

40TH PARLIAMENT



Report 57

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

Legal Proceedings by the President - Further Authorisation by the Legislative Council

Presented by
Hon Kate Doust MLC (Chair)
September 2019

Standing Committee on Procedure and Privileges

Members as at the time of this inquiry:

Hon Kate Doust MLC (Chair)

Hon Simon O'Brien MLC (Deputy Chairman)

Hon Martin Aldridge MLC

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ISBN 978-1-925578-79-9



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1 Update to the Legislative Council's orders of 5 September 2019

- 1.1 On Thursday, 5 September 2019 the Legislative Council made a number of orders recommended by the Standing Committee on Procedure and Privileges (**Committee**) in its Report 56, *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*.¹
- 1.2 One of those orders was to authorise 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 records or things and one notice to produce information issued by the Corruption and Crime Commission of Western Australia (**Commission**) to the Director General, Department of the Premier and Cabinet (DPC), issued between April and August 2019, and of the conduct of the Commission in issuing those notices.²
- 1.3 Another order was for the Commission to produce to the Clerk of the Legislative Council the laptop issued to Mr Phillip Edman by the DPC 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 Commission's possession.³ On 4 September 2019 the Commission delivered the laptop and an external hard drive to the Committee.
- 1.4 On 10 September 2019 the Commission served on the Clerk of the Legislative Council two notices to produce records or things, NPR 00615-2019-4695 and NPR 00615-2019-4696, relating to the following, "**SAVE AND EXCEPT** for any [content] which is determined by the Procedure and Privileges Committee of the Legislative Council to be subject to Parliamentary Privilege":
 - the confidential email data and documents of three former Members and their staff which had been originally sought from Mr Darren Foster, Director General of the DPC between April and August 2019; and
 - Mr Edman's laptop and external hard drive.
- 1.5 The two Commission notices to produce records or things served on the Clerk have a compliance deadline of 4pm on Monday, 7 October 2019.
- 1.6 As a legal and practical result of the serving of these two notices to produce records or things on the Clerk, there is a need to update the Legislative Council's order of 5 September 2019 to reflect the changing circumstances, being:
 - the addition of the two latest Commission notices to produce records or things and related matters as the possible subject matter of legal proceedings;
 - to accommodate the fact that the Clerk of the Legislative Council will now likely be a party to any proceedings challenging the validity of the Commission's notices to produce records or things;
 - to recognise that, with the Clerk being a likely party to any legal proceedings, the Deputy Clerk shall be the Accountable Authority of the Department of the Legislative Council to

¹ Western Australia, Legislative Council, *Hansard*, 5 September 2019 pp6514-6541, pp6549-6553.

² Recommendation 4 of Report 56.

³ Recommendation 3 of Report 56.

permit the authorisation of the expenditure of funds necessary and reasonable with respect to any legal proceedings; and

- to acknowledge that now that legal proceedings are about to be undertaken and that the Legislative Council is exercising its right to assess documentary material for parliamentary privilege, it would be inconsistent for the Clerk to comply with the Commission notices to produce records or things served on the Clerk on 10 September 2019 unless under the direction of the Committee.

- 1.7 For the information of the Legislative Council, the drafting of the pleadings for the legal proceedings are well advanced and the proceedings will be commenced shortly.
- 1.8 The Committee reiterates that it is not the intention of the Committee or the Legislative Council to impede the Commission's investigation. Parliamentary privilege, however, is critical to the proper functioning of Parliament and to enable Members of Parliament to conduct their business representing their constituents and holding the executive arm of government to account.
- 1.9 Notwithstanding the imminent commencement of legal proceedings, the Committee intends to continue to develop a workable procedure, with the technical assistance of the Commission, for assessing those documents sought in the Commission investigation that may be subject to parliamentary privilege.

RECOMMENDATION 1

Recommendation 1

The Committee recommends that the Legislative Council notes:

- A. That on 10 September 2019, the Clerk of the Legislative Council was served by the Corruption and Crime Commission with two notices to produce records or things, including documents and data retained by him.
- B. That the retention of those documents and data by the Clerk is the result of orders made by the Standing Committee on Procedure and Privileges pursuant to the authority provided by the Legislative Council on 12 June 2019.
- C. That, on 5 September 2019, the Legislative Council authorised the President to commence legal proceedings with respect to some or all of three notices to produce records or things, and one notice to produce information, issued by the CCC to the Director General of the Department of the Premier and Cabinet.
- D. That those legal proceedings will relate to the validity of some or all of the CCC notices to produce.
- E. That similar questions arise in respect to the validity of the CCC notices to produce served on the Clerk.
- F. That, to the extent that the CCC notices to produce are invalid, the CCC will not have a lawful right to the documents, data or information sought by those notices.

And that the Legislative Council orders as follows:

Resolution regarding the 'arrangement'

1. That the proceedings described in Resolution 4(1) passed on 5 September 2019 may include the following, and proceedings may be commenced and pursued on behalf of the Legislative Council of Western Australia accordingly:

- (a) a challenge to the validity of the Commission's actions in making and implementing an arrangement with the Director General, Department of Premier and Cabinet, concerning the searching of electronic records and the review of records by staff of the State Solicitor's Office to purportedly determine whether any of the records were the subject of Parliamentary Privilege; and
- (b) any causes of action which in the opinion of solicitors and counsel are related or raise similar questions.

Resolutions regarding the new notices and funding

2. That proceedings may be commenced and pursued, in the Supreme Court of Western Australia, on behalf of the Legislative Council of Western Australia, challenging the validity of notices to produce records or things issued by the Corruption and Crime Commission to the Clerk of the Legislative Council on 10 September 2019, and of any future notices issued by the Commission that in the opinion of solicitors and counsel give rise to similar issues, and of the conduct of the Commission in issuing those notices.
3. 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 such 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 Deputy Clerk of the Legislative Council 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.
4. That the reference to 'Clerk' in Resolution 4 passed by the Legislative Council on 5 September 2019 is to be read as a reference to the 'Deputy Clerk', now being the Accountable Authority of the Department of the Legislative Council for the purposes of authorisation of expenditure of funds necessary and reasonable with respect to any proceedings.
5. Causes of action commenced in accordance with Resolution 4 passed on 5 September 2019 and the resolutions set out above, may be the subject of one proceeding, multiple separate proceedings, or otherwise, as advised by solicitors and counsel or as determined by the Court.

Resolution regarding the Clerk

6. That the Clerk is directed not to comply with the CCC notices to produce served on the Clerk on 10 September 2019 pending:
 - (a) both the outcome of any proceedings and an assessment of parliamentary privilege by the Standing Committee on Procedure and Privileges with respect to those notices; or
 - (b) further direction from the Standing Committee on Procedure and Privileges taking account of legal advice.

A handwritten signature in blue ink, appearing to read 'K Doust', is positioned above the printed name.

Hon Kate Doust MLC
Chair

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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