



MEMORANDUM TO MEMBERS OF THE LEGISLATIVE ASSEMBLY

RESPONSE BY THE COMMISSIONER OF POLICE

I wish to update you with correspondence I received yesterday from the Commissioner of Police in response to my request to clarify what criminal offences he is investigating in relation to Mr Urban. Attached is a copy of his response.

While I will table the attached letter when the House resumes sitting on Tuesday, 12 June 2018, I believe it is necessary to circulate his response immediately to allow members to fully consider the implications of the Commissioner of Police's response.

As you will be aware, the Commissioner wrote to me on Wednesday, 9 May 2018 regarding the Procedure and Privileges Committee report *Misleading the House: Statements Made by the Member for Darling Range*. The Commissioner advised me that it was his intention to instruct the Major Fraud Squad to commence a criminal investigation into the actions of Mr Barry Urban to determine if a criminal act had occurred. As part of this investigation, the Commissioner requested the provision of any documentation and evidence in relation to the Committee's determination. I tabled this letter with the House on Thursday, 10 May 2018, and advised the House that I was seeking advice as to what issues of parliamentary privilege were involved in answering his request.

The Clerk provided me with a letter of advice, which I tabled in the House on Tuesday, 15 May 2018. I advised the House that further to the Clerk's advice, I would seek clarification from the Commissioner on what criminal offences he is investigating and that I would advise the House of his response.

As to the Commissioner's most recent response, I have a number of concerns with the views expressed therein, including that:

- (1) it is "open to the Legislative Assembly to disclose the documentation and evidence"; and
- (2) with respect to the evidence of witnesses, "as long as I am only provided with the actual transcripts of what was said to the Procedure and Privileges Committee, if those witnesses were granted parliamentary privilege in the usual manner, the mere disclosure of the transcripts to me will not result in a waiver of parliamentary privilege."

With respect to (1), the Clerk's letter of advice specifically addressed the issues of parliamentary privilege regarding the release of evidence if the police investigated under section 57 of *The Criminal Code* and the release of evidence if the police investigated offences other than ss 55 to 61 of *The Criminal Code* (ss 55 to 61 are offences against the Legislature). I understand that the Clerk's

view is that if the House allowed the Committee to provide all of the evidence to the Commissioner, it could lead to the House acting outside its powers i.e. the House cannot waive privilege.

With respect to (2), parliamentary privilege is not something consciously conferred on witnesses who appear before a Committee; rather, parliamentary privilege is absolute and is part of the law. Hence, any evidence given by a witness is covered by Article 9 of the Bill of Rights, which states:

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

If the Committee provided the Commissioner with the oral evidence given by the witnesses to the Inquiry, this would have a chilling effect on witnesses cooperating with Parliament, who would no longer trust Parliament to keep their evidence secure. This in turn would impede the ability of the House to transact its business.

For your information, I have written to the Commissioner today (copy attached) advising him that I have distributed his response to all Members of the Legislative Assembly and I also provided him with a copy of this memorandum. In my letter, I advised the Commissioner that the earliest the House will have the opportunity, if it thinks fit, to consider his response is the sitting week commencing Tuesday 12 June 2018.

Yours sincerely



HON. PETER WATSON MLA
SPEAKER OF THE LEGISLATIVE ASSEMBLY

24 May 2018



WESTERN AUSTRALIA POLICE FORCE

OFFICE OF COMMISSIONER OF POLICE

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Hon Peter Watson MLA
Speaker of the Legislative Assembly
Legislative Assembly
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Dear Mr Speaker

CRIMINAL INVESTIGATION INTO ACTIONS BY THE FORMER MEMBER FOR DARLING RANGE

I refer to your letter of 15 May 2018 and my response of 17 May 2018. I have sought and considered advice from State Counsel, Mr Tannin SC, regarding this matter.

With great respect, I consider that it is more appropriate that I do not advise you of any potential criminal offences the Western Australia Police Force is considering in the investigation of Mr Urban. I am required to act independently and there is a risk that disclosing any potential offences may prejudice the investigation.

Mr Tannin has advised that it is open to the Legislative Assembly to disclose the documentation and evidence that I sought in my letter dated 10 May 2018.

With respect to the evidence of witnesses other than Mr Urban, Mr Tannin's opinion is that as long as I am only provided with the actual transcripts of what was said to the Procedure and Privileges Committee, if those witnesses were granted parliamentary privilege in the usual manner, the mere disclosure of the transcripts to me will not result in a waiver of parliamentary privilege.

I attach a copy of State Counsel's advice dated 17 May 2018 to assist you in your deliberations on this matter.

Yours sincerely

CHRIS DAWSON
COMMISSIONER OF POLICE

23 May 2018



COPY

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Chris Dawson APM
Commissioner of Police
Police Headquarters
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Date: 17 May 2018

Privileged and Confidential

Dear Commissioner,

REQUEST BY SPEAKER OF THE LEGISLATIVE ASSEMBLY THAT THE COMMISSIONER ADVISE THE SPEAKER AS THE CRIMINAL OFFENCES WA POLICE IS INVESTIGATING IN RESPECT OF BARRY URBAN

1. BACKGROUND

1. On 8 May 2018 the Legislative Assembly's Procedure and Privileges Committee (Committee) tabled a report *Misleading the House: Statements Made by the Member for Darling Range (Report)*. Relevantly, the Report:
 - found that Mr Barry Urban, a former Member of the Legislative Assembly (who at the time of the Report's tabling was a Member) committed a gross and aggravated contempt of Parliament; and
 - recommended Mr Urban's expulsion.
2. Mr Urban resigned from Parliament before the Legislative Assembly could resolve to expel him from the House.
3. You intend to instruct the Major Fraud Squad to commence a criminal investigation into Mr Urban's actions, to determine if his conduct, as detailed in the Report, may have involved the commission of criminal offences. However, it is premature to characterise the investigation as inevitably leading to formal charges. There are many matters for WA Police to consider, not least the public interest. Further, you have also indicated your concern to preserve and maintain the integrity of the processes of police service recruiting.
4. On 10 May 2018 you wrote to the Speaker of the Legislative Assembly, Hon Peter Watson MLA, indicating your intention as mentioned at [3] above, and requesting for the purpose of the investigation that the Speaker (or the House) 'provide any documentation and evidence in relation to the Committee's determination'. The Speaker tabled your letter in Parliament.

5. On 15 May 2018 the Clerk of the Legislative Assembly has provided advice to the Speaker, which has been tabled in Parliament, to the following effect:
 - before the Speaker should act on the request in your letter of 10 May 2018, you should clarify to the Speaker the specific criminal offences Police are investigating or intending to investigate;
 - depending on which specific criminal offences you state Police are investigating or intending to investigate in respect of Mr Urban, it may or may not be appropriate for the House to disclose to Police all or some of the evidence provided by Mr Urban to the Committee;
 - irrespective of whether you clarify to the Speaker the matters mentioned above, the House should be very careful when considering releasing evidence provided to the Committee by persons other than Mr Urban.
 6. Further, the Speaker has indicated he intends to table your response in the House.
 7. I have been asked to advise on how you should respond to the Speaker, in the light of the Clerk's advice.
- 2. SUMMARY OF ADVICE**
8. With great respect, I do not agree with the Clerk's advice, for two reasons.
 - 8.1.1 *First*, the question of whether the House should disclose the Committee's evidence to Police centrally concerns invocation of the privilege of non-disclosure. As that privilege is discretionary, the House can choose not to invoke it. Accordingly, there is no legal requirement that, before the House can comply with your request, you must disclose to the House the specific offences in respect of which Mr Urban is being, or may be, investigated.
 - 8.1.2 *Secondly*, with respect to the issue of the liability of Committee witnesses other than Mr Urban, I advise as follows.
 - (a) Assuming the Procedure and Privileges Committee engaged in the ordinary committee practice of extending parliamentary privilege to witnesses before it, then the better view is all oral, written and real evidence provided by witnesses other than Mr Urban to the Committee in session is protected by parliamentary privilege.
 - (b) Parliamentary privilege includes freedom of speech, which is an absolute immunity from civil and criminal proceedings for words spoken or representations made during the course of parliamentary proceedings.
 - (c) Finally, as freedom of speech only applies to publications or proceedings *within* parliament, to protect the privilege the better view is that the House should only provide Police with the actual transcripts and exhibits (or access to the exhibits) made and tendered *before the Committee*, rather than any extract or republication of those materials.
 - (d) Accordingly, while I agree with the Clerk that the House should be cautious in disclosing to Police Committee evidence provided

by witnesses other than Mr Urban, I am not of the view that the mere provision of the actual transcripts and extracts provided to the Committee will expose those witnesses to criminal or civil liability. Rather, their evidence will remain subject to parliamentary privilege (including freedom of speech).

9. You should not disclose to the Speaker the specific criminal offences in respect of which Mr Urban is being, or may be, investigated. Police must conduct all investigations independently and without external influence. As advised just above, there is no legal or moral requirement that you have to disclose these matters. Further, there are very good practical and operational reasons why you should not do so.

3. ADVICE

10. Section 1 of the *Parliamentary Privileges Act 1891* (WA) enacts:

1. Privileges, immunities and powers of Council and Assembly

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.

11. The critical aspects of section 1 are that first, it confers privilege on both the Assembly *and* its committees, and secondly it confers the same privileges, immunities and powers as the House of Commons enjoyed at 1 January 1989.

3.1. Is the Assembly required to know the specific offences considered by Police before it can disclose the Committee's evidence to Police?

12. The Clerk's advice has generally approached this question by considering whether the relevant offence provision with which Mr Urban may be charged with abrogates freedom of speech (which is one aspect of parliamentary privilege) by express words or necessary implication.
13. I agree that abrogation of freedom of speech is a relevant issue in respect of disclosing Committee evidence provided by witnesses other than Mr Urban (and I consider this issue below). However, I respectfully do not agree that freedom of speech is relevant to the question of whether there is any requirement that Police disclose the specific offences in respect of which Mr Urban is being, or may be, investigated. Rather, the issue of whether the House can disclose that information turns on the privilege of non-disclosure.
14. The privilege of non-disclosure is a discretionary privilege which allows the Parliament to refuse to produce certain types of documents which are otherwise

compellable.¹ Plainly, it is the *privilege of non-disclosure* which is centrally enlivened by the question of disclosure of the Committee's evidence. Whether Parliament should disclose evidence in its possession is really a question of whether it should exercise its privilege of non-disclosure over that evidence.

15. The privilege of non-disclosure is discretionary. This is made clear in the case law cited above, and in section 1 itself, which States that the 'Assembly... and committees, have and *may* exercise [the privilege]!'

16. Accordingly, there are no legal barriers to the House deciding not to invoke its privilege of non-disclosure. Further, provided the House decides for a good reason not to invoke its privilege of non-disclosure, there are not even any moral or conventional barriers to such a decision.

3.2. Criminal and civil liability for witness's providing evidence to the Committee other than Mr Urban

17. The Clerk's advice is that the House should be extremely careful when considering disclosing evidence provided to the Committee by witnesses other than Mr Urban, because in disclosing such evidence the House may breach Standing Order 308, which states:

'Any witnesses examined by the Assembly or a committee are entitled to the protection of the Assembly in respect of their having given evidence and anything that may be said in their evidence'

18. I agree that the House should exercise great caution when disclosing this kind of evidence. However, for the following reasons I consider that, provided proper process is followed, disclosure will not contravene Standing Order 308.

19. As stated above, the essential effect of the privilege of free speech is it confers immunity from civil and criminal suit on the individual who holds the privilege. However, importantly, the privilege only applies to statements and representations made, or written documents delivered, during the course of parliamentary proceedings.² It was House of Commons practice before 1989 that parliamentary proceedings can include committee proceedings,³ and judicial authority supports this.⁴

20. The ordinary practice of committees of the Western Australian Parliament is to confer parliamentary privilege on witnesses who appear before the committee when it is in session.⁵ There is judicial authority supporting the view that evidence given by witnesses appearing before parliamentary committees cannot be used to support a civil action or prosecution.⁶

¹ See *O'Chee v Rowley* (1997) 150 ALR 199; *National Tertiary Education Industry Union v Commonwealth* [2001] FCA 610.

² Sir Charles Gordon, *Erskine May's Parliamentary Practice* (20th edition, 1983), 92-94 (citing *R v Bunting* (1884) 7 Ont Rep 563; *Coffin v Coffin* (4 Mass I)

³ *Ibid.*

⁴ *Goffin v Donnelly* (1881) 6 QBD 307; *R v Wainscot* (1899) 1 WALR 77.

⁵ See as one example, Public Accounts Committee, *Inquiry into the Management and Oversight of the Perth Children's Hospital Project* (Transcript of Evidence Taken at Perth, Monday, 18 September 2017 – Session Four), 1 (The Chair: 'Your evidence is protected by parliamentary privilege. However, this privilege does not apply to anything you might say outside today's proceedings).

⁶ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321; *Dingle v Associated Newspapers Ltd* [1960] 2 QB 405; *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522.

21. Accordingly, assuming that the Committee in this case did undertake the ordinary practice of conferring parliamentary privilege on witnesses who appeared before it, the better view is parliamentary privilege applies to the actual transcripts and exhibits made and provided during the course of the witness's appearance before the Committee. Although there is no express judicial authority on the matter, the better view is the Committee's power to confer such a privilege is located in section 1 of the *Parliamentary Privileges Act 1981* (WA)
22. However, given the advice above, in my view it is important that the House provides Police only with the actual transcripts and exhibits (or access to exhibits) made and provided to the Committee during its proceedings. If the House were to summarise, re-publish or otherwise extract Committee evidence, this could be considered a new publication outside of parliamentary proceedings which would not attract parliamentary privilege.
- 3.3. Suggested response to the Speaker**
23. The final matter for consideration is whether, notwithstanding the absence of any requirement as discussed above, you should nevertheless disclose to the House the matters mentioned above.
24. In my respectful view, you should not. There are a number of risks involved in doing so. Disclosure could prejudice the investigation. It could also unfairly prejudice any subsequent prosecution, by generating unnecessary publicity and speculation. Such unfair prejudice may in turn provide grounds for an application for permanent stay of any potential prosecution.⁷ Disclosure also creates risks of flight, and destruction or manufacturing of evidence, and unnecessarily hamstrings the operational capacity and capability of your investigators and officers.
25. I trust you have found the above advice helpful. I have no objections if you forward this advice to the Speaker of the Legislative Assembly.

Yours faithfully,

**GEORGE TANNIN SC
STATE COUNSEL**

17 May 2018

⁷ *Jago v District Court (NSW)* (1989) 168 CLR 23, 57 (Deane J) (accused's right not to be tried unfairly can ground permanent stay application); *R v Glennon* (1992) 173 CLR 592, 605-6 (Mason CJ and Toohey J) (permanent stay not ordered due to facts of case, but High Court accepted that prejudicial publicity can support a permanent stay; subsequently approved in *Dupas v The Queen* (2010) 241 CLR 237, [18] (the Court)).



24 May 2018

Mr Chris Dawson
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Dear Commissioner

I acknowledge receipt of your letter dated 23 May 2018 regarding your response to my request to clarify what criminal offences you are investigating in relation to Mr Urban.

I am not able to table your response until the House resumes sitting on Tuesday 12 June, which means that the House will not be able to consider your response until then.

In the interim, I have circulated your response (and accompanying advice) to all Members of the Legislative Assembly under cover of my memo, which I also enclose. As you will see I have concerns as to the correctness of a number of propositions contained in the advice you have provided.

Yours sincerely

HON PETER WATSON MLA
SPEAKER OF THE LEGISLATIVE ASSEMBLY