

40TH PARLIAMENT



Report 56

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

*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*

Presented by
Hon Kate Doust MLC (Chair)
September 2019

Standing Committee on Procedure and Privileges

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EXECUTIVE SUMMARY

Findings and recommendations

Findings and recommendations are grouped as they appear in the text at the page number indicated:

RECOMMENDATION 1

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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
 - (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.

RECOMMENDATION 2

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That the Legislative Council rescind its Order No. 4 made on 15 August 2019

RECOMMENDATION 3

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That the Legislative Council order the Corruption and Crime Commission to produce to the Clerk of the Legislative Council by Wednesday, 11 September 2019 at 4.00pm, the laptop issued to Mr Phillip Edman by the Department of Premier and Cabinet that was seized from Mr Edman pursuant to a search warrant, on 14 August 2019, and all copies of the data contained on it in the Corruption and Crime Commission's possession.

1. That proceedings be commenced and pursued, in the Supreme Court of Western Australia, on behalf of the Legislative Council of Western Australia, challenging the validity of some or all of three notices to produce documents, and one notice to produce information issued by the Corruption and Crime Commission to the Director General, Department of Premier and Cabinet, issued between April and August 2019, and of the conduct of the Commission in issuing those notices;
2. That the President of the Legislative Council of Western Australia be authorised to conduct such proceedings in that capacity on behalf of the Legislative Council of Western Australia and to do all things reasonably necessary for, and incidental to, the commencement and pursuit of those proceedings, including to:
 - a. engage solicitors and counsel to represent the Legislative Council of Western Australia and to act upon their advice with respect to the proceedings in consultation with the Standing Committee on Procedure and Privileges;
 - b. if considered appropriate, engage separate solicitors and other service providers to search and review the records produced to the Commission in response to the above notices;
 - c. maintain the confidentiality and legal professional privilege attaching to communication relating to the proposed proceedings;
 - d. take direction from the Standing Committee on Procedure and Privileges with respect to the conduct of the proceedings and matters related to them;
 - e. report to the Legislative Council of Western Australia, periodically, and when requested, with respect to the proposed proceedings; and
 - f. to consult with the Clerk as the Accountable Authority of the Department of the Legislative Council to permit the authorisation of the expenditure of funds necessary and reasonable with respect to any proceedings.

1 Introduction

- 1.1 On 12 June 2019, the Legislative Council authorised the Standing Committee on Procedure and Privileges (PPC) to act on its behalf by making the following order:

That the Standing Committee on Procedure and Privileges be granted authority by the Legislative Council to make any orders and do all things necessary and expedient to ensure that any documents or data created or received by a current or former member of the Legislative Council are released to an investigative agency only when —

- (a) its description falls within the lawful scope of any warrant, notice to produce, or other similar power granted to an investigative agency under a written law; and***
- (b) the documents or data is not proceedings in Parliament within the meaning of article 9 of the Bill of Rights 1688 or does not otherwise fall within the scope of parliamentary privilege.***

- 1.2 The PPC tabled report 55, on Wednesday, 14 August 2019.

- 1.3 The House agreed on Thursday, 15 August 2019 to all four recommendations made by the PPC in its report 55. Orders No. 1 and No. 2 related to referring two matters of privilege to the PPC for inquiry and report. Those inquiries are under way. Order No. 3 ordered the Director General, Department of the Premier and Cabinet (DPC) to attend before the PPC and produce the documents not produced to the PPC on Friday, 9 August 2019. The Director General produced these documents to the PPC on Friday, 23 August 2019 at 9.00am in compliance with the order. Order No 4 was directed to the Director General, Department of the Premier and Cabinet to prevent further breaches of the privileges of the Legislative Council.

- 1.4 Order No. 4 is as follows:

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

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

2 The Order made by the Legislative Council

DPC as the Parliament's Agent

- 2.1 Order No. 4 concerns document or data in the DPC's possession, custody or power that were created or received by a current or former member of the Legislative Council or their staff. The vast majority of the documents sought by the CCC in two notices to produce served on the Director General of the DPC related to the emails, attachments to those emails and diary entries for 3 former members of the Legislative Council and their staff. These documents are held on email servers and back up tapes maintained by the DPC.
- 2.2 As outlined in PPC Report 55, the parliamentary email accounts of Members of the Parliament of Western Australia have been managed offsite by the DPC since 23 August 1984. There are no guidelines or protocols governing this arrangement.¹ However, the DPC deals with members' data and that of their staff in a manner very different to other data it holds.
- 2.3 By default, no access is provided by the DPC to the email accounts or network storage data of Members of Parliament or their staff. Senior DPC IT staff have administrative access to the accounts in order to provide management and support services, but may only access information with the approval of the relevant Member.² The relevant Member's authority is required for their email accounts or those of their staff to be closed or created. Since 2007/8 Member email accounts are not deleted when the Member ceases to be a Member, and are retained indefinitely by DPC. This policy is currently being reviewed by a working group made up of current Members.³
- 2.4 The arrangements outlined above demonstrate a clear possessory right by the members concerned to their data and that of their staff. Those rights adhere regardless of the location where and by whom that data is managed on behalf of the member and the Legislative Council. The Commissioner of the CCC in his correspondence considers that these arrangements amount to the DPC being the agent of the Legislative Council in respect to the documents and data of the three former members and their staff retained by DPC under these arrangements.⁴ The PPC agrees with this assessment of that relationship.
- 2.5 The Legislative Council, which comprises the 36 members of that body established by s 2 of the *Constitution Act 1889*, has a direct interest in the manner in which emails accounts of its members are managed and maintained given that these email accounts comprise a significant volume of a member's working documents for both parliamentary and constituency work. That interest relates to the Legislative Council:
 - a) protecting its privileges, immunities and powers in respect to those documents that are proceedings in parliament or otherwise subject to parliamentary privilege; and
 - b) protecting communications of a confidential nature that include communications from persons who provide information in circumstances where there is either an express or implied request that their communication be kept confidential or where they are given by whistle blowers, informers or constituents about unlawful or potentially unlawful activities, maladministration or other complaints regarding the activity of Government.

¹ Letter to Mr Nigel Pratt, Clerk of the Legislative Council, from Mr Craig Bydder, Deputy State Solicitor, 18 June 2019, p1. (See **Appendix 2, PPC Report 55**)

² Ibid, p.2

³ Ibid, p3.

⁴ Letter to the President of the Legislative Council from the Commissioner of the CCC dated 26 June 2019.

Rationale for the Order

- 2.6 Order No. 4 made by the Legislative Council was in the nature of a protective order to prevent further breaches of its privileges by the Director General of the DPC. It sought to achieve this by ordering the Director General of the DPC to not produce to the CCC any document or data in the DPC's possession, custody or power that was created or received by a current or former member of the Legislative Council or their staff.
- 2.7 The other limb of that order, which informed the rationale behind the first limb, was to require the Director General to produce any documents sought by the CCC to the PPC in order for the PPC to fulfil the remit granted to it by the Legislative Council in its resolution of 12 June 2019. This would have resulted in the PPC applying the procedure that it had developed with the assistance of the CCC to determine which of the documents or data the subject of the CCC notices to produce were proceedings in Parliament or otherwise subject to parliamentary privilege.
- 2.8 The further breaches of the Legislative Council's privileges related to the possibility that if served with additional CCC Notices to Produce, the Director General would repeat the procedure he had used previously. That procedure was not authorised by the PPC or the Legislative Council and involved officers of the State Solicitor's Office (SSO) being instructed by Mr Foster to determine on his behalf which of the documents or data sought by the CCC were subject to parliamentary privilege and therefore immune from production.
- 2.9 The concerns of the PPC are well placed. In his evidence to the PPC on Tuesday, 27 August 2019, the Director General confirmed that he had been served by the CCC with additional notices. Mr Foster told the PPC that he had complied with one further CCC notice relating to the provision of information and foreshadowed to the PPC that he intended, on the same basis, to comply with a third notice to produce documents by Friday, 30 August 2019.⁵
- 2.10 The third notice referred to by Mr Foster relates to the 400 to 600 terabytes of data contained on back up tapes of the former members' and staff email data held by the DPC. The Commissioner of the CCC has informed the PPC that he has granted an extension of time to enable Mr Foster to comply with the third notice to 30 September 2019.⁶ The PPC maintains that the question of whether a document or data sought by the CCC by way of compulsory process issued to the Director General is subject to parliamentary privilege is, one for determination by the Legislative Council.⁷

3 The State's Legal Action

- 3.1 The State Solicitor wrote to the President on 26 August 2019 advising that he had been instructed to commence proceedings against the President (attached at Appendix 1). The President referred that correspondence to the PPC as a matter concerning the privileges of the Legislative Council.
- 3.2 The writ of summons that was filed at the Supreme Court on 27 August 2019 together with the orders of Hon Justice Allanson is attached at Appendix 2. Correspondence that passed between the State Solicitor and the Legislative Council is attached at Appendix 3.
- 3.3 The State relies on its view that there is no parliamentary or judicial precedent establishing that the Commons House of Parliament of the United Kingdom as at 1 January 1989 possessed any power to order a person not to produce a document in answer to a

⁵ Uncorrected Transcript of Evidence, Mr Darren Foster, Tuesday, 27 August 2019, p.18

⁶ Uncorrected Transcript of Evidence, Hon John McKechnie QC, Monday, 2 September 2019, p.18.

⁷ See PPC Report 55.

compulsory process lawfully issued pursuant to a statutory authority by an investigative agency.

- 3.4 The State's action against the Legislative Council is that the House does not have a power to order persons to not produce documents to the CCC. The State therefore seeks a declaration from the court that Order No. 4 (described in the writ as the non-production order) is beyond the power of the Legislative Council.
- 3.5 The PPC observes that if the court determined that the Legislative Council did not have that power, that decision would not resolve the central controversy between the Legislative Council and the Director General. That controversy relates to the right of the Legislative Council and not Mr Foster, or the SSO on his behalf, to determine questions of parliamentary privilege in respect to the documents and information sought by the CCC under a compulsory process.
- 3.6 It would also not resolve the controversies between the Legislative Council and the CCC in respect to whether that body is acting according to law in the exercise of its powers, rights or functions conferred under the *Corruption Crime and Misconduct Act 2003*. That Act, by s.3(2), is subject to the law of parliamentary privilege and expressly requires the CCC to not exercise a power, right or function if, or to the extent, that the exercise would relate to a matter determinable by a House of Parliament.

4 Legal Advice to the PPC

- 4.1 The PPC has received legal advice from Mr Chris Zelestis QC in respect to the matters raised by the State's legal action and also in respect to the matters contained in PPC report 55.
- 4.2 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.
- 4.3 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 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.
- 4.4 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.
- 4.5 A resolution that declares the privileges of the Legislative Council and in the terms described above was settled by Mr Zelestis and is reflected in recommendation 1 to this report.
- 4.6 The resolution has a similar effect to Order No. 4 in that it declares that persons who disregard or breach the privileges of the Legislative Council expose themselves to the risk of

being in contempt of the Legislative Council. This would occur where any person not authorised by the Legislative Council in the circumstances described in PPC Report 55 undertook a procedure by which they or their agents determined questions of privilege in respect to members' documents and those of their staff.

- 4.7 The obvious effect of agents of the executive or others not authorised by the Legislative Council making determinations regarding whether members' documents are subject to parliamentary privilege is that in doing so they are disregarding a privilege of the Legislative Council. In undertaking that determination, those unauthorised persons would be required to read and consider a broad range of members' documents and those of their staff. These may include documents subject to parliamentary privilege but also documents that may reveal the identity of informers and whistle blowers and sensitive or confidential documents having no relevance to the subject matter of the CCC inquiry.
- 4.8 The PPC has received further legal advice from Mr Zelestis that there are grounds upon which the Legislative Council could ask a court to rule on matters connected to PPC Report No. 55 that, if a favourable ruling was obtained from the court, would have the effect of upholding the Legislative Council's privileges, powers and immunities.
- 4.9 The PPC is not in a position to disclose that advice at this time as this would reveal prematurely details of the prospective legal actions that may be taken by the President, on behalf of the Legislative Council, should the President be authorised to do so. Disclosure of that advice would prejudice any legal action by not only revealing that advice to the State but additionally, waiving legal professional privilege in that advice.

5 Alternative Resolution and Rescission of Order No 4

- 5.1 The PPC therefore makes the following recommendations:

RECOMMENDATION 1

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
 - (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.

RECOMMENDATION 2

That the Legislative Council rescind its Order No. 4 made on 15 August 2019

6 The PPC's Ongoing Inquiry

State Solicitor's Office Procedure for Determining Parliamentary Privilege

- 6.1 The PPC has taken evidence from a Deputy State Solicitor who was responsible for determining the procedure used by the SSO to determine which of the documents and data tagged by the CCC as relevant to its investigation were subject to parliamentary privilege. As team leader, this very senior and experienced SSO lawyer managed the procedure undertaken on behalf of the Director General of the DPC. The Deputy State Solicitor's Statement about the procedure carried out by the SSO in relation to two CCC notices to produce records is attached at Appendix 4.
- 6.2 The Deputy State Solicitor prepared and distributed a memorandum which included a checklist to assist SSO staff to determine whether or not a document was subject to parliamentary privilege (attached at Appendix 5). The Committee notes that the SSO checklist is not based on the test universally recognised amongst Australasian Parliaments as first developed by the NSW Legislative Council, and adapted for use by the Australian Senate. The application of this recognised test occurred recently in the Australian Senate in a matter involving Senator Conroy and the execution of search warrants by the Australian Federal Police on the Australian Parliament and at the home of a staff member to Senator Conroy.⁸ The test used by the Australian Senate and the one intended to be adapted for use by the independent third party appointed by the PPC in undertaking the PPC procedure for dealing with the documents is attached by way of comparison at Appendix 6.
- 6.3 The evidence of the Deputy State Solicitor revealed that the procedure undertaken by SSO was over a two-week period determined by deadlines set by the CCC under extensions to its first two s.95 Notices to Produce. During this two-week period, approximately 30 SSO employees and assistants viewed approximately 68,000 electronic files of the former members and their staff. The SSO cohort undertaking this task included law student vacation clerks, articulated clerks, junior lawyers of less than 5 years' standing and senior lawyers. Speed, rather than accuracy appeared to be the dominant requirement. That need for speed arose directly from deadlines set by the CCC.
- 6.4 The SSO procedure identified over 2000 documents as being subject to parliamentary privilege.
- 6.5 The documents determined by the cohort of SSO staff as not being subject to parliamentary privilege were not further reviewed following that initial determination.
- 6.6 However, after the SSO procedure was completed, and not as part of that procedure, the team leader undertook a random 'spot check' of files that had been determined as not being subject to parliamentary privilege. The outcome of that spot check over a period of approximately one hour was that the team leader identified a further 8 privileged documents

⁸ Senate Reports 163 and 164, Committee of Privileges, Status of material seized under warrant, 2016-2017.

which had been incorrectly classified as not subject to parliamentary privilege.⁹ The team leader removed these documents from the bundle to be sent to the Commission. The number of documents revealed in the spot check as incorrectly identified represents a significant and material error rate.

- 6.7 The PPC maintains its view based on the evidence presented to it that its procedure, or one closely following it, when used with the test universally recognised amongst Australasian Parliaments, is far superior to the SSO test and process. The PPC procedure:
- 6.7.1 Accords with the right of the Legislative Council to determine matters of privilege in respect to the documents and data of its members and their staff in the current circumstances; and
- 6.7.2 As a practical matter will better secure the purpose of ensuring that documents that are proceedings in Parliament or otherwise subject to parliamentary privilege; and other documents that do not fall within the lawful scope of any compulsory process are not released to an investigative agency.
- 6.8 The procedures in other Australasian Parliaments are predicated on the investigative agency agreeing to deliver up to the relevant House the documents or data over which a claim of parliamentary privilege is made and not to deal with that material until such time as the House makes its determination. This has not occurred in this case.
- 6.9 If the State persists in challenging the Legislative Council's right to protect its privileges then the Legislative Council should reserve its right to take whatever action is necessary to defend those privileges, immunities and powers and to ensure persons act according to law.

Evidence of Commissioner of the Corruption and Crime Commission

- 6.10 The PPC took evidence from Hon John McKechnie QC, Commissioner of the CCC on 2 September 2019. The corrected transcripts of evidence are not available as at the time of this report. However, given the urgency of this matter, the PPC has set out below some of the germane aspects of the Commissioner's evidence.
- 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.¹⁰
- 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.¹¹
- 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

⁹ Transcript of evidence, Mr Craig Bydder, Deputy State Solicitor, 27 August 2019, p23.

¹⁰ Uncorrected Transcript of Evidence, Hon John McKechnie QC, Monday, 2 September 2019 p. 26.

¹¹ Email from Ms Wendy Edenbrock-Brown, Principle Legal Officer CCC to Mr Craig Bydder, Deputy State Solicitor dated 1 July 2019 (attached to Appendix 3).

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.

- 6.14 The Commissioner told the PPC that he would continue his investigation on the basis of his view of parliamentary privilege. This was that it prevents the use by the CCC of proceedings in Parliament but does not prevent the CCC from obtaining under compulsory process documents or data that is subject to parliamentary privilege.¹²
- 6.15 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”.¹³ 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 (CCC) 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.¹⁴
- 6.16 If this is in fact the case, the CCC would now have the means to access all of Mr Edman’s emails and their attachments sent and received for a period of 8 years when he was a member of Parliament. The PPC makes the observation that the CCC notice relating to Mr Edman sought email data for a period of 3 years and 9 months. In his evidence, the Commissioner conceded that by having the encryption and pass codes the CCC would have access to everything on Mr Edman’s computer.¹⁵
- 6.17 The Commissioner confirmed to the PPC that Mr Edman had made a claim to the CCC of parliamentary privilege over everything seized by the CCC under the search warrant, including the computer.¹⁶ Notwithstanding that claim, and the usual procedures that apply to similar claims made by members of the Federal Parliament, the Queensland Parliament, the ACT Parliament and the NSW Parliament under various memoranda of understanding or protocols, whereby those claims are determined by the relevant House of Parliament or their delegate, the Commissioner has retained the computer and all data on it.
- 6.18 The Commissioner explained, consistent with his correspondence to the PPC dated 25 July 2019, that any document that the CCC determined may be privileged during the course of its inquiry would be quarantined and treated in a way analogous to how the CCC deals with claims of legal professional privilege. As the Commissioner understood it, any document that was identified by a CCC investigator or analyst as possibly privileged would be quarantined by the CCC and reviewed by separate lawyers to determine whether it was

¹² Uncorrected Transcript of Evidence Hon John McKechnie QC dated 2 September 2019, p.15.

¹³ Uncorrected Transcript of Evidence Hon John McKechnie QC dated 2 September 2019, p.13.

¹⁴ Letter Graeme A. Ryan & Associates, Lawyers to Hon Kate Doust, President of the Legislative Council dated 15 August 2019.

¹⁵ Uncorrected Transcript of Evidence Hon John McKechnie QC dated 2 September 2019, p.14.

¹⁶ Uncorrected Transcript of Evidence Hon John McKechnie QC dated 2 September 2019, p.14.

subject to parliamentary privilege. Those 'separate' lawyers would be those of the CCC not involved with that particular investigation.¹⁷

- 6.19 The Commissioner told the PPC that the data on the computer seized from Mr Edman would be dealt with in the same way as the CCC is dealing with the other data it has obtained as outlined in the previous paragraph.¹⁸ When asked about how Mr Edman's claim of parliamentary privilege over the data contained on the laptop was being addressed, the Commissioner advised that the CCC has asked Mr Edman to identify what particular matters of privilege he is referring to. This was to enable the Commission to assess it and, if necessary, have the claim of privileged determined by the Legislative Council.¹⁹
- 6.20 The PPC notes, that in a letter to Mr Edman's lawyers, dated 28 August 2019, Ms Wendy Endebrock-Brown, Director Legal Services, CCC, expressly rejected Mr Edman's claim of parliamentary privilege over all items that were seized under warrant from both his home and business. She further advised Mr Edman's lawyers that:

Your client was given a list of all items seized at the conclusion of each warrant. If parliamentary privilege is now claimed in respect of any document or communication in or on any item by your client, please identify the document or communication and the basis for the claim. Upon receipt of this information, the Commission will seek to agree a process involving the Legislative Council to determine the extent to which parliamentary privilege applies to the document or communication.

The difficulties for Mr Edman in attempting to identify from memory, with no access to the laptop computer, any privileged documents from amongst 8 years of email data contained on it are plain. Ms Endebrock-Brown's letter was attached to the Commissioner's correspondence to the President dated 28 August 2019 (attached at Appendix 7).

- 6.21 The PPC's concerns have been reinforced by recent actions of the CCC. On Monday, 2 September 2019 the CCC delivered to the PPC a portable storage device containing:
- a) The documents and data provided to the CCC by the DPC from the first CCC notice to produce relating to Mr Edman and his staff; and
 - b) An image of the hard drive from the laptop computer seized by the CCC on 14 August 2019 when it executed search warrants relating to Mr Edman.
- 6.22 The purported purpose of the CCC in delivering this material is to enable the PPC to assess the documents and data to determine what documents are subject to parliamentary privilege.
- 6.23 That assessment will involve interrogating almost 68,000 files obtained from the DPC managed email accounts of the three former members and their staff that the CCC considered are relevant to its investigation. In addition, and based on the information from Mr Edman's lawyers, the PPC would be required to assess up to 8 years of Mr Edman's email communications to determine what documents or data is proceedings in Parliament. The CCC has given no undertakings to the PPC that it will not deal with the data contained on the laptop computer or the documents it has received from the DPC until the PPC concludes any assessment.
- 6.24 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

¹⁷ Uncorrected Transcript of Evidence Hon John McKechnie QC dated 2 September 2019, pp.11-14.

¹⁸ Uncorrected Transcript of Evidence Hon John McKechnie QC dated 2 September 2019, pp.13.

¹⁹ Uncorrected Transcript of Evidence Hon John McKechnie QC dated 2 September 2019, p.14.

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. The task presented to the PPC in assessing the documents is a direct result of the scope of the CCC notices to produce which require the production to the CCC of proceedings in Parliament together with sensitive and confidential documents of members and their staff most of which are either immune from production and/or have no relevance to the CCC investigation. That investigation is into possible misconduct of members in the use of their electoral and other allowances.

- 6.25 The PPC has serious concerns following the advice provided by Mr Zelestis, the matters referred to in Report 55 and the preceding evidence of the Commissioner above that the CCC is not exercising its powers rights and functions according to law and in a manner consistent with the privileges, immunities and powers of the Legislative Council. Those privileges immunities and powers have been expressly retained under s.3(2) of the *Corruption Crime and Misconduct Act 2003*.

RECOMMENDATION 3

That the Legislative Council order the Corruption and Crime Commission to produce to the Clerk of the Legislative Council by Wednesday, 11 September 2019 at 4.00pm, the laptop issued to Mr Phillip Edman by the Department of Premier and Cabinet that was seized from Mr Edman pursuant to a search warrant, on 14 August 2019, and all copies of the data contained on it in the Corruption and Crime Commission's possession.

7 Authorising the President

- 7.1 The Legislative Council as an arm of the legislature can only act through its members or officers. The President of the Legislative Council is the spokesperson for the Council and presides over its meetings. The President was named as the respondent to the State's legal action as the legal *persona* representing the Legislative Council, the office constituted under s.5 of the *Constitution Acts Amendment Act 1899*.

- 7.2 Other than for those functions provided by law or authorised by the Standing Orders the President may act as a litigant on behalf of the Legislative Council when authorised to do so. This accords with the nature of the office as expressed by the Speaker of the House of Commons, Sir William Lenthall, in 1643 following the entry into the House of Commons by King Charles I accompanied by 400 armed men seeking the arrest of five of its members accused of treason. When questioned by the King as to the whereabouts of those members, the Speaker said in answer:

May it please your majesty, I have neither eyes to see nor tongue to speak in this place but as this House is pleased to direct me whose servant I am here.

- 7.3 This statement was made during a period of great conflict between the Crown and the Parliament for ascendancy, a conflict in which the Parliament prevailed and gave rise to what is known historically as the Glorious Revolution. One of the first acts of the new Monarchs was to assent to the *Bill of Rights 1688* upon which many of the Legislative Council's privileges, immunities and powers arise and endure to this day. Despite the historic origins of this law, which is part of the law of Western Australia under s.1 of the *Parliamentary Privileges Act 1891*, it is as relevant today as it was in the 17th Century. Its objectives are to prevent interference with the legislature by the executive (the Crown/State), the judiciary and other like bodies as 'places outside Parliament' and to permit the free flow of information to the representatives of the people.

- 7.4 The Legislative Council may authorise the President as its representative to bring or defend legal actions on behalf of the House. This authority is required if the President is to commence any legal proceedings on behalf of the Legislative Council based on the legal advice provided to the PPC by Mr Zelestis. Consequently, the PPC recommends as follows:

RECOMMENDATION 4

1. That proceedings be commenced and pursued, in the Supreme Court of Western Australia, on behalf of the Legislative Council of Western Australia, challenging the validity of some or all of three notices to produce documents, and one notice to produce information issued by the Corruption and Crime Commission to the Director General, Department of Premier and Cabinet, issued between April and August 2019, and of the conduct of the Commission in issuing those notices;
2. That the President of the Legislative Council of Western Australia be authorised to conduct such proceedings in that capacity on behalf of the Legislative Council of Western Australia and to do all things reasonably necessary for, and incidental to, the commencement and pursuit of those proceedings, including to:
 - a. engage solicitors and counsel to represent the Legislative Council of Western Australia and to act upon their advice with respect to the proceedings;
 - b. if considered appropriate, engage separate solicitors and other service providers to search and review the records produced to the Commission in response to the above notices;
 - c. maintain the confidentiality and legal professional privilege attaching to communication relating to the proposed proceedings;
 - d. take direction from the Standing Committee on Procedure and Privileges with respect to the conduct of the proceedings and matters relating to them;
 - e. report to the Legislative Council of Western Australia, periodically, and when requested, with respect to the proposed proceedings; and
 - f. to consult with the Clerk as the Accountable Authority of the Department of the Legislative Council to permit the authorisation of the expenditure of funds necessary and reasonable with respect to any proceedings.

APPENDIX 1

LETTER FROM THE STATE SOLICITER TO THE PRESIDENT



STATE SOLICITOR'S OFFICE

Your Ref: 1570-19
SSO Ref: Nicholas Egan | (08) 9264 1888 | n.egan@sso.wa.gov.au
Enquiries:

David Malcolm Justice Centre
26 Barrack Street
Perth, Western Australia 6000
GPO Box 883 Perth WA 6838
Telephone (08) 6264 1888
Fax (08) 9264 1440
Email sso@sso.wa.gov.au
DX 175

The Hon Kate Doust
President of the Legislative Council
Parliament House
4 Parliament Terrace
WEST PERTH WA 6005

By email: ClerkLC@parliament.wa.gov.au

Date: 26 August 2019

Privileged and Confidential

Dear President

JUDICIAL PROCEEDINGS FOR DECLARATION CHALLENGING VALIDITY OF ORDER MADE BY LEGISLATIVE COUNCIL

The purpose of this letter is to raise an issue concerning the Legislative Council's order of 15 August 2019 which requires Mr Darren Foster, Director General, Department of the Premier and Cabinet (**Department**), or any person acting in that capacity to not produce to the Corruption and Crime Commission (CCC) 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. We will refer to this as the Order. The terms of the Order were not confined only to documents or data in the Department's possession, custody or power which are subject to parliamentary privilege.

Validity of the Order

In my view, serious doubt exists as to whether the Order is valid to prevent Mr Foster from producing documents to the CCC in answer to any existing or future compulsory process such as a notice to produce.

With the greatest of respect to the Legislative Council, I have formed this view for the following reasons.

1. Section 4 of the *Parliamentary Privileges Act 1891* (WA) expressly confers power upon the Legislative Council to "order any person ... to produce to [a House of the Parliament] any paper, book, record, or other document in the possession or power of such person". The *Parliamentary Privileges Act* does not expressly confer any power to order a person not to produce a document in answer to a compulsory process issued by the Corruption and Crime Commission;

2. There is no parliamentary or judicial precedent, as far as we are aware, establishing that the Commons House of Parliament of the United Kingdom as at 1 January 1989 possessed any power to order a person not to produce a document in answer to a compulsory process lawfully issued pursuant to a statutory authority by an investigative agency. Consequently, the order is not within a power conferred upon the Legislative Council by section 1(b) of the *Parliamentary Privileges Act*.

If, contrary to the above points, the Legislative Council does have the power to order Mr Foster not to produce documents, then, in my view the following additional reasons support the conclusion that it could not be used to order Mr Foster not to comply with a compulsory process issued by the CCC:

3. Section 95 of the *Corruption, Crime and Misconduct Act 2003* (WA) (**CCM Act**) was enacted as legislation by the Parliament of Western Australia and expressly confers power upon the CCC, by written notice served on a person, requiring that person to produce a record or other thing specified in the notice. It does not seem to me that an order of the Legislative Council alone, as compared to the Parliament as a whole, can diminish the statutory powers of the CCC conferred by legislation;
4. To the extent that section 3(2) of the CCM Act provides that nothing in CCM Act affects the operation of the *Parliamentary Privileges Act*, points 1 and 2 above show that the *Parliamentary Privileges Act* did not have any relevant operation in respect of a compulsory process issued by the CCC pursuant to section 95 of the CCM Act. To put it another way, at the time the CCM Act was enacted, and notwithstanding the *Parliamentary Privileges Act*, Parliament as a whole had no difficulty with providing powers of compulsion to the CCC pursuant to section 95 of the CCM Act – rather, the only restraint on that process was captured within section 3(2) of the CCM Act;
5. To the extent that section 3(2) of the CCM Act also provides that a power conferred under that Act is not to be exercised if that exercise would relate to a matter determinable by a House of Parliament, the terms of the order made by the Legislative Council are not confined to preventing production of documents or data which relate to any matter determinable by the Legislative Council. For example, the terms of the order prevent the Director General from producing documents received by a staff member of a current or former member of the Legislative Council in that staff member's capacity which were wholly unconnected with any parliamentary business.

In addition, and again with the greatest of respect to the Legislative Council, it would appear that the Order is based on two tenets:

- (a) first, parliamentary privilege may protect some documents from production to the CCC for the purposes of an investigation carried out by the Commission; and
- (b) second, it is solely for the Legislative Council to determine the existence of parliamentary privilege in respect of documents created or received by a current or former member of the Legislative Council or their staff.

I will discuss each of these in turn.

Parliamentary Privilege Prevents Production

6. Whether parliamentary privilege applies to protect material from disclosure which demonstrates criminal or serious misconduct in response to the exercise of compulsory investigative powers by an investigative body, in my respectful opinion, is to be

resolved by reference to the extent of parliamentary privilege in the House of Commons on 1 January 1989: section 1(b) of the *Parliamentary Privileges Act*.

In *R v Chaytor* [2011] 1 AC 684, Lord Phillips PSC said, at [83], that "the House [of Commons] does not assert an exclusive jurisdiction to deal with criminal conduct, even where this relates to or interferes with proceedings in committee or in the House": (underlining added). He also said, at [83], where it is necessary to investigate facts and obtain evidence of criminal misconduct, "[w]hat occurs is that Parliament permits the police to carry out their investigations within the precincts". Although he did not elaborate, Lord Phillips mentioned, at [92], that in the course of a criminal prosecution (but he did not say investigation), issues might arise involving areas of inquiry precluded by parliamentary privilege. Lord Hope, Baroness Hale, Lord Brown, Lord Mance, Lord Collins, Lord Kerr and Lord Clarke all expressly concurred with Lord Phillips. There is no UK authority or parliamentary precedent for or against parliamentary privilege providing immunity from the exercise of functions and powers of a statutory body in the investigation of criminal or serious misconduct by a parliamentarian (and I note none is cited in Report 55 of the Standing Committee on Procedure and Privileges, which you presented).

Determination of Parliamentary Privilege

7. I note, with the greatest of respect to the Legislative Council, that determining the existence of parliamentary privilege is not the sole province of the Legislative Council. For example, a court will do so whenever a question of parliamentary privilege properly arises in proceedings before it.
8. In effect, the Legislative Council appears to consider that it may rely upon the doctrine of parliamentary privilege to assert control over all documents in the entire email system, maintained by the Department for parliamentarians. That is in circumstances where the email system is in the control of the Department and not Parliament. There is no precedent for parliamentary privilege effectively permitting Parliament to assert control over documents which are outside its control, and which Parliament has permitted to be maintained outside of its control.

Given all of the above, and as I have stated at the outset of this letter, I am of the view that there are serious doubts as to the validity of the Order.

The Effect on Mr Foster

As you will appreciate, if Mr Foster complies with the Order, then he will be unable to comply with any notices to produce issued by the CCC, even when those notices do not relate to, or capture, any material which is properly subject to parliamentary privilege. It follows that Mr Foster would be exposed to prosecution under the CCM Act. I also understand that there is a serious risk that any investigation by the CCC into serious misconduct or corruption would be compromised, and perhaps gravely so.

On the other hand, as you will also appreciate, if Mr Foster does not comply with the Order, and instead provides to the CCC any material which is the subject of compulsory process, then he will risk being in contempt of Parliament.

With the greatest of respect, this irreconcilable paradox places Mr Foster in an invidious position. Mr Foster's legal position (and the position of any other public servant placed in the



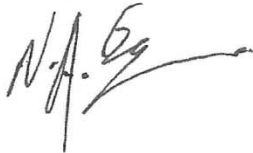
same position) is therefore clouded in great uncertainty. Clearly, however, if the Order is invalid for the reasons I have expressed, Mr Foster's legal position is clearer.

Declaratory Relief

Given the serious doubts which I have, and the uncertainty of Mr Foster's legal position, I have been instructed by the Attorney General to commence proceedings urgently in the Supreme Court of Western Australia (for and on behalf of Mr Foster), seeking a declaration that the Order is of no legal effect. I respectfully advise that the defendant in the proceedings will be yourself as President of the Legislative Council. I am informed that the CCC may wish to intervene in those proceedings. As far as the timing of those proceedings are concerned, I would anticipate, subject to any communications we might have in the intervening period, that they would be commenced tomorrow.

To the extent that you, or those who might provide advice to you on this matter, see benefit in discussing the matter, either to avoid the proceedings altogether or to explore the most efficient way that the proceedings might be resolved, then I will make myself available.

Yours faithfully

A handwritten signature in black ink, appearing to read 'N.A. Egan', with a long horizontal flourish extending to the right.

**NICHOLAS EGAN
STATE SOLICITOR**

APPENDIX 2

WRIT OF SUMMONS

IN THE SUPREME COURT
OF WESTERN AUSTRALIA
HELD AT PERTH

No. CIV 2518 of 2019

BETWEEN

Darren Jon FOSTER

Plaintiff

AND

Catherine Esther DOUST

Defendant

WRIT OF SUMMONS

Date of Document: 27/08/2019

Filed on behalf of: The Plaintiff

Date of Filing (and valid for service from): 27/08/2019

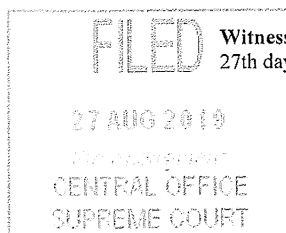
Filed by:

State Solicitor's Office
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Telephone: (08) 9264 1888
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Contact: Gregory Stockton
Email: sso@sso.wa.gov.au
Reference: SSO 3425-19

TO: Catherine Esther DOUST
OF: 399 Albany Highway
VICTORIA PARK WA 6100
Australia

You are commanded that, within 10 days after the service of this writ on you, exclusive of the day of such service, you cause an appearance to be entered for you in our Supreme Court in an action at the suit of the abovenamed plaintiff; and take notice that in default of your so doing the plaintiff may proceed therein and judgment may be given in your absence.



Witness: **THE CHIEF JUSTICE OF WESTERN AUSTRALIA** on Tuesday, the 27th day of August 2019

Folio 1
Page 1

NOTE: This writ may not be served later than 12 calendar months beginning with the above date unless renewed by order of the Court.

A defendant may appear to the writ by entering an appearance either personally or by solicitor at the Central Office of the Supreme Court at Perth.

If the defendant enters an appearance, then unless a summons for judgment is served on him in the meantime, he must also file a defence at the Central Office of the Supreme Court at Perth, and serve such defence on the solicitor for the plaintiff, within 14 days after the last day of the time limited for entering an appearance, otherwise judgment may be entered against him without notice.



Statement of Claim

Parties and Other Persons

1. The plaintiff is the Director General of the Department of the Premier and Cabinet (the "**Department**").
2. The Department is established pursuant to section 35 of the *Public Sector Management Act 1994* (WA), and the Minister responsible for the Department is the Premier of Western Australia.
3. The defendant is the President of the Legislative Council of Western Australia, constituted by section 5 of the *Constitution Acts Amendment Act 1899* (WA).

Corruption and Crime Commission

4. The Corruption and Crime Commission (the "**Commission**") is established by section 8 of the *Corruption, Crime and Misconduct Act 2003* (WA).
5. Pursuant to section 18 of the *Corruption, Crime and Misconduct Act*, it is a function of the Commission:
 - (a) to receive and initiate allegations of "serious misconduct" (as that term is defined in section 4) (section 18(2)(a));
 - (b) to investigate or take other action in relation to allegations related to serious misconduct if it is appropriate to do so (section 18(2)(c));
 - (c) regardless of whether or not there has been an allegation of serious misconduct, to investigate whether serious misconduct has or may

have occurred; is or may be occurring; is or may be about to occur;
or is likely to occur (section 18(2)(e)); and

(d) to assemble evidence obtained in the course of exercising the serious misconduct function and –

(i) furnish to an independent agency or another authority, evidence which may be admissible in the prosecution of a person for a criminal offence against a written law or which may otherwise be relevant to the functions of the agency or authority; or

(ii) furnish to the Attorney General or a suitable authority of another State, a Territory, the Commonwealth or another country, evidence which may be admissible in the prosecution of a person for a criminal offence against a law of the jurisdiction concerned or which may otherwise be relevant to that jurisdiction (section 18(2)(h)).

6. Pursuant to section 94 of the *Corruption, Crime and Misconduct Act*, for the purposes of an investigation into serious misconduct under Part 3 of that Act, the Commission may, by written notice served on a public authority or public officer ("**Statement Notice**"), require the authority or officer to produce a statement of information.

7. Pursuant to section 95(1) of the *Corruption, Crime and Misconduct Act*, the Commission may, by written notice served on a person ("**Production Notice**"), require the person:

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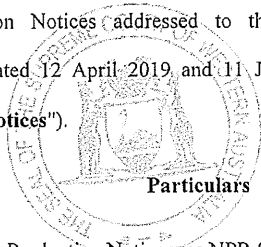
- (a) to attend, at a time and place specified in the notice, before the Commission or an officer of the Commission as specified in the notice; and
 - (b) to produce at that time and place to the person so specified a record or other thing specified in the notice.
- 8. By reason of section 99(2) of the *Corruption, Crime and Misconduct Act*, a Statement Notice or Production Notice, or a summons under section 96 of the *Corruption, Crime and Misconduct Act*, may include a notation in the circumstances prescribed in section 99(4) or (5), to the effect that disclosure of information about the notice or summons, or about any official matter (as defined in section 99(1)) connected with it, is prohibited except in circumstances, if any, specified in the notation.

Parliamentary Email Accounts

- 9. At all relevant times, the parliamentary email accounts of members of the Parliament of Western Australia:
 - (a) have been managed outside the precincts of Parliament by the Department;
 - (b) have been in the possession and custody of the Department (and therefore the State), which is under the control of the plaintiff; and
 - (c) have not been deleted upon a member of Parliament retiring.
- 10. There are no guidelines, protocols or other arrangements which have been agreed by the members of Parliament or the Houses of the Parliament of

Western Australia, and the Director General of the Department, in respect of the disclosure of material from parliamentary email accounts to the Commission or any other investigative agency or body.

Allowances Investigation

11. The Commission has held public hearings in relation to an investigation into whether serious misconduct has occurred in the use of parliamentary electoral allowances by members of the Parliament of Western Australia (the "**Allowances Investigation**") on 16 August 2019.
12. For the purposes of the Allowances Investigation, the Commission issued two Production Notices addressed to the Director General of the Department dated 12 April 2019 and 11 June 2019 (the "**Pre-Existing Production Notices**").

Particulars

 1. The first Production Notice was NPR 00615-2019-4614.
 2. The second Production Notice was NPR 00615-2019-4647.
13. The Pre-Existing Production Notices required the Director General of the Department to provide the following material in relation to the parliamentary email accounts of three named former members of the Legislative Council, save for any documents which were the subject of parliamentary privilege:

- (a) a complete electronic copy of all emails and email attachments sent to, and received by, all of the email addresses listed for the date period 1 January 2014 to 30 September 2017;
- (b) a complete electronic copy of all calendar entries created by, or on behalf of, the former members of Parliament for the date period 1 January 2014 to 30 September 2017; and
- (c) copies of various other documents of the former members of Parliament for the date period 1 January 2014 to 31 December 2015.

Particulars

The exception not requiring production of documents which were the subject of parliamentary privilege was confirmed by letters dated 20 May 2019 and 9 July 2019 sent by the Commission's Principal Lawyer to the State Solicitor, on behalf of the plaintiff.

14. At the public hearings for the Allowances Investigation on 16 August 2019, in her opening address, counsel assisting the Commission:
 - (a) stated that the Commission was investigating whether a lack of public accountability and transparency as to how members of Parliament spend their entitlement is a serious misconduct risk;
 - (b) did not confine her opening statement only to an investigation of three former members of Parliament;
 - (c) stated that the Commission had served notices to produce documents to compel the person receiving the notices to give the Commission

specified documents that would assist the Allowances Investigation;
and

(d) stated that the Allowances Investigation was ongoing.

15. In the circumstances pleaded in paragraphs 9 to 14 above:

(a) there was the possibility that, prior to 16 August 2019, the Commission had already issued Statement Notices and Production Notices other than the Pre-Existing Production Notices to the plaintiff; and

(b) at all material times since 16 August 2019 there has been, and remains, a serious prospect that the Commission will serve Statement Notices and further Production Notices upon the plaintiff in respect of the three former members of Parliament who were the subject of the Pre-Existing Production Notices, or in respect of other members of Parliament, for the purposes of the Allowances Investigation.

Orders of Legislative Council

16. On 15 August 2019, the Legislative Council resolved that the plaintiff, as the Director General of the Department, or any person acting in that capacity, was ordered:

(a) to not produce to the 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 (the "**Non-Production Order**");

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(b) to produce any documents or data that is the subject of any further compulsory process immediately to the Legislative Council Standing Committee on Procedure and Privileges at the Legislative Council Committee Office, Ground Floor, 18-32 Parliament Place, West Perth, pursuant to the provisions of the *Parliamentary Privileges Act 1891* for that Committee to determine whether:

- (i) its description falls within the lawful scope of any warrant, notice to produce, or other similar power granted to an investigative agency under a written law; and
- (ii) the documents or data is not proceedings in Parliament within the meaning of Article 9 of the *Bill of Rights 1688* or does not otherwise fall within the scope of parliamentary privilege (the "**Further Production Order**").

17. Properly construed, the reference to any further compulsory process in the Non-Production Order excluded the Pre-Existing Production Notices.

Particulars

The Pre-Existing Production Notices were referred to specifically in a separate order which the Legislative Council resolved to make on 15 August 2019.

18. Notice of the terms of the Non-Production Order and the Further Production Order was given to the plaintiff by letter from the defendant dated 16 August 2019.

Further Compulsory Process

19. On 6 August 2019, the Commission issued a further Production Notice to the plaintiff (the "**Third Production Notice**"), which required the plaintiff to produce to the Commission by 30 August 2019 (subject to any extension which might be granted) the following, save for any documents which were the subject of parliamentary privilege:
- (a) a complete electronic copy of all back up emails and email attachments sent to, and received by, the three former members of Parliament and their staff who were subject to the Pre-Existing Production Notices for the date period 1 January 2014 to 30 September 2017;
 - (b) copies of all applications, approvals and disapprovals, in electronic or hard copy form, for the issuance/disbursement of parliamentary travel allowance for the three former members of Parliament who were subject to the Pre-Existing Production Notices for the date period 1 January 2014 to 31 December 2015;
 - (c) copies of all pay slips and PAYG group certificates for the three former members of Parliament who were subject to the Pre-Existing Production Notices for the date period 1 July 2013 to 31 August 2017; and
 - (d) in relation to certain named former electoral officers (not being members of Parliament), copies of their respective employment contracts and job description forms, along with copies of any Code of Conduct that was applicable to their roles.

Particulars

1. See Production Notice No NPR 00615-2019-4669 dated 6 August 2019.
 2. The plaintiff repeats the particulars in relation to paragraph 13 in respect of the exception not requiring production of documents which were the subject of parliamentary privilege, and says that the plaintiff will apply the same approach to the Third Production Notice.
20. If the terms of the Non-Production Order have legally binding effect upon the plaintiff, the Non-Production Order prohibits the plaintiff from providing the documents which are the subject of the Third Production Notice to the Commission, where the plaintiff has been legally advised that the documents are not the subject of parliamentary privilege.
21. On 20 August 2019, the Commission issued a Statement Notice to the plaintiff (the "**First Statement Notice**") requiring the plaintiff to produce a statement of information by 4:00 pm on 21 August 2019, and the plaintiff produced such a statement.

Particulars

See Notice NPI 00615-2019-4681 dated 20 August 2019.

22. If the terms of the Non-Production Order have legally binding effect upon the plaintiff, the Non-Production Order did not prohibit the plaintiff from providing the statement which is the subject of the First Statement Notice to the Commission, as the Non-Production Order only relates to documents

that were created or received by a current or former member of the Legislative Council or their staff, and not to statements prepared by the plaintiff.

Non-Production Order not Legally Valid

23. (a) The *Parliamentary Privileges Act* does not confer any power or authority upon the Legislative Council to order a person not to produce a document, which 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; and / or
- (b) The Legislative Council did not have the power or authority to resolve to make the Non-Production Order with legally binding effect upon the plaintiff, further or alternatively could not lawfully make the Non-Production Order with legally binding effect upon the plaintiff.

Particulars

1. The *Parliamentary Privileges Act* does not expressly confer any power or authority to order a person not to produce a document, either generally, or specifically in answer to a compulsory process issued by an investigative agency investigating serious or criminal misconduct.
2. There is no 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, which 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.

3. To the extent that the Legislative Council may subsequently determine that a document created or received by a current or former member of the Legislative Council or their staff is the subject of parliamentary privilege, there is no relevant judicial authority or parliamentary precedent which establishes that parliamentary privilege requires a person who is not a parliamentarian, and who has custody or possession over documents outside Parliament, to refuse to comply with a compulsory process issued by a statutory body in the exercise of functions and powers to investigate criminal or serious misconduct by a parliamentarian, until the House in which the parliamentarian sits has determined the existence of parliamentary privilege.
4. There is no relevant judicial authority or parliamentary precedent which establishes that the existence of parliamentary privilege may only be determined by a House of Parliament, and may not be assessed by a member of the Executive, where:
 - (a) a member of the Executive government is required to produce documents (which are in that person's custody or possession outside of Parliament) pursuant to the exercise of functions

and powers of a statutory body in the investigation of criminal or serious misconduct by a parliamentarian; and

(b) the requirement imposed upon the member of the Executive excludes a requirement to produce any documents which that person is legally advised are the subject of parliamentary privilege.

5. In the circumstances of particulars 2-4 above, the Non-Production Order is not within a power or authority conferred upon the Legislative Council by section 1(b) of the *Parliamentary Privileges Act*.

6. An order of the Legislative Council cannot diminish the statutory powers of the Commission conferred by sections 94 or 95 of the *Corruption, Crime and Misconduct Act*.

7. To the extent that the terms of the Non-Production Order prevent the plaintiff from producing documents to the Commission created or received by a current or former member of the Legislative Council or their staff, which are wholly unconnected with any parliamentary business or which are not the subject of parliamentary privilege, the terms of the order are too wide and the whole order is invalid.

24. In the circumstances alleged in paragraph 23 above, the Non-Production Order is not legally valid.

Entitlement to Declaratory Relief

25. In the circumstances alleged in paragraphs 15, 19 and 20 above, and where the plaintiff is the subject of the Non-Production Order, the plaintiff is a person interested in whether the Non-Production Order is legally valid.

AND THE PLAINTIFF CLAIMS AGAINST THE DEFENDANT:

- A. A declaration that the *Parliamentary Privileges Act 1891* (WA) does not confer any power or authority upon the Legislative Council of the Parliament of Western Australia to order a person not to produce a document, which 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.
- B. A declaration that the Non-Production Order made by the Legislative Council on 15 August 2019, and notified to the plaintiff by letter dated 16 August 2019, was outside the power or authority of the Legislative Council and not legally valid.
- C. Such other order as the Court thinks is just and appropriate.

J A Thomson SC

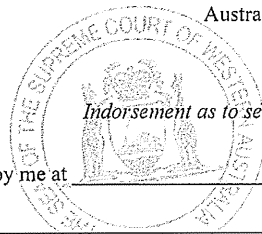
G Stockton

Place of Trial: Perth

This writ was issued by or on behalf of the plaintiff.

The plaintiff's geographical address is: Darren Jon FOSTER
C/Dumas House
2 Havelock Street
WEST PERTH WA 6005
Australia

The plaintiff's service details are: c/-State Solicitor's Office
David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000
Australia



Indorsement as to service

This writ was served by me at _____
on _____
(The Defendant or one of the Defendants)
on _____ day the _____ day of _____ 20__.

Indorsed the _____ day of _____ 20__.

(Signed)

(Address)



IN THE SUPREME COURT OF WESTERN AUSTRALIA

CIV/2518/2019

BETWEEN:

Darren Jon FOSTER

First Plaintiff

AND

Catherine Esther DOUST

First Defendant

ORDERS OF THE HONOURABLE JUSTICE ALLANSON
MADE 28 August 2019

IT IS ORDERED THAT:

1. Pursuant to O 4A r 13(2) of the Supreme Court Rules 1971 (WA) this action be admitted to the CMC list.
2. The action be managed by the Honourable Justice hall.

BY THE COURT

THE HONOURABLE JUSTICE J ALLANSON

ACCEPTANCE OF SERVICE

I, Nigel Pratt, Clerk of the Legislative Council care of Parliament House,
4 Harvest Terrace, WEST PERTH WA 6005 ACCEPT SERVICE of:

1. Supreme Court of Western Australia, Writ of Summons for matter CIV 2518 of 2019
between Darren Jon Foster and Catherine Esther Doust; and
2. Orders of the Honourable Justice Allanson dated 28 August 2019.

Dated: 30 August 2019.

Time: : pm

NIGEL PRATT
Clerk of the Legislative Council

APPENDIX 3

CORRESPONDENCE BETWEEN STATE SOLICITOR AND LEGISLATIVE COUNCIL



STATE SOLICITOR'S OFFICE

David Malcolm Justice Centre
28 Barrack Street
Perth, Western Australia 6000
GPO Box 883 Perth WA 6838
Telephone (08) 9264 1888
Fax (08) 9264 1440
Email sso@sso.wa.gov.au
DX 175

Your Ref:
SSO Ref: 1570-19 & 3425-19
Enquiries: Nicholas Egan | (08) 9264 1888 | n.egan@sso.wa.gov.au

The Hon Kate Doust
President of the Legislative Council
Parliament House
4 Parliament Terrace
WEST PERTH WA 6005

By email: ClerkLC@parliament.wa.gov.au

Date: 27 August 2019

Privileged and Confidential

Dear President

**SUPREME COURT OF WA ACTION: CIV 2518 OF 2019
DARREN JON FOSTER v CATHERINE ESTHER DOUST**

I refer to my letter of yesterday advising that I had received instructions to commence proceedings in the Supreme Court of Western Australia seeking a declaration to the effect that the order of the Legislative Council dated 15 August 2019 was, in effect, unlawful.

I now confirm that those proceedings have been issued.

The purpose of this letter is to inquire whether there are solicitors who are, or might be, instructed to accept service of the proceedings on your behalf. If so, I will make contact with them and arrange service. If not, I would be grateful if you could provide an indication of your availability so I can arrange personal service.

Should you wish to discuss any of the above, please do not hesitate to contact me, and if for any reason I am unavailable please contact either Ms Kirsten Chivers, Senior Assistant State Solicitor, or Mr Greg Stockton, Solicitor (whose details also appear at the top of this letter).

Yours faithfully

NICHOLAS EGAN
STATE SOLICITOR

OFFICE OF THE CLERK



SSO Ref: 1570-19 & 3425-19
Our Ref: A774625

28 August 2019

Mr Nicholas Egan
State Solicitor
State Solicitor's Office
GPO Box B83
Perth WA 6838

Via email: negan@sso.wa.gov.au

Dear Mr Egan,

Supreme Court of WA Action: CIV 2518 of 2019
Darren Jon Foster v Catherine Esther Doust

I refer to your letters of 26 and 27 August 2019.

In relation to your letter of 27 August 2019 and the matter of service of the above proceedings, I have been authorised by Hon Kate Doust MLC, President of the Legislative Council, to receive service on her behalf. As service of legal process cannot take place on the Parliamentary precincts, I propose that I attend at your offices on Friday, 30 August 2019 at 3.00pm to receive the documents. Please confirm whether this is acceptable.

In relation to your letter of 26 August 2019 and matters contained in it, it is not conceded that the Legislative Council cannot make an Order to prohibit a person from the delivery of documents to a third party. That power derives from Section 1 of the *Parliamentary Privileges Act 1891*. I refer you to the House of Commons journals, reference, 2 Com J 220, available online [here](#), which indicates that, in 1641, an Order was passed by the House of Commons enjoining all Members of the Lower House from delivering copies or notes of proceedings to anyone outside Parliament.

Notwithstanding the above, 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 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.

I will advise you of the outcome of the Legislative Council's deliberations next week.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'N. Pratt'.

Mr Nigel Pratt
Clerk of the Legislative Council

Legislative Council
Parliament House | West Perth
Postal address: Parliament House | 4 Harvest Terrace | West Perth WA 6005
Telephone: 08 9222 7214 | Email: clerklc@parliament.wa.gov.au



STATE SOLICITOR'S OFFICE

David Malcolm Justice Centre
28 Barrack Street
Perth, Western Australia 6000
GPO Box 883 Perth WA 6838
Telephone (08) 9264 1888
Fax (08) 9264 1440
Email sso@ssa.wa.gov.au
DX 175

Your ref: A774625
SSO Ref: 1570-19 & 3425-19
Enquiries: Nicholas Egan | (08) 9264 1871 | n.egan@sso.wa.gov.au

Mr Nigel Pratt
Clerk of the Legislative Council
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

By email: clerklc@parliament.wa.gov.au

Date: 29 August 2019

Dear Mr Pratt

SUPREME COURT OF WA ACTION: CV 2518 OF 2019
DARREN JON FOSTER v CATHERINE ESTHER DOUST

I refer to your letter dated 28 August 2019 concerning this matter and hereby acknowledge its receipt.

I confirm that Friday, 30 August 2019 at 3pm would be a convenient time for you to attend my Offices to accept service of the proceedings on behalf of Hon Kate Doust MLC.

I also confirm that I have been instructed, in accordance with the request set out in your letter, not to take any further step in the proceedings at the present time although obviously that is a matter which will need to be reviewed following the events of next week and the substitute orders which you have foreshadowed. In the meantime I would be grateful if you could provide some indication as to whether it is presently contemplated whether, following the rescinding of the order the subject of these proceedings, there is any intention to move any motion for other orders relating to Mr Foster. To the extent that there is such an intention then, as you might appreciate, Mr Foster may wish to be heard about the matter.

In the meantime I note from your aforementioned letter that you have drawn my attention to the House of Commons journals, reference 2, 2 Com J 220 ("**the Journal**") in purported support of the proposition that s1 of the Parliamentary Privileges Act 1891 empowers the Legislative Council to make an Order prohibiting a person from delivering documents to a third party. With respect, the Journal does not, on any view, support the proposition. The relevant order was that "*... all the Members of the House are enjoined to deliver out no Copy or Notes of anything that is brought into the House, propounded, or agitated in the House*". As the side note evidences (and as is apparent from the face of the Order itself), the purpose of the Order was to restrict Members from publishing the proceedings of the House; no

doubt that was to ensure that there was a single source of reporting (that source being the House itself). Importantly it was not an order that prevented Members, *let alone any third party who is not a Member* (such as Mr Foster), from delivering up material *under compulsory process*, and a process which had been enacted by Parliament itself.

In any event I look forward to you attending my Offices tomorrow. At the time of your attendance I will also provide to you a copy of the orders made by the Supreme Court (of its own motion) transferring the proceedings to the Commercial and Managed Cases List (or 'CMC List') to be managed by the Honourable Justice Hall.

Yours faithfully



NICHOLAS EGAN
STATE SOLICITOR

APPENDIX 4

STATEMENT OF DEPUTY STATE SOLICITOR

STATEMENT ABOUT THE PROCESS CARRIED OUT BY THE STATE SOLICITOR'S OFFICE IN RELATION TO TWO NOTICES TO PRODUCE SERVED BY THE CORRUPTION AND CRIME COMMISSION

I, CRAIG STEVEN BYDDER, of c/- the State Solicitor's Office, David Malcolm Justice Centre, Barrack Street, Perth, state as follows:

1. I am a Deputy State Solicitor employed in the State Solicitor's Office.
2. I have the conduct of this matter on behalf of the State of Western Australia acting through the Department of the Premier and Cabinet and am authorised to make this statement. To the extent necessary to make this statement, but to no greater extent, the Attorney General has waived legal professional privilege held by the State.

INTRODUCTION

3. Prior to Thursday, 27 June 2019, the Corruption and Crime Commission (CCC) had served on Mr Darren Foster, the Director General of the Department of the Premier and Cabinet (DPC), two notices to produce documents under section 95 of the *Corruption, Crime and Misconduct Act 2003* (WA) (CCM Act). As at 27 June 2019:
 - (a) the first notice, served on Mr Foster on 15 April 2019, required production of the documents the subject of that notice by Friday, 5 July 2019 at 4 p.m.; and
 - (b) the second notice, served on Mr Foster on 11 June 2019, required production of the documents the subject of that notice by Friday, 5 July 2019 at 10 a.m.
4. In the afternoon of Thursday, 27 June 2019, Mr Nigel Pratt, Clerk of the Legislative Council, informed me by telephone and then in writing that the Legislative Council's Standing Committee on Procedure and Privileges (Committee) had determined a process for dealing with parliamentary privilege issues raised by the notices, to which the CCC had acceded. I attach a copy of Mr Pratt's email to me of 27 June 2019 and its attachments.
5. As set out in Attachment 3 to Mr Pratt's emails, the Committee's process did not involve production of documents to the CCC by 5 July 2019 (such that the CCC would have them). Instead, it involved formal or nominal production. That is, the documents would be produced to CCC officers, but only for them to be handed to Mr Pratt so that the Committee's process could be followed.

6. I had emphasised in my telephone conversation with Mr Pratt of Friday, 21 June 2019 the importance of the CCC accepting this formal or nominal production as fulfilling the requirements of each section 95 notice. If Mr Foster's formal or nominal production was not accepted as fully complying with the notices by the CCC, then Mr Foster would be at risk of contempt of the CCC when the deadlines for production passed on Friday, 5 July 2019.
7. In a telephone conversation late in the afternoon of Friday, 28 June 2019, I was informed by Ms Kirsten Nelson, Principal Legal Officer at the CCC, that formal or nominal production – as contemplated by the Committee's process – would not be viewed by the CCC as compliance with the section 95 notices. Ms Nelson also informed me that she had spoken to the Clerk to the same effect earlier that day. I attach a copy of a letter to me dated 22 July 2019 from Ms Wendy Endebrock-Brown, Director Legal Services of the CCC, in which amongst other things Ms Endebrock-Brown refers to the conversation between Ms Nelson and Mr Pratt on 28 June 2019.
8. On Monday, 1 July 2019, Ms Nelson confirmed the CCC's position to me by email in which, amongst other things:
 - (a) the CCC required the production of records under the two notices that were not subject to parliamentary privilege by Friday, 5 July 2019;
 - (b) the CCC was unlikely to grant an extension in respect of the first notice; and
 - (c) the CCC would not consider records to have been produced unless full access to the records was granted.I attach a copy of Ms Nelson's email to me of 1 July 2019.
9. On Tuesday, 2 July 2019, the State Solicitor's Office was instructed to undertake an urgent review of the documents (all in electronic format) the subject of the two notices, beginning with the first notice. The review commenced in the afternoon of 2 July 2019, but was suspended before 9 a.m. on Wednesday, 3 July 2019.
10. The review was re-commenced in the early afternoon of Monday, 8 July 2019. That review was of documents provided in electronic format to SSO by DPC in the early afternoon of Friday, 5 July 2019. The documents provided to SSO on 5 July 2019 were those falling within the terms of the two notices which had been identified (with technical assistance from the CCC) as being of interest to the CCC.

11. No documents were produced to the CCC until late in the afternoon of Monday, 22 July 2019. Ultimately, almost 59,000 documents required review under the first notice and approximately 9,000 documents required review under the second notice.
12. Before the review began, no steps had been taken by DPC or the State Solicitor's Office (SSO) to review any of the documents the subject of the notices to identify those which are subject to parliamentary privilege.

PREPARATORY STEPS

13. Once the documents were received from DPC on a USB drive, they were transferred from the USB drive into a directory in a secure drive (the T drive) on SSO's network.
14. The member of SSO's information technology (IT) staff who created the directory and transferred the documents from DPC's USB drive to the T drive directory had full access to the directory on T drive. Another member of SSO's IT staff was given the same level of access in the last week or so before documents were produced to the CCC on Monday, 22 July 2019. When instructed to do so, the IT staff members removed documents, which had been identified as subject to parliamentary privilege (or, in the case of one email and its attachment, legal professional privilege) as a result of the review process, from the directory into another directory in the T drive.
15. The only other persons with access to the T drive directory were members of the team of SSO legal and non-legal staff which I assembled, led and coordinated to undertake the review. Their access (and mine) was read-only and did not permit the editing or removal of documents from the T drive.
16. Before the review was commenced, the documents on the T drive were administratively divided into "packets" of approximately 500 documents in order, as will be explained, to facilitate the review.
17. Also before the review was commenced, I briefed the team. The briefing took place early in the afternoon of Tuesday, 2 June 2019 after instructions had been received to undertake the review. In the briefing I explained the process that would be followed and emphasised the confidentiality associated with the matter, arising not only from the usual confidentiality attached to matters dealt with by SSO but also from the notations that had been placed on the notices under section 99 of the CCM Act. One person joined the team later and was separately briefed by an Assistant State Solicitor who had attended the original briefing.

INITIAL REVIEW

18. After the preparatory steps had been completed, the review process could begin. That process began with the initial review, which involved everyone on the team.
19. The purpose of the initial review was to permit a large team of around 30 staff to go through nearly 70,000 documents in the limited time provided by the CCC (since it had become apparent that the CCC would not accept formal or nominal production in satisfaction of the section 95 notices) and identify those documents which either should be excluded from production or required further consideration by an experienced lawyer, so that there would remain sufficient time:
 - (a) for that further consideration to occur; and
 - (b) for the documents which were identified as ones which should be excluded to be removed from the directory containing documents which were to be produced (**the production directory**) and to check that they had been successfully removed from the production directory.
20. In order to undertake the review, team members were each allocated a "packet" and reviewed each document in the "packet" to identify any document that was:
 - (a) one that was definitely subject to parliamentary privilege, in the sense that it would constitute proceedings in Parliament;
 - (b) one that may be subject to parliamentary privilege in the same sense.
21. After the team member had recorded any document which the team member had identified as falling within either of those two categories, the team member returned the "packet" and was issued with another "packet". This continued until all of the "packets" for each of the two notices had been reviewed. All of the "packets" had not been reviewed until the early evening of Friday, 12 July 2019.
22. The documents which were identified in the initial review as being definitely subject to parliamentary privilege in the sense described above were listed so that they could be removed from the production directory. Each document that was identified in the initial review as one which may be subject to parliamentary privilege in the sense described above was listed so that they could be the subject of further consideration.

23. Subject to a final spot review at the end of the process, the documents which had not been identified in either of these ways during the initial review remained in the production directory and were ultimately produced to the CCC.

FURTHER CONSIDERATION

24. Once the initial review was completed, most members of the team had completed their involvement in the review process. However, a small number of experienced lawyers undertook further consideration of the documents which had been identified in the initial review as ones which may be the subject of parliamentary privilege in the sense described above.
25. Those documents were distributed between the experienced lawyers giving further consideration to the documents and they consulted with each other as necessary in the course of that further consideration. If the relevant experienced lawyer identified a document as being subject to parliamentary privilege in the sense described above, it was listed so that it could be removed from the production directory.
26. If the relevant experienced lawyer identified a document as not being subject to parliamentary privilege in that sense, it remained in the production directory. Once again, subject to the final spot review at the end of the process, those documents were ultimately produced to the CCC.

PREPARATION FOR PRODUCTION

27. The lists of documents that were subject to parliamentary privilege in the sense described above were provided to the SSO IT staff member (and later, the two SSO IT staff members) in order for each document so identified to be removed from the production directory to another directory on T drive for the storage of privileged documents. The documents were removed one-by-one and checks were undertaken by the first SSO IT member to ensure that each document was removed from the production directory, and not merely copied so that the document remained in the production directory after it was copied to another directory on T drive.
28. Once that process had been completed and the final spot check was done, the documents remaining in the production directory were placed on a BitLocker-protected USB drive. The USB drive and consequently those documents were produced to the CCC late in the afternoon of Monday, 22 July 2019.

23. Subject to a final spot review at the end of the process, the documents which had not been identified in either of these ways during the initial review remained in the production directory and were ultimately produced to the CCC.

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25. Those documents were distributed between the experienced lawyers giving further consideration to the documents and they consulted with each other as necessary in the course of that further consideration. If the relevant experienced lawyer identified a document as being subject to parliamentary privilege in the sense described above, it was listed so that it could be removed from the production directory.
26. If the relevant experienced lawyer identified a document as not being subject to parliamentary privilege in that sense, it remained in the production directory. Once again, subject to the final spot review at the end of the process, those documents were ultimately produced to the CCC.

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28. Once that process had been completed and the final spot check was done, the documents remaining in the production directory were placed on a BitLocker-protected USB drive. The USB drive and consequently those documents were produced to the CCC late in the afternoon of Monday, 22 July 2019.

THE FINAL SPOT CHECK

29. 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.

COPIES RETAINED

30. 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.

CRAIG BYDDER

27 August 2019



**Confidential: SSO 1570-19: Notices to produce - Director General of
Department of the Premier and Cabinet**
Clerk LC to c.bydder@sso.wa.gov.au
Cc: "Grant, Paul"

27/06/2019 01:41 PM

History: This message has been forwarded.

Dear Craig,

Thank you for your email of 18 June 2019 and the attached memorandum.

I refer to our discussion this afternoon and attach a letter to your client from Hon Kate Doust MLC, Chair of the Procedure and Privileges Committee (PPC).

A procedure has been established by the PPC and acceded to by the Commission.

I would appreciate you confirming with me at the earliest opportunity a convenient date, time and place at Dumas House next week for your client to produce the documents and data sought by the two notices. Please note that my unavailability next week due to previous commitments is as follows:

Tuesday, 2 July – 9:45am-10:15am; .11:15am – 12.15am; and 1:00pm to 4:00pm.

Friday, 5 July - 2.00pm-3.30pm.

I will confirm with you the arrangements when I have spoken to Ms Kirsten Nelson at the Commission. I confirm that the PPC has no objection to the Commission's Mr Pretorius taking possession of the materials briefly for the purpose of satisfying the technical requirements of the notices. I also confirm that you may discuss this matter with Ms Nelson or relevant Commission Officers to enable the notices to be executed at the agreed date, time and place.

Thank you for assisting with the satisfactory resolution of this matter.

Kind regards,

Nigel

Nigel Pratt | Clerk of the Legislative Council | Clerk of the Parliaments
Legislative Council of Western Australia
Parliament House | 4 Harvest Terrace | West Perth WA 6005
t (08) 9222 7214 |
e ClerkLC@parliament.wa.gov.au | w www.parliament.wa.gov.au

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PROCEDURE AND PRIVILEGES COMMITTEE



27 June 2019

Mr Darren Foster
Director General
Department of the Premier and Cabinet
Dumas House
2 Havelock Street
WEST PERTH WA 6005

Dear Mr Foster

Corruption and Crime Commission Notice to Produce No. NPR 00615-2019-4614 & NPR 00615-2019-4647

I refer to the above Corruption and Crime Commission (CCC) Notices to Produce, issued on 12 April and 11 June 2019 respectively to the Director General of the Department of the Premier and Cabinet.

Please find attached:

1. Resolution of the Standing Committee on Procedure and Privileges (Committee) made on 25 June 2019;
2. Letter from the Commissioner, CCC, to the President dated 26 June 2019; and
3. Procedure agreed to by the Committee for identifying and isolating material that may be subject to parliamentary privilege from amongst the material set out in the two CCC Notices to Produce.

The Committee's resolution in 1. above was made to address the additional Notice to Produce issued by the CCC on 11 June 2019.

The agreed procedure provides for a Commission forensic officer to take possession of the data and documents from the Director General at the time of execution for the sole purpose of sealing them in evidence bags and handing them to the Clerk of the Legislative Council, Mr Nigel Pratt. The Clerk has made the Committee aware of your concerns that releasing the data and documents described by the notices to a person other than the investigator listed may not be an adequate discharge of the notices. This is a matter between you and the Commission. The Committee notes that this concern could be addressed by the Commission withdrawing the existing notices and reissuing them to be returned before Mr Adrian Kay (Principal, Digital Forensics). Alternatively, the materials the subject of the notices could be delivered to Mr Pretorius and through him to the forensic officer and then to the Clerk at the time of execution. The latter would be sufficient compliance with the agreed procedure.

Legislative Council
Parliament House | West Perth
Postal address: Parliament House | 4 Harvest Terrace | West Perth WA 6005
Telephone: 08 9222 7300 | Email: pgrant@parliament.wa.gov.au

The Clerk will be in contact with you in the next few days to confirm the date, place and time for the delivery of data and documents on or before 5 July 2019.

Yours sincerely



Hon Kate Doust MLC

President

Chair of the Procedure and Privileges Committee

Attachment 1

Resolution of the Legislative Council Standing Committee on Procedure and Privileges made at a deliberative meeting held on 25 June 2019

- 1. That given the extent of the Notices to Produce (No. NPR 00615-2019-4614 and No. NPR 00615-2019-4647) issued by the Corruption and Crime Commission (CCC) to the Director General of the Department of the Premier and Cabinet (DPC) on 12 April 2019 and 11 June 2019 respectively, they will include some documents or data that are proceedings in Parliament within the meaning of Article 9 of the Bill of Rights 1688;*
- 2. That proceedings in Parliament are immune from compulsory seizure by any place out of Parliament within the meaning of Article 9 of the Bill of Rights 1688;*
- 3. That the question of whether documents or data within the scope of each Notice to Produce is proceedings in Parliament is one for determination by the Legislative Council;*
- 4. That the release of documents or data that are proceedings in Parliament by the Director General of DPC to the CCC without the authority of the Legislative Council or the Procedure and Privileges Committee (Committee) would constitute a grave breach of the privileges and a contempt of the Legislative Council of Western Australia;*
- 5. That should the Director General of DPC release documents or data that are proceedings in Parliament to the CCC without the authority of the Legislative Council or the Committee:*
 - a) the Committee will report that matter to the Legislative Council; and*
 - b) the Legislative Council will determine the questions of breach of privilege and contempt and any penalty to be imposed under the Parliamentary Privileges Act 1891.*

Attachment 2

Letter from Hon John McKechnie QC, Commissioner of the Corruption and Crime Commission to, Hon Kate Doust MLC, President of the Legislative Council, dated 27 June 2019.



SENSITIVE
Legal in Confidence

CCC | Corruption and
Crime Commission

Your reference:
Our reference: 00606/2019

26 June 2019

The Hon Kate Doust, MLC
President of the Legislative Council
Parliament House
4 Harvest Terrace
PERTH WA 6000
By email: ClerkLC@parliament.wa.gov.au

Dear President

Notices to Produce (Nos. NPR 00615-2019-4614 and NPR 00615-2019-4647) served on the Department of Premier and Cabinet

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. I respectfully draw your agent's attention to the *Corruption, Crime and Misconduct Act* s 158 in relation to all non-privileged documents.

As to the balance of your letter, I repeat what I have previously stressed. The Commission has no interest in, and does not seek to read, any document that is subject to parliamentary privilege. The Commission's investigation is focused on whether certain public officers (who happen to be former members of Parliament) may have acted in a manner which brings their conduct within the definition of serious misconduct under the *Corruption, Crime and Misconduct Act 2003* s 4. The Commission will not form any opinion until the conclusion of its investigation.

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

Contact the Corruption and Crime Commission

Level 5, 45 Church Street
Northbridge WA 6004
General enquiries: 08 9410 4545
Request Commission: 1300 879 000
www.crc.wa.gov.au
information@ccc.wa.gov.au
ask@ccc.wa.gov.au

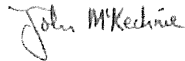
SENSITIVE

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SENSITIVE

May I thank the House for dealing promptly with the issue and settling its procedures for dealing with documents over which a claim for privilege is made. From my knowledge of facts already uncovered by the Commission, I highly doubt whether the hypothetical situations in the preantepenultimate paragraph of your letter will emerge. However, that determination is a matter for the House. I look forward, with the House, to an expeditious resolution of questions of privilege so that your agent can comply with his legal obligations.

Yours sincerely



John McKechnie, QC
Commissioner

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Attachment 3

PPC PROCEDURE FOR COMMISSION NOTICE NPR 00615-2019-4614 & NPR 00615-2019-4647

Step	Proposed PPC Procedure	Notes to Procedure
1	Commission officers Mr Adrian Kay (Principal, Digital Forensics) and Mr Andrew Malec (Digital Forensics Specialist) attend at the Department of the Premier and Cabinet to take delivery of a copy of the email caches sought in 1 and 2 and the electronic copy of documents listed in 3 and 4 of the notices. Mr Nigel Pratt (Clerk of the Legislative Council) also attends;	DPC have extracted email caches and items sought are in electronic form on storage devices/USB. Procedure includes all items sought by CCC.
2	The data copy of email caches in 1 and 2 and documents listed in 3 and 4 of the notices are provided by Mr Kay and Mr Malec to Nigel Pratt (Clerk of the Legislative Council) and not retained by the Commission;	Storage devices placed in evidence bags and sealed.
3	The data copy of emails and electronic copy of documents in 3 and 4 of the notices are retained securely on a segregated Legislative Council server;	Commission officers Mr Kay and Mr Malec attend at Parliament House to witness unsealing of evidence bags and witness loading of data onto segregated server and resealing of devices into evidence bags after loading completed. Evidence retained by Mr Pratt.
4	Access to the data copy of emails is processed within the Legislative Council's forensic platform, <i>Intella</i> and access to the email data set and electronic copy of documents in 3 and 4 of the notice is limited to Mr Pratt and Mr Stefan Urlus (Senior Technical Officer, Parliament Information Technology);	The Legislative Council will purchase <i>Intella</i> and install on its platform.
5	The email data set is processed within the forensic platform, <i>Intella</i> using search queries provided by Commission investigators to Mr Kay and Mr Malec;	Mr Kay and Mr Malec are granted access to the segregated Legislative Council server for this purpose
6	Data identified in the email data set is tagged;	

7	Mr Malec, Mr Kay and Mr Urlus produce a report of documents/data tagged and the report is provided only to Mr Pratt. The PPC and the Commissioner are provided with an index to the report listing the documents/data tagged and documents in 3 and 4 of the notice;	Neither PPC members nor Commission have access to report of documents/data tagged, or documents in 3 and 4 of the notice. None of the persons who produce the report are to discuss the content of the report with a third party.
8	The untagged but searched original email caches are removed from the segregated Legislative Council's server and retained by Mr Pratt;	
9	The report of documents/data tagged and documents in 3 and 4 are provided by Mr Pratt to an external party appointed by the PPC to recommend to the PPC whether parliamentary privilege applies to any document;	The PPC rather than the House must appoint the external party so that investigation remains confidential.
10	The external party provides a report to the PPC making recommendations as to which of the documents are subject to parliamentary privilege and which are not subject to parliamentary privilege;	
11	Where the external party recommends documents are not subject to parliamentary privilege the PPC shall immediately order the release of those documents to the Commission;	Legislative Council is the body that ultimately determines whether parliamentary privilege applies to seized documents/data.
12	Where the external party recommends documents are subject to parliamentary privilege the PPC shall not order the release to the Commission of those documents unless otherwise ordered by the Legislative Council;	Legislative Council is the body that ultimately determines whether parliamentary privilege applies to seized documents/data.
13	The external party delivers the sealed report of documents/data tagged and documents in 3 and 4 to Mr Pratt. Mr Pratt shall retain and not open or release the following documents/data to any person unless otherwise ordered by the Legislative Council or the PPC: a) The report of documents/data tagged and documents in 3 and 4 of the notices delivered by the third party;	Ensures all material available to permit the Legislative Council to make a determination on a claim of privilege. Retains integrity of chain of evidence.

	<p>b) The untagged but searched original email caches removed from the segregated Legislative Council's server; and</p> <p>c) The data copy of email caches in 1 and 2 and documents listed in 3 and 4 of the notices retained in evidence bags.</p>	
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CCC | Corruption and
Crime Commission

SENSITIVE
Legal in Confidence

Your reference: 1570-19
Our reference: NPR 00615-2019-4614

22 July 2019

Mr Craig Bydder
Deputy State Solicitor
State Solicitor's Office
David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000
By Email: c.bydder@sso.wa.gov.au

Dear Mr Bydder

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

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

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

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

The Commission has not agreed a procedure with the PPC.

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

Contact the Corruption and Crime Commission

Level 5, 45 Francis Street
Northbridge WA 6003

General Enquiries (08) 9215 4888
Report Corruption 1800 809 000

www.ccc.wa.gov.au

info@ccc.wa.gov.au

[@CCCWestAus](https://twitter.com/CCCWestAus)

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SENSITIVE

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

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

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

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

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

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

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

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

Yours sincerely



Wendy Endebrock-Brown
Director Legal Services



Message regarding Notices 4614 and 4647

Kirsten Nelson to: 'c.bydder@sso.wa.gov.au'

Cc: "Wendy Endebrock-Brown"

01/07/2019 09:16 AM

History:

This message has been forwarded.

Dear Mr Bydder,

Following from our telephone call on Friday afternoon, during which we discussed compliance with Commission Notices NPR 00615/2019/4614 and NPR 00615/2019/4647, I confirm the Commission's position is as follows:

- production of records pursuant to Commission Notices 4614 and 4647 are due on 5 July 2019;
- the Commission is unlikely to grant any further extension given that several extensions have already been given for Notice 4614;
- Commission digital forensic officers are available to assist Mr Foster practically extract the digital records (and their assistance has been offered since Notice 4614 was initially served). This assistance remains available this week, including after hours if required;
- should the Privileges Committee wish to claim parliamentary privilege the process by which that occurs is a matter for them;
- the Commission accepts any document covered by parliamentary privilege is privileged from production and does not seek any such document;
- the Commission has maintained in all written correspondence with the Privileges Committee that any process they choose to adopt to exclude privileged material does not absolve Mr Foster from compliance with the Notice by producing all non-privileged material by the due date;
- the Commission has offered the same digital forensic assistance to the Privileges Committee as to Mr Foster. This has extended to offering use of the Commission's Digital Forensic Lab and expertise.

The Commission's view is that the imposition of any process the Privileges Committee has chosen to adopt should not interfere with production of all non-privileged material by 5 July 2019; and the failure to have finalised this process by 5 July does not excuse Mr Foster from the responsibility of complying with the Notices by 4pm 5th July.

The Commission will not consider records to have been produced unless full access to the records is granted.

During our telephone conversation you mentioned that the Commission's desire to brief the Privilege's Committee led to a delay. The Commission initially contacted the President on 13 May 2019 (after receiving correspondence from the State Solicitor dated 10 May), however did not meet with the President until 20 May 2019. We do not consider this to have caused

material delay.

regards

Kirsten Nelson

Principal Legal Officer

Corruption and Crime Commission

cid:image001.png@01D2FBAF.CDC62850 Level 5, 45 Francis Street,
NORTHBRIDGE WA 6003

cid:image002.png@01D2FBAF.CDC62850 (08) 9215 4822

cid:image004.png@01D2FBAF.CDC62850 kirsten.nelson@ccc.wa.gov.au






cid:image005.png@01D2FBAF.CDC62850 www.ccc.wa.gov.au |

cid:image006.png@01D2FBAF.CDC62850 <https://twitter.com/CCCWestAus>

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image009.png

APPENDIX 5

SSO MEMORANDUM AND CHECKLIST FOR DETERMINING PARLIAMENTARY PRIVILEGE

PARLIAMENTARY PRIVILEGE

PARLIAMENTARY PRIVILEGE

Parliamentary privilege comprises certain powers, rights and immunities conferred on Houses of Parliament, their committees, members and officers.¹ The justification for parliamentary privilege is that, to work effectively, Parliament must have freedom of speech and the freedom to control its own proceedings so that it can operate independently and protect the integrity of its processes without interference from external sources.²

SOURCE OF PARLIAMENTARY PRIVILEGE IN WESTERN AUSTRALIA

Section 36 of the *Constitution Act 1889* provides that:

"It shall be lawful for the Legislature of the Colony, by any Act to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Legislative Council and Legislative Assembly, and by the members thereof respectively"

As contemplated by s.36, Parliament enacted the *Parliamentary Privileges Act 1891* (PP Act).³ Section 1 of the PP Act provides that:

"The Legislative Council and Legislative Assembly of Western Australia, and their members and committees, have and may exercise —

- (a) the privileges, immunities and powers set out in this Act; and
- (b) to the extent that they are not inconsistent with this Act, the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989."

Section 1 of the PP Act links to the Parliament of Western Australia those privileges held by the House of Commons of the Parliament of the United Kingdom as at 1 January 1989.⁴ Further, it indicates that privileges of the Parliament of Western Australia are derived from both statute⁵ and common law.

The principle powers and privileges of Parliament are:⁶

1. freedom of speech in Parliament;
2. exclusive cognisance (jurisdiction) over Parliament's internal affairs;
3. the power to discipline members; and
4. the power to punish for contempt.

¹ NSW Parliamentary Library Research Service, *Parliamentary privilege: first principles and recent applications* by Gareth Griffith, Briefing Paper No 1/09 (*Briefing Paper*) pp.1-2 - <https://www.parliament.nsw.gov.au/researchpapers/Documents/parliamentary-privilege-first-principles-and-rec/BP%20-%20Parliamentary%20Privilege%202009.pdf>.

² A Twomey, *The Constitution of New South Wales*, (Federation Press) (*Constitution of NSW*) p 496; *Re Saffioti and Minister for Transport; Housing* [2012] WAICmr 10 (*Re Saffioti*) at [22].

³ And the *Parliamentary Papers Act 1891* (WA), which does not appear relevant to this matter.

⁴ An amendment to s.1 of the PP Act in 2004 introduced the date of 1 January 1989.

⁵ Relevantly, the PP Act goes on to set out primarily the powers enjoyed by the Legislative Council and Legislative Assembly.

⁶ *Briefing Paper* p.2.

The first of those set out above is generally considered to be the most important Parliamentary privilege.⁷ It is enshrined in Article 9 of the *Bill of Rights 1688* (Imp) (**Bill of Rights**) and confers a clear immunity from legal inquiry and liability for what is said and done within the walls of Parliament.⁸

Article 9 of the Bill of Rights provides:

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

The Supreme Court has held that "[t]he central focus of Article 9 is on what is said and done actually within the Parliamentary chamber and not with matters preceding or following that, except to the extent that they are *necessarily incidental to the performance of the function of a Member in the House*"⁹ (my emphasis).

Proceedings in Parliament

There is, however, no provision in Western Australia defining the term "proceedings in Parliament"¹⁰ and we have to rely on case law and academic commentary for guidance.

The term "proceedings in Parliament" covers:

1. the preparation of a document for the purposes of or incidental to the transacting of the business of a House or committee of Parliament;¹¹
2. statements made in the House while it is sitting, both by Members of Parliament and others (for example, a person called to the bar of the House to give evidence);¹²
3. proceedings of a Parliamentary committee including evidence given to that committee (orally, written submission or letter);¹³
4. correspondence to and from Members of Parliament *only* where (at the least) the information is sought, provided or collected for the purpose of use in parliamentary proceedings;¹⁴
5. debates in Parliament (including motions, Parliamentary questions and answers);¹⁵ and
6. tabling of documents and petitions once presented to the House.¹⁶

⁷ *Legal Practitioners Complaints Committee v Quigley* [2005] WASAT 215 (*Quigley*) at [106]. Note that there is debate as to whether Article 9 is the *source* of the privilege of freedom of speech, or whether the source is parliamentary law and Article 9 merely enshrines that law (refer Briefing Paper pp.3-4).

⁸ *Gangemi v The Western Australian Farmers Federation (Inc)* [2002] WASC 229 at [16]-[17].

⁹ *The Queen v Parry & Ors ex parte Attorney General of Western Australia* (unreported Lib. No: 970196A) (*Queen v Parry*) per Malcolm CJ at 70 (Franklyn and Murray JJ appear to concur – no separate judgments appears). In *obiter*, Malcolm CJ notes that Western Australia has not taken the step taken by the Commonwealth by legislating a list of matters which are taken to be "proceedings in Parliament" (p.71).

¹⁰ *Quigley* at [107].

¹¹ *Re Saffioti* at [28]-[30] a decision of the (former) Information Commissioner considering the scope of clause 12(c) of Schedule 1 to the *Freedom of Information Act 1992* (WA) (**FOI Act**). The (former) Information Commissioner looked to Commonwealth and Queensland legislation by way of guidance for the meaning of this term (*Parliamentary Privileges Act 1987* (Cth), s 16(2)(c); *Commonwealth of Australia Constitution Act 1900* (Cth), s 49, and *Parliament of Queensland Act 2001* (Qld), ss 8, 9(2)(e); *Constitution Act 1867* (Qld), s 40A).

¹² *Constitution of NSW* pp. 496-8.

¹³ *Constitution of NSW* pp. 496-8. The committee needs to be validly constituted etc.

¹⁴ *Constitution of NSW* pp. 496-8.

¹⁵ E Campbell, *Parliamentary Privilege* (Federation Press, 2003) (*Parliamentary Privilege*), p.12.

There is no requirement that the author of the document be a Member of Parliament.¹⁷ There must nevertheless still be a particular connection with the document and the business of Parliament that is not too distant or tenuous to fall within the scope of the definition.¹⁸

The privilege is not attracted to a document until, at earliest, the Parliamentary member or his or her agent does some act with respect to it for the purpose of transacting business in the House¹⁹ (described as "*appropriat[ing] the document to proceedings in Parliament*").²⁰ Something less than "soliciting" the document will satisfy that concept. It will be sufficient if the Minister knows of the preparation of the document in question and it is being prepared with the intention of being read in Parliament (even though no specific proceedings were on foot at the time).

Parliamentary privilege cannot be "manufactured" by sending documents to a Member of Parliament, or submitting them to a Parliamentary committee.²¹

Documents or matters that are *unlikely* to be caught by the term "proceedings in Parliament" include:

1. administrative records, internal office communications and standard documents of a Member of Parliament (including those showing travel itineraries) whether held in his or her Parliamentary or electorate office;²²
2. extra-Parliamentary communications between Ministers of the Crown;²³
3. the Register of Member's Interests;²⁴
4. casual conversations between Members of Parliament between debates;²⁵
5. meetings of political parties within Parliamentary precincts;²⁶
6. documents relating to caucus (that is, a private meeting of members of a party to determine joint action in Parliament);²⁷
7. (possibly) Parliamentary committees where they perform executive (rather than Parliamentary) functions;²⁸
8. documents that are merely sent to a Member of Parliament, or submitted to a Parliamentary committee, without more;²⁹
9. copies of a document where the original is prepared and retained for a relevant purpose, but the copies are not made for that purpose.³⁰

¹⁶ *Parliamentary Privilege*, p.12; *Queen v Parry* at p.69.

¹⁷ *Re Saffioti* at [31].

¹⁸ *Sportsbet Pty Ltd v NSW* (No 3) (2009) 262 ALR 27 (*Sportsbet*) at [19]-[21].

¹⁹ *Erglis v Buckley* (No 2) [2005] QCA 404 (*Erglis*), per McPherson JA at [98]; *O'Chee v Rowley* (1997) 150 ALR 199 (*O'Chee*).

²⁰ *Erglis* at [99].

²¹ *Constitution of NSW* p.498.

²² *Crane v Gething* (2000) 169 ALR 727 (*Crane*), per French J at 745, cited in *Constitution of NSW* p.499.

²³ *Hamsher v Swift* (1991) 33 FCR 545 (*Hamsher*), per French J at 656 cited in *Constitution of NSW* p.499.

²⁴ *Rost v Edwards* [1990] 2 QB 460 (*Rost*) per Popplewell J at 478, cited in *Constitution of NSW* p.499.

²⁵ *Parliamentary Privilege* p.12

²⁶ *Parliamentary Privilege* p.12

²⁷ *R v Turnbull* [1958] Tas SR 80 (*Turnbull*) cited in *Constitution of NSW* p.497.

²⁸ *Constitution of NSW* p.497.

²⁹ *O'Chee* cited in *Constitution of NSW* p.498.

³⁰ *Szwarcbord v Gallop* (2002) 167 FLR 262 (*Szwarcbord*) per Crispin J at [21] cited in *Constitution of NSW* p.498.

Impeach

The meaning of the term "impeach or questioned in...any place out of parliament" is also somewhat uncertain, and there does not appear to be any fixed rule as to what "impeaching" or "questioning" in any place out of Parliament means.³¹

In *O'Chee* McPherson JA looked to dictionary definitions to ascertain how the verb "to impeach" was understood in the late 17th century (when Article 9 was enacted) and determined that it meant "to impede, hinder, prevent", "to hinder the action, progress, or well-being of; affect prejudicially; to hurt endanger, impair".

The word "question" appears to have the meaning of "criticise", although there is no definitive case law on this. It has been interpreted both widely and narrowly.³²

It seems to be well accepted that while Article 9 contains a restriction on the uses which may be made of evidence of Parliamentary proceedings, it does not contain a blanket rule or restriction preventing the admission and use of evidence of proceedings in Parliament in all circumstances.³³

Rather, it seems (and again there is no uniform view on this) that whether evidence of parliamentary proceedings may be received and used by a court depends on the purpose for which it is tendered. If the purpose is to challenge the truth of statements made under parliamentary privilege, or to question the motives of the author of the statements, evidence must be excluded.³⁴ There is an inevitable tension between the right to prove the occurrence of Parliamentary events and the prohibition on questioning their propriety.³⁵

This appears to have limited relevance to our examination of documents for Parliamentary privilege, but it is included for completeness.

Any place out of Parliament

The phrase "any place out of parliament" is not defined (either in Western Australia or elsewhere in Australia), but it is apparent from *Parliamentary Privilege* and the *Constitution of NSW* that it is given a wide meaning.³⁶

Again, this seems likely to have little relevance to our examination of documents for Parliamentary privilege, having regard to s.3(2) of the *Corruption, Crime and Misconduct Act 2003* (WA) which provides that:

- "(2) Nothing in this Act affects, or is intended to affect, the operation of the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891* and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable by a House of Parliament."

³¹ *Parliamentary Privilege* p.11.

³² *Constitution of NSW* p.499.

³³ Refer *Parliamentary Privilege* pp.16-18, and *Constitution of NSW* p.500.

³⁴ *Parliamentary Privilege* p.117, citing *Prebble v Television New Zealand* [1995] 1 AC 321.

³⁵ *Egan v Willis* (1998) 195 CLR 424 per Kirby J at 490, cited in *Constitution of NSW* at p.494.

³⁶ *Parliamentary Privilege* pp.19 – 21 and *Constitution of NSW* pp.501-2.

PROTECTION FROM WHAT?

The consequence of speech, debates and proceedings in Parliament not being impeached or questioned outside of Parliament is that such material is "privileged". It cannot be used in court proceedings or in other tribunals or bodies for the purpose of establishing that the privileged material was false, misleading or made in bad faith.³⁷

For example, in *O'Chee* McPherson JA held that "proceedings in Parliament will inevitably be hindered, impeded or impaired if members realise that acts of the kind done here [assembly of documents] for the purpose of Parliamentary debates or question time are vulnerable to compulsory court process of discovery".³⁸

³⁷ *Constitution of NSW* p 494.

³⁸ Quoted in *Parliamentary Privilege* p.17.

CHECKLIST

WHAT DOCUMENTS WILL PARLIAMENTARY PRIVILEGE PROTECT?

Category 1: Things said or done in Parliament

1. Hansard (Parliamentary debates and committee transcripts), chamber documents, Bills;
2. statements made in the House while it is sitting, both by Members of Parliament and others;³⁹
3. proceedings of a Parliamentary committee including evidence given to that committee (orally, written submission or letter);⁴⁰
4. debates in Parliament (including motions, Parliamentary questions and answers);⁴¹ and
5. tabling of documents and petitions once presented to the House.⁴²

Category 2: Things that a necessarily incidental to transacting business of Parliament

1. correspondence to and from Members of Parliament *only* where (at the least) the information is sought, provided or collected for the purpose of use in parliamentary proceedings;⁴³
2. letters from a Parliamentary Committee to the CEOs of two government agencies, as they related specifically to the proceedings of a formally constituted committee of Parliament;⁴⁴
3. documents created, prepared or brought into existence by a Senator for the purpose of or incidental to the transacting of Senate business;⁴⁵
4. a Ministerial briefing note, prepared to assist a Minister to answer questions that might be put to the Minister in Parliament and which had not been publicly disclosed;⁴⁶
5. a copy of a Question on Notice;⁴⁷
6. internal papers prepared by the Officers of either House directly related to the proceedings of the House or committees;⁴⁸
7. Contentious Issues Briefing Notes (because they are prepared solely for the purposes of assisting a Minister to answer questions in Parliament);

³⁹ *Constitution of NSW* pp. 496-8.

⁴⁰ *Constitution of NSW* pp. 496-8.

⁴¹ *Parliamentary Privilege*, p.12.

⁴² *Parliamentary Privilege*, p.12; *Queen v Parry* at p.69.

⁴³ *Constitution of NSW* pp. 496-8.

⁴⁴ *Re Ravlich and the Department of the Premier and Cabinet* [2011] WAICmr 3 at [23]-[24].

⁴⁵ *O'Chee; Crane; Sportsbet* at [19]-[21].

⁴⁶ *Stiller v Department of Transport QICmr* [2009] 210440, [44]-[46].

⁴⁷ *Re Farina and Department of State Development* [2012] WAICmr 5.

⁴⁸ *Re Rita Saffioti MLA and the Minister for Transport; Housing* [2012] WAICmr 10 at [32].

8. drafts of answers to Parliamentary questions (regardless of the form they take – text message, email etc);
9. other notes prepared for possibly being read in Parliament.

Category 3: Things unlikely to attract Parliamentary privilege

1. administrative records, internal office communications and standard documents of a Member of Parliament (including those showing travel itineraries) whether held in his or her Parliamentary or electorate office;⁴⁹
2. extra-Parliamentary communications between Ministers of the Crown;⁵⁰
3. the Register of Member's Interests;⁵¹
4. casual conversations between Members of Parliament between debates;⁵²
5. meetings of political parties within Parliamentary precincts;⁵³
6. documents relating to caucus (that is, a private meeting of members of a party to determine joint action in Parliament);⁵⁴
7. (possibly) Parliamentary committees where they perform executive (rather than Parliamentary) functions;⁵⁵
8. documents that are merely sent to a Member of Parliament, or submitted to a Parliamentary committee, without more;⁵⁶
9. copies of a document where the original is prepared and retained for a relevant purpose, but the copies are not made for that purpose.⁵⁷

⁴⁹ *Crane* per French J at 745, cited in *Constitution of NSW* p.499.

⁵⁰ *Hamsher*, per French J at 656 cited in *Constitution of NSW* p.499.

⁵¹ *Rost* per Popplewell J at 478, cited in *Constitution of NSW* p.499.

⁵² *Parliamentary Privilege* p.12

⁵³ *Parliamentary Privilege* p.12

⁵⁴ *Turnbull* cited in *Constitution of NSW* p.497.

⁵⁵ *Constitution of NSW* p.497.

⁵⁶ *O'Chee* cited in *Constitution of NSW* p.498.

⁵⁷ *Szwarcbord* at [21] cited in *Constitution of NSW* p.498.

APPENDIX 6

AUSTRALIAN SENATE'S TEST FOR DETERMINING PARLIAMENTARY PRIVILEGE

'proceedings in parliament'

2.14 As indicated in its preliminary report,⁴ the committee has adopted a three-question test for determining whether the seized documents come within the definition of 'proceedings in parliament' and therefore warrant protection. This is the test for the scope of privilege in legal proceedings, which turns on the connection between the material in question and parliamentary business. Generally, proceedings in parliament may not be questioned in legal proceedings⁵ and the national guideline imports similar protections in relation to the execution of search warrants.

2.15 The test may be summarised as follows:

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

YES → falls within "proceedings in Parliament".

NO → move to step 2.

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

YES → falls within "proceedings in Parliament".

NO → move to step 3.

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

YES → falls within "proceedings in Parliament".

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

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

APPENDIX 7

LETTER FROM CCC CONTAINING CORRESPONDENCE BETWEEN CCC AND MR EDMAN'S LAWYERS



SENSITIVE
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CCC | Corruption and
Crime Commission

Your reference:
Our reference: 00606/2019

28 August 2019

The Hon Kate Doust, MLC
President
Chair of the Procedure and Privileges Committee
Legislative Council
Parliament House

By email: ClerkLC@parliament.wa.gov.au

Dear Madam President

Search warrants executed by the Corruption and Crime Commission - Mr Phillip Edman

Thank you for your letter of 26 August 2019.

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.

Prior to the commencement of the searches at Mr Edman's residential and business premises, Mr Edman was given the opportunity to speak with his lawyer. He did so. No issue or claim in respect of parliamentary privilege was raised or made at that time, or at any time during the execution of either warrant.

On 26 August 2019, the Commission received a letter from Mr Edman's lawyer which appeared to claim parliamentary privilege over all items seized. The Commission has responded to Mr Edman's lawyer today. A copy of both letters are enclosed.

As indicated to Mr Edman's lawyer, if Mr Edman makes a claim of privilege over any document or communication, it is the Commission's intention to seek to agree a process involving the Legislative Council to determine the claim.

Yours sincerely

John McKechnie QC
Commissioner

Contact the Corruption and Crime Commission

Level 5, 45 Francis Street
Northbridge WA 6003

General Enquiries (08) 9215 4888
Report Corruption 1800 809 000

www.ccc.wa.gov.au

info@ccc.wa.gov.au

[@CCCWestAus](https://twitter.com/CCCWestAus)

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A1217211



Your Ref: 03823/2018-1
Our Ref: GR:19544

26 August 2019

Commissioner John McKechnie, QC
Corruption and Crime Commission
5 45 Francis Street
NORTHBRIDGE WA 6003

Dear Commissioner,

Phillip John Edman
Illegal Searches and Seizure of items pursuant to Warrants applied for by the CCC

We continue to act for Mr Phillip Edman.

We note that search warrants were applied for by your office in relation to premises owned by our client.

We note that your office knew, or ought to have known that those execution of those warrants would breach the *Parliamentary Privileges Act 1891*.

Your Acting Principal Investigator, Rohan O'Leary, confirmed to the writer last Friday that the CCC had no intention of regarding Parliamentary Privilege and that the balance of our client's seized items would be returned sometime in the future after they had been accessed.

Again, you are hereby advised that you have breached our client's rights and privileges as a former member of Parliament.

You are required to return our client's seized items immediately. Our client continues to exercise his right of Parliamentary Privilege in relation to all items you have seized.

Yours faithfully

Graeme Ryan
Graeme A Ryan & Associates

phone 08 9316 9678 | email office@garlaw.com.au | web www.garlaw.com.au

Graeme A. Ryan & Associates Lawyers
Suite 5, 24 Riseley Street Ardross WA 6153 | PO Box 1835 Applecross WA 6953
ABN: 12 152 209 754



CCC | Corruption and
Crime Commission

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Your reference: GR:19544
Our reference: 00606/2019

28 August 2019

Mr Graeme Ryan
Graeme A Ryan & Associates
Suite 5, 24 Riseley Street
Ardross WA 6153
By email: graeme@garlaw.com.au

Dear Mr Ryan

Phillip John Edman - Search warrants executed on 14 August 2019

The Commission has received your correspondence dated 26 August 2019.

The Commission executed two search warrants pursuant to the *Corruption, Crime and Misconduct Act 2003* s 101 on residential and business premises occupied by your client. There is nothing in the *Parliamentary Privileges Act 1891*, or any other law, which puts the residence and/or business of a former member of Parliament beyond the reach of a warrant.

Your client was given the opportunity and time before the searches commenced to speak with a lawyer. He did so. No issue or claim in respect of parliamentary privilege was raised or made at that time, or at any time during the execution of the warrants at either premises.

We understand your letter to be claiming parliamentary privilege now over all items seized at both warrant premises.

Such a claim is clearly untenable.

Parliamentary privilege attaches to documents and/or communications which came into existence for the purposes of or incidental to transacting the business of either House of Parliament or a Parliamentary committee. Every item seized at the residential and business premises of your client could not be subject to parliamentary privilege.

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Your client was given a list of all items seized at the conclusion of each warrant. If parliamentary privilege is now claimed in respect of any document or communication in or on any item by your client, please identify the document or communication and the basis for the claim. Upon receipt of this information, the Commission will seek to agree a process involving the Legislative Council to determine the extent to which parliamentary privilege applies to the document or communication.

In the meantime, we advise the Commission will not be returning all seized items immediately, as requested. The Commission has the express statutory power to retain possession of relevant material (as defined) for such reasonable period as it thinks fit; and to release any relevant material to any person who appears to be entitled to possession of it: *Corruption, Crime and Misconduct Act 2003* s 101(6). The Commission has returned a number of devices to your client already and is in the process of imaging and reviewing remaining devices and documents. Your client will be contacted when additional items are available for return.

Yours sincerely



Wendy Endebrock-Brown
Director Legal Services

Standing Committee on Procedure and Privileges

Date first appointed:

24 May 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'1. Procedure and Privileges Committee

- 1.1 *A Procedure and Privileges Committee* is established.
- 1.2 The Committee consists of 5 Members, including the President and the Chair of Committees, and any Members co-opted by the Committee whether generally or in relation to a particular matter. The President is the Chair, and the Chair of Committees is the Deputy Chair, of the Committee.
- 1.3 With any necessary modifications, Standing Order 163 applies to a co-opted Member.
- 1.4 The Committee is to keep under review the law and custom of Parliament, the rules of procedure of the Council and its Committees, and recommend to the Council such alterations in that law, custom, or rules that, in its opinion, will assist or improve the proper and orderly transaction of the business of the Council or its Committees.'



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