

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

Committee

The President (Hon Kate Doust) in the chair.

Fifty-sixth Report — “Parliamentary Privilege and Intrusive Powers — Interim Report: Judicial Proceedings for Declaration Challenging the Validity of the Order made by Legislative Council on 15 August 2019” — Recommendation 1 — Adoption

Hon SIMON O'BRIEN — without notice: I move —

That recommendation 1 be adopted and agreed to.

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

That the Legislative Council pass the following resolution in substitution for Order No. 4 made on 15 August 2019 as follows:

That the Legislative Council:

1. notes that:
 - a. the law of parliamentary privilege is intended to protect the ability of the Houses of Parliament, their members and committees, to exercise their authority and perform their duties without undue external interference; and
 - b. an aspect of that law is the protection of the legislature against improper interference by the judiciary and the executive;
2. further notes and affirms that:
 - a. the privileges, immunities and powers of the Legislative Council are secured through s.36 of the *Constitution Act 1889*, the *Parliamentary Privileges Act 1891*, and *Parliamentary Papers Act 1891* and include the freedoms and immunities formulated in Article 9 of the *Bill of Rights 1688*, protecting speech and debates and proceedings in Parliament against being impeached or questioned in any court or place out of Parliament;
 - b. the protections recited in Article 9 are not confined to courts and tribunals, but also encompass the protection of material subject to parliamentary privilege against incursion by the executive and executive agencies including an Investigative Agency; and
 - c. a thing, material and Document or Data subject to parliamentary privilege is immune from compulsory seizure by an Investigative Agency under a notice to produce, warrant, or similar compulsory process;
3. declares for the avoidance of doubt:
 - a. that the right of the Legislative Council to determine claims of parliamentary privilege over material sought to be seized or accessed by an Investigative Agency adheres regardless of the form of the material, the means by which those agencies seek seizure or access, and the procedures followed;
 - b. that the right of the Legislative Council to determine claims of parliamentary privilege over material sought to be seized or accessed by an Investigative Agency applies to Documents or Data of its members, former members and their staff in the possession, custody, or power of the Director General, Department of the Premier and Cabinet or other Government department or agency; and
 - c. that a person served with a Notice by an Investigative Agency for the production of Documents or Data who, without the authority of the Legislative Council or its authorised delegate, purports to determine, either personally or by any agent of the executive, the question of whether a Document or Data is subject to parliamentary privilege:
 - (i) would usurp the right of the Legislative Council to determine that question; and

Extract from Hansard

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- (ii) in the absence of a lawful excuse, may commit a breach of the privileges of the Legislative Council;
4. expects that where there are reasonable grounds to believe that a Notice served by an Investigative Agency on a person may require production of Documents or Data which attract parliamentary privilege, the person upon whom the Notice is served will inform the Clerk of the Legislative Council promptly following receipt of the Notice and before producing any Documents or Data in compliance with the Notice;
5. requires an Investigative Agency to observe the privileges, immunities and powers of the Legislative Council, its committees and members (including as declared in paragraph 3 above) in determining whether and how to exercise its powers, rights or functions in matters which might engage questions of parliamentary privilege; and

For the purpose of this order:

Document or Data, includes a document or electronic or other data in the possession, custody or power of a government department that was created or received by a current or former member of the Legislative Council or their staff;

Investigative Agency, includes the Western Australian Police Force, the Australian Federal Police, the Corruption and Crime Commission and any like body with a power to issue a Notice to produce or obtain Documents or Data;

Notice includes a notice to produce, warrant, or similar compulsory process for the production or obtaining of Documents or Data.

Hon SIMON O'BRIEN: In every debate, members need to recognise what is at issue. At issue here is a very serious matter indeed. We have been told that it is about a factional Labor conflict. It is not. We are told that it is a stoush between the President and the Leader of the House. It is not. We are told that the house, or its Standing Committee on Procedure and Privileges, is trying to frustrate the fight against corruption. It is not. We are told that the Standing Committee on Procedure and Privileges is hindering an investigation into corruption. It is not. We are told that the Parliament has to change its position on privilege in the digital age. It most certainly does not. This is about an agency of government seeking to change our rules to suit itself. This resolution is about the Parliament asserting its authority in circumstances in which it has become necessary to do so.

Fundamentally, there is a difference of opinion between the Commissioner of the Corruption and Crime Commission and the Parliament about privilege. I can fairly characterise the commissioner's view, in summary, as this: that the commission is entitled to send its agents out to seize large caches of information that will contain information that is subject to parliamentary privilege and that those agents of the commission can then trawl through all of that information, ignoring matter that is irrelevant to their investigation, obviously, and focus on perhaps one, two or 100 documents that are relevant, obviously, but not publicise any document deemed to be captured by privilege. This chamber needs to reassert the view that matter subject to parliamentary privilege is not there to be seized or trawled up in those fishing expeditions—full stop—and that it is unacceptable to do that.

The chamber is aware through public announcements and public actions, and through the fifty-fifth report, and now the fifty-sixth report, of the Standing Committee on Procedure and Privileges, of some of the circumstances through which this issue has achieved prominence. One chapter in this saga that is still being played out commenced with the service of section 95 notices to produce copies of documents belonging to a former member of the Parliament and to a number of former electorate office staff, delivered to the director general of the Department of the Premier and Cabinet in these terms, as cited in the fifty-fifth report —

1. A complete electronic copy of all emails and email attachments sent to, and received by all of the email addresses listed above for the date period: 1 January 2014 to 30 September 2017;
2. A complete electronic copy of all calendar entries created by, or on behalf of, former Members of Parliament ... for the date period:
1 January 2014 to 30 September 2017;

And a number of other documents, as if that was not enough. As has already been reported to the house, we already know some more things, as a result of evidence gained by the Standing Committee on Procedure and Privileges, that help to inform us about how these matters were being pursued. I invite members to examine, again, the redacted section 95 notice contained in our fifty-fifth report. There they will see no reference to matters of privilege. They will, however, see a section 99 notation, in red, forbidding the director general from disclosing any information about the existence of the section 95 notice—in effect, forbidding him from approaching the Parliament to get advice about the matter of privilege that obviously has arisen. He was forbidden to do that because it might compromise the CCC's operations.

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Ultimately, we became aware from the commissioner himself of this particular investigation, which in due course was made very public by the CCC itself around 14 August, when it very publicly raided premises, including residential premises of a former member. It certainly was not the committee that made this matter public. We have reported in our fifty-fifth report on an example of what then happened in the course of the CCC trying to source that material. We see that, ultimately, the director general of the Department of the Premier and Cabinet was prevailed upon by the CCC to enter into a process that was not according to the wishes and the explicit instructions of the Legislative Council, via its President and our procedure and privileges committee. This is reported on in the fifty-sixth report, which members now have before them. I draw the following to the attention of members. The Deputy State Solicitor himself provided the information by way of a statement and by evidence in person. He said that the CCC had reduced its demand for documents to only about 68 000—some reduction, some winnowing that is. Then, working with and receiving advice from the CCC, the State Solicitor's Office embarked on a process to examine those documents to determine which documents were subject to parliamentary privilege—a determination that is the prerogative of this Parliament, not some other agency. Those documents were handed over by the director general of the DPC, in this case to the State Solicitor's Office. That is the subject of a further inquiry that the house has already ordered our committee to undertake, and we will report on that in due course. How on earth, in a few days, which is the time limit it was given, did the State Solicitor's Office go through the process that it was not qualified to do and should not have been engaged in, having access to material that it should not have had access to and that the director general of the DPC was bound to keep to himself? What did it do? It had to engage 30 legal officers, and it took them a couple of weeks to scan through all of these documents. I did not think the State Solicitor's Office would have had 30 lawyers or senior counsel and state solicitors sitting around. Apparently, the cohort undertaking the task included law student vacation clerks, articulated clerks, junior lawyers with less than five years' standing and senior lawyers. How extraordinary it is that they were given access to this information. Many hundreds of documents were found to have parliamentary privilege attached to them. I am going to seek the call again, if members will indulge me.

The PRESIDENT: Hon Simon O'Brien.

Hon SIMON O'BRIEN: Of those 68 000 electronic files, it was guesstimated that maybe 2 000 or so had privilege attached to them. Given there are multiple threads of emails and so on, the actual number might be fewer than that. Whether it is only one, the principle is clear and the principle has been flouted. They did not do it in the time that the Corruption and Crime Commission gave them, but apparently that is all right. In due course, the remainder of the documents were handed over to them.

This is a matter of great concern to the Standing Committee on Procedure and Privileges, as it has reported in its fifty-sixth report. It is not okay for this attitude to be taken towards matters of privilege. There will be other reports from other inquiries yet to be conducted. We will discuss all that in due course. But for now, it is important that the recommendation that is before members be made by the chamber. It is necessary in order for this Parliament to reassert its authority. It should do so because the circumstances exemplified by only one incident that I have just described make it necessary to do so. If we fail to uphold the rights and privileges of the Parliament when they are under challenge, and they are, we fail in a fundamental duty to those who elect us. I commend the recommendation to the house.

Hon SUE ELLERY: I rise to put the government's position in response to the recommendation before us. The Standing Committee on Procedure and Privileges has made four recommendations. If I may, I intend to do what I did last time because I think it is the easiest way to deal with these—that is, to make general comments about the whole package to indicate to the chamber that I propose to move an amendment to recommendation 1. With respect to committee recommendation 2, I accept it but I will be seeking to add to it. With respect to recommendations 3 and 4, I will be opposing them and I will set out for the chamber my reasons for doing so. That will take me a little while. I am going to be relying heavily on advice that I have been provided with. I would ask for members' indulgence to allow me to do that.

I thank Hon Simon O'Brien for outlining the committee's reasons for moving recommendation 1. I appreciate hearing the committee's point of view. I have a slightly different view of what brings us to this point. I think there are essentially two issues. One is the investigation that the CCC is conducting into allegations of corruption. That is a serious matter. It behoves all of us to treat that seriously because, unfortunately, the investigation is into former members of Parliament. We are held in low regard in the community in any event, which I think is unfair but it is a fact, so when there are allegations of corruption by members of Parliament, we need to be —

Point of Order

Hon NICK GOIRAN: This is the second time in this short speech from the minister that she has referred to allegations of corruption. My understanding is that there are allegations of serious misconduct. They are two significantly different things and I would ask her to correct the record.

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Hon SUE ELLERY: I do not intend to correct the record, but I do intend to rely on the material I have seen, written by the Corruption and Crime Commissioner, who referred to the word “corruption”. If it makes the chamber more comfortable, let us talk about serious misconduct.

Hon NICK GOIRAN: The minister has referred to a document from the commissioner. I would ask her to identify it.

Committee Resumed

Hon SUE ELLERY: In due course, I will, but if it makes members feel better, I will use the expression —

Hon Michael Mischin: No—be accurate. Don’t mislead the house.

Hon SUE ELLERY: I will use the expression “serious misconduct” if that makes members feel better.

Be assured, the community views it as a serious matter, and we should too. That is the first instance. The second issue that arises goes to the conflict when parliamentary privilege rubs up against the investigative powers of the Corruption and Crime Commission. That is a serious issue as well and that needs to be resolved.

As far back as 2016, if not before, in relation to a different set of circumstances, a report from the Standing Committee on Procedure and Privileges recommended that agreement be entered into about how to manage this. It was referring to the specific circumstances in that report but, frankly, could have been expanded into and probably contemplated that something like this might occur. That needs to be resolved. I do not share the view that the next step that needs to be taken by this chamber in resolving that is going to the courts. I think that other steps need to be taken. I do not have any evidence from the committee’s report that was tabled yesterday that demonstrates to me what steps have been taken. I cannot believe that the committee has not taken steps—I am sure it has—but that has not been provided to me in the committee’s report.

Those are the two issues. There is the issue of the conduct of those former members of Parliament, and that is a serious issue, and then there is the issue of how we resolve this conflict between the Parliament and the CCC. I say with respect to the second issue, we have taken the final step before it is demonstrated to the chamber that other steps have been taken. The reason it is important for us to think about whether we have taken the most extreme step before we have taken other steps is that we were advised in good faith that what we were doing, when the chamber accepted all of the recommendations that came out of the committee’s fifty-fifth report, was the correct thing to do.

Recommendation 2, which seeks to rescind recommendation 4 in the committee’s fifty-fifth report, would suggest that the committee has formed the view that is not the right thing to do. I would like to think that the reason the committee formed that view was because of the arguments I put last time about why we should not accept that recommendation. I am going to talk about the process of that in more detail in a minute. If it were on the basis of my arguments that indeed the committee and the chamber did not have the power to make that order, it is of concern to me that we did not stop the process at that point to allow the committee to consider the points that I had made before we voted on it. We voted on something that the committee is now telling us we need to rescind. I am concerned that we are making serious decisions based on two public servants who did not create the conflict between the Parliament and the CCC. We are proceeding down a path with respect to those two, acting on the advice of the committee. The committee has put before us a recommendation today that it would appear was misplaced or ill informed; I do not know. I look forward to hearing from Hon Simon O’Brien when we get to that particular recommendation. I worry, based on why we are here today—to rescind a motion—that we are being asked to proceed without the committee having the opportunity to hear what I have to say, consider it and determine whether it wants to proceed down the same path. Perhaps if we had done that last time, we would not be here today rescinding that particular recommendation.

I refer to the first part of recommendation 4 in the committee’s fifty-fifth report. For those members who cannot remember the numbers of the reports, the fifty-fifth report was the one tabled when we last sat. The first part of recommendation 4 was a recommendation that this chamber should order —

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

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 ...

In other words, this was a recommendation to the chamber that it should order Mr Foster not to produce material to the Corruption and Crime Commission. It was an order for non-production. The chamber voted on that recommendation on 15 August 2019.

If members go back and look at the transcript of the *Hansard* from that day, they will see that the very first thing I said about recommendation 4 was that it was beyond power. Not only did I say it was beyond the power of the

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Standing Committee on Procedure and Privileges, I also said it was beyond the power of the chamber. Members will also recall that I specifically pointed out that the legal advice that had been obtained by the committee from Mr Bret Walker, SC, had not been appended to the fifty-fifth report, as I understood was the usual practice, and as certainly was the case for the forty-fourth report of the committee. I noted that there were some very important threshold questions that needed answering and that there was nothing in the summary of the legal advice provided that suggested those issues were considered. They may have been, but there was nothing in the report. I specifically questioned why the legal advice had not been disclosed. Regrettably, the chamber voted without members having had the opportunity to consider what I had to say against the legal advice. The failure to append that advice or to otherwise disclose the basis for proceeding with recommendation 4 and an order for non-production appears to have had very serious consequences, which I will return to.

I expressly mentioned the impossible position that recommendation 4 and an order for non-production would create for Mr Foster. I said it should not be a recommendation that was accepted, because it amounted to making an order that might direct Mr Foster to break the law. I pointed out that Mr Foster should not be ordered to refrain from producing any document to the Corruption and Crime Commission, or other investigative agency, irrespective of whether it is subject to parliamentary privilege and irrespective of the legislation under which Mr Foster is ordered to produce the document.

The PRESIDENT: Leader of the House.

Hon SUE ELLERY: I said that to make such an order might place Mr Foster in the position of having to decide whether to break the law or contravene this house's order. That is an impossible position to put a public servant in—an impossible position. Either way, whichever way he went, he was going to be subject to public criticism because of a dispute, which this house has a responsibility to ensure it has taken every step available to it to resolve, with the CCC. The argument is with the CCC. I get that. However, two public servants are being investigated because of actions they took, all because they found themselves caught in the crossfire of a dispute between the Parliament and the CCC.

At the time, when it came to vote on the resolution to make the order for non-production contained in recommendation 4, Hon Nick Goiran expressly accepted that the recommendation could be described as “somewhat unusual”. However, he said that “these individuals cannot be trusted”. I assume that what he was referring to was the Corruption and Crime Commission—for the purposes of *Hansard*, he is nodding—because he went on to say 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”. That lack of trust in the Corruption and Crime Commission was then relied upon, effectively, as a basis for the chamber to act beyond power. The result was to use Mr Foster as a pawn in a dispute between this chamber and the Corruption and Crime Commission. Most unfortunately, he has been dragged into the dispute and publicly criticised. That was done without regard to his statutory duty to comply with an order of the commission, a body that the Parliament created. It also affected the reputation of Mr Foster, an individual who is a member of the Western Australian community, and a highly regarded public servant. That is in circumstances in which his interest was nothing more than to cooperate with an investigative agency that the Parliament itself has entrusted specifically with the function of investigating and exposing serious misconduct and corruption. I do not say that he was deliberately used as a pawn, but I ask the committee to reflect on whether, unwittingly, it has used Mr Foster as a pawn, and whether, in fact, the greater public interest is resolving the dispute with the CCC. In circumstances in which Mr Foster had to choose between which law he followed and which law, if you like, he did not, that is an impossible position for the house to put him in and then say, “We stand ready to condemn you for doing that.”

Hon Michael Mischin: Will you take an interjection?

Hon SUE ELLERY: No, I will not, honourable member.

Hon Michael Mischin: It's a question. It will help.

Hon SUE ELLERY: The member will have his opportunity to have a say.

The PRESIDENT: Order! The minister is trying to get some flow in her thoughts, so it is probably better to wait until she has completed her speech.

Hon SUE ELLERY: Thank you very much, Madam President; I appreciate that.

As well, Hon Martin Aldridge in the debate said that he wanted to do everything possible within his power to support the investigation by the Corruption and Crime Commission, as long as it is conducted lawfully. He said that 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. But the order did not achieve that. It did not ensure any kind of proper process. All it did was make Mr Foster choose which he was going to follow. Instead—

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I am going to come back to this—it put Mr Foster in an untenable position in which he was forced to pick the law that he would break, when he had done everything possible to ensure that he broke neither.

In efforts to ensure that the Corruption and Crime Commission be supported only in so far as acting lawfully, the chamber itself sought to, and did, make an order that it would appear, by virtue of the recommendation to rescind, it now recognises it did not have legal basis to do. That was done without considering the points that I had made in my contribution to the debate before proceeding to the actual vote. Notwithstanding that I had expressly made the point to the chamber that the order contained in recommendation 4 was outside the power and notwithstanding that we could not have presented to us the legal advice to show the chamber that I was wrong and notwithstanding that the fifty-fifth report did not expressly address the question of the power, this chamber proceeded to make the order for non-production contained in recommendation 4.

There are some who might think that this would give me some sense of, “I’ve gotcha! I told you so!” It gives me no pleasure that we find ourselves in this position—none whatsoever. I wish that the point I had made that recommendation 4 was beyond power had been calmly and methodically considered by the committee before we went to the vote. That is what I wish had happened, but it did not happen. I do not think it reflects well on us as a chamber that we did not stop to consider whether there was anything of merit—anything of merit—in the contribution that I had to make in the debate last time before we proceeded to the vote. I think that that is unfortunate. The house did this in circumstances in which the order would unquestionably place Mr Foster in a completely untenable position of having to make the choice between obeying the notices issued by the Corruption and Crime Commission or the order of the house. He was given no opportunity to be heard or to comment on the fifty-fifth report or recommendation 4 despite the fact that the order would impact uniquely and directly on him. His conduct and the conduct of the deputy director general have been scrutinised and, indeed, criticised in this chamber. That occurred without any regard for the role that we played as a chamber and putting him in the position by which he had to choose. It was not of his making, but the consequences for him were, and still are, grave. His professional reputation has suffered, as has that of the deputy director general, and frankly there are personal consequences, and I will talk about those subsequently. I reiterate that both of them are public servants and at all times they have acted to best serve the public of Western Australia. As a result of recommendation 4, the committee then required Mr Foster to appear before it and testify on the basis that recommendation 4 was a valid order. In doing so, Mr Foster was required to engage independent counsel. In addition to the significant impact on Mr Foster, recommendation 4 raised issues of broad reaching significance for all public servants who might from time to time find themselves the subject of a legally binding obligation to produce documents or information to the Corruption and Crime Commission or, indeed, any other investigative agency. Mr Foster recognised that there were serious questions as to the validity of the order and that at the heart of the matter was a possibility that he or anyone else who found themselves in that position might either commit a contempt of the house or a contempt of the commission. Consequently, Mr Foster sought the assistance of the government to consider the validity of recommendation 4. The government recognised Mr Foster’s position and authorised the State Solicitor’s Office to assist him. The State Solicitor then wrote to the President of the chamber on Monday, 26 August 2019 expressing serious doubt about the lawfulness of the order contained in recommendation 4. Mr Foster then commenced proceedings in the Supreme Court of Western Australia challenging the order contained in recommendation 4.

The PRESIDENT: Leader of the House.

Hon SUE ELLERY: I should observe that the fifty-sixth report suggests that it was the state that commenced those proceedings. It was not; it was the person who was adversely affected by the order of this chamber. The legal validity of the order for non-production was the one and only thing that these proceedings challenged. The proceedings that were commenced against the President were issued out of the Supreme Court on Tuesday, 27 August 2019, the same day that Mr Foster was required to appear before the Standing Committee on Procedure and Privileges. The proceedings sought two declarations. The first declaration was a declaration that the Parliamentary Privileges Act 1891 does not confer any power or authority upon this house to order a person not to produce a document that is not in the possession or custody of Parliament or a parliamentarian in answer to a compulsory process lawfully issued pursuant to a statutory authority by an investigative agency investigating serious or criminal misconduct. The second declaration was a declaration that the order contained in the first part of recommendation 4 made by the chamber on 15 August 2019, and notified to Mr Foster by letter dated 16 August 2019, was outside the power or authority of the Legislative Council and was not legally valid. The proceedings were not served on the President until Friday, 30 August 2019, and that is significant. It is significant because before the proceedings were served, and in a remarkable incident, the Clerk of Legislative Council wrote to the State Solicitor on Wednesday, 28 August 2019 and said, in part —

... I am instructed to advise that the Standing Committee on Procedure and Privileges (PPC) will make recommendations to the Legislative Council next week to pass a resolution in substitution to the Order made by the Legislative Council on 15 August 2019, the subject of these proceedings. The PPC will also

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recommend that the Legislative Council rescind the Order the subject of these proceedings. Consequently, I request that your Office take no further action in relation to this matter to ensure that the parties do not incur costs unnecessarily.

The upshot of the correspondence is, I think, a backdown in respect of recommendation 4. It occurred within days of the committee recommending to this chamber that we make the order in recommendation 4 and after the committee caused Mr Foster to make a choice between being in contempt of the house on the one hand and being in contempt of the commission on the other.

In its letter of 28 August 2019 to the State Solicitor the committee maintained that it did not concede that the Legislative Council cannot make an order to prohibit a person from the delivery of documents to a third party. It went so far as to give an example of a situation from 1641, which it said justified the order it recommended to the house. The 1641 example is worth considering. It is worth noting, as the State Solicitor did in his response, that a careful reading of the precedent from 1641 shows that it was concerned with protecting the revenue of particular publishers relating to the proceedings in the house. It had absolutely nothing to do with an order to prevent a third person from complying with a compulsory process issued by an investigative body and did not support the position taken by the committee. We find ourselves in a position in which Mr Zelestis, QC, has agreed with the State Solicitor and confirmed that the chamber does not have the power to order persons not being members of the house to produce documents. In any event, the State Solicitor wrote to the committee on behalf of Mr Foster agreeing not to take further steps in relation to the proceedings until such time as the committee had the opportunity to make appropriate recommendations to the house about the rescission of the order for non-production made pursuant to recommendation 4. The Clerk was specifically requested to provide an indication of whether any other substitute orders relating to Mr Foster were proposed to be made, and it was expressly brought to the attention of the Clerk that Mr Foster may wish to be heard in relation to those orders. As it transpires, no indication of any substitute orders was provided, nor was Mr Foster given any opportunity to be heard on the matter.

That brings us to the fifty-sixth report. With no notice to Mr Foster, nor to the State Solicitor's Office as his legal representative, the fifty-sixth report was tabled. It contains four new recommendations. Before I go to the specifics of the recommendations, there are two matters I want to raise. The first of those goes to the content of the report itself. It presents a version of events that does little to reflect the position that Mr Foster found himself in, the efforts that he went to in order to avoid such an unsatisfactory outcome or the extent to which the outcome was one over which neither Mr Foster nor the Department of the Premier and Cabinet had any control. Instead, the committee criticised the actions of Mr Foster and those officers of the executive who were involved in the process while ignoring the more pressing matter of precisely what Mr Foster was meant to do when he found himself in a position in which he was potentially either in contempt of Parliament or contempt of the Corruption and Crime Commission. He could not follow the committee's process without risking a breach of the notices issued by the commission, and the commission did not accept the committee's process as constituting compliance with the notices. Therein lies the rub: the argument is between the PPC and the commission. It was not for Mr Foster to be held responsible for the fact that no agreement could be reached. It was not for Mr Foster to resolve a protocol between the committee and the commission. That was a matter for the chamber and the commission to address directly between themselves. Had the committee and the commission managed to resolve such a protocol, there would have been no need for Mr Foster to make the difficult decision to adopt the process that he did, nor would there have been any need for any other officer of the executive to be involved in carrying out that process. Indeed, I am advised that the commission has written to the President of the house on seven recent occasions about arrangements for dealing with questions of privilege in relation to documents produced to it, and I am advised that it has not received a substantive written response from the chamber, and I want to table the following correspondence. I have a bundle of all the documents I seek to table, so rather than do them one at a time, I will identify them and then hand them up to be tabled, and that will give an opportunity for them to be copied as a bundle. It is correspondence from the CCC to the President of the Legislative Council dated 25 July, correspondence from the CCC to the President of the Legislative Council dated 16 August, correspondence from the CCC to the President of the Legislative Council dated 23 August, correspondence from the CCC to the President of the Legislative Council dated 28 August, correspondence from the CCC to the President of the Legislative Council dated 3 September, correspondence from the CCC to the President of the Legislative Council dated 4 September and further correspondence from the CCC to the President of the Legislative Council dated 4 September. I table those documents.

[See paper 2999.]

Sitting suspended from 1.00 to 2.00 pm

Hon SUE ELLERY: Immediately before we rose for lunch, I tabled a series of letters from the Corruption and Crime Commissioner to the President of the Legislative Council. Included in those documents was a letter from the commissioner to the President dated 30 August 2019. I am advised by people listening to the debate that although I tabled that document—I have checked that the documents that the chamber has include that letter—

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I did not refer, name or properly identify the one that was dated 30 August. For the purposes of clarification, I identify that the collection of eight letters that I tabled include one dated 30 August 2019.

I will refer to some relevant passages in some of those letters. In the letter dated 25 July 2019, the commissioner writes on the first page —

The Commission is investigating grave allegations of serious misconduct against former members of Parliament. The documents covered by the Notices are essential to the advancement of this important investigation.

Without the documents the Commission would be impeded in fulfilling its statutory investigative function.

On the next page, the commissioner writes —

The Commission acknowledges that once the former members become aware of the investigation then they will have a right to make a claim of parliamentary privilege. When the investigation moves from a covert to an overt phase the Commission will remain alert to the former members' right to make such a claim. Should a claim for parliamentary privilege be made at any stage during the overt investigative phase by a former member, the Commission will refer the claim back to the Committee for determination by the Council.

The commissioner ended the letter —

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.

I look forward to speaking with you soon and working together with the Committee on these important aspects of each of our functions.

In a letter dated 16 August 2019, the commissioner stated —

I am keen to meet with the Committee and am happy to do so at the arranged time today.

I think it might be more productive if we first met in an informal round table way, rather than a private hearing but that is a matter for you.

I would like, so to speak, to hit the 'reset' button and work together to find a solution because this will be a continuing issue in the current investigation and will probably arise from time to time in future.

The issue as I see it, is not primarily a legal issue or a debate about whether parliamentary immunity applies but the practical impact in the modern era. The rules around parliamentary immunity have developed over more than three centuries but they are proving unworkable in an era which sees data measured in terabytes, not folios.

I look forward to reaching a collaborative solution with the committee.

In a letter dated 20 August 2019, the commissioner extended an invitation to members of the Standing Committee on Procedure and Privileges to attend the commission offices to enable the committee to understand the security measures in place and see how the commission handles large datasets. As far as I am aware, the invitation was not accepted.

In a comprehensive letter dated 23 August 2019, the commissioner outlined the practical issues of examining large amounts of data. He emphasised that the commission was logistically able to deal with these matters but there may be difficulties for Parliament to do so. The commissioner also emphasised the statutory obligations of confidentiality that surrounds the examination of documents by the commission officers, which will not apply to those who might examine the documents on behalf of Parliament directly. At the end of the letter on pages 3 to 4, the commissioner wrote —

The secure Commission physical environment together with our digital and personal expertise in triangulating large data sets to isolate relevant investigative material, make the Commission the ideal environment to deal with sensitive and private materials.

The practical solution to the current problem is that the Commission uses its expertise to isolate the communication and documents of relevance to the serious misconduct investigation, Operation Betelgeuse. Before these are used in the examination room, or included in a draft report, the Committee can assess whether any attract Parliamentary immunity. This would ensure that any privileged documents are removed before there is any potential exposure to a non-Commission officer either through examination or report.

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If it would assist the Committee's confidence in our process the Commission would be happy to accommodate a Committee officer onsite during the investigative process to oversight the Commission's access to documents or communications.

I am confident that we can come to a practical working solution that addresses the reality of the size of the data set that is involved.

As to the resolution of the legal position on what attracts parliamentary immunity and in what circumstances, it is my suggestion that lawyers representing the Government, Parliament and the Commission meet to discuss and determine the legal pathway forward. The Joint Standing Committee into the Corruption and Crime Commission may also have a role.

We look forward to working together with the Committee and extend an invitation to the entire Committee to visit Commission premises to view the secure forensic capabilities for themselves.

I shall always make myself available to give evidence to the Committee on this or any other matter of relevance.

Hon Peter Collier: Have you tabled all these?

Hon SUE ELLERY: Yes.

Hon Peter Collier: Why are you reading them in?

Hon SUE ELLERY: Because I think it would be of assistance to the chamber, honourable member. I am not reading the whole letters; I am referring to specific parts.

Hon Peter Collier: You don't need to. You've tabled them.

Hon SUE ELLERY: Honourable member, I think it is important that I draw to the chamber's attention particular parts.

Hon Peter Collier: But you've tabled them.

Hon SUE ELLERY: Honourable member, this is my —

The PRESIDENT: Member, the Leader of the House has the right to work through this as she so chooses. I am sure that Hon Peter Collier will have an opportunity to respond in due course.

Hon SUE ELLERY: Thank you, Madam President.

In a letter from the commissioner dated 28 August, he referred to the fact that there had been no agreement between the Parliament or the Council and the commission about how to handle claims of parliamentary privilege in relation to search warrants executed by the commission in respect of Mr Edman, and he writes —

As I have previously stated, it is unfortunate there is no MOU in place between the Parliament of this State and the Commission which would have assisted in this matter.

The Commission does not apply the MOU between the Commonwealth Parliament and the AFP to the execution of its powers. In the absence of an MOU in this State, the Commission has found aspects of the Commonwealth MOU, in addition to MOUs established in other jurisdictions, to be helpful in respect of a process which might be agreed and applied.

In a letter from the commissioner to the President dated 3 September 2019, the commissioner stated —

It has never been the Commission's intention to bypass the Council as the ultimate decision maker in relation to Parliamentary Privilege and I regret that any Commission action is perceived that way. At all times the Commission has only sought to carry out its statutory functions which will from time to time include members of Parliament. They are defined as public officers.

In order to allay some of the Committee's concerns I provide by way of sealed evidence bag, a copy of all documents provided to the Commission under the first Notice to Produce Records ...

I note this has already been provided by Mr Foster. I am heartened by the Committee's repeated assurances that it does not wish to impede the Commission's investigation. I presume work is under way for the Committee to satisfy itself about which documents the Council considers are within Parliamentary Privilege.

I also provide an image of the DPC computer seized under warrant. The encryption key is provided in the Notice to Produce Information issued to Mr Foster, a copy of which is already in the Committee's possession. The Commission did not know Mr Edman had retained the computer, beyond his term of office when the search warrant was executed.

Finally I undertake to provide copies of all material produced in response to the third NPR served on Mr Foster and any further NPR served on him.

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The Committee is now in a position to make its own evaluation and to instruct the Commission what constitutes privileged material.

The Commission has no interest in using any privileged material.

In a further letter to the President, dated 4 September 2019, the commissioner referred to the letter that I have just read. The letter states —

Acknowledging:

- members of the Procedure and Privileges Committee have emphasized that they do not wish to impede the Committee's investigation;
- the Committee obtained from Mr Foster the contents of the first Notice to Produce Records (NPR) on 23 August 2019; and
- the Committee obtained an image of the DPS computer retained by a person on 3 September 2019.

I respectfully enquire when the Committee anticipates being able to advise the Commission as to what documents and other material are not subject to Parliamentary privilege.

At each stage, the commissioner has been diligent and has tried to pursue a practical solution to the difficult problem of how to protect parliamentary privilege in relation to documents contained in a large dataset. For that purpose, he has endeavoured to try to engage with the house and representatives on the committee to devise a satisfactory and practical way forward. Madam President will recall that in my last comments before the house, I said that it was of regret—I do think it is a matter of regret—that the commissioner did not advise the committee in perhaps the most timely fashion that he did not agree to the process that the committee believed it had agreement on, prior to the report being tabled in the house.

The PRESIDENT: Leader of the House.

Hon SUE ELLERY: Secondly, the commissioner has always stated that he does not wish to use information that is the subject of parliamentary privilege. His difficulty is that he is under a statutory duty to carry out investigations in a timely and often covert manner. Without a satisfactory protocol being agreed with the house and the committee, he has taken the steps available to him to ensure that the material subject to parliamentary privilege is not used for the purposes of his investigation, but that he is still able to proceed with his investigation expeditiously and without alerting the people being investigated, where that might impede the process of the investigation.

We find ourselves having been advised that we should accept a recommendation without proper legal advice and without responding to the commission's attempts to resolve that conflict about the butting up, if I can call it that, between parliamentary privilege and the investigative responsibility of the CCC.

I have tabled the letter where he stated —

... I am extremely disappointed that the proposals put forward by the Commission for a workable and expeditious solution have not been responded to and that the Committee has quoted portions of an uncorrected transcript.

I do not recall, honourable members, seeing any report, actually, tabled in the house that refers to uncorrected *Hansard*, but I might stand corrected on that. I certainly do not recall seeing one from the Standing Committee on Procedure and Privileges that refers so extensively to uncorrected *Hansard*.

Hon Nick Goiran: Are there any errors in the transcript?

Hon SUE ELLERY: I do not know.

Hon Nick Goiran: Then it is irrelevant.

Hon SUE ELLERY: That is my point. I do not know; it has not been tested.

Hon Nick Goiran: You can only be disappointed if there are errors.

Hon SUE ELLERY: The point I am trying to make is that he was not afforded the courtesy of the committee waiting until he had advised the committee that the transcript was accurate. The chamber ought to be concerned about that.

The other matter I want to address is the importance that we do not do this again. I have spoken about the consequences of not tabling the legal advice, and of the need for the chamber not to do that same thing again, which led to the making of the order for non-production proposed in recommendation 4.

Hon Martin Aldridge: Will you table the Solicitor-General's advice?

Hon SUE ELLERY: Honourable member, I have a lot to say. I appreciate that may be annoying for some people, but I want to be able to place my views on the record.

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Hon Peter Collier: Your views or the government's views?

Hon SUE ELLERY: This is my response on behalf of the government to what is a very serious issue. It is my response. Honourable members, we are dealing with a very serious issue.

Several members interjected.

The PRESIDENT: Order! Members, the Leader of the House is correct. This is a very significant and serious issue. I appreciate that a number of people have views that they want to put on the record at some point. We have agreed to give the Leader of the House an opportunity to put her statement. I appreciate it is lengthy. I would ask you to listen to her quietly and without interruption so that she can move on with it. Looking at the time that we have this afternoon, I am hoping that we will be able to finish this today, one way or another. Leader of the House.

Hon SUE ELLERY: Thank you, Madam President. I hope we can, too. I find myself in the extraordinary position in which the house has been asked to rescind a motion that, when we last sat, I said the house should not agree to. I want to set out again the things that I want the house to consider, because I do not want the house to make that mistake again. That is what I am trying to do.

Any action or order proposed must be fully and properly considered before it is made. That is why one of the amendments I am going to move today is to ask that consideration of recommendation 1 be deferred until some further action is taken, and I will set that out in a moment. The committee needs to be fully transparent about the advice that has been received, because we are being asked to rescind something that, in my previous commentary, I said we should not do. If we had had before us the advice on which that recommendation was made, maybe I would not have made the submission that I did; however, I had to make it in the absence of having any other authority to rely upon that stated the house had the power to make a recommendation. It now appears there is an acknowledgement that it did not have the power to make a recommendation.

The potential impact of any action on individuals, the community, and everybody for whom we serve must be measured and taken into account. The chamber is entitled to know whether any advice exists that clearly and unequivocally supports the substitute order which is now proposed by recommendation 1, because in the circumstances in which the fifty-fifth report clearly recommended the order contained in recommendation 4, but immediately that was challenged in any substantial way, it appears it has been accepted that that order would need to be rescinded. Before the chamber is asked to act upon a substitute order, the legality of that order should be attested to in writing and provided to the house, not by way of a partial summary in a report. The advice should be provided to us so that all members can be satisfied that this time we are being asked to vote on something about which we have received detailed advice. Until such time as the house has been provided with that advice, the matter should be deferred. That is only fair, given the history of what happened with recommendation 4. We do not want to place any person in the invidious position in which Mr Foster found himself. The house should not be making an order against a public servant who is then potentially liable to be in contempt of both the house and the Corruption and Crime Commission.

I make these comments in circumstances in which I made remarks on the debate around the fifty-fifth report to the effect there was no parliamentary or judicial precedent establishing that as at 1 January 1989, the House of Commons of the United Kingdom Parliament possessed any power or authority to order a person not to produce a document that was not in the possession or custody of Parliament or a parliamentarian in answer to a compulsory process lawfully issued pursuant to a statutory authority by an investigative agency. That proposition was also pleaded in the statement of claim in the proceedings taken by Mr Foster, which I believe caused the change leading to the fifty-sixth report.

I previously referred the chamber to the decision of the United Kingdom's Supreme Court in *The Queen v Chaytor* 2011, volume 1 of the appeal cases, at page 684, in support of that proposition. I also said previously that as a matter of principle there is no reason why investigation of criminal or serious misconduct by parliamentarians should be subject to parliamentary privilege. There is no basis by which parliamentarians should be treated differently from other citizens for the purpose of investigating criminal or serious misconduct. I am sure no-one in this house would disagree with that. It can hardly be suggested that there is any form of criminal or serious misconduct that would ever be so connected with the proceedings of Parliament or parliamentary work so as to attract the legitimate protection of parliamentary privilege. That point was also made in the letter sent to the President on behalf of Mr Foster. The fifty-sixth report does not expressly address any of these specific matters. There is no opinion that has been produced to the house under the name of the legal advisers advising the committee that specifically addresses the matter. Fundamentally, the committee has not pointed to any precedent or authority from the Commons that justifies the specific orders that it now proposes. Indeed, the suggestion that the chamber should pass an order for the President to commence proceedings against persons or entities unknown, the effect of which would be to prevent an investigative agency from investigating serious misconduct and corruption, is unprecedented. In these circumstances, we should not act without the benefit and the confidence of specific legal advice, particularly where

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it would appear the chamber has been asked to act beyond power previously. It is particularly so where there is no explanation as to why the chamber has not endeavoured to reach a practical solution by negotiating a protocol. The committee may well have tried to do that, and there may well, indeed, be an entirely appropriate, legitimate and perfectly reasonable response to the letters that I have referred to from Mr McKechnie. But the house does not know that. A practical solution should be attempted to be negotiated in the first instance. What we do not have before us now is the evidence of that. Maybe that has happened, and negotiations have fallen down, but the advice to me from Mr McKechnie is that if they have fallen apart, he does not know it.

The PRESIDENT: Leader of the House.

Hon SUE ELLERY: If they have been attempted and there is still room to proceed, that needs to happen before we say to the President on behalf of the house that she is authorised to take this to the courts.

I turn specifically to the four recommendations. In respect to recommendation 1, I do not know whether this recommendation is a correct characterisation of the legal position. No legal advice has been tabled. I say that the chamber ought not proceed on the basis that the committee is correct in its characterisation that recommendation 1 properly encapsulates the position on parliamentary privilege, because just three weeks ago we were told that the chamber had the power to make an order along the lines of order 4 in the fifty-fifth report, but it appears that that was incorrect. This recommendations may or may not properly characterise the legal position. I say that legal advice, in these circumstances, should be tabled, and after it has been tabled and my submissions have been considered, then we should be in a position to determine whether or not it is appropriate to make orders in respect to recommendation 1. In any event, the declarations in this order are most likely—this is the advice provided to me—of doubtful legal effect. If they are legally incorrect, they cannot override the effect of the Parliamentary Privileges Act. Declarations as to the extent of privilege in this order is the chamber declaring its own rights when the extent of privileges has been defined by a statute passed by the WA Parliament. Where the house has refused, or not provided to members, evidence of a pursuit of a practical approach to dealing directly with the commission to develop a protocol, we should not proceed further.

I take particular issue with two paragraphs of recommendation 1—paragraph (2)(c) for example. We are being asked to note and affirm that documents or material that is the subject of parliamentary privilege is immune from compulsory seizure by an investigative agency under compulsory process. It seems it is being suggested that if there is documentation or material in existence to which parliamentary privilege applies and that documentation or material demonstrates a serious misconduct or corruption on the part of the parliamentarian, it should be immune from compulsion, irrespective of what it might say or not say about serious misconduct or corruption. We need to think about what we are saying to the people of Western Australia about that case. To the extent that there is legal authority for the proposition that such documentation or material is immune, then we need to have that in front of us before we make this decision. That goes to the issue that I have already addressed. We are being asked to pass this declaration when nobody has specifically identified any parliamentary or judicial precedent establishing that the Commons House of Parliament of the United Kingdom as at 1 January 1989 possessed any power or authority to order a person not to produce a document that was not in their possession in answer to a compulsory process, lawfully issued pursuant to a statutory authority by an investigative agency.

If we look at paragraph 4, by this paragraph it is being suggested that there is an expectation on the part of the chamber that where there are reasonable grounds to believe that a notice served by an investigative agency on a person may require production of documents or data which attract parliamentary privilege, then the person receiving the notice will inform the Clerk of the Legislative Council. What is the basis of that expectation? What if the person receiving the notice does not fulfil the expectation? What will the chamber do in those circumstances? Are we to infer that the committee or the chamber or some future committee or future chamber would suggest that the person should be in contempt of fulfilling the expectation? Paragraph 4 seems to contemplate that the person served with the notice is free to comply with the notice so long as they notify the Clerk of their expectation about the documents containing privileged material and so long as they do not try to extract privileged material themselves. It refers to notifying the Clerk before producing documents, but paragraph (3)(c) says it would usurp the role of the Council for a person other than the Legislative Council to attempt to determine privilege. In other words, paragraph 4 seems to contemplate that a person receiving a notice from an investigative agency may comply with the notice by handing over all the documents, but must not assess them for parliamentary privilege. If that is what the intention is, I think it should be expressly stated. The person receiving the notice is entitled to know what they can and cannot do.

Hon Simon O'Brien interjected.

Hon SUE ELLERY: Honourable, member, I do appreciate that there will be people who do not agree with what I am saying, but let me finish my contribution and then you will have your opportunity as well.

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What happens in a case like the present one where the commission purports to exclude from production any documents which are the subject of parliamentary privilege? Paragraph (5) is another example. By this paragraph it is being suggested that an investigative agency is required to observe the privileges, immunities and powers of the Legislative Council and its committee members in determining how to exercise its powers, rights or functions in a manner that might engage parliamentary privilege. It is unclear how the chamber can require an investigative agency to act when the functions and powers of any investigative agency are set out and defined within the act of Parliament that constitutes them. Is it being suggested that the requirements captured by paragraph (5) are in addition to that set in in any governing legislation? In addition, I see that the definition of “investigative agency” extends to the Australian Federal Police, which, of course, has been constituted by commonwealth legislation in the form of the Australian Federal Police Act 1979. Is it the case that legal advice has been obtained that suggests we, in this Parliament—in this chamber—have the power to require the federal police to act in a particular manner? If that is the case, I ask to see the advice that is based on. For all these reasons, recommendation 1 should not be supported by the chamber—at least not at this time—until the house gets the advice that I think it needs to properly consider this, so that we do not find ourselves rescinding another motion. It needs to be tabled and we need to have the opportunity to consider it.

Amendment to Motion

Hon SUE ELLERY: The motion before the house is that recommendation 1 be adopted and agreed to. I move —

To add after “That” —

consideration of

To delete “be adopted and agreed to” and substitute —

be deferred until such time as a member of the Standing Committee on Procedure and Privileges has tabled legal advice that confirms that the recommendation properly encapsulates the position on parliamentary privilege

If I may, I will proceed with my comments on the amendment while it is being photocopied and made available to the house. I turn to recommendation 2.

Several members interjected.

The PRESIDENT: Members! Members, I agreed earlier that the member would be able to make broad comments across all of the recommendations. The Leader of the House flagged, at the time, that she would make comments about her proposed amendments during this debate. Given that we are waiting on a copy of that amendment to come back to her, I do not think it is unreasonable that she wants to flag her next amendment.

Hon SUE ELLERY: Thank you, Madam President; I appreciate that.

Point of Order

Hon NICK GOIRAN: I respect that, but there is a new question now before the Chair. It was the case that the Leader of the House indicated that she would provide a broad response to recommendation 1, but that was before she moved an amendment. Now that the question before the Chair is this amendment, the only contribution that can be made by the member is in respect of the matter that is before the Chair.

The PRESIDENT: He is right.

Hon SUE ELLERY: I do not mind.

The PRESIDENT: Let us just deal with this amendment that the member has flagged.

Committee Resumed

Hon NICK GOIRAN: I rise to indicate to the Leader of the House—I am just speaking my own part—that I cannot support this amendment. It is not unreasonable for the Leader of the House, as one of the 36 members of this house, to want to sight the legal advice that, clearly, five other members of this chamber have seen. The advice of Mr Zelestis has been seen by those members. If the Leader of the House wants to satisfy herself and see that advice, that is not unreasonable; in fact, I would not mind seeing it myself. However, it is quite another thing to ask us to defer this recommendation until such time as that advice is tabled and everybody else has seen it. I think that another mechanism is available to the Leader of the House. She could ask the procedure and privileges committee to sight that advice in closed session. Despite the fact that she is Leader of the House and a member of cabinet, she would be prohibited from being able to talk about that advice to anyone else, including the Solicitor-General or anyone else who has been giving the government advice so far. But if the Leader of the House wants to be satisfied in her own mind and then be required to keep that information private, I am not going to stand in her way. However, that is not the matter that is before the house. I cannot support this amendment.

Extract from Hansard
[COUNCIL — Thursday, 5 September 2019]
p6514b-6540a

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

Hon SUE ELLERY: I thank the honourable member for his advice. I agree that that could be one way I could proceed if I were speaking today about only myself, as an individual member. As the Leader of the Government in the house, I am actually speaking on behalf of the government. Therefore, it would not be satisfactory to me that I would be able to see the advice and not seek my own advice on the advice, and I think people could understand why that is. Although I appreciate the member pointing that option out to me, that option is not a viable one. My argument is that to avoid us having to rescind a motion in the future, we ought to be able to satisfy ourselves that the committee is acting on advice that we can all judge to be entirely reasonable. Then I might have a completely different position. But I cannot reach that conclusion.

Division

Amendment put and a division taken with the following result —

Ayes (11)

Hon Alanna Clohesy
Hon Stephen Dawson
Hon Sue Ellery

Hon Alannah MacTiernan
Hon Kyle McGinn
Hon Martin Pritchard

Hon Samantha Rowe
Hon Matthew Swinbourn
Hon Dr Sally Talbot

Hon Darren West
Hon Pierre Yang (*Teller*)

Noes (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*)

Pairs

Hon Adele Farina
Hon Laurie Graham

Hon Colin de Grussa
Hon Dr Steve Thomas

Amendment thus negatived.

Motion Resumed

Hon SUE ELLERY: I propose to now continue with my general comments. I have an amendment to recommendation 2, but I will deal with that when we get to recommendation 2. I will explain what I am going to do.

In respect to recommendation 2, which is about rescinding recommendation 4 from the fifty-fifth report, the recommendation is supported. I have already expressed the view that the orders made pursuant to recommendation 4 were not lawful. That was not accepted by the house and so the house proceeded to do what it did. I think recommendation 2 does not go far enough, because the investigation into Ms Roper and Mr Foster ought to discontinue. In saying this, I think it is useful to consider the investigation into the conduct of Mr Foster and Ms Roper. I rely on what I have said already. Those two public servants are caught in the conflict between Parliament and the Corruption and Crime Commission. It is unreasonable. We have to ask ourselves what public benefit is served by finding that in all the circumstances there was a technical breach, for example, when the real argument—the real issue to be resolved—is between Parliament and the CCC. What is the public benefit in pursuing an investigation against those two public servants, causing them both enormous personal stress, when our argument is with the CCC?

Hon Michael Mischin: Ours or yours?

Hon SUE ELLERY: The Parliament.

Several members interjected.

The PRESIDENT: Members, you will have your opportunity to speak.

Hon SUE ELLERY: I do not know how many times I have made the point that the argument is about the Parliament's rights with respect to parliamentary privilege and the CCC's rights to conduct an investigation into serious matters of either misconduct or corruption.

Hon Michael Mischin interjected.

Hon SUE ELLERY: Madam President.

The PRESIDENT: Leader of the House, ignore all the interjections and make your comments to me, please.

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

Hon SUE ELLERY: Thank you, Madam President. I do not think members should be surprised or question when I say that there is a dispute between the Parliament and the CCC on how we deal with parliamentary privilege and allow the CCC to conduct its investigations. I have never shied away from that. That is the real dispute. That is what needs to be sorted out. It is not reasonable to capture Darren Foster and Emily Roper in that.

Point of Order

Hon MARTIN ALDRIDGE: In the last five minutes, the Leader of the House has turned her mind to the inquiry into Ms Roper and Mr Foster. Throughout the last two weeks, the Leader of the House refused to answer questions because of an active inquiry by the Standing Committee on Procedure and Privileges that is underway. It is not relevant to the four recommendations before the chamber in committee today.

Hon Sue Ellery interjected.

The PRESIDENT: I am trying to hear what this member has to say.

Hon MARTIN ALDRIDGE: In line with the Leader of the House's refusal to answer questions during question time in the last two weeks, she should not be turning her mind to the current inquiry before the committee.

The PRESIDENT: Member, I am not going to acknowledge that as a point of order. Given the nature of what we are dealing with, I think it is a fairly broad debate. The Leader of the House is trying to articulate why she thinks recommendation 2 should not be agreed. I am going to give her that latitude.

Committee Resumed

Hon SUE ELLERY: I am absolutely not saying that recommendation 2 should not be agreed. I agree with recommendation 2; I would just like to amend it. I was trying to canvass what I want to amend before I move my amendment. I said at the outset that I want to move an amendment and I want to canvass it in my comments.

I think that recommendation 2 ought to go further and that the house ought to request that the committee discontinue the investigations into those other two public servants. That is what I think about recommendation 2. However, recommendation 2 as it stands —

Hon Martin Aldridge interjected.

The PRESIDENT: Order, member!

Hon SUE ELLERY: Whether my amendment is accepted or not, we will support recommendation 2. The reason I want the recommendation to go further, and will move an amendment to that effect, is what I have said already. Mr Foster and Ms Roper sought to cooperate with an investigative agency and thereby allow the Corruption and Crime Commission to investigate serious misconduct. Ms Roper was acting in the position at the time, between 12 July 2019 and 12 August 2019. She is a senior public servant of the state. She takes her obligations to the government, to the Parliament and to the law seriously. She believes at all times she has conducted herself in a respectful way and she would never have acted with cavalier disregard, as was stated at the time the fifty-fifth report was tabled. She is horrified that —

Hon Michael Mischin interjected.

The PRESIDENT: Member, let us move on. Everyone will have a chance to have a say. Leader of the House, I am just going to say that when I ask members to be quiet, that goes to everyone else in the chamber as well. It does not help when your own team is arcing up.

Hon SUE ELLERY: With the greatest of respect, Madam President, I have not heard anyone on my side arcing up, but maybe you have.

The PRESIDENT: I have. Let us just deal with it and move on.

Hon SUE ELLERY: That is what I am trying to do, Madam President.

These matters have not only affected Ms Roper but also caused her family considerable distress and worry. The characterisation of her actions as "cavalier" has been repeated in the media locally and nationally. This has occasioned considerable damage to her reputation. She and her family, including young children, are living every day with the fear that she could face a sanction by the committee, including —

Several members interjected.

Hon Alanna Clohesy: Madam President, I am unable to hear.

The PRESIDENT: Thank you for that; you are right. I have asked for people to be quiet. I know that this is difficult. I have noticed that there is a little bit of cross-chamber chatter happening; please hold it down and let the Leader of the House finish what she has to say.

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Hon Rick Mazza; Hon Aaron Stonehouse

Hon SUE ELLERY: Thank you very much, Madam President. Ms Roper was acting at all times under advice or direction and it is not reasonable that that should continue when the real argument, the point I am trying to make, is between —

Point of Order

Hon NICK GOIRAN: I regret to take this point of order. I have listened to the Leader of the House for some time and I recognise that the house has unofficially given her some latitude with how we are going to deal with recommendation 1, but this is really well outside the scope of recommendation 1. Through you, Madam President, it is one thing for the Leader of the House to foreshadow the government's response to recommendations 1, 2, 3 and 4; it is an entirely different thing for the Leader of the House to now uplift and take on matters dealing with Ms Roper, a failure to adhere to summonses and the like. That is not the matter that is before the house. It is not at all contemplated in the entirety of the fifty-sixth report, and it is miles outside of the scope.

Hon SUE ELLERY: On the same point of order, if I may, Madam President. What I sought to do for the assistance of the house—I get that people are not agreeing with me—was to cover the whole of the government's position. That is what I sought to do. That includes flagging the nature of the amendments, so that when members go to vote on the remaining ones, they understand the total picture of where the government sees this ending up. I am trying to do that because I think it will be most helpful for the house to understand the whole picture of where the government sits on all the recommendations before the chamber votes on them one by one. I actually do not have much more to say, so, Madam President, if you could just let me do that.

The PRESIDENT: I appreciate what you have had to say, and you are in a lot of ways correct in terms of the nature of the detail of this particular report, but, as I said earlier, we are going to give the Leader of the House that latitude. I am sure she is coming to a conclusion and she will make her points succinctly on this matter.

Committee Resumed

Hon SUE ELLERY: Thank you, Madam President. That is the amendment that I will make to recommendation 2. I believe there is no public benefit in pursuing those two public servants when our argument is actually about the relationship between parliamentary privilege and the CCC.

I was surprised to see in the report a reference to the former member Phil Edman—is he still the honourable? No, okay—but only insofar as to imply that he has been treated unfairly in respect of the commission requesting certain information from him. There is a reference to that in the fifty-sixth report. The deputy chair of the committee has flagged that the committee may make future reports to the house about other matters that it is currently dealing with. We know the committee is currently dealing with an inquiry into Darren Foster and Emily Roper. I would ask the committee to consider in its drafting of the report how it reflects on things like that. Because that sentence just appears by itself, it looks like the committee has formed the view that Mr Edman is being treated unfairly. I suspect that the committee has a view—I hope the committee has a view—and, in fact, I would be confident in saying that each member of the committee would not be supportive if evidence eventually appeared that Mr Edman or anyone else has acted in a way that meets the definitions of “serious misconduct” or “corruption”. But when the only reference to that in the fifty-sixth report is that he might have been hard done by, I do not think it reflects on the total context. I think there needs to be a couple of extra sentences around that.

Hon Martin Aldridge: Join the committee.

Hon SUE ELLERY: I would love to, so if that is an invitation, I say yes.

Hon Martin Aldridge: It's up to the house.

Hon SUE ELLERY: I thought the member was speaking on behalf of the house.

The PRESIDENT: Leader of the House, let us not get distracted. You are so close.

Hon SUE ELLERY: I make the point that we need to constantly make sure that we put the whole thing in its context.

I want to touch on recommendation 3. This is about the laptop and handing over the laptop. Recommendation 3 has been rather overtaken by events. I think it falls away, but if the chamber were to proceed with it, we would oppose it because the Corruption and Crime Commission has pointed out that it has now surrendered the laptop and it is unable to protect the integrity of the information required in it. Given those comments, the committee should assure the chamber that it has complied with requirements to preserve the integrity of the evidence so that any future potential prosecution is not impeded or made impossible.

On recommendation 4, it would seem, but it is not clear to me—perhaps the deputy chair of the committee might be able to make it clearer—that the committee has in mind commencing and pursuing proceedings against the Corruption and Crime Commission. It is not entirely clear. Does it intend to commence and pursue proceedings against any member of the community or public servants?

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The PRESIDENT: Leader of the House.

Hon SUE ELLERY: How much are taxpayers likely to be charged or have to pay for any such proceedings? What relief is being sought? We do not know the answer to any of these questions. I have said before that I urge members of the committee to put before the chamber what steps have been taken to reach agreement with the commission before we take the step of authorising the President to go to court on our behalf. I think that we should not proceed with recommendation 4. I would invite the deputy chair when he speaks to advise what steps might have been taken to discuss matters with the Corruption and Crime Commissioner to avoid the need for any such proceedings.

There is one other matter that I want to touch on before I conclude my remarks, and that is that at the very beginning of my comments there was, I think, a point of order about my use of the word “corruption”. I want to refer to the Corruption, Crime and Misconduct Act. Under section 18, the Corruption and Crime Commission is to investigate serious misconduct. “Serious misconduct” is a defined term in the act and is conduct of the nature described in section 4(a), (b), (c) and (d) of the act. Misconduct occurs, under section 4(a), if a public officer corruptly acts or, under paragraph (b), corruptly takes advantage of public office. “Serious misconduct”, by its very definition, includes corruption.

I want to conclude effectively where I began. What brings us here is an investigation into possible corruption. What also brings us here is an ongoing dispute between the Parliament and the CCC. Those are the two things that we need to focus on. We should let the CCC conduct its investigation, but try our very best to reach agreement with the CCC on an appropriate procedure. It may be that we reach the conclusion that it is not possible to reach agreement with the CCC on an appropriate procedure, but I do not have before me now evidence to that effect. I need to advise the chamber that the government will not support recommendation 1, which is before the chamber now.

The PRESIDENT: Members, the Leader of the House has had extensive time to outline the government’s position in response to the recommendations in the report. I plan to take each recommendation separately, so we will work our way through that and that will give people ample opportunity to speak on the various recommendations. We revert to recommendation 1 in the report and the question is that recommendation 1 be adopted and agreed to.

Hon MARTIN ALDRIDGE: I rise to speak to recommendation 1 of the fifty-sixth report of the Standing Committee on Procedure and Privileges and, in doing so, at the outset I would like to thank my fellow members of the committee, as well as our staff, for their significant efforts and the emphasis that has been placed on this very significant matter before the Legislative Council and its committee over the past few weeks and months. Recommendation 1 relates to recommendation 2 because it is effectively a substitution motion, so if recommendation 1 were to pass, obviously recommendation 2 would need to be rescinded. It obviously arises from some correspondence, which is made clear in the fifty-sixth report, between the State Solicitor of Western Australia and the committee over the validity of the order in the committee’s fifty-fifth report. Obviously, that resulted in a writ of summons being filed in the Supreme Court on 27 August 2019 in the name of Mr Darren Foster. That action contends that the fourth resolution of the Legislative Council passed on 15 August 2019 in relation to the fifty-fifth report was unlawful. That court action has not progressed. I refer members to pages 36 and 37 of the report, where they will see the correspondence, which was cited earlier by the Leader of the House, between Mr Pratt, the Clerk of the Council, and Mr Egan, the State Solicitor, on this matter. It is apparent from that correspondence that the state anticipated the Legislative Council considering this matter this week in order for it to further consider the legal action that has been commenced in the Supreme Court, as I understand it, on the instruction of the Attorney General of the state of Western Australia.

As the report makes clear, the PPC has taken legal advice since the fifty-fifth report was tabled and certainly in light of the legal action that has been commenced in the Supreme Court. Part 4 of the report highlights those matters on pages 4 and 5. I want to quote the relevant paragraphs. Paragraph 4.2 states —

Mr Zelestis’s advice confirms that the Legislative Council does not have a power to order persons, not being members of the Council, to not produce documents. However, Mr Zelestis confirms that the Legislative Council does have the power to pass a resolution in terms which “require” a person not to produce privileged documents to another person or body. In his view, such a requirement would not be directly binding in law upon the person to whom the order is directed. Rather, it would be an authoritative demand, non-compliance with which could constitute the commission of a contempt, if the person concerned was aware of the resolution, but ignored it and provided privileged documents to a third person or body

The report goes on to say —

Mr Zelestis’s advice also confirms that an important aspect of parliamentary privilege is the paramount right of each House of Parliament to determine for itself whether a particular document is privileged. To

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usurp that role would be to interfere with the privilege, even if no privileged documents were in fact produced. Depending upon the particular circumstances, this could constitute a contempt of a House of Parliament.

Paragraph 4.4 then states —

The Legislative Council can therefore pass a resolution that declares its privileges, including a declaration of its opinion that a person served with a Notice by an Investigative Agency for the production of Documents or Data who, without the authority of the Legislative Council or its authorised delegate, purports to determine, either personally or by any agent of the executive, the question of whether a Document or Data is subject to parliamentary privilege:

- a) would usurp the right of the Legislative Council to determine that question; and
- b) in the absence of a lawful excuse, may commit a breach of the privileges of the Legislative Council.

Recommendation 1 is the substitute order that I just mentioned and, in many respects, it is far superior to the fourth order recommended by the fifty-fifth report of the Standing Committee on Procedure and Privileges and passed by the Legislative Council on 15 August 2019. In my remarks that day I mentioned that this matter ought to be and needed to be addressed by the Council at some future time. On that day I made direct reference to an order of the Australian Senate on Thursday, 6 December 2018, contained in a motion moved by Senator Penny Wong, the then Leader of the Opposition in the Australian Senate. Members will find the resolution of the Australian Senate contains remarkable similarities to the recommendation before the Council today.

The third part of recommendation 1 of the committee is particularly important, and a breach of that order would potentially constitute a contempt of this Council. Members might ask why we need this. If members turn to page 728 of the report, they will find a number of paragraphs that have been canvassed already about the process initiated by the State Solicitor's Office on the direct instruction of the director general of the Department of the Premier and Cabinet on the reading of emails and other documents and the assessment that was made. Before this information came to me as a member of the committee, and was ultimately published in this report, I thought that considerable due care and attention would have been given by the government's agents—the State Solicitor's Office—to this matter, particularly given the seriousness of the correspondence and communication from the Standing Committee on Procedure and Privileges, which not only did not authorise that process, but insisted that it not proceed with that process. Nevertheless, I thought that given the SSO had disregarded the committee, which was acting on the orders of the Council at the time, it would take every possible appropriate step to make sure that the best possible process could be run in the circumstances. If members read any part this report, please read paragraphs 6.3, 6.5 and 6.6. They plainly set out the clear flaws in the State Solicitor's Office and the government's approach to this matter. I do not want to rehash the issues raised by Hon Simon O'Brien, but it is plainly obvious that having law students make a determination of privilege is not and never will be acceptable.

I refer members to page 67 of the committee's report, which is the last page of the memorandum issued by the Deputy State Solicitor to the 30 staff who were engaged in this process. I draw member's attention to category 3. I do not want to dwell on this, but members will see there categories 1 and 2. Category 1 is basically things that will most likely be privileged, category 2 are things that might be privileged, and category 3 are things that are not likely to be privileged. In fact, the advice to those law students was that if something falls within that category, just mark it as "no" and move on.

I draw members attention to the sixth point on page 66, because I do not have a lot of time to dwell on this today, which states —

- 6. documents relating to caucus (that is, a private meeting of members of a party to determine joint action in Parliament);

Members, I am not sure what happens in your party rooms, but I doubt there would be a single meeting of my party room that would not be subject to parliamentary privilege—not a single meeting. Yet in this memorandum of the Deputy State Solicitor to these 30 staff, that is something that would be unlikely to attract parliamentary privilege. Clearly, it will be a debate for another day to dissect exactly what happened there.

The other thing that is of grave concern is the Corruption and Crime Commission and the reason that recommendation 1 needs to be agreed to. I draw members' attention to page 8 of the fifty-sixth report and the evidence of the Commissioner of the Corruption and Crime Commission. I want to read these paragraphs because they are particularly important. The report states —

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6.11 The Commissioner in his evidence took the view that the CCC was not prevented at law from requiring the compulsory production (by notices to produce) or seizure (by search warrant) of documents that are subject to parliamentary privilege.

6.12 The Committee notes there is an apparent conflict between the view expressed by the Commissioner and that of the CCC's Principal Legal Officer. In an email to the Deputy State Solicitor dated 1 July 2019 she stated:

The Commission accepts that any document covered by parliamentary privilege is privileged from production and does not seek any such document.

The PRESIDENT: Hon Martin Aldridge.

Hon MARTIN ALDRIDGE: It goes on —

6.13 The acknowledgement of the CCC's Principal Legal Officer accords with the view taken by the PPC. The ambit of Article 9 of the *Bill of Rights 1688* extends not only to the 'use' immunity but to what the PPC refers to as the 'compulsory production' immunity. The PPC has consistently expressed the view that the CCC or any other investigative agency exercising powers of compulsory production or seizure of documents or data has no lawful capacity to take or seize documents or data that are proceedings in parliament and therefore subject to parliamentary privilege in the circumstances referred to in its report No. 55. As a matter of logic, if an investigative agency has no power to use material that is proceedings in Parliament, it correspondingly has no power to obtain or seize it. Ignoring that privilege of the Legislative Council would *prima facie* be a very serious breach of its privileges and a contempt.

It concerns me, as a member of this house and of the committee, that even the commission is not on the same page about the application of parliamentary privilege. I heard the Leader of the House go on for more than an hour about the need for procedures, protocols, agreements and understandings, but at the end of the day, it is this house's responsibility to determine its privilege. It is not up to some protocol. It is not up to some negotiation. The protocols and procedures may well be put in place to navigate the house's view of privilege, but it is not up for negotiation with the executive or the commissioner, in whatever place he thinks his commission sits in the tiers of government, to decide or negotiate with us what our privilege is. That is our job. Recommendation 1 asserts that privilege; it is consistent with the view of other Parliaments. This house should strongly support that recommendation here today.

Hon MICHAEL MISCHIN: Also for convenience, I will speak globally on the recommendations of the Standing Committee on Procedure and Privileges. They are very limited in what they seek to achieve. The first is an assertion of this house's view of its rights, privileges and prerogatives. That can hardly be objectionable. Recommendation 2 simply rescinds one infelicitously framed recommendation that was approved on the last occasion. That cannot be opposed, and I understand that it is not, but the government is asking this house to extend its operation to actually discontinue the sort of inquiry that got us here in the first place on the last occasion in the fifty-fifth report—that is, to investigate and determine whether there has been a breach of parliamentary privilege. On the strength of that, we have heard a long plea in mitigation on the part of the people being investigated and a long submission on the law, which no doubt will be presented in some form or other in the Supreme Court in the litigation that the state has commenced against this house. But what we are being asked to do is nothing—not to do anything. The Standing Committee on Procedure and Privileges has made its recommendations and done its work. The government is urging us to stop everything and is trying to come to some sort of agreement with the CCC, but without the slightest undertaking on the part of the government, which is urging this, that the CCC not continue to do what may very well be, and in the view of this house is, a *prima facie* breach of its privileges.

I draw members' attention to paragraph 6.24 of the fifty-sixth report, which states —

It is clear from the Commissioner's evidence that the CCC will proceed with its investigation with all of the information obtained by it based on the Commissioner's view that proceedings in Parliament are not immune from compulsory production to or seizure by the CCC and only immune from being used in determining opinions of misconduct.

There is a fundamental difference in view that needs to be resolved, but the government is saying, "Don't do anything about it; just let it go on. The CCC will do what it is doing. Try to ameliorate that problem, but in the meanwhile, just let it do it." This is not a fight between the Parliament and the Corruption and Crime Commission or its commissioner; this is broader than that. There are three tiers in our system: Parliament, the executive and the judiciary. This is a fight between the Parliament and the executive in all its forms. It has been said that this is a very serious issue. Sure right it is a serious issue! It is being deflected as being an argument between this Parliament and the CCC, but the government is very closely involved with it. We are urged to accept the government's view as being the correct one. We have heard hearsay evidence through the Leader of the House

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about one of the people being investigated. She may be right, but we have not heard anything from that in evidence. We have heard that there are public servants who have been acting only in accordance with direction and advice, yet I have asked on numerous occasions, "What advice did these people get from the Premier or the Attorney General?" I have been told, "Sorry, we can't tell you." In fact, I have repeatedly asked about the process that is being used by the government's lawyers to determine whether documents that have been produced to the government's lawyers by the government attract parliamentary privilege. I want to see whether the process is sound and to understand what the process was and who was involved in it. I have been told, "No, I'm not going to tell you! It's legally professionally privileged. Besides which, I won't tell you anyway." We have had to get a report from the committee to find out that about 30 people, not necessarily all public servants, have trawled through what may be privileged emails in order to decide on parliamentary privilege, in accordance with a test that does not accord with what is being used in other jurisdictions, for the government's purposes. We are supposed to take all this on faith somehow; because the government has put up a plea in mitigation and run its legal argument, we are supposed to accept that.

This Parliament is being sued by the state for a declaration. There is a declaration being sought that the Parliament is incorrect in its view of those section 95 notices, yet we are supposed to do nothing about that because the government does not want us to do anything about it. It has been said that we have not costed what it might cost the taxpayer, if you do not mind, to defend this Parliament's privileges, yet the government has said nothing about how much it will cost the taxpayers to challenge this Parliament's view of its own privileges. It has said nothing about a discontinuance of that action, yet we are supposed to tie the President's hands when she is acting on our behalf, through the committee, to defend this Parliament's privileges against what the government would like it to do and what suits the government. If anyone has trivialised this debate, it has been the government. We need look only at the debate in the Assembly and comments to the media by the Premier, who said that this is all about protecting three potentially corrupt Liberal ex-members of Parliament. That is what it is about, and good old mate Darren is actually trying to do his best. One thing that has not been said is that if he was the meat in the sandwich, between a rock and a hard place, and having difficulty deciding what his lawful position was, did he get advice from the government? Did the government say, "Look, tell you what, we will seek the same sort of declaration that we are now seeking from the Supreme Court regarding the validity of those notices." That would have been the way to go. It could have been sought by the government, but it did not suit the government's purposes. This is a fight between the government and this house. Sadly, the Leader of the House is representing not her position as leader of this house and her responsibilities here; she is being the advocate for the government.

Hon Sue Ellery: Which I represent.

Hon MICHAEL MISCHIN: Absolutely, yet we are supposed to take the Leader of the House's views as the correct ones in a battle between Parliament and the government.

When the government, which wants to get the legal advice upon which the Parliament is relying, produces the legal advice that it claims is correct, I might then pay a little more attention to the leader's comments on that and defer any action in this place, but at the moment, we are doing the best we can with what we have. I have confidence, because of the difficulty of this particular case and the reasons that have been put forward in these two reports, that the committee ought to be permitted to do its stuff and not be impeded by a government that has plainly not been forthright and frank as to its involvement in this saga and is not prepared to provide any information in this chamber. That information has to be wheedled out of the government in committee, yet it wants us to take it at its word. That is not good enough, frankly. My confidence is in members of this Parliament who are standing up for the privileges of this Parliament, not in a government that is seeking short-term political gain and is asking us to take it on its word, when plainly it has proved that it prevaricates, dissembles, conceals, gives inconsistent answers to straightforward questions and will not be frank and forthright with us. I support the four recommendations. I only hope that the government starts to grow up and has some regard to not only its own immediate interests, but also the preservation of the institutions of this state that have served it well—the privileges of a Parliament—which will, hopefully, live on beyond this particular executive, which itself may rely on these privileges at some stage in the future. I urge members that if they have any responsibility towards the preservation of this institution, which has grown up through a lot of difficulties over a thousand years of conflict with executives, they will do the right thing by it and err, if there is an error, on the side of Parliament and its preservation.

Hon RICK MAZZA: I will also speak on these four recommendations as a job lot. There has been a lot of focus on the government response on this being a stoush between the Standing Committee on Procedure and Privileges, the Corruption and Crime Commission and the director general of the Department of the Premier and Cabinet. Really, nothing could be further from the truth. We have not in any way tried to impede or be belligerent and prevent the CCC from being able to undertake its work of investigating issues surrounding serious misconduct. This whole issue is around parliamentary privilege and how parliamentary privilege is treated and respected. To have 30-odd staff of mixed designation going through member's emails should put a shiver down the spines of

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every single member in this place. It is not just the privileged documents that they should be concerned about. Many of these emails—many Legislative Council members' emails—may contain very sensitive and private material that we do not want people looking through. The CCC's commissioned officers are sworn to secrecy. They have a very stringent way of handling evidence to make sure people who are being investigated are not embarrassed or their reputations tarnished if, at the end of the day, they do not find anything. The system that was devised to obtain the information that the CCC required was very misguided.

In the papers that have been tabled by the Leader of the House, there was a letter of 16 August from the CCC to the President of this house. The second last paragraph states —

The issue as I see it, is not primarily a legal issue or a debate about whether parliamentary immunity applies but the practical impact in the modern era. The rules around parliamentary immunity have developed over more than three centuries but they are proving unworkable in an era which sees data measured in terabytes, not folios.

I am alarmed by that. The rules have been developed over three centuries but because they do not suit the investigation that the commissioner wants to go through, we are just going to disregard that and move on. It does not fit in the modern era so we will just push them to the side; they are obsolete. It does not work that way. There are other ways we could have dealt with this.

There has been quite a bit of discussion about the fact that the director general and the acting director general were put in a situation in which they were the meat in the sandwich. They were stuck whichever way they went and their position was untenable. On page 7 of the fifty-fifth report, "A Refusal to Comply with a Summons to Produce Documents", paragraph 2.4 states —

158. Failing to comply with notice given under s. 94 or 95

A person who —

- (a) fails, without reasonable excuse, to comply with a notice served on the person under section 94 or 95;

I would have thought that a direction from this chamber through the parliamentary process would have been scope for a reasonable excuse. If it was found that it was not a reasonable excuse, the director general or the department could have gone back to the PPC to put their case as to why they were in this position. From my recollection, we never heard that. They just went off and did their own process, with 30 unknown people going through emails one at a time looking for key words.

Our report looks at the evidence that the PPC took from the Deputy State Solicitor about that process. On page 45 of the fifty-sixth report, paragraph 29 states —

On the morning of Monday, 22 July 2019, I undertook a final random search of the documents which were to be produced to the CCC. Where in a particular folder any document was identified as one that should be removed, I checked each document with a similar subject heading in that folder. As a consequence of my final spot check, eight more documents were removed from production to the CCC.

This spot check was over a short period. We are talking about 68 000 documents or thereabouts, and in a spot check, before handing the documents over to the CCC, they found eight documents. How many other privileged documents are within that packet of files? I do not think that parliamentary privilege has been given the due respect that it should have been given. As I said in the debate on the fifty-fifth report, parliamentary privilege is a fundamental pillar of our democracy. If we usurp that by allowing executive government to take a shortcut—truncate the thing because it is just not fitting in with what we want to do—we really are moving down a path that could be particularly dangerous.

As I said at the beginning of my contribution, the PPC has been under enormous pressure. A few days ago, an article claimed that the Premier had said that he wants the PPC to back off. Three hours ago, another article states that the Premier has slammed the PPC for going through this process. As a committee, we have a duty and an obligation to protect privilege and to report to this chamber, and that is what we have done, and we have done it in such a way that we tried to navigate our way through to provide the CCC with the information it wanted. We put forward a procedure that could be used. Apparently, that was too clunky, but then we did not have any other way to work out a suitable system that would work with the CCC and also this chamber. With that, I support all four recommendations. There has been a lot of emphasis on recommendation 1, which is a substitute recommendation, but that is in response to the fact that the state wishes to take the President to court over the previous recommendation. We have had to act on this. We talk about the expenditure of funds. The writ that has been issued will, of course, cost an enormous amount of money. We are being challenged on this, and if we are challenged on this, we should defend parliamentary privilege.

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Hon NICK GOIRAN: I rise to consider recommendation 1, but perhaps, like other members, I will make some remarks broadly about the fifty-sixth report of the Standing Committee on Procedure and Privileges. Like other members, I express my thanks to the five members of that committee and its staff.

I am broadly supportive of the four recommendations. I use the word “broadly” with intent. In some respects, I thank the Leader of the House for repeating to the chamber the comments that I made about what was order 4 on the last occasion. Members who read between the lines on the last occasion will understand that I was not overly enthusiastic about that recommendation. The Leader of the House has already recounted precisely what I said and I thank her for that. I have a few questions about the matter before us. If I look at recommendation 1, I note that the proposal is that it be a substitution for order 4. I have no problem with that. However, I note that at recommendation 2 the proposal is that we will rescind order 4. The reason I pose this question for consideration is: is it the intent that we will uplift the old recommendation and insert this new one in substitution, and it will then have force and effect from that day, 15 August 2019, and that is why we are saying that it is a resolution in substitution? Is that what is intended or is this supposed to have force and effect from today onwards? I am trying to understand that in the context of us saying in one breath that we are going to substitute an order and then saying in the next breath that we are going to rescind the other order. It seems to me that if we are going to rescind the other order, there is no need to substitute; we would simply do a separate order. The only way that I can make sense of it is if we are trying to have some form of retrospective effect. Perhaps that can be clarified by either Madam President or one of the other members of the committee.

I want to raise another thing about recommendation 1. This is absolutely sweating the small stuff, Madam President, but given where this is going and that the Parliament and the government are having a dispute about legal interpretation that will potentially be decided by the courts, I would rather that we get everything right. I note the most minor of drafting issues, which is found in paragraph 2.a. That refers to “the” Constitution Act 1889 and “the” Parliamentary Privileges Act 1891, and, plainly, it should then read, “and the Parliamentary Papers Act 1891”. I would like to think that we can attend to that by way of a clerical amendment rather than a formal amendment. I would rather that we get this right now than be chastised by somebody else later for not considering this matter properly.

The other thing I want to say about recommendation 1 is more substantive, and it is in response to the remarks made by the Leader of the House and the government’s view about recommendation 1, paragraph 5, if I can categorise it that way. It seems to me that the government’s issue is around the use of the word “requires”. If I remove the word “requires” from paragraph 5, it seems to be a statement of law. I assume that the government does not dispute the rest of it being a statement of law. The point that the government is trying to make is about whether we can require someone to adhere to a statement of law. I would think, for the Leader of the House and the government advisers who no doubt will be perusing and considering this at some later stage, that that is a statement of the obvious. We are all required to abide by the law of the land; that is the very point about the rule of law. It is the case that investigative agencies need to observe the privileges of Parliament; that is just a statement of fact. If they are trying to make some kind of semantic point about whether this house has the power to require those people to adhere to the law of the land, I would be interested to hear the advice. If I can even be so bold, I ask the government to table the advice that it is relying on to determine that. Is there some judicially considered interpretation of the word “required” that is in doubt? I cannot see it. I am not concerned about it, but that is why I am not dissuaded from supporting recommendation 1, paragraph 5.

Apart from that question around substitution and rescinding, the other thing I want to raise is paragraph 4 of recommendation 1. This was a point that the Leader of the House made. I have to say that when I first read recommendation 1.4, it jumped out at me. It says there that we will be expecting people to inform the Clerk of the Legislative Council. Look, I can live with it. It is perhaps not the way that I would draft this. I am not 100 per cent satisfied, I have to say, that we can expect a person who is served with a notice to inform the Clerk of the Legislative Council. For example, what if a former member of the Legislative Assembly receives a notice and they then say, “Look, I would like to claim parliamentary privilege in respect of this matter”? I would think that they would then inform the Clerk of the Legislative Assembly, albeit that the Clerk of the Legislative Council is the Clerk of the Parliaments, and maybe that would be a better way of phrasing this particular paragraph. At the end of the day, it is not something on which I want to hold up this process; I am just putting on the record my views on recommendation 1, paragraph 4.

I have already spoken about recommendation 2, so I will not speak further on that. I am simply asking for clarification around substitution and rescinding.

Upon reading the report, recommendation 3 was another area that I was not overly enthusiastic about, but last night, as I considered it, I decided that I would support it, because I heard it reported yesterday evening that the Corruption and Crime Commission had indicated that it would comply with it. Now we have some information that seems to indicate that it may have already complied with it, so I take no issue with recommendation 3. I do

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ask the question, along the same lines as the Leader of the House: does it now fall away? It would be useful to have some clarification on that.

Recommendation 4 has my support. However, I want to say this: as I was considering this last night, my first reaction was exactly the same as that of the Leader of the House, which was to ask whether there was not another way for us to deal with this, other than taking the most nuclear option possible, which is to have litigation in the courts. Is there not some other way that it can be dealt with? In the end, I concluded that it is actually in our best interests that it go down this path. There is plainly too much doubt or disagreement in the minds of more than one learned individual, and we need to have this resolved once and for all. If there is then a problem, it will have been robustly tested. At that point, we can decide whether there needs to be any law reform, including any changes to the law of Western Australia.

The PRESIDENT: Hon Simon O'Brien. Are you perhaps responding to some of those questions that have been raised?

Hon SIMON O'BRIEN: Of course, we are in Committee of the Whole House, so we can all get up and down as much as we like. I was, mercifully, brief, I thought, in my opening remarks—an example that was not necessarily followed. As it happens, yes, there are a few points that deserve a response, not for the sake of being argumentative, though I will possibly stray into that area a little, but simply to inform members about some matters of fact that now seem to be in dispute. I think we might all benefit from this. I hope iPhones and things are not distracting people too much.

Members need to understand, again, what I said in my opening remarks. This is a matter of the utmost seriousness. Firstly, I gave a number of examples of what this issue is not about. I noticed one particular speaker after that then tried to distract members with a number of those things. They are red herrings and irrelevancies. We are going to touch on some of those in a moment, but there are also some other things that I want to bring to members' attention—things that certainly should crystallise in our minds what we are up against. We will come to those a little later in our proceedings.

There are a couple of comments that I want to make in response to some of the views that have been advanced. I think most members recognise that, as ever, a privileges committee does its absolute best in dealing with items of complexity, moment and difficulty. It works to the very best of its ability. This has been no exception. Although it might be a pain in the neck for any privileges committee to have to put in the sorts of hours and confront the difficult issues that it has to confront on matters of privilege, whatever they might be, I am certainly approaching the chamber now in good faith, because I know that every one of the members has put all other considerations aside to focus on the real issues at stake here. I am a little disappointed that, once again, we do not have the support of the Australian Labor Party. This is something that I have not seen before. I am now in my third decade in this place. When a privileges committee reports, the presumption on all sides is that members have used their energies, have had the right attitude and demeanour and have been able to put aside sectarian interests to do what is right in terms of recommendations and resolutions. That is taken for granted, even if it is uncomfortable for the members of the chamber receiving those recommendations and resolutions. Whether some member or other has committed a contempt, or whether some member of the public needs to be hauled across the tiles for giving false evidence to a standing committee—whatever it might be—it is often unpleasant stuff, and this is no exception. I would have thought that all members of this place would understand that they have a fundamental role to support the Parliament. I hope that that will still be conjured up between now and when we put these matters to rest.

In relation to some of the matters that have been raised just now, I am not going to canvass widely over everything. There are a few later resolutions that I want to address in isolation. We have just learnt some things that have come up now that I want members to understand and be reassured about. Members have basically been told some things that are not the case, so I am just going to correct them for members. I hope they are able to accept that, because I do not owe anything to anybody in this. I just want to see the right thing done by the Parliament, because the Parliament is collectively representative of our people. If they have not got the Parliament, what have they got? They are completely exposed. That is why it is important.

There were a couple of things I noticed when I was listening to the Leader of the House. After spending such a lot of time receiving evidence on this matter and going through, again and again, correspondence and messages and all the rest of it, I thought, listening to the Leader of the House, "I've heard this before. This sounds very familiar. Where have I heard all this before?" Then when she tabled a whole heap of correspondence to or from the Corruption and Crime Commissioner, I thought, "That's where I've heard it all before!" They are the same bogus arguments—the same irrelevant arguments! I have said to the commissioner, "Sir, with the greatest respect, we disagree on this."

In my opening remarks, Madam President, I articulated what I thought was the nub of the disagreement about where we think privilege needs to be applied. I have had that conversation collectively with the committee. That has become apparent through the reports that you have seen, as well as my remarks earlier today. When we look at a later resolution in a few minutes, I am going to give you an example of just how that works. But for now, I have heard these same old arguments and they are wrong. One of them that members, I think, are led to believe is

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that it is a failing of everybody—but particularly the Parliament, particularly members, particularly the leadership of this house—that there is no memorandum of understanding or procedure between the house and the CCC about this. That has gained some currency just this afternoon. What members perhaps need to do is have a look at two documents from the fifty-fifth report. I will give them the gist of them. The first one is dated 26 June 2019. In the scheme of things, from my point of view, this is pretty early in the proceedings. The President and the Clerk had been working, they thought, with the CCC for some little while. We, the members of the privileges committee, were able to come on board a bit later in the piece and did some work about what sort of process is to be adopted to go through a pile of emails or other correspondence to assess that there is no material there subject to parliamentary privilege so that the balance of it could all be handed over to the CCC and it can get on with whatever very important investigation it has got. There was all this work being done and I thought, “This is pretty cumbersome.” All of that is in the fifty-fifth report. Members have all read it. They can refresh their memory about it if they want to, but it strikes me as an awfully overblown and labour-intensive process, but at that stage the commissioner was talking about a thousand or so articles of communication. I thought, “As a one-off, I suppose you could do that. You could get in some independent third party under the supervision of the Clerk and go through that process. I suppose you could possibly do it.” As members will see when we come to a later resolution —

The PRESIDENT: Hon Simon O'Brien.

Hon SIMON O'BRIEN: I will show members how that spectacularly imploded in a few minutes.

For now, we were working in good faith. Has anyone gained the impression here from the government that somehow we were not working in good faith? That seems to be the impression that it was trying to give, but we have been. That was reflected in the commissioner's letter to the President dated 26 June 2019, which members will see at pages 76 and 77 of the fifty-fifth report. It says, *inter alia* —

Dear President

...

Thank you for your letter of 25 June 2019.

I note that the Privileges Committee has now finalised its procedure for dealing with the Commission notices. There should be no impediment now to your agent, Mr Foster, complying with the notices by the due date and I am confident the Committee will ensure this occurs.

It goes on to assure us about his certainty of our good intentions and all that. That strikes me that a bit of an agreement has been reached. That was on 26 June. Members can flip over to page 88 of the same report, if they like, to see what came from the director of operations of the Corruption and Crime Commission, Mr David Robinson, on 5 July to the Clerk of the Parliaments. It states —

Dear Nigel

Further to our telephone conversations Wednesday afternoon, I confirm the following:

That is a week after the last thing has happened —

1. The Commissioner notes the President's proposed process for receiving and reviewing the emails of the three former members. The Commission cannot approve or agree to the process as it is a matter for the Privileges Committee, not the Commission;

There it is, bailing out, saying, “We cannot come to an agreement on process with you.” So do not come in here with any of your sanctimonious nonsense about how your privileges committee, or your Clerk, or your President has somehow failed to strike an agreement with the CCC. It is not open to it. It may give the impression that it is—it may even give the false impression that we have arrived there—but clearly it is not. I would like to find out a little bit more from Mr David Robinson, director of operations at the Corruption and Crime Commission, because he seems to know what is going on there. I might appreciate the benefit of his advice. Do not give me any nonsense that we have not got any MOUs or procedures and it is our fault.

Similarly, I have heard it said that allegations have been made. Sometimes, even in that CCC correspondence, it slipped into saying that there are some allegations of corruption. In most of the correspondence I have seen, which is reproduced in our reports and has been tabled again by the Leader of the House, members will see that the commissioner is keen, particularly in the early days before this all went public, to stress how there are no accusations against anyone. There has been no misconduct that he can disclose. It says, “It may well be that we will go through all these documents and find absolutely nothing, so we don't want to go naming anybody at this stage, because it might be grossly unfair to them when it is found that they do not have any charges to answer.” I thought, “That is not like the old-fashioned CCC, which did not seem to care too much about people's reputations.” Anyway, I do not know what allegations have been made, so I do not want to hear about allegations being cast in this chamber. As I earlier said, this is not about a former member, whether they be called Edman or anything else. It is about the

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privileges of the house. That is what it is about. I might add that I feel some empathy for anyone caught in the situation that Mr Edman and his family seem to be caught in at the moment.

A question was raised by Hon Rick Mazza, amongst others, and I thank him and also Hon Martin Aldridge for their comments. The sorts of documents that we have on email servers relating to parliamentary privilege clearly go beyond what some of these other experts, who presume to lecture us, know about parliamentary privilege. Hon Martin Aldridge cited the example of partyroom agendas, discussion papers and so on, much of which would be targeted fairly and squarely to proceedings in Parliament about proposed motions, bills and all sorts of things. Members should also think about the committee work that they do. They would be done by this procedure and privileges committee if they disclosed the deliberations of any of those proceedings until they have reported those deliberations. In this case, we can have law students going through all our emails, apparently; it is acceptable to do that.

As for members who have been or are on the Joint Standing Committee on the Corruption and Crime Commission, I am sure that they would turn a blind eye when trawling through their emails to anything that refers to the deliberations of that committee. The conflicts here are obvious, and this is before we start looking at the people whom we have to deal with as members, who should have a privileged status, in my view, equal to, if not exceeding, this much-vaunted legal privilege that we hear so much about. That is a debate for another day, but I am sure all members can relate to it. It is about people who come to us seeking relief from harsh treatment, people who have matters of great seriousness to report but who do not know how to go about bringing them to public attention—matters of considerable gravity that relate to Family Court matters, police matters and all those sorts of things. How would it be if someone cannot go to their member of Parliament and have that discussion and be worried about who else is looking over their shoulder, in secret, at the sorts of documents that are being created?

We could explore a number of things but I think I have made my point in the response, except for one final thing relating to recommendation 1, the resolution. This is not an encyclical treatise on privilege and it is not intended to be. It is an assertion of certain matters of fact relevant to the current issues. As I said, by unruly interjection in response to the Leader of the House when she was seeking to eviscerate the resolution, I pointed out, starting with paragraph 4, that this is not something new, radical or challengeable; this is the status quo that we would expect. Paragraph 4 states —

expects that where there are reasonable grounds to believe that a Notice served by an Investigative Agency on a person may require production of Documents or Data which attract parliamentary privilege, the person upon whom the Notice is served will inform the Clerk of the Legislative Council promptly following receipt of the Notice and before producing any Documents or Data in compliance with the Notice;

That is what the director general of the Department of the Premier and Cabinet recognised as his duty and what he wanted to do. It is the status quo. Why can we not declare it as such? People need to be reminded of the status quo. This is not stuff that is 300 years out of date. It is exactly what we need going into the future and exactly what we need going into the digital age. I would be very disappointed if this chamber could not agree with the resolution contained in recommendation 1.

Hon AARON STONEHOUSE: I will not have too much to say on this matter today because I think previous speakers have already exhaustively ranged over the issues at play in these recommendations of the fifty-sixth report of the Standing Committee on Procedure and Privileges. I would like to pick up on a thread of the previous speaker and clarify exactly what we are talking about today. If we look at the rhetoric coming from the government, from the Premier, and the way this has been coloured in the media, it is a fight between a committee of the upper house and the Corruption and Crime Commission or, in some cases, it is even characterised as a fight between the Premier and yourself, Madam President. That is absurd. Anyone in this place knows that that is not true. I would like to clear that up for the sake of anyone who might be listening today. This is not a fight between the privileges committee and the CCC. It is not even a fight between the upper house and the CCC; it is a fight, as another speaker already quite accurately categorised, between the Parliament and the executive. It is a fight between elected representatives and unelected bureaucrats. It is a fight that I think this Parliament has to take up and that this Parliament needs to assert. It is unfortunate that the words are “parliamentary privilege” because it creates a misconception of what it is. Parliamentary privilege is the right of members of this place to speak freely without having what we say or do in this chamber questioned by a court or by the executive in some other place. It is an important right. Without that right to free speech here in Parliament and through parliamentary proceedings, we cannot carry out our job. We cannot discharge our function as a house of review and as a place that scrutinises the government and the executive wing of government.

Recommendation 1 has essentially been summarised, quite accurately by previous speakers, as a statement of fact. It is the current understanding of parliamentary privilege—a current understanding of the rights that Parliament has and must have to carry out its function. The requirement in paragraph 5 of recommendation 1 seems almost self-evident. As another speaker before me pointed out, if this is, in fact, the law, it follows that someone must abide by that law. Although we might drill down into the phrasing and legalistic arguments, on the face of it,

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requiring that somebody follow the law, as we understand it, really is not all that controversial. I will be supporting recommendation 1 but may have something to say on the following three recommendations.

Hon MARTIN ALDRIDGE: I want to raise a couple of things. Hon Nick Goiran raised some questions during the debate that I want to respond to. Recommendations 1 and 2 could have been drafted as one, perhaps as an alternative, which could have addressed the rescission as well as the creation of the new motion or the new order, but it has been structured in two recommendations. Recommendation 1, if passed, will have full effect from the moment of its passage; and then, obviously, the second motion deals with the rescission, and, if passed, that will obviously remove the previous order. It is not intended to have retrospective effect; it would have effect from today's date.

The other issue that Hon Nick Goiran raised concerned paragraph 4 of recommendation 1. We need to consider this recommendation in the context of the privileges of the Council. If I heard Hon Nick Goiran correctly, he was concerned about a member of the Assembly being served a notice. We cannot speak on behalf of or assert the privileges of the other place. This is, strictly speaking, regarding the privileges of the Council. This is an important part of the motion. Members may not be aware but when the Corruption and Crime Commission issues a section 95 notice, it commonly issues a section 99 notice that says, "You can't tell anybody about the section 95 notice." This would give rise to a reasonable excuse, if we needed an excuse, because section 3(2) of the Corruption, Crime and Misconduct Act 2003 makes it plainly clear that nothing in that act or a power under that act is meant to interfere with the privileges of the Parliament.

Hon Nick Goiran: It's worth noting that the CCC does have the discretionary power to use that.

Hon MARTIN ALDRIDGE: Yes.

Hon Nick Goiran: So, it could use it more judiciously if it wanted to.

Hon MARTIN ALDRIDGE: Yes. Through this, Hon Nick Goiran, it certainly is being used quite consistently.

The other thing that I am authorised by the committee to provide to the chamber is some updated information on recommendation 3 of the fifty-fifth report. Recommendation 3 was the order placed on Mr Foster, arising from the noncompliance with the summons of Ms Roper, about the documents relating to two notices to produce. Obviously, the fifty-sixth report canvasses those two notices in different points, and some information that has come to hand to the committee yesterday—which I want to update the chamber with and which is in direct connection to this issue—is the number of documents that are now in the possession of the committee in the safe custody of the Clerk. I also want to make it very clear to the chamber that the members of the committee have not read or accessed that data in any way, but we have instructed the Clerk to identify the number of documents that were provided to the State Solicitor's Office and the number of documents that were provided to the Corruption and Crime Commission. With respect to the first two notices to produce, a total of 68 965 documents were provided to the State Solicitor's Office, of which it identified 67 821 that were not subject to privilege and therefore produced those to the Corruption and Crime Commission, and a further 1 144 documents that were, according to the State Solicitor's Office, privileged.

For the benefit of the chamber, I bring to members' attention the statement of the Deputy State Solicitor, on page 45 of the report, titled "Copies Retained". It states —

A copy of each of the production directory and the directories containing documents that were identified during the review process as being subject to privilege was retained by SSO on its secure T drive and access remains restricted to those directories.

In reading this information, which I will table, members must also be aware that the entirety of these 68 965 documents, of which 1 144 are privileged according to the SSO, remain in the possession of the State Solicitor to this day. Madam President, I table that paper.

Leave granted. [See paper 3000.]

Division

Question put and a division taken with the following result —

Ayes (19)

Hon Martin Aldridge
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*)

Extract from *Hansard*
[COUNCIL — Thursday, 5 September 2019]
p6514b-6540a

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

Noes (10)

Hon Alanna Clohesy
Hon Stephen Dawson
Hon Sue Ellery

Hon Alannah MacTiernan
Hon Kyle McGinn
Hon Martin Pritchard

Hon Matthew Swinbourn
Hon Dr Sally Talbot
Hon Darren West

Hon Pierre Yang (*Teller*)

Pairs

Hon Colin de Grussa
Hon Dr Steve Thomas
Hon Jacqui Boydell

Hon Adele Farina
Hon Laurie Graham
Hon Samantha Rowe

Question thus passed.

Recommendation 2 — Motion

Hon SIMON O'BRIEN — without notice: I move —

That in relation to recommendation 2 —

That the vote passed by the Legislative Council on 15 August 2019 adopting and agreeing to the order contained in recommendation 4 in the fifty-fifth report of the Standing Committee on Procedure and Privileges, “A Refusal to Comply with a Summons to Produce Documents”, is hereby rescinded.

Amendment to Motion

Hon SUE ELLERY: I had flagged my intention to move an amendment to recommendation 2, so I will do that now. I move —

To add after “rescinded” —

and to request the Standing Committee on Procedure and Privileges to discontinue the investigations in relation to the actions of two public servants, being Ms Emily Roper, the deputy director general of the Department of the Premier and Cabinet, and Mr Darren Foster, the director general of the Department of the Premier and Cabinet

I rely on the comments that I have already made.

Point of Order

Hon NICK GOIRAN: I seek your clarification, Madam President, as to whether the amendment is within the scope of what is permissible. As I understand it, the matters that have been raised by the Leader of the House have absolutely nothing to do with order 4; neither is it contained in any place in the fifty-sixth report, which is the report before us.

Hon SIMON O'BRIEN: I am sorry, Madam President, just as you are receiving advice, further to the point of order, may I respectfully suggest that it might facilitate the processes of the chamber if this were ruled out of order for the reasons given by Hon Nick Goiran. Clearly, something as serious as the referral of contempt investigations to the Standing Committee on Procedure and Privileges and cancellation of the same is something that merits its own motion on notice, not something to just be tacked on to an unrelated matter.

Hon MARTIN ALDRIDGE: Madam President, I seek your advice further to this point of order. I have just received a copy of the motion moved by the Leader of the House, which says, “to request the Standing Committee”. Is this a suggestion that is being offered to the committee or could it be interpreted to be a direction to the committee to cease its investigation? If it is the latter, I draw Madam President’s attention to standing order 84. If the effect were that it would revoke recommendations 1 and 2 of the Standing Committee on Procedure and Privileges’ fifty-fifth report, obviously standing order 84 with respect to rescission of previous votes would have effect.

Hon SUE ELLERY: On the same point of order, the word is quite deliberately “request”. It may well be ruled out of order; I do not know. What I am asking the committee to do is to discontinue. I am asking the chamber to request that the committee do that. The committee will need to make its own determination on whether that is the appropriate thing to do. If the member’s question is: is this a directive? It is deliberately not.

The PRESIDENT: Members, given there have been a number of points of order in relation to the amendment moved by the Leader of the House, I intend to seek some appropriate advice on whether that amendment is within the scope. I would hope that somebody might suggest that we postpone dealing with recommendation 2 at this point and defer until a later stage. We would then move on to deal with recommendation 3.

Resolved, on motion by Hon Sue Ellery (Leader of the House), that consideration of recommendation 2 be postponed to a later stage of the sitting.

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Hon Rick Mazza; Hon Aaron Stonehouse

Recommendation 3 — Adoption

Hon SIMON O'BRIEN — without notice: I move —

That recommendation 3 be adopted and agreed to.

Hon MARTIN ALDRIDGE: There was some discussion earlier today on whether recommendation 3 is still required. I draw members' attention to a media statement of 4 September 2019 by the Corruption and Crime Commissioner. I seek leave to table that document.

Leave granted. [See paper 3001.]

Hon MARTIN ALDRIDGE: The statement obviously made clear, for those members who are aware of it, the commissioner's intention as of 4 September 2019, I suspect, arising from his awareness of the fifty-sixth report yesterday. Obviously, there is correspondence in the tabled paper that the Leader of the House tabled today. If I am not mistaken, it is the last document dated 4 September, which references that the commissioner has provided to the committee a Department of the Premier and Cabinet portable hard drive and a laptop that were seized from Mr Edman on 14 August 2019. Given that these events occurred yesterday, it is my view that the committee has not yet been able to ascertain what has been provided to it. Therefore, to ensure that the committee has what it needs with respect to the claim of privilege over the items seized—namely, the hard drive and laptop issued by DPC to Mr Edman for parliamentary purposes—I think it would be wise to continue with recommendation 3.

Whilst I am on my feet, I want to draw members' attention to paragraph 6.15 at page 9 of the report, which states —

The Commissioner also told the PPC that the CCC had obtained from the DPC, via a notice to produce information issued to Mr Foster, the encryption and pass codes for the computer that the DPC issued to Mr Edman when he was a member of Parliament. Those codes according to the Commissioner “unlock the computer”. On Tuesday, 27 August 2019 during his evidence to the PPC, Mr Foster produced to the PPC a copy of this information. In a letter dated 15 August 2019, Mr Edman's solicitor's informed the President of the following:

We are instructed that the Corruption and Crime Commission ... executed a search warrant upon Mr Edman's home and office on 14 August 2019. In the course of executing the warrant, a computer was seized which relevantly contained all the emails passing to and from Mr Edman while he was a member of Parliament.

Our client is concerned that the action of the CCC in seizing the computer in the circumstances may have constituted a breach of the *Parliamentary Privileges Act 1891*. He requests that this be noted by the Legislative Council and reserves the right to take further action in relation to this matter.

Progress reported and leave granted to sit again at a later stage of the sitting, on motion by Hon Simon O'Brien.

[Continued on page 6549.]

Sitting suspended from 4.16 pm to 4.30 pm