure to be determined by the House itself rather than an agent.
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> The question of the protection afforded by parliamentary privilege to documents seized under the authority of a search warrant has not been clearly established at law. In *Crane v Gething* in 2000, the question of the application of parliamentary privilege was not ultimately decided, although French J was of the view that the issuing of a search warrant, authorising a search of Senator Crane's home, parliamentary and electoral offices, was an administrative or executive act in aid of an executive investigation, not a judicial one … From this he concluded that it 'is not, in the ordinary course, for the courts to decide questions of privilege as between the executive and the parliament in litigation between the subject and the executive'.
>
> In another incident in 2002, the Queensland Police executed a search of Senator Harris's electoral office, impounding documents, but providing the Senator with an opportunity to identify those documents he claimed were immune from seizure by virtue of parliamentary privilege. The Senator declined the offer, leaving the matter to be resolved, following the precedent in *Crane v Gething*, by the Senate itself.
>
> There is no settled law in the case of the seizure of members' documents under search warrant. However, as the procedure followed in the Breen case suggests, material cannot be seized if it is covered by parliamentary privilege, although not every document or item in a member's office is necessarily covered by parliamentary privilege.

That was a very lengthy quote and I apologise to members for that, but I think all of that quote from the *New South Wales Legislative Council Practice* is relevant to the matter before us and the future actions of the Corruption and Crime Commission.

We know from the recent case referred to in the forty-fourth report that, clearly, there were breaches of parliamentary privilege, yet still to this day we have not advanced an improvement of that situation; nor do we have a better understanding of how the CCC's practices may have changed in respect of the intersect with parliamentary privilege and whether it exists within Parliament, the executive or another place.

I also want to touch on another example from the Australian Capital Territory that I have become aware of. It has more explicitly placed references in the Integrity Commission Act 2018. Section 3(2) of our act 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.

Obviously, that is one section of this voluminous act that we are amending by adding one word, "exclusively". I am not sure whether this 2018 vintage act of the ACT is the newest corruption and crime act in Australia, but I would say that it would be close. In that act, section 7, "Application of Act—Parliamentary privilege", states —

> (1) This Act does not affect the law relating to the privileges of—
>
> (a) the Legislative Assembly; or
>
> (b) any Australian Parliament; or
>
> (c) any house of any Australian Parliament.

> (2) This section is subject to section 178 (Parliamentary privilege—taken to be waived for MLAs' declarations of interests etc).

Interestingly, similarly to us, it establishes early on in that act that there is no impact on parliamentary privilege, but an exception is made in relation to the statements of pecuniary interest that we make to this house on an annual basis, which of course is a document of the house and is therefore subject to parliamentary privilege. Later on in that act, section 177, "Parliamentary privilege", states —

> (1) This section applies if, in the exercise of the commission's functions, a claim of parliamentary privilege is made.
>
> (2) The claim of parliamentary privilege must be dealt with by the Legislative Assembly.

I think the provision in the ACT act is a superior provision. It spells out the way in which claims of parliamentary privilege can be made and how they will be dealt with, which is that each house of Parliament has exclusive jurisdiction over matters of privilege; it is not something that can be decided by anybody else. Interestingly, to accompany that statutory provision in the ACT, it has a continuing resolution 4A, "Claims of Parliamentary Privilege that Arise During the Exercise of the Act: Integrity Commission's Powers and Functions". I am not suggesting that we should take a cookie-cutter approach to what the ACT has done, but that we should merely observe what it and other jurisdictions have done, because at the moment I think we are starting from a fairly low bar. The Legislative Assembly of the ACT has quite a significant continuing resolution, keeping in mind that it is a unicameral Parliament. This resolution specifically relates to the powers and functions of the Independent Commission Against Corruption and the intersect with parliamentary privilege. I will not go through this because it is quite a significant document, but it has a preamble that sets out and affirms the right of the Legislative Assembly of the ACT to determine matters of privilege. It establishes procedures for the compulsory production of documents by ICAC. It refers to the examination or questioning of members by ICAC. It refers to making determinations of privileges. It steps through a process of determining whether privilege applies or does not apply. It refers to appointing an independent legal arbiter, which is a similar provision to the case I referred to earlier in the Australian Senate, whereby it appoints an independent legal arbiter to determine the application of privilege. I want to quote a short paragraph from that resolution. It states —

> The Independent Legal Arbiter must be a Queen's Counsel, Senior Counsel, or a retired judge or justice of the Supreme, Federal or High Court and the Speaker must consult with the Standing Committee on Administration and Procedure prior to making an appointment. The Arbiter will be paid a fee approved by the Speaker.

Obviously, it may not be everybody's cup of tea that we head down the path of appointing independent legal advisers to determine the privileges of this house; in fact, I am pretty sure that notion would sink faster than a lead balloon. I am merely reflecting on examples in other jurisdictions. There is a paragraph on a memorandum of understanding and it states —

> For the purposes of facilitating the effective administration of this resolution, the Speaker may enter into a memorandum of understanding with the Integrity Commissioner in relation to parliamentary privilege and the exercise of the Commission's powers. A memorandum of understanding must not be inconsistent with this resolution and must be tabled in the Assembly on the first available sitting day following its finalisation.

The last part of the continuing resolution refers to the recusal of the Speaker or a member of the standing committee on a relevant matter. Obviously, that is a new act in the ACT and I have not checked whether any provision contained therein has been tested since it came into force. I think the resolution was agreed to by the Assembly in the ACT only on 29 November 2018—so, very recently.

Nevertheless, Parliaments in other parts of Australia have given this greater consideration. Unfortunately, we have a lot more work to do on the intrusive powers of the executive more generally. There is a moment in time for us now to consider the intrusive powers of the Corruption and Crime Commission because there is a bill before the house. At some stage, there needs to be some greater examination of the intrusive powers of the executive on the Parliament to make sure that we maintain our sovereignty and our independence from the executive and from investigations of the executive in the right circumstances. At the same time and with equal measure, we must make sure that when a member amongst our ranks has done the wrong thing, they are brought to justice in the same way that we would expect any member of the public to be brought to justice.

I want to turn briefly to the amendment that has been circulated. As I said, there will be ongoing discussion about this as we move forward. I see there is a second supplementary notice paper. I am not sure whether it has been succeeded by another while I have been speaking for the last hour. I am working on issue 2 of supplementary notice paper 41.

Hon Sue Ellery: There isn't a replacement yet. I expect on Tuesday there probably will be.

Hon MARTIN ALDRIDGE: The Leader of the House just indicated that this is the current supplementary notice paper and that further amendments may be placed on the notice paper between now and the next sitting of the house on Tuesday next week. I foreshadow that there are some amendments—one from Hon Alison Xamon and one from the government—in regard to allegations about members of Parliament. I understand what Hon Alison Xamon is attempting to achieve, although I am not really that familiar with the operations of the Corruption and Crime Commission. Obviously, some members of this house sit on the Joint Standing Committee on the Corruption and Crime Commission and would be much more conversant with the operations of the CCC and, indeed, would be able to inform the house of the importance of having the Parliamentary Inspector of the Corruption and Crime Commission informed of an allegation against a member of Parliament. Similarly, it will be interesting to get an answer to the question that I earlier foreshadowed I will ask the Attorney General on the number of allegations received in the last few years about public officers—largely, members of Parliament—that he has been unable to investigate as a result of the removal of the word "exclusively".

The second part of Hon Alison Xamon's amendment refers to the memorandum of understanding. As I said in my earlier remarks, my thinking has moved on a little from the memorandum of understanding. I think the government is somewhat cautious about giving statutory recognition to a non-binding agreement that does not exist, and I share that view. It is our right, and our right alone, to determine our privilege and how our privilege is interacted with by investigations of the executive. In hindsight, I think an MOU is not strong enough. I like the approach taken in other jurisdictions that have set out, by resolution of the house, the way in which investigatory bodies will engage with investigations of members of Parliament or other public officers when parliamentary privilege exists. I think it is better to do this in advance of there being a problem, because investigatory bodies have covert powers. We only know what we know. If someone turns up at our door wanting to conduct a lawful search, we obviously know that they are there and what they want to obtain, but members should keep in mind that some of these investigatory bodies, like the CCC, have significant covert powers, such as the ability to intercept telecommunications and access the servers of the DPC. As we know from the answer provided by the Premier in August 2017, the department will provide access when a lawful request is made, and without notification. That is a concern. Obviously, if we were to adopt a different approach, perhaps by form of a resolution setting out the way in which claims of parliamentary privilege are made and how they are assessed and determined, and some sort of right of appeal to those determinations, that would provide a much stronger position from which this house could protect itself from actions of investigative bodies, which are lawful, but which at times could be motivated by other things.

The second amendment on the supplementary notice paper is from the government. The government is working in good faith with all parties in this house to try to find an acceptable outcome. There have been some discussions behind the Chair on this amendment, and I am sure they will continue over the coming days. There is limited time left in the debate today and before we enter the committee stage, which will most likely happen next week. If I am not mistaken, the Leader of the House has already indicated that she intends to defer her reply to the second reading debate until the next sitting of the house.

Some questions need to be answered during the committee stage of the bill, if not through the minister's reply to the second reading. I think some improvements could be made to certain aspects of this bill. I certainly do not accept that members of Parliament are untouchable, as *The West Australian* described us in March 2017. This bill will reinstate the CCC's powers and re-establish concurrent jurisdiction for the police, Parliament and the CCC on matters relating to section 8 offences in the Parliamentary Privileges Act and similar offences contained within the Criminal Code. We need to make sure that we are prepared for those circumstances arising. Something we may further consider in the committee stage is that the other place is already dealing with some of those challenges with respect to a Procedure and Privileges Committee report and the referral of matters to police arising from the investigation of the former member for Darling Range. Those are some of the issues that could be examined in terms of how the CCC was constrained or how the executive is now constrained in fully pursuing the alleged criminality of Mr Urban, and the application of parliamentary privilege. That is worthy of further consideration at some stage. As I said in the beginning, the National Party has provided in-principle support for the bill. We look forward to the committee stage, when we can examine some of these things more carefully.

HON NICK GOIRAN (South Metropolitan) [3.06 pm]: I seek to contribute to the consideration of the Corruption, Crime and Misconduct Amendment Bill 2017 as a former Chairman of the Joint Standing Committee on the Corruption and Crime Commission. Indeed, I chaired that committee for eight years over two consecutive Parliaments. It is in that context that I wish to make a few remarks this afternoon.

As has already been indicated by my learned friend the shadow Attorney General, Hon Michael Mischin, the opposition supports the Corruption, Crime and Misconduct Amendment Bill 2017. As best as I can recall, this is the fourth bill brought on by the government so far this year. The top priority for the government was the Gender Reassignment Amendment Bill. The second priority for the government was the Residential Parks (Long-stay Tenants) Amendment Bill 2018, which has been now sent to the committee chaired by Hon Dr Sally Talbot.

I am looking forward to serving on that committee with the honourable member. That was an interesting foray by the government. The government could have sent that bill to the committee prior to the summer recess, but left it until this week to do so. The third bill that the government brought on for debate was the Ports Legislation Amendment Bill, which I understand was third read earlier today. Now we are dealing with the fourth piece of legislation, the Corruption, Crime and Misconduct Amendment Bill 2017. This is the fourth priority of the government this year. Despite the fact that the government has brought this bill on for debate today, I understand that it is not ready to conclude proceedings.

Hon Sue Ellery: That is not true; we are trying to be helpful to other people.

Hon NICK GOIRAN: I understood from an earlier interjection that the Leader of the House is busy working with her colleagues to prepare another amendment that might find its way onto the supplementary notice paper. I heard the Leader of the House indicate that she is not preparing to give her reply this afternoon, so the government is not ready to deal with this bill today.

Point of Order

Hon SUE ELLERY: I think that is deliberately disingenuous. I appreciate that the honourable member has not been party to the discussions behind the Chair, but there has been genuine willingness to meet. Indeed, the Attorney General and the Solicitor-General joined the meeting by phone from the eastern states. I was asked by the Liberal Party's lead speaker to consider not giving my reply today to enable those discussions and negotiations to continue. I think it is quite disingenuous of Hon Nick Goiran to try to have the record show that the government is not ready when, in fact, as is not uncommon, we are actually trying to reach agreement.

The ACTING PRESIDENT (Hon Martin Aldridge): I think that there is a difference in view amongst members but there is no point of order.

Several members interjected.

The ACTING PRESIDENT: Order, members! Hon Nick Goiran has the call.

Debate Resumed

Hon NICK GOIRAN: As I said, the government is not prepared for this legislation today. If it was prepared, we would be going into Committee of the Whole House. The Leader of the House is unable to give her reply today and has indicated that she is busy working on amendments.

Hon Alannah MacTiernan interjected.

The ACTING PRESIDENT: Order, member!

Hon NICK GOIRAN: What is interesting is that this is actually quite typical for this government. It is even typical behaviour related to this bill itself. Let us look at the chronology of this bill as it has progressed through the Parliament. On 18 October 2017—no, I have not misspoken, Mr Acting President. Some members opposite might not realise it but we are now in 2019. On 18 October 2017, the bill was introduced into the Legislative Assembly. One month later, on 28 November 2017—not to be confused with 2018—it was transmitted from the other place to this chamber and it languished on the notice paper at the will of the Leader of the House until 20 March last year. From 28 November 2017 until 20 March 2018, it languished on the notice paper and at that time, on 20 March 2018, Hon Sue Ellery moved a motion to refer the bill to the Standing Committee on Procedure and Privileges. That committee reported on 10 May last year. What has happened to the bill since? It has been languishing on the *Daily Notice Paper*. Time and again, the Clerk and the Clerk's assistants have to tediously type into the *Daily Notice Paper* "Corruption, Crime and Misconduct Amendment Bill 2017". We are wasting their time with more printing while it continues to languish on the notice paper, and all because the Leader of the House and her team are not ready to debate the bill. If they were ready, they would have brought it on sometime since 10 May last year. But here we are on 14 February and they are still not ready.

In an interjection earlier this afternoon, we were told that apparently more work is being done on the supplementary notice paper. Why would that be the case? Hon Alison Xamon put her amendment on the supplementary notice paper many moons ago, but it is only now, after the summer recess, that the government has decided to wake up and say, "We'd better have a look at what Hon Alison Xamon has had to say. She's intending to insert new clause 5. Far out! It looks like there's a bit of support for Hon Alison Xamon and her amendment."

The government might not have the numbers, which it is obsessed about, so it has said that it is apparently not ready and will not deal with it in committee today. How much more time does it need to deal with a simple bill? I have heard speech after speech on this bill from members on both sides of the chamber about how we are inserting only one word into the act. Earlier this week, the top priority of this government was the Gender Reassignment Amendment Bill 2018. I said that one would be battling to find a simpler bill. Well, this one is right up there! If there was ever going to be a bill that can compete with the gender reassignment bill for simplicity and conciseness, it

would be this one. The main content of it fits on one page, but the government apparently needs years to progress this bill through the Parliament. Remember, it was introduced into the other place not last year but on 18 October 2017. It has been languishing on our notice paper ever since 10 May 2018, not through the fault of the Standing Committee on Procedure and Privileges. It reported in a very timely fashion and it provided us with a very useful report, which I would like to speak on in a moment. It is not the committee's fault. It has done its work in a timely fashion. But the Leader of the House, the most experienced member opposite, has decided, week in and week out, to make sure that this bill gets buried. Since May, this bill has been buried at the will of the Leader of the House and today when it has finally been brought on for debate, the Leader of the House is still not ready: "I'm not going to give my reply. We're not going into Committee of the Whole House." It is her prerogative to do so, but she should expect me to criticise her each and every time she mismanages the house like that.

This bill simply allows the Corruption and Crime Commission to rejoin the Western Australia Police Force as investigators into members of Parliament. That has been totally missed in the public debate on this. There is some kind of suggestion that MPs are above the law and can escape any investigation. That is utter rubbish. The former member for Darling Range knows that full well, as do members opposite, because the police have every ability to investigate members of Parliament. What police cannot do during the course of their investigations and what they will never be able to do, and what the CCC will still never be able to do, is impinge upon parliamentary privilege—none of that changes. All we are doing is adding another group as investigators once again, which is apparently the will of the government. The opposition has indicated that we will support that.

I was grateful that, on this occasion, this bill had made its way to a committee for an inquiry. I have said repeatedly, both when I was in government and now in opposition, that it is my view that the default position should be that bills go to committees for inquiry. It should be the responsibility of the government of the day to make a case about why a bill should not go to a committee. But we do things the opposite way in this house. The approach taken requires people to make a case about why the bill needs to go to a committee. I think it should be the opposite. In any event, in March last year, Hon Sue Ellery decided to move a motion to refer the bill to the Standing Committee on Procedure and Privileges. That referral was supported and the committee reported on 10 May 2018. Members would be aware, if they have had the opportunity to peruse and consider the report, that at page 7 the committee sets out its finding —

> The Bill will not result in a diminution in the scope or operation of parliamentary privilege.

The committee has appended to its report the legal advice of the now Chief Justice, but at the time Solicitor-General, Mr Quinlan. Interestingly enough, I constantly ask the Leader of the House during Committee of the Whole House to reveal legal advice, and time and again she says, "No. You know we can't do that." But she did it on this occasion. We will make sure that we keep reminding the Leader of the House about that. Her Attorney General released the advice on this occasion, and do members know what? It was not only appropriate, but also helpful. That piece of advice in the form of a briefing note is found at page 61 in appendix 1 of the report. It is an excellent opinion of Mr Quinlan dated 25 August 2017. The one part that I would like to quote from in his opinion is found at paragraph 16, which states —

> 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*.

That is entirely correct, and given that that advice had been provided to the government, the committee has quite appropriately sought its own independent advice from Mr Bret Walker, SC, whom the committee customarily approaches for legal advice on complex matters. Members will find his opinion at appendix 2 of the report starting at page 66. Again I would like to briefly quote his opinion on page 69, where he states —

> 10. I agree with the opinion of the Solicitor General that, whether intended or not, whilst the word *"exclusively"* does not appear in s 3(2) of the CCC Act, the CCC is precluded from inquiring into those *Criminal Code* offences that are congruent with the 'contempt' offences listed in s 8 of the *Parliamentary Privileges Act 1891*. This is necessarily the case as the investigation of a *Criminal Code* offence that was similar to a *Parliamentary Privileges Act 1891* offence, would plainly relate to a matter *"determinable by a house of Parliament"*.
>
> 11. In my view clause 3(2) of the CCC Act preserves parliamentary privilege and the proposed amendment will not alter this position. The only likely impact on parliamentary privilege of the proposed amendment is that it will give rise to some incidental issues relating to the identification of parliamentary privilege and the proper use of evidence in the course of the CCC's exercise of its investigative function.

Very interestingly, members may be very quick to say that the Solicitor-General and the independent senior counsel have agreed that parliamentary privilege is preserved. That is true, but let us not forget what Bret Walker, SC, has said; that is, it will give rise to some incidental issues relating to the identification of parliamentary privilege and

the proper use of evidence in the course of the CCC's exercise of its investigative function. That is the very thing Hon Alison Xamon seeks to cure by her amendment, which has been on the notice paper for a very long time and which the government is still not ready to deal with. That is the amendment that is before us, and it is important for us to consider it due to what Mr Walker, SC, has said. I am in broad support of what Hon Alison Xamon has proposed in principle, albeit I think there can be some modifications in the drafting, because I remind members that the Corruption and Crime Commission does not have entirely the best track record when it comes to matters of privilege.

I will give members two examples. One has already been touched on by members regarding the Turnseck inquiry. The first one I want to bring to members' attention is the twenty-first report that was tabled by the Joint Standing Committee on the Corruption and Crime Commission in the thirty-eighth Parliament. That report was tabled by me in this house and in the other place by the then member for Perth, John Hyde, on 24 November 2011. The report is entitled, "Parliamentary Inspector's Report Concerning Telecommunication Interceptions and Legal Professional Privilege". I refer members to the chairman's foreword of that report and I will quote a few paragraphs. It states —

> The report arose out of an inquiry commenced by the Parliamentary Inspector in March 2010. On 4 March 2010 an article published in *The West Australian* newspaper referred to evidence given in the Perth Magistrates Court by a CCC investigator in criminal proceedings against Mr Brian Burke. The article reported that the CCC investigator had given evidence that the CCC had intercepted and listened to telephone conversations between Mr Burke and his lawyer, Mr Grant Donaldson. After reading the article, the Parliamentary Inspector obtained a copy of the transcript of evidence of the proceedings, and confirmed that the article was broadly accurate.
>
> This gave the Parliamentary Inspector cause for concern about the procedures adopted by the CCC in dealing with intercepted telephone conversations that are the subject of legal professional privilege, and he duly launched his inquiry.
>
> Legal professional privilege protects two kinds of confidential communications between a client and her or his lawyer: Where the communications are confidential and made for the purposes of seeking or being provided with legal advice, and where the communications are made for the purpose of existing or reasonably contemplated judicial or quasi-judicial proceedings. As the Parliamentary Inspector states in his report, "LPP has been described as 'a fundamental and general principle of the common law,' and it exists to protect 'a very important entitlement in our society by which anyone may seek, and obtain, legal counsel in the confidence that communications with a lawyer, and documents produced for or in consequence of such communications, will not normally be disclosed without the affected client's consent.'"
>
> Notwithstanding the importance of LPP, the *Telecommunications (Interception and Access) Act 1979* (Cth) allows Commission officers executing a warrant to make a record of, communicate to another person and make use of any lawfully intercepted information for a permitted purpose, including the investigation of misconduct. This power extends to conversations that may attract LPP. As such, the CCC state that:
>
> > *A permitted purpose includes an investigation of misconduct under our Act. Thus, if we intercept material that might be protected by legal professional privilege, that material can be listened to, recorded, transcribed and communicated to an officer of the Commission (including an investigator). However, we may not be able to use it in evidence during court proceedings.*
>
> In his report, however, the Parliamentary Inspector contends that while the use of such information may be lawful, the CCC has not in the past properly considered the appropriateness of using privileged material in its investigations:
>
> > *This shows a serious misconception by the Commission of its responsibilities concerning privileged material. That interception of information subject to LPP is lawful, and that its communication to someone other than an authorised recipient is lawful if made for a permitted purpose, does not answer the question whether the use is appropriate in the circumstances.*
>
> Accordingly, in his report the Parliamentary Inspector essentially recommends that the CCC take a more measured approach to dealing with material that may be covered by LPP than has up until now been the case.
>
> Though it is no doubt well understood by a number of the citizens of Western Australia, it bears mentioning that not every conversation between a lawyer and her or his client will necessarily attract LPP. As such, this is an extremely complex issue: put simply, it is impossible for the CCC to determine whether or not intercepted material would be covered by LPP without a CCC officer first having listened to it in order to make this determination. This fact is perhaps best encapsulated by Mr Peter Hastings QC in the Memorandum of Advice he prepared for the CCC on 9 August 2011 at the CCC's request:

> *It should not be overlooked that is not always clear that legal professional privilege is applicable, even though communications may be between a person and his or her lawyer. As the Federal Court pointed out in* Carmody v MacKellar*, one of the reasons for concluding that telephone interception warrants were not limited by legal professional privilege was that it will often be impossible to ascertain with any degree of assurance whether a particular conversation is or is not privileged while it is taking place, because even a conversation which bears the appearance of a privileged communication may not be privileged. If the lawyer is engaged in a criminal enterprise, the communication may not be privileged because it is made in furtherance of an illegal purpose.*
>
> *The same position may exist while a matter is still being investigated, and it may not be until the investigation is complete that it becomes clear whether the communication was privileged. That is a further reason why it seems to me that there is no restriction upon using information in an investigation by providing summaries of intercepted telecommunications to Counsel Assisting. Whether the information can then be used in the examination will depend whether it can be demonstrated that the communication was in furtherance of a crime of fraud or dishonesty.*

In this respect, the CCC's investigation into the City of Stirling is instructive: As a derivative to that investigation, an intercepted conversation between a lawyer and his client saw criminal charges being laid against the lawyer.

Importantly, the Parliamentary Inspector found that there was no misconduct by any officer of the CCC as a result of his inquiry into this issue. Rather, he identified ways that the CCC might enhance its future handling of intercepted material that may be the subject of LPP. The Committee notes that the CCC have already taken steps to improve its processes in this regard, and regards this as an excellent outcome of the Parliamentary Inspector's inquiry.

As members can see, the Corruption and Crime Commission already had bad form on the issue of legal professional privilege and had to improve its processes as a result of this report in 2011 in the thirty-eighth Parliament. The CCC also does not have a wonderful track record on legal professional privilege and has struggled on at least one occasion with that issue. I refer members to the forty-eighth report of the Standing Committee on Procedure and Privileges, which was presented by the President, Hon Kate Doust, in May last year. The report sets out in chapter 8 a summary of the events that took place in what is referred to as the Turnseck investigation. The report states at page 58 —

> On occasion, the demarcation of the jurisdictions of the Parliament and of investigative bodies such as the CCC may be difficult to discern. It is not always a bright line of separation. However, in this instance, there was such a clear bright line. The evidence relied on by the CCC to form its adverse opinion about Ms Turnseck's conduct was so closely and directly connected to actions occurring in the Legislative Council as to make it obvious that this evidence constituted a proceeding in Parliament. The Committee would have expected the CCC to have known that using such materials to form an opinion on the conduct of a public officer in these circumstances would breach the immunity provided by Article 9.
>
> By adopting the findings and recommendations of this Committee and enforcing any related orders, the Legislative Council will remind all those involved in parliamentary proceedings to conduct themselves with honesty, fairness and impartiality when carrying out their official duties. This task falls squarely within the exclusive jurisdiction of the Houses of Parliament. The CCC has no concurrent or 'shared' jurisdiction with the Parliament to investigate and pursue matters of this nature.
>
> The Legislative Council, as in the past, will welcome any assistance that the CCC may provide to enable the House to determine whether a contempt or breach of its privileges has occurred. However, the CCC is not empowered by its statute to intrude upon the privileges of the Legislative Council. The Houses of Parliament, when first enacting the *Corruption and Crime Commission Act 2003* and recent amendments made to it by the *Corruption and Crime Commission Amendment (Misconduct) Act 2014* were careful to ensure that Parliamentary Privilege was expressly preserved. Section 3(2) of the Corruption, Crime and Misconduct Act 2003 is a clear expression of both the Parliament's will and the law of this State in this regard.

The report at page 59 makes the following important observations —

> The Committee is concerned by the decision of the Commissioner of the CCC to provide this part of the CCC report to the Premier rather than to the Parliament. If it were not for the actions of the Premier in making the CCC report public by tabling it in the Legislative Assembly on 16 March 2016, the Legislative Council would have remained unaware of the possible contempts committed against it. This aspect of the CCC report was not a matter solely for the Premier as the Minister responsible for the Department of Premier and Cabinet and the employer of Mr Home and Ms Turnseck. It was a matter that concerned the integrity of Question Time, one of the important mechanisms of the Legislature for

> obtaining information from the Executive and bringing it to account as an incidence of democratic governance in Western Australia. It was therefore also a matter that the Commissioner should have brought to the attention of the Legislative Council.
>
> The Committee therefore strongly disagrees with the view expressed by the CCC in its report that there is no particular public interest in a report to Parliament on the conduct of Ms Turnseck when this conduct resulted in an incomplete, misleading and ultimately false answer to a parliamentary question being provided to the Legislative Council. Where such conduct directly affects the integrity of a parliamentary proceeding, the CCC should advise the relevant House of the Legislature and, where practicable, provide it with all relevant evidence that it has obtained. This will enable the relevant House to deal with the matter under its inquiry and contempt powers as it has done in this particular case.

Those are two examples of how the CCC has had difficulty and has struggled with not only legal professional privilege but also parliamentary privilege. It is because of that track record that I have some sympathy for the amendment that has been foreshadowed by Hon Alison Xamon. The government is not willing to deal with that amendment today. It has had months and months to consider it. I fail to understand in any way, shape or form what the government was doing during the summer recess that prohibited it from getting across its brief on this bill. Perhaps it was too busy dealing with the lobster fiasco. It is now 14 February 2019 and the government is more concerned with Valentine's Day than with progressing this piece of legislation. I indicate to members that this bill has my support. I also have a great deal of sympathy for the amendment. However, I would like to see some tweaking of the amendment, and I encourage those members who are involved in that exercise to continue that process to ensure that all members are satisfied with it.

The second limb of the amendment as drafted by Hon Alison Xamon refers to a memorandum of understanding. The member who spoke in this debate immediately prior to me, indicated that no progress has been made on the MOU. I was a member of the committee that looked into the Turnseck matter, as it is referred to, and made those observations, findings and recommendations. It is troubling that although that was quite some time ago, in the previous Parliament, no progress has been made on the memorandum of understanding and we are in the same position we were in back then. That is undesirable. I would support either the amendment as foreshadowed by Hon Alison Xamon or any amendment to that amendment that would provide an imperative for the relevant individuals to bring that memorandum of understanding to a conclusion. The CCC already has a track record of indiscretion when it comes to matters of privilege, and we cannot have that repeated.

Indeed, the Standing Committee on Procedure and Privileges, on which I served, in that inquiry went to great lengths to say that this can never happen again. We cannot have a situation in which the Corruption and Crime Commission intrudes upon the privileges of the Legislative Council. That simply can never happen again. I draw members' attention to page 5 of the report that has been tabled by the President. In particular, for those who have the forty-eighth report available to them, I draw their attention to paragraph 1.18, which states —

> The Committee notes that a memorandum of understanding to give effect to Recommendation 5 of Report 44 has yet to be finalised. It is anticipated that the memorandum of understanding will cover issues such as early notification of investigations and evidence sharing. The Committee further notes that this memorandum of understanding will not cover wider issues relating to the execution of CCC search warrants on parliamentary or electorate offices or the CCC's ability to use proceedings of the Parliament as evidence in its investigations.

There we have it from our own Standing Committee on Procedure and Privileges; it indicates that the memorandum of understanding is yet to be finalised. Whatever the reason for the hold-up, it needs to be brought to a conclusion. It would not shock me if this were the case, but if the two houses are unable to come to a conclusion on what might be in the memorandum of understanding, from my perspective, I see no barrier to the Legislative Council and its Standing Committee on Procedure and Privileges going it alone. It is not my desired outcome. I would rather that the way privileges are dealt with in this state is identical between the two houses. That would be my aspiration. However, if that is unable to be achieved, do not let us have nothing in place. Let us at least continue to have something in place because, at the end of the day, whatever the other place might or might not want to do with its privileges is really a matter for it. When there is an investigation, we do not investigate its members and it does not investigate our members. If needs be, our Standing Committee on Procedure and Privileges and our house should go it alone and enter into a memorandum of understanding with the Corruption and Crime Commission. Another approach might be for us to simply set out a directive on how these matters are to be dealt with.

In the end, as has been identified in the cases involving legal professional privilege, the CCC has had a torturous history of having to have some of its officers listen to the material, contemplate whether legal professional privilege has been impinged and then make a determination, and that material is then made available to others. Will that be an acceptable approach for the Legislative Council and the privileges of this place? We should obviously provide some direction to the Corruption and Crime Commission.

As a result of that last episode, it appears that the CCC has taken a very—to use its language—"timorous" approach to these matters. I note that towards the end of the report tabled by the committee in May last year, the very final paragraph, paragraph 8.4, on page 60 of the report, in chapter 8, states —

> Mr McKechnie went on to recount that the CCC had been taken "to task" by the Parliament for straying outside its jurisdiction in investigating government officials involved in the preparing of answers to questions asked in the Parliament. He stated that:

The committee then quotes from an online piece in *The West Australian* of 20 March 2017, titled "MPs exempt from CCC probe". The commissioner is quoted as saying —

> I will adopt a prudent, some might say timorous course in future on any matter which could conceivably fall within parliamentary privilege.

That is good. Equally, if matters need to be brought to the attention of the Legislative Council because the CCC has been made aware of some breach, it should bring it to our attention. I would not want this approach that has been taken to be so mild that it means that there is no communication. There should still be a healthy relationship between the Corruption and Crime Commission, its commissioner and the Presiding Officers of this Parliament, and certainly the Presiding Officer of this chamber. That is crucial.

I think that the Standing Committee on Procedure and Privileges has a useful role to play to facilitate that. For example, why could a meeting not be convened between the Corruption and Crime Commissioner and perhaps his chief legal adviser and the Standing Committee on Procedure and Privileges to start to progress this matter forward? Maybe those meetings have already taken place. I am not a member of that committee in this current Parliament, but it would be good for somebody to provide a more comprehensive update to the house on the progress of that memorandum of understanding than the one at paragraph 1.18 of the report, which simply notes that the memorandum of understanding is yet to be finalised. It is yet to be finalised, but what steps have been taken over the past few years to facilitate that process? There does not seem to be a need for any secrecy in that process. I think it would be useful for us, particularly in the course of this debate. Eventually, when the Parliament is ready to continue the debate, it would be useful to have that information available. So, if it is available to a member, it would be good if that could be provided for the benefit of all 35 members who are voting on this bill that is before the house.

In summary, I indicate my dismay that this bill has taken so long to come to this house. It has languished on the notice paper for such an incredibly long time that the government is still not ready to deal with it. I am dismayed by that. But I am pleased that it is before us now. I am pleased by the expressions of support that have been articulated by members who have contributed in the course of this debate. In particular, I thank Hon Alison Xamon for her studious approach to this bill in giving a massive amount of notice for her amendment. I only wish that the supplementary notice paper—maybe this is a possible improvement for the future—listed the date on which these amendments were brought forward. When I look at supplementary notice paper 41, issue 2, which was issued yesterday, it is not immediately apparent to me when exactly Hon Alison Xamon submitted her amendment. To the best of my recollection, it was sitting in my file last year well before we rose for the summer recess. I do not know for how many months it was there in my file. Maybe the relevant government member has lost their copy, I am not sure, but it is very disappointing that after the member was so courteous to give so much notice that the government is so ill-prepared and ill-equipped to deal with it after the long recess. It is the longest recess that we have in the year, yet it seems to have been the period that has created the least amount of work within government. Maybe the government has had other distractions.

Be that as it may, the bill is now finally before us. I can only hope that whenever the government next decides to bring on this matter, these four clauses can be efficiently dealt with. Let us remember that the bill proposes to insert one word. Although Hon Alison Xamon's proposed amendment is far more comprehensive than the entirety of the bill itself, she is not bringing a complex matter to our attention. She is merely asking that the Corruption and Crime Commission be required to inform the Parliamentary Inspector of the Corruption and Crime Commission, in the event that it is delving into an investigation into a member of Parliament, why that is. Why would it be appropriate to have that extra level of oversight? Let us not forget the past indiscretions of the CCC and also let us not forget that it is the Parliament that ultimately oversees the Corruption and Crime Commission. Two members from this place, at the very least, serve on the Joint Standing Committee on the Corruption and Crime Commission which oversees the CCC. There is an awkwardness, or a tension, by which somebody who oversees another person is now potentially being investigated by that same person. If we are going to have that type of regime, at the very least we need to have the parliamentary inspector overseeing that entire process. That would be a far more palatable outcome.

I congratulate Hon Alison Xamon for bringing that to the attention of the government, which is now familiar with it. As for the second limb of her amendment, I think some words are missing that could be added. Overall, the bill has my support.

Debate adjourned, on motion by **Hon Pierre Yang**.