THIRTY-NINTH PARLIAMENT

REPORT 44
STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES
A MATTER OF PRIVILEGE RAISED BY HON SUE ELLERY MLC

Presented by Hon Barry House MLC (Chair)

November 2016
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, SO 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.’

Members as at the time of this inquiry:

Hon Barry House MLC (Chair)  Hon Adele Farina MLC (Deputy Chair)
Hon Martin Aldridge MLC  Hon Nick Goiran MLC

Substitute Member: Hon Sue Ellery MLC

Staff as at the time of this inquiry:

Nigel Pratt (Clerk of the Legislative Council)  Paul Grant (Deputy Clerk)
Grant Hitchcock (Usher of the Black Rod)

Address:
Parliament House, Perth WA 6000, Telephone (08) 9222 7222
leco@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au
ISBN 978-1-925149-91-3
CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS .................................................. I

EXECUTIVE SUMMARY ......................................................................................................... I
RECOMMENDATIONS .......................................................................................................... IV

CHAPTER 1 REFERENCE AND PROCEDURE .................................................... 1

REFERENCE AND PROCEDURE ............................................................................................. 1
BACKGROUND TO THE REFERENCE ..................................................................................... 1
INQUIRY TERMS OF REFERENCE .......................................................................................... 2
INQUIRY PROCESS ............................................................................................................... 2

CHAPTER 2 BACKGROUND ............................................................................................... 5

THE EVENTS OF THE 22ND AND 23RD OF FEBRUARY 2014 ........................................ 5
THE RESIGNATION OF THE TREASURER; MINISTER FOR TRANSPORT ............................... 5
QUESTIONS IN PARLIAMENT ............................................................................................... 5
INVESTIGATION BY THE WESTERN AUSTRALIA POLICE AND THE PUBLIC SECTOR
COMMISSIONER .................................................................................................................. 8
INVESTIGATION BY THE CCC .............................................................................................. 8
REFERRAL OF A MATTER OF PRIVILEGE TO THE COMMITTEE .......................................... 10

CHAPTER 3 CONSIDERING MATTERS OF PRIVILEGE ........................................... 13

WHAT IS PARLIAMENTARY PRIVILEGE? ................................................................. 13
  Freedom of Speech ......................................................................................................... 14
  Exclusive Cognisance .................................................................................................... 14
THE DISTINCTION BETWEEN ‘BREACH OF PRIVILEGE’ AND ‘CONTEMPT OF PARLIAMENT’
................................................................................................................................... 15
PENALTIES AVAILABLE FOR CONTEMPTS ......................................................................... 21

CHAPTER 4 QUESTIONS WITHOUT NOTICE .................................................................. 23

QUESTIONS WITHOUT NOTICE ........................................................................................... 23
QUESTIONS WITHOUT NOTICE PROCESS IN THE LEGISLATIVE COUNCIL ....................... 25
QUESTIONS WITHOUT NOTICE ASKED ON WEDNESDAY, 12 MARCH 2014 ...................... 27

CHAPTER 5 THE EVIDENCE OF MR STEPHEN HOME ............................................. 29

PRIVATE HEARING WITH MR STEPHEN HOME .......................................................... 29
QUESTIONS WITHOUT NOTICE PROCESS ......................................................................... 29
QUESTION WITHOUT NOTICE NO. 176 (C 192) .................................................................. 30

CHAPTER 6 THE EVIDENCE OF MS RACHAEL TURNSECK ................................... 41

PRIVATE HEARING WITH MS RACHAEL TURNSECK ..................................................... 41
PREPARATION OF THE ANSWER ....................................................................................... 41
The CCC Report and Ms Turnseck’s Initial Response ......................................................... 41
CHAPTER 7 OTHER PERSONS CONNECTED TO QUESTION WITHOUT NOTICE NO. 176 (C 192)................................................................................................................ 53
EMAILS .............................................................................................................................. 53

CHAPTER 8 THE CORRUPTION AND CRIME COMMISSION ........................................ 55
THE CCC’S INVESTIGATION ................................................................................................. 55
THE BILL OF RIGHTS 1688 (UK) AND PARLIAMENTARY PRIVILEGE.............................. 56
IS THE CCC A ‘PLACE OUT OF PARLIAMENT’? ............................................................... 56
WERE THE DRAFTS OF LEGISLATIVE COUNCIL QUESTION WITHOUT NOTICE C 192
AND/OR ASSOCIATED EMAILS ‘PROCEEDINGS IN PARLIAMENT’? ............................... 58
DID THE CCC’S USE OF THE DRAFTS OF LEGISLATIVE COUNCIL QUESTION WITHOUT
NOTICE C 192 AND ASSOCIATED EMAILS ‘QUESTION OR IMPEACH’ A ‘PROCEEDING IN
PARLIAMENT’? ................................................................................................................ 62
Meaning of ‘impeached or questioned’ ........................................................................... 64
CCC’s use of proceedings in parliament ......................................................................... 66
DO THE STATUTORY PROVISIONS GOVERNING THE POWERS OF THE CCC ALTER
PARLIAMENTARY PRIVILEGE? ...................................................................................... 69
DID THE CCC’S USE OF PROCEEDINGS IN PARLIAMENT RESULT IN A SUBSTANTIAL
INTERFERENCE WITH A PROCEEDING OF THE LEGISLATIVE COUNCIL? ........................ 74
CCC COMMENT ON DRAFT FINDINGS AND RECOMMENDATIONS .............................. 75

CHAPTER 9 CONCLUSIONS .............................................................................................. 79

CHAPTER 10 RECOMMENDATIONS .............................................................................. 83
APPENDIX 1 LIST OF WITNESSES AND MEETINGS/HEARINGS HELD ...................... 85
WITNESSES AND HEARINGS HELD .................................................................................. 85
DAYS OF MEETINGS ............................................................................................................ 85
APPENDIX 2 STATEMENT FROM MR STEPHEN HOME ................................................ 87
STATEMENT TO THE LEGISLATIVE COUNCIL PROCEDURE AND PRIVILEGES COMMITTEE
OF STEPHEN HOME, DEPUTY CHIEF OF STAFF, OFFICE OF THE PREMIER ................. 87
APPENDIX 3 STATEMENT FROM MS RACHAEL TURNSECK ....................................... 91
STATEMENT TO THE LEGISLATIVE COUNCIL PROCEDURE AND PRIVILEGES COMMITTEE
OF MS RACHAEL TURNSECK (GIVEN 24 JUNE 2016) ..................................................... 91
APPENDIX 4 RESPONSES TO THE COMMITTEE’S CORRESPONDENCE BY
OTHER PERSONS CONNECTED TO QUESTION WITHOUT NOTICE NO. 176
(C 192) ............................................................................................................................... 95
EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

1. The Committee has found that both Mr Stephen Home and Ms Rachael Turnseck have committed contempts of the Legislative Council. The contempts in question were the conduct by each of them in deliberately constructing an incomplete, misleading and ultimately false answer to a parliamentary question. This conduct is a substantial interference with the parliament's information gathering and accountability functions. The facts supporting these findings are set out in this report. The available evidence does not support a finding of contempt or breach of privilege against any other natural person.

2. In relation to the Corruption and Crime Commission (“the CCC”), the Committee acknowledges that in the absence of the CCC investigation, it would have been unlikely that the evidence supporting the Committee’s findings of contempt against Mr Home and Ms Turnseck would have come to light. This evidence included draft answers to a parliamentary question prepared by Mr Home with the assistance of Ms Turnseck for the consideration and approval of the Premier and the Leader of the Government in the Legislative Council. The sole purpose of these activities was so that an answer to the question could be provided in the Legislative Council. The Committee has found that the draft answers to the parliamentary questions and associated emails were proceedings in parliament.

3. The CCC used the draft answers to the parliamentary question and associated emails to form an opinion of misconduct against Ms Turnseck by reason of her failure to adhere to the required standards of behaviour of a public officer. This outcome provides a stark reminder to all public officers involved in the drafting of answers to parliamentary questions of their obligations of honesty, fairness and impartiality in the discharge of their duties as well as the dire consequences of departing from those principles of conduct.

4. Article 9 of the Bill of Rights 1688 (UK) states that: “The freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.” The immunity afforded by Article 9 is provided to the Houses of Parliament, its Members and others involved in parliamentary proceedings. Article 9 is part of the law of this State. The Committee has found that the CCC has breached this essential immunity by its use of parliamentary proceedings and in doing so intruded into an area of the Parliament’s exclusive jurisdiction. The Committee cannot overstate the importance of the immunity provided under Article 9 as a bulwark against oppression of the Legislature by the Executive and Judicial arms.
of government. This remains the *raison d'être* of the continuing relevance of a 330 year old UK statute to our parliamentary democracy.

5 On occasion, the demarcation of the jurisdictions of the Parliament and of investigative bodies such as the CCC may be difficult to discern. It is not always a bright line of separation. However, in this instance, there was such a clear bright line. The evidence relied on by the CCC to form its adverse opinion about Ms Turnseck’s conduct was so closely and directly connected to actions occurring in the Legislative Council as to make it obvious that this evidence constituted a proceeding in Parliament. The Committee would have expected the CCC to have known that using such materials to form an opinion on the conduct of a public officer in these circumstances would breach the immunity provided by Article 9.

6 By adopting the findings and recommendations of this Committee and enforcing any related orders, the Legislative Council will remind all those involved in parliamentary proceedings to conduct themselves with honesty, fairness and impartiality when carrying out their official duties. This task falls squarely within the exclusive jurisdiction of the Houses of Parliament. The CCC has no concurrent or ‘shared’ jurisdiction with the Parliament to investigate and pursue matters of this nature.

7 The Legislative Council, as in the past, will welcome any assistance that the CCC may provide to enable the House to determine whether a contempt or breach of its privileges has occurred. However, the CCC is not empowered by its statute to intrude upon the privileges of the Legislative Council. The Houses of Parliament, when first enacting the *Corruption and Crime Commission Act 2003* and recent amendments made to it by the *Corruption and Crime Commission Amendment (Misconduct) Act 2014* were careful to ensure that Parliamentary Privilege was expressly preserved. Section 3(2) of the Corruption, Crime and Misconduct Act 2003 is a clear expression of both the Parliament’s will and the law of this State in this regard.

8 Due deference is essential to avoid unnecessary conflict between the three arms of government. It is precisely for this reason that Article 9 of the *Bill of Rights 1688* (UK) has been consistently asserted by Westminster based Parliaments, and observed by the Courts, quasi-judicial bodies, Royal Commissions, tribunals and other corruption bodies all of which fall within the meaning of a “court or place out of Parliament”. The potential for conflict to occur in this instance would have been eliminated if the CCC had complied with the exclusionary rule that applies to evidence of proceedings in Parliament under Article 9. Doing so would have required the CCC to decline to form an opinion regarding the conduct of Ms Turnseck in relation to Legislative Council Question without notice C 192 (No.176), and to refer the matter of her conduct together with any evidence it had obtained to the Legislative Council. This would have been consistent with previous action by the CCC where the activities of individuals involved possible contempts or breaches of the privileges of the Legislative Council.
The Committee is concerned by the decision of the Commissioner of the CCC to provide this part of the CCC report to the Premier rather than to the Parliament. If it were not for the actions of the Premier in making the CCC report public by tabling it in the Legislative Assembly on 16 March 2016, the Legislative Council would have remained unaware of the possible contempts committed against it. This aspect of the CCC report was not a matter solely for the Premier as the Minister responsible for the Department of Premier and Cabinet and the employer of Mr Home and Ms Turnseck. It was a matter that concerned the integrity of Question Time, one of the important mechanisms of the Legislature for obtaining information from the Executive and bringing it to account as an incidence of democratic governance in Western Australia. It was therefore also a matter that the Commissioner should have brought to the attention of the Legislative Council.

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

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

12 Recommendations appear in the text at the page number indicated:

Recommendation 1: The Committee recommends (at page 83):

That Mr Stephen Home be adjudged guilty of a contempt of the Legislative Council.

Recommendation 2: The Committee recommends (at page 83):

That Mr Stephen Home do within 7 days unreservedly apologise in writing to the Legislative Council for providing incomplete and misleading information in answer to Question without Notice No. 176 (C 192) which rendered part 2 of the answer false in a material particular.

Recommendation 3: The Committee recommends (at page 83):

That Ms Rachael Turnseck be adjudged guilty of a contempt of the Legislative Council.

Recommendation 4: The Committee recommends (at page 83):

That Ms Rachael Turnseck do within 7 days unreservedly apologise in writing to the Legislative Council for providing incomplete and misleading information in answer to Question without Notice No. 176 (C 192) which rendered part 2 of the answer false in a material particular.
Recommendation 5: The Committee Recommends (at page 84):

That a Memorandum of Understanding be developed between the Houses of the Parliament of Western Australia and the Corruption and Crime Commission to ensure that:

(a) in forming an opinion of misconduct against a public officer the CCC does not breach the privileges of the Parliament;

(b) conduct of public officers which constitutes a contempt or breach of privilege of the Houses of Parliament is dealt with by the relevant House of Parliament under the powers provided to the Houses by the Parliamentary Privileges Act 1891; and

(c) the CCC, where practicable, provide evidence in its custody, control or power to assist a House of Parliament to investigate and determine offences of contempt or breach of privilege.
CHAPTER 1
REFERENCE AND PROCEDURE

REFERENCE AND PROCEDURE

1.1 On 17 March 2016, Hon Sue Ellery MLC raised a matter of privilege in the Legislative Council under Standing Order 93. The matter of privilege concerned the integrity of the Parliament’s information gathering and accountability functions with regard to one particular answer to a Question without Notice.

1.2 On 22 March 2016 the President of the Legislative Council provided a ruling to the Council and referred the matter to the Procedure and Privileges Committee (“the PPC”).

1.3 This report canvasses the PPC’s deliberations, findings and recommendations in relation to A Matter of Privilege raised by Hon Sue Ellery MLC.

BACKGROUND TO THE REFERENCE

1.4 On 16 March 2016 the Premier of Western Australia, Hon Colin Barnett MLA, tabled in the Legislative Assembly the Corruption and Crime Commission (“the CCC”) Report of Alleged Public Sector Misconduct in Relation to an Incident Involving the Hon. Troy Buswell that Occurred on 23 February 2014. At the time of the incident Mr Buswell was the Member for Vasse in the Legislative Assembly and the State’s Treasurer and Minister for Transport.

1.5 On 16 March 2016, and as a consequence of the tabling of the CCC report, the Leader of the Government in the Legislative Council, Hon Peter Collier MLC, tabled a corrected answer to Question without Notice No. 176. The answer to that question was given in the Legislative Council on 12 March 2014. That corrected answer and the CCC report provided the impetus for the matter of privilege raised by Hon Sue Ellery MLC.

---

1 See Legislative Assembly Tabled Paper No. 3929. The CCC report was also tabled in the Legislative Council on 16 March 2016 by the President: See Legislative Council Tabled Paper No. 3894.
INQUIRY TERMS OF REFERENCE

1.6 Following the referral from the President, the PPC resolved to undertake an inquiry and reported its terms of reference to the House on 24 March 2016 as follows:

*In relation to Legislative Council Question without Notice No. 176 asked by the Leader of the Opposition, Hon Sue Ellery, and answered on 12 March 2014 by the Leader of the House, the Hon Peter Collier, in his capacity as the Minister representing the Premier:*

1. Did Ms Rachael Turnseck commit a contempt of this House or any breach of its privileges?

2. Did Mr Stephen Home commit a contempt of this House or any breach of its privileges?

3. Did any other person or body commit a contempt of this House or any breach of its privileges?

INQUIRY PROCESS

1.7 At the commencement of its inquiry the PPC wrote to the Commissioner of the CCC requesting copies of the evidence in its possession, custody or power relating specifically to the CCC’s investigation regarding the answer to Question without Notice No. 176. The Commissioner provided these documents under s. 152(4)(c) of the *Corruption, Crime and Misconduct Act 2003*, having determined that it was in the public interest to release this material to the Committee. The PPC thanks the Commissioner for his assistance, without which its investigation would have been significantly hampered.

1.8 The PPC conducted two private hearings in which Mr Stephen Home, Deputy Chief of Staff to the Premier, and Ms Rachael Turnseck, former Chief of Staff to the Treasurer and Minister for Transport, appeared as witnesses. Mr Home attended before the committee on Monday, 20 June 2016. Ms Turnseck, accompanied by Mr Grant Donaldson SC as her legal counsel, attended a hearing on Friday, 24 June 2016.

1.9 Following the hearings, the PPC wrote to current and former staff who worked in the Premier’s office on 12 March 2014 and whose names were listed as recipients of the emails that related to Question without Notice No. 176. This was done to determine whether any of these staff had knowledge of, or were involved, directly or indirectly, with the answer to Question without Notice No. 176.

1.10 The PPC also wrote to the Premier in an effort to determine his state of knowledge regarding the accuracy of the answer which he authorised to be given by the Minister representing him in the Legislative Council, Hon Peter Collier MLC. The

---

correspondence and related responses is contained in Appendix 4. The PPC thanks the Premier and staff of his office for their co-operation and for the answers provided.

1.11 As a final measure, the PPC sought advice from Mr Bret Walker SC in relation to Term of Reference No. 3, with specific regard to the actions of the CCC in using the draft answers to Questions without Notice No. 176 in reaching its opinion of misconduct against Ms Turnseck. This involved Mr Walker addressing questions concerning the respective jurisdictions of the CCC and a House of Parliament and the degree to which, if at all, the CCC’s actions infringed those privileges or could constituted a contempt. The preliminary question regarding this issue and the Committee’s Terms of Reference No. 1 and No. 2 was whether the drafts of answers to the parliamentary questions constituted “proceedings in parliament” for the purposes of Article 9 of the Bill of Rights 1688 (UK).

1.12 Mr Walker’s advice is contained at Appendix 6. The PPC thanks Mr Bret Walker SC for his valuable advice on these matters.
CHAPTER 2
BACKGROUND

THE EVENTS OF THE 22ND AND 23RD OF FEBRUARY 2014

2.1 On the evening of 22 February 2014 the then Treasurer and Minister for Transport, Hon Troy Buswell MLA, attended a friend’s wedding. Sometime after 11:00pm that night he drove home, in the course of which damage was done to the government vehicle that he was driving, several parked vehicles and the front gate to his driveway.³

2.2 On the following morning, 23 February 2014, Hon Troy Buswell MLA phoned his Chief of Staff, Ms Rachael Turnseck. Ms Turnseck subsequently spent several hours that day at Mr Buswell’s house, during which time she organised for the Minister’s family to come to the house and take him to Busselton.⁴

2.3 Hon Troy Buswell MLA then took a week’s personal leave. Ms Turnseck did not inform the Premier, his staff, or any of the staff in her office of the damage to Mr Buswell's vehicle prior to 9 March 2014.⁵

THE RESIGNATION OF THE TREASURER; MINISTER FOR TRANSPORT

2.4 On Monday, 10 March 2014 the media reported on the events of the night of 22-23 February 2014. Later that day, the Premier, Hon Colin Barnett MLA, announced that Hon Troy Buswell MLA had resigned as Treasurer and Minister for Transport.

QUESTIONS IN PARLIAMENT

2.5 On Wednesday, 12 March 2014, Hon Sue Ellery MLC asked a series of Questions without Notice (of which some notice had been given) of Hon Peter Collier MLC, the Leader of the House representing the Premier in the Legislative Council. Drafts of the questions had been provided to the Department of Premier and Cabinet prior to 11:00am that day as required by the agreed procedure. The answers to those questions

⁴ Ibid, pp 6-8.
⁵ Ibid, p 8.
were given by Hon Peter Collier during the question time period on the afternoon of the same day. The questions and answers were as follows.6

**QUESTIONS WITHOUT NOTICE**

MEMBER FOR VASSE — RACHAEL TURNSECK — MEETING WITH BRIAN PONTIFEX

161. Hon SUE ELLERY to the Leader of the House representing the Premier:

I refer to the advice to the other place yesterday that the former Treasurer’s chief of staff, Rachael Turnseck, met with the Premier’s chief of staff, Brian Pontifex, and principal adviser, Narelle Cant. on Tuesday, 25 February for 45 minutes.

(1) What information did Ms Turnseck provide about the events in the days leading up to the former Treasurer seeking personal leave?

(2) Did Mr Pontifex or Ms Cant ask Ms Turnseck whether there was any further information about the events in the days leading up to the former Treasurer seeking personal leave?

(3) What advice did Mr Pontifex or Ms Cant give to Ms Turnseck at that meeting?

Hon PETER COLLIER replied:

I thank the honourable member for some notice of this question.

(1)–(3) Ms Turnseck advised of the Treasurer’s condition. She also advised that she and the Treasurer had attended a wedding of a mutual friend on the Saturday night. Ms Turnseck had left the reception independently earlier in the evening. The focus of the meeting was on ensuring the Treasurer was receiving the necessary medical attention and support. The conversation also covered the likely duration of his absence and the short-term handling of portfolio matters.

MEMBER FOR VASSE — PERSONAL LEAVE

162. Hon SUE ELLERY to the Leader of the House representing the Premier:

(1) Did anyone from the Premier’s or Treasurer’s office contact Ben Morton or anyone else in Liberal Party headquarters about the events in the days leading up to the Treasurer commencing personal leave in February this year?

(2) If so, when was contact made, who made contact, with whom and what was discussed?

Hon PETER COLLIERN replied:

I thank the honourable member for some notice of this question.

(1) No; however, Mr Morton was advised in person by the Premier’s chief of staff, Brian Pontifex, on 28 February of the Treasurer’s ongoing absence. Mr Pontifex also advised Mr Morton by telephone on 9 March of the likelihood that the Premier would be making a statement the following day in response to media reports. On 10 March he telephoned Mr Morton to confirm that the Premier would be making a statement.

(2) Not applicable.

176. Hon SUE ELLERY to the Leader of the House representing the Premier:

(1) Has the Premier or anyone from his office asked the former Treasurer’s chief of staff, Ms Rachael Turnseck, whether she discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his chief of staff and Ms Narelle Cant; and, if not, why not?

(2) Has Ms Turnseck discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his chief of staff and Ms Narelle Cant; and, if so, with whom and when?
Hon PETER COLLIER replied:

(1) No. The concern of the Premier and his office has been the welfare of the former Treasurer.

(2) Prior to the former Treasurer’s resignation, no.

INVESTIGATION BY THE WESTERN AUSTRALIA POLICE AND THE PUBLIC SECTOR COMMISSIONER

2.6 From mid-March 2014 separate investigations were conducted into the events of the night of 22-23 February 2014 by the Western Australia Police and the Public Sector Commissioner.

2.7 On 28 March 2014 Ms Turnseck resigned as Chief of Staff to the Treasurer.

2.8 On 29 April 2014 Hon Troy Buswell was convicted of 11 charges under the Road Traffic Act 1974 after pleading guilty to all charges. Those charges were:

- four charges of careless driving (s 62);
- four charges of failure to report an incident in which property was damaged (s 56(4)); and
- three charges of failure to stop and provide particulars (s 55(1)).

2.9 On 3 September 2014 Hon Troy Buswell resigned as a Member of the Legislative Assembly.

INVESTIGATION BY THE CCC

2.10 Between December 2014 and June 2015 Ms Turnseck was examined on three separate occasions by the CCC.

2.11 On 16 March 2016 the Premier tabled a report in the Legislative Assembly prepared by the CCC regarding the incident on the night of 22-23 February 2014. In tabling the report the Premier made the following statement:

“The commission finds there to be no public interest in forming an opinion on the conduct of the former member for Vasse, based on his acceptance of responsibility by pleading guilty to traffic charges laid

---

against him and by personally settling associated damages claims rather than burden the state. It also references the fact that he has left public service and was suffering a significant health condition at the time.

The commission found there to be no evidence of any kind to suggest any misconduct or improper behaviour by members of my office—that is, the Premier’s office. However, the commission does find fault with the conduct of the former minister’s chief of staff, Ms Rachael Turnseck, expressing an opinion that some of her actions constitute misconduct. It also determines that the conduct of the former minister’s electorate officer, Mr Leo Gibbons, be investigated by the Department of the Premier and Cabinet. Since the provision of the report to me, Mr Gibbons’ employment within government has ceased. Ms Turnseck was found to have withheld information, thereby misleading her employer, indirectly the Parliament and later the commission itself. Notwithstanding this, the commission sees no particular public interest in itself reporting to Parliament on her actions, partly as she has also left the public service and was never a public figure.

The commission’s provision of its report to me is in the context of its finding that Ms Turnseck put her loyalty to a minister above her duty to the state, and the need for all ministerial officers to learn lessons in this respect. I accept the commission’s findings, and the lessons it highlights will be learned. The CCC addresses itself in the report to the unique and complex role of a chief of staff in supporting and protecting a minister—part gatekeeper, part confidante and adviser, and part crisis manager. Critically, however, the commission states that a chief of staff’s loyalty to a minister should not override their responsibilities as a public officer.

I strongly emphasise the point that Ms Turnseck found herself in a rare and confronting situation, in which she genuinely, and with good reason, seriously feared for the physical and mental wellbeing of the minister she served. Her decisive actions at that time were critical in ensuring his welfare. Although her failure to be complete with her disclosures subsequent to those events is a serious error of judgement, I think it is important to consider that none of her actions were motivated by self-interest, and she has already suffered a serious detriment, arising from events on the night of 22–23 February 2014, which might have been averted had her advice to the former minister that night been heeded.”
2.12 On 16 March 2016 during Question Time in the Legislative Council, Hon Peter Collier, Leader of the House representing the Premier provided the following correction to the answer to Question without Notice No. 176 given to Hon Sue Ellery on 12 March 2014:8

**FORMER MEMBER FOR VASSE — ROAD TRAFFIC INCIDENT — RACHAEL TURNSECK**

*Question without Notice 176 — Correction of Answer*

**HON PETER COLLIER (North Metropolitan — Leader of the House) [5.07.pm]:** In a response provided by me, in my capacity as Leader of the House representing the Premier, to Question without Notice 176, answered on 12 March 2014, it has recently become apparent that incorrect information was provided in the answer. Part (1) of the answer remains unchanged. The corrected answer to part (2) of the question is—

(2) Yes, with two members of Mr Buswell’s family, and with Mr Buswell’s then electorate officer.

2.13 Hon Peter Collier subsequently apologised to the House for the incorrect information provided by him to the House on 12 March 2014.9

**REFERRAL OF A MATTER OF PRIVILEGE TO THE COMMITTEE**

2.14 On Thursday, 17 March 2016, Hon Sue Ellery raised a matter of privilege under Standing Order 93. This Standing Order requires the President of the Legislative Council to rule on whether there was some substance to the matter; essentially whether a *prima facie* case is made out for further inquiry. If so the matter is referred to this Committee. In this task the President is guided by previous rulings and the Standing Orders of the Legislative Council, which in Schedule 4 sets out the criteria to be taken into account when determining whether matters possibly involving contempt should be referred to this Committee.

2.15 In his ruling on the matter, delivered on 22 March 2016, the President stated:10

*The matters raised by Hon Sue Ellery concern the integrity of the Parliament’s information gathering and accountability functions. Without pre-empting the view of the procedure and privileges*

---

committee, I believe the matter of privilege can be summarised by the following statement. In relation to Legislative Council Question without Notice 176 asked by the Leader of the Opposition, Hon Sue Ellery, and answered on 12 March 2014 by the Leader of the House, Hon Peter Collier, in his capacity as the minister representing the Premier, firstly, did Ms Rachael Turnseck commit a contempt of this house; secondly, did Mr Stephen Home commit a contempt of this house; and, thirdly, did any other person or body commit a contempt of this house or any breach of its privileges?

I am satisfied under Standing Order 93(5) that this matter of privilege should be referred to the procedure and privileges committee. I will formally write to the committee today to refer the matter.

2.16 The Committee on receiving the referral from the President determined the following terms of reference for its inquiry:

In relation to an answer to Legislative Council Question without Notice No. 176 asked by the Leader of the Opposition, Hon Sue Ellery, and answered on 12 March 2014 by the Leader of the House, the Hon Peter Collier, in his capacity as the Minister representing the Premier —

(1) Did Ms Rachael Turnseck commit a contempt of this House or any breach of its privileges?

(2) Did Mr Stephen Home commit a contempt of this House or any breach of its privileges?

(3) Did any other person or body commit a contempt of this House or any breach of its privileges?

2.17 Pursuant to Standing Order 163, Hon Sue Ellery substituted for Hon Kate Doust on the Committee for the duration of this inquiry.
CHAPTER 3
CONSIDERING MATTERS OF PRIVILEGE

WHAT IS PARLIAMENTARY PRIVILEGE?

3.1 The 1999 report of the United Kingdom Parliament Joint Committee on Parliamentary Privilege described “parliamentary privilege” as follows:11

Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions effectively.

Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished.

3.2 Parliamentary privilege is part of the common law and is recognised by the courts, although it is important to note that it is also enforceable by Parliament itself through the exercise of its penal powers.12

3.3 Section 36 of the Constitution Act 1889 provides that it is lawful for the Parliament of Western Australia by any Act to define the privileges, immunities, and power to be held, enjoyed, and exercised by the Legislative Council and Legislative Assembly, and by the Members thereof respectively.

3.4 Accordingly, the privileges, immunities and powers of each House of the Western Australian Parliament are set out in the Parliamentary Privileges Act 1891, which was enacted in reliance on s 36 of the Constitution Act 1889.

3.5 Section 1 of the Parliamentary Privileges Act 1891 confers on the Legislative Council, its Members and its committees the privileges, immunities and powers set out in that Act, and to the extent that they are not inconsistent with that Act, all those privileges, immunities and powers (by custom or statute or otherwise) of the United Kingdom House of Commons, its members and committees as at 1 January 1989. The privileges of the House of Commons include those conferred by UK statutes. One

11 United Kingdom, Joint Committee on Parliamentary Privilege, Report 1, Parliamentary Privilege, 30 March 1999, Chapter 1, para 3.
12 Ibid, para 5.
such important statute is the Bill of Rights 1688 (UK). This statute is part of the law of Western Australia by reason of s 1 of the Parliamentary Privileges Act 1891.  

3.6 The two main aspects of parliamentary privilege are freedom of speech and exclusive cognisance.

**Freedom of Speech**

3.7 Members of Parliament and other participants in the parliamentary process enjoy, in certain situations, a special absolute immunity from interference or other action by the Executive or the courts. This is arguably the “single most important”\(^{\text{14}}\) aspect of the wider collection of immunities and powers known as “parliamentary privilege”, and is derived from Article 9 of the Bill of Rights 1688 (UK), which states (in modern language):

> 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.

3.8 The purpose of the immunity is to prevent retribution by the Executive against Members of Parliament and those involved in parliamentary proceedings and to protect the free flow of information necessary in a deliberative democracy. An erosion of the immunity would likely have a ‘chilling’ effect on the information available to Members and the Legislature.\(^{\text{15}}\)

**Exclusive Cognisance**

3.9 The concept of exclusive cognisance was explained in the 1999 report of the United Kingdom Parliament Joint Committee on Parliamentary Privilege as follows:\(^{\text{16}}\)

> The other main component of parliamentary privilege is still called by the antiquated name of ‘exclusive cognisance’ (or ‘exclusive jurisdiction’). Parliament must have sole control over all aspects of its own affairs: to determine for itself what the procedures shall be, whether there has been a breach of its procedures and what then should happen. This privilege is also of fundamental importance.

---


15 See Questions of privilege concerning the defamation action Attorney General and Gow v Leigh, Report of Privileges Committee, New Zealand House of Representatives, June 2013, p 27.

16 United Kingdom, Joint Committee on Parliamentary Privilege, Report 1, Parliamentary Privilege, 30 March 1999, Chapter 1, paras 13-14.
Indeed, acceptance by the executive and the courts of law that Parliament has the right to make its own rules, and has unquestioned authority over the procedures it employs as legislator, is of scarcely less importance than the right to freedom of speech. Both rights are essential elements in parliamentary independence.

Parliament’s right to regulate its own affairs includes the **power to discipline its own members** for misconduct and, further, **power to punish anyone**, whether a member or not, for behaviour interfering substantially with the proper conduct of parliamentary business. Such interference is known as contempt of Parliament. This falls within the penal jurisdiction exercised by each House to ensure it can carry out its constitutional functions properly and that its members and officers are not obstructed or impeded, for example by threats or bribes.

3.10 The proper scope and effect of the immunity provided by Article 9 of the **Bill of Rights 1688** (UK) and the extent to which, if at all, the privileges of the Legislative Council are affected by the provisions of the **Corruption, Crime and Misconduct Act 2003** and its predecessor statute are explored in **CHAPTER 8**.

**THE DISTINCTION BETWEEN ‘BREACH OF PRIVILEGE’ AND ‘CONTEMPT OF PARLIAMENT’**

3.11 The terms ‘breach of privilege’ and ‘contempt of Parliament’ are often used interchangeably. Technically speaking, however, although all breaches of privilege are generally a contempt of Parliament, not all contempts are a breach of privilege.\(^{17}\)

3.12 **Erskine May** states that:\(^{18}\)

> When any of these rights and immunities, both of the Members, individually, and of the assembly in its collective capacity, which are known by the general name of privileges, are disregarded or attacked by any individual or authority, the offence is called a breach of privilege, and is punished under the law of Parliament. Each House also claims the right to punish actions, which, while not breaches of any specific privilege, are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its officers or its Members. Such actions, though often called ‘breaches of privilege’, are more properly distinguished as ‘contempts’.

---


3.13 Erskine May defines “contempt of Parliament” as:

... any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.

3.14 Erskine May states that it would be vain to attempt an enumeration of every act which might be construed as a contempt, the power to punish for contempt being in its nature discretionary. The Clerk of the United Kingdom House of Commons in his memorandum to the House of Commons Committee of Privileges 1976-77 cautioned against too rigidly codifying the House’s options for dealing with matters of privilege. He wrote:

It would be a mistake first and foremost because it would introduce an element of inflexibility into the manner in which the House upholds its privileges and punishes contempts. It is true that the House would be in no danger of abridging its privileges or powers by a mere resolution setting out the sort of cases upon which it normally proposed to act. But formulas which may appear precise and faultless at the time at which they are drafted, may be found to be defective at a later stage owing to some undiscovered loophole or developments which could not be envisaged at an earlier stage. It would certainly seem undesirable to have to ask the House to amend its resolutions on privileges with any frequency.

3.15 The 1984 Australian Commonwealth Parliament Joint Select Committee on Parliamentary Privilege also did not support the codification of a definition of contempt:

In the search for precision the necessary reach of the contempt power may be unintentionally narrowed, offences may be expressed too rigidly, flexibility may be lost, and matters which should be included may unintentionally be excluded. In short, we think that the wiser

---

19 Ibid, p 143.
21 Cited in Robert Marleau and Camille Montpetit (Eds), House of Commons Procedure and Practice, Canada, 2000, p 59.
course is not to seek to define exhaustively the contempt power. We rest on the broad consideration that it is impossible, in advance, to define exhaustively the circumstances that may constitute contempt of Parliament.

3.16 Nevertheless, some general guidelines have been established. Since 2012, the Legislative Council has established criteria to be taken into account when determining matters relating to contempt. This criteria is set out in Schedule 4 of the Standing Orders of the Legislative Council as follows:

Criteria to be Taken into Account when Determining Matters Relating to Contempt

The Council shall take into account the following criteria when determining whether matters possibly involving contempt should be referred to the Procedure and Privileges Committee and whether a contempt has been committed, and requires the Procedure and Privileges Committee to take these criteria into account when inquiring into any matter referred to it –

(a) the principle that the Council’s power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Council and its Committees and for Members against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Council;

(b) the existence of any remedy other than that power for any act which may be held to be a contempt; and

(c) whether a person who committed any act which may be held to be a contempt –

(i) knowingly committed that act; or

(ii) had any reasonable excuse for the commission of that act.

Matters Constituting Contempts

That, without derogating from its power to determine that particular acts constitute contempts, the Council declares, as a matter of general guidance, that breaches of the following prohibitions, and attempts or
conspiracies to do the prohibited acts, may be treated by the Council as contempts.

1. Interference with the Council

A person shall not improperly interfere with the free exercise by the Council or a Committee of its authority, or with the free performance by a Member of the Council’s duties as a Member.

2. Improper Influence of Members

A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence a Member in the Member’s conduct as a Member or induce a Member to be absent from the Council or a Committee.

3. Members Seeking or Receiving Benefits

A Member shall not ask for, receive or obtain, any property or benefit for the Member, or another person, on any understanding that the Member will be influenced in the discharge of the Member’s duties, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of controlling or limiting the Member’s independence or freedom of action as a Member, or pursuant to which the Member is in any way to act as the representative of any outside body in the discharge of the Member’s duties.

4. Molestation of Members

A person shall not inflict any punishment, penalty or injury upon, or deprive of any benefit, a Member on account of the Member’s conduct as a Member.

5. Disturbance of the Council

A person shall not wilfully disturb the Council or a Committee while it is meeting, or wilfully engage in any disorderly conduct in the precincts of the Council or a Committee tending to disturb its proceedings.
6. Service of Writs

A person shall not serve or execute any criminal or civil process in the precincts of the Council except with the consent of the Council or the President.

7. Exemption from Compulsory Attendance in a Court or Tribunal

A Member shall not be required to attend before a court or tribunal, if that attendance would interfere with the proceedings of the Council or its Committees, but may attend voluntarily.

8. False Reports of Proceedings

A person shall not wilfully publish any false or misleading report of the proceedings of the Council or of a Committee.

9. Disobedience of Orders

A person shall not, without reasonable excuse, disobey a lawful order of the Council or of a Committee.

10. Obstruction of Orders

A person shall not interfere with or obstruct another person who is carrying out a lawful order of the Council or of a Committee.

11. Interference with Witnesses

A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Council or a Committee, or induce another person to refrain from giving such evidence.

12. Molestation of Witnesses

A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Council or a Committee.
13. Obstruction by Witnesses

(1) A witness before the Council or a Committee shall not –
   (a) without reasonable excuse, refuse to make an oath or affirmation or give some similar undertaking to tell the truth when required to do so;
   (b) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so; or
   (c) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.

(2) A person shall not, without reasonable excuse –
   (a) refuse or fail to attend before the Council or a Committee when ordered to do so; or
   (b) refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Council or of a Committee.

(3) A person shall not wilfully avoid service of an order of the Council or of a Committee.

(4) A person shall not destroy, damage, forge or falsify any document required to be produced by the Council or by a Committee.

14. Unauthorised Disclosure

A person shall not, without the authority of the Council or a Committee, disclose or publish –

(a) a document submitted to the Council, where the Council has ordered that document not be made public;

(b) any private or in camera evidence received by a Committee;

(c) any documentation produced by a Committee; or

(d) any deliberation of a Committee.
In the present matter before the Committee, it would seem that the most relevant category of contempt is that of “Interference with the Council”, and specifically, interference with the Legislative Council’s functions of gathering information and holding the Government accountable for its actions.

**Penalties Available for Contempts**

Parliament possesses the power to examine and to punish any breach of privilege or other contempt committed against it. This power is one inherited from the United Kingdom House of Commons and is referred to as the Parliament’s penal jurisdiction.

The penal jurisdiction is the means by which the Parliament protects itself from acts which directly or indirectly impede it in the performance of its functions. This power gives a House the ability to enforce its orders, deal with serious impediments to or interference with its proceedings and also to deal with serious affronts to the dignity of the House.

The power of Parliament to punish breaches of privilege and contempts is the safeguard that ensures that Parliament, its committees and Members can function effectively and freely.

The United Kingdom Parliament’s 1999 Joint Standing Committee on Parliamentary Privilege observed that:

> If the work of Parliament is to proceed without improper interference, there must ultimately be some sanction available against those who offend: those who interrupt the proceedings or destroy evidence, or seek to intimidate members or witnesses; those who disobey orders of the House or a committee to attend and answer questions or produce documents .... But unless a residual power to punish exists, the obligation not to obstruct will be little more than a pious aspiration. The absence of a sanction will be cynically exploited by some persons from time to time.

A non-exhaustive list of penalties available to the Western Australian Parliament, by virtue of s 1 of the Parliamentary Privileges Act 1891, for breaches of privilege and contempt of Parliament are:

- Imprisonment;
- Expulsion of a Member;
- Fine;

---

23 United Kingdom, Joint Committee on Parliamentary Privilege, First Report, 30 March 1999, Chapter 6, para 302.
• Suspension of a Member;
• Suspension of a Member without pay;
• Disqualification of a Member from membership from any parliamentary committee;
• Reprimand and admonishment: By the President or Speaker of a Member standing in his/her place or a private individual at the bar of the House;
• Censure: A censure motion may be put in relation to Members and private individuals;
• Requirement for an apology, either in writing or in person: by a Member standing in his/her place or a private individual at the bar of the House;
• Exclusion from the parliamentary precincts;
• Prohibition from petitioning parliament without the consent of the House.
CHAPTER 4
QUESTIONS WITHOUT NOTICE

QUESTIONS WITHOUT NOTICE

4.1 The parliamentary procedure for Questions without Notice is one means available to Members of the Legislative Council to scrutinise the Executive and to obtain information about the activities and decisions of Ministers and the departments for which they are responsible. The answering of Questions without Notice by members of the Executive or their parliamentary representatives during the period allocated for oral Questions without Notice, colloquially known as ‘Question Time’, is a public demonstration of the accountability of the Executive to Parliament. However, it has also been observed that Question Time provides this accountability in the crudest form exacted by the Parliament. 24

4.2 In the final report (Part II) of the Royal Commission into Commercial Activities of Government the Commissioners provided their view on the value of Question Time as an accountability measure, observing that:

The manner of its conduct, the apparent acceptance of evasion and equivocation in providing answers, and the governmental manipulation of it for its own purposes, can leave the public with little reassurance that it presently serves the accountability purpose the traditional view attributes to it in anything other than a fortuitous way. 25

4.3 This observation has its origins in parliamentary rules and practice and ultimately the willingness of the Executive to provide requested information. While Standing Orders give Members the right to ask questions of Ministers and certain other Members there is no corresponding obligation on those questioned to give an answer. The various rulings of presiding officers of the Legislative Council are consistent with those in the United Kingdom Parliament and Australian legislatures on that point.

4.4 The practice of backbench Members who support the Government asking ‘Dorothy Dix’ questions is also designed to provide Ministers with an opportunity to explain in glowing terms a government program or policy or some other achievement of the administration. This practice also serves the purpose of reducing the limited time

25 Ibid.
available for Members of opposition parties to ask questions designed to elicit information and achieve the accountability function intended by Question Time. The use by the Executive, legitimate or otherwise, of certain claimed legal immunities can also restrict the flow of information made available in answers to parliamentary questions.26

4.5 The convention in the Legislative Council, however, is that ‘Dorothy Dix’ questions are not asked and the announcement of new government policy or the completion of a government program is dealt with under a separate procedure permitting statements to be made by Ministers and Parliamentary Secretaries at the commencement of each sitting day and at other times.27 In addition, the number of questions asked and answered in the Legislative Council has improved markedly when compared to the 37th and 38th Parliaments,28 and when compared with the Legislative Assembly.29 These conventions and procedures are consistent with and reflect the Legislative Council’s significant role as a House of review.

4.6 Despite some of the limitations of Questions without Notice as an accountability mechanism30, questions asked of Ministers remains one of the important procedures utilised by Members of the Legislative Council to gather information and test the extent of a Minister’s understanding of the Department or Agency for which they are responsible. In this way the procedure, whatever its actual or perceived limitations, supports the valuable scrutiny and accountability functions of the Parliament.

4.7 In the Legislative Council the scrutiny and accountability functions served by Questions without Notice is affected by the bicameral nature of the Parliament and the fact that the 17 ministerial positions comprising the Executive arm of government are shared between the membership of the two Houses. This has resulted in the Executive appointing Ministers or Parliamentary Secretaries in each House to represent Ministers in the other House. Subject ultimately to the express or implied consent of


27 Statements by Minister and Parliamentary Secretaries, See SOs 14 and 103.

28 For the 39th Parliament to the end of parliamentary sittings in September 2016, a total of 4,892 Questions without Notice had been asked and answered in the Legislative Council. On average, 23.3 questions were asked and answered on each sitting day since April 2013. By way of comparison, the average number of Questions without Notice asked and answered in the Legislative Council for the 37th and 38th parliaments were 19.5 and 16.8 respectively.

29 For the same period in the Legislative Assembly, a total of 3,748 Questions without Notice had been asked and answered. On average, 16.3 questions were asked and answered on each sitting day since April 2013. By way of comparison, the average number of Questions without Notice asked and answered in the Legislative Assembly for the 37th and 38th parliaments were 14.02 and 13.97 respectively.

the House of Parliament, these representatives perform functions such as having carriage of Bills and the answering of parliamentary questions.

4.8 If a Member of the Legislative Council through a parliamentary question is seeking information relating to a portfolio for which a Minister in the other House is responsible, it is the representative Minister or Parliamentary Secretary to whom the parliamentary question is directed. Because these representative Ministers or Parliamentary Secretaries are not individually responsible in any political or legal sense for the relevant department or agency, the answer is provided through the responsible Minister in the other House who authorises their representative Minister or Parliamentary Secretary to provide the answer. The representative Minister or Parliamentary Secretary is nevertheless responsible in a personal capacity to the House of which they are a Member for the answer that they give. In the event that an inaccurate answer is given it is required to be corrected at the first opportunity and an apology offered to the House. A failure to do so in a timely fashion may result in a sanction but not for misleading the House as this requires an element of intent, gross negligence or wilful disregard as to whether an answer provided is accurate or not.

4.9 There are fewer Ministers in the Legislative Council when compared with the Legislative Assembly and as a result a greater number of representative Ministers or Parliamentary Secretaries. This situation and the absence of any formal entitlement in the Legislative Council to ask supplementary questions has contributed to a trend for the daily Question Time period to be used primarily for information gathering rather than to test a Minister’s immediate knowledge of their portfolio. The result is a practice in which few questions are asked without any notice at all. This is because to obtain a useful answer to most questions co-ordination with Ministers in the Legislative Assembly is required. The term ‘Questions without Notice’ is therefore an expression not apt to describe the parliamentary proceedings in the Legislative Council. All representative Ministers and Parliamentary Secretaries in the Legislative Council are therefore asked the curiously worded Questions without Notice “of which some notice has been given”.

QUESTIONS WITHOUT NOTICE PROCESS IN THE LEGISLATIVE COUNCIL

4.10 Members of the Legislative Council lodge their Questions without Notice through a parliamentary sitting day office staffed by a Parliamentary Liaison Officer who is an employee of the Department of Premier and Cabinet (“DPC”). There is a corresponding Parliamentary Liaison Officer for Members of the Legislative Assembly.

4.11 The process in the Legislative Council for Questions without Notice is generally as follows:

- Questions are submitted by Members of the Legislative Council to the Parliamentary Liaison Officer via email prior to 11.00am on a sitting day.
Upon receipt, the Parliamentary Liaison Officer assigns each question a sequential number which is recorded in a cumulative running sheet. The alpha “C” which precedes the allocated number indicates that the question originates from the Legislative Council.31

After assigning the question numbers, the Parliamentary Liaison Officer emails the questions to a group containing the relevant Ministerial Liaison Officers in government for an answer.

The Ministerial Liaison Officers are responsible for collating the draft answer to each question. The officers use the number assigned by the Parliamentary Liaison Officer as the reference number for each question prior to its answer in the Legislative Council.

The Ministerial Liaison Officer provides the draft answer to the question prepared from information supplied by the relevant department or agency to the responsible minister for their signature. The signature indicates to the representative minister or parliamentary secretary that the answer has been authorised by the responsible minister and may be given in the Legislative Council.

The authorised answers for each question are returned to the Parliamentary Liaison Officer who then sorts the answers received into separate files in the names of each minister or parliamentary secretary in the Legislative Council in preparation for question time in the Council chamber at 4.30pm that day. The answer to each question retains the assigned number from the beginning of the process to the point at which it is answered in the Legislative Council.

When a question is asked and the answer provided during Question Time, a copy of the hard-copy answer is provided to the Member who has asked the question and to the Hansard reporter in the Chamber. The number appearing on the hard-copy answer is the same number as originally assigned by the Parliamentary Liaison Officer.

The number appearing in the Hansard record of debates is not the original number assigned by the Parliamentary Liaison Officer but a number allocated by Hansard. The Hansard number is assigned sequentially and starts at number one when the first answer is provided to a Question without Notice in the Legislative Council during that calendar year.

The Legislative Council Question without Notice C 192 which is the subject of the Committee’s inquiry was allocated number 176 by Hansard when it was answered on 12 March 2014.

31 Legislative Assembly Questions without Notice are preceded with the alpha “A” to distinguish them from Legislative Council questions.
On Wednesday, 12 March 2014 a total of 42 questions were asked and answered in the two Houses of the Parliament of Western Australia. Of the questions asked and answered, 27 occurred in the Legislative Council.

Five of the 42 questions asked on this particular day related to the events surrounding the then Member for Vasse, Hon Troy Buswell MLA. Of these five questions, three were submitted by a Member of the Legislative Council.

The three questions asked in the Legislative Council on 12 March 2014 were assigned the numbers C 190, C 191 and C 192 respectively by the DPC Parliamentary Liaison Officer for the Legislative Council. All three questions were asked by Hon Sue Ellery MLC.
CHAPTER 5
THE EVIDENCE OF MR STEPHEN HOME

PRIVATE HEARING WITH MR STEPHEN HOME

5.1 On Monday, 20 June 2016 the Committee held a private hearing with Mr Stephen Home. Mr Home provided evidence to the Committee relating to the general process for Questions without Notice lodged on a sitting day, and the circumstances surrounding his involvement in the preparation of the answer to Question without Notice No. 176 (C 192).

5.2 Prior to the hearing Mr Home provided a statement to the Committee which is contained at Appendix 2.

QUESTIONS WITHOUT NOTICE PROCESS

5.3 As noted in Chapter 4, on a typical sitting day, Questions without Notice that are intended to be asked of government Ministers are lodged with the Parliamentary Liaison Officer by 11.00am. The Parliamentary Liaison Officer assigns question numbers in the order of their receipt and then forwards the questions via email to a group containing the responsible Ministerial Liaison Officers in government. Mr Home provided the following comments on this process:

... parliamentary questions that are received from the Council are relayed on to a number of people by email, but, basically, a decision will be made by an officer adjoining the Premier’s office in Parliament House as to who should answer it. So that might go to a government department; it might go to Premier and Cabinet. Sometimes they are answered within the Premier’s office itself, as was the case in relation to this one.\(^\text{32}\)

5.4 Mr Home explained that the process of preparing an answer to a Question without Notice is a consultative process. The person responsible for preparing an answer is required to liaise with persons or bodies with the specific knowledge of the subject matter of a question in order to provide a reasonable and appropriate answer.

5.5 When the final prepared version of the answer for each question is returned to the Parliamentary Liaison Officer, they are sorted into separate files for the Ministers or

Parliamentary Secretaries responsible for providing the answers during Question Time.

5.6 Answers to questions are provided to the relevant Member when the questions are asked during Question Time.

**QUESTION WITHOUT NOTICE NO. 176 (C 192)**

5.7 On Wednesday, 12 March 2014 at 11.19am Ms Roxana Pike sent an email to seven recipients in the Premier’s office with the subject line reading “URGENT: LC QWN SNG x 3: Contact / information surrounding Treasurer’s personal leave”. The purpose of Ms Pike’s email was to disseminate the questions to the staff responsible for coordinating the responses to three parliamentary questions. The questions were to be asked as “Questions without Notice” by Hon Sue Ellery MLC in the Legislative Council during the Question Time period between 4.30pm and approximately 5.00pm that day.

5.8 The email from Ms Pike was as follows:

From: Pike, Roxana

Sent: Wednesday, 12 March 2014 11:19 AM

To: Pontifex, Brian; Hammond, John; Turnseck, Rachael; Marshall, Dixie; Kirkup, Zak; Cant, Narelle; Home, Stephen

Subject: URGENT: LC QWN SNG x 3: Contact / information surrounding Treasurer’s personal leave

Importance: High

All

The Hon Sue Ellery has asked three Questions without Notice (Some Notice Given) as below, which she intend to ask during QT in the Upper House.

Can you please advise on the proposed response?

Word document is attached for whoever is drafting the response.

Thank you.

Roxy
Hon Sue Ellery to the Leader of the House representing the Premier

1. Did anyone from the Premier's or Treasurer's offices contact Ben Morton or anyone else in Liberal Party Headquarters about the events in the days leading up to the Treasurer commencing personal leave in February this year?

2. If so, when was contact made, who made contact, with whom and what was discussed

Hon Sue Ellery to the Leader of the House representing the Premier

I refer to the advice to the other place yesterday that the former Treasurer's Chief of Staff Rachael Turnseck met with Premier's Chief of Staff Brian Pontifex and Principal Adviser Narelle Cant on the Tuesday 25th February for 45 minutes, and I ask:

1. What information did Ms Turnseck provide as to the events in the days leading up to the former Treasurer seeking personal leave?

2. Did Mr Pontifex or Ms Cant ask Ms Turnseck whether there was any further information about the events in the days leading up to the former Treasurer seeking personal leave?

3. What advice did Mr Pontifex or Ms Cant give to Ms Turnseck at that meeting?

Hon Sue Ellery to the Leader of the House representing the Premier

1. Has the Premier or anyone from his office asked the former Treasurer's Chief of Staff Ms Rachael Turnseck whether she discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his Chief of Staff and Ms Narelle Cant, and if not why not?

2. Has Ms Turnseck discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his Chief of Staff and Ms Narelle Cant, and if so with whom and when?33

5.9 On this occasion the answers to these questions were prepared in the Premier’s office by Mr Home who was the person assigned responsibility for co-ordinating the answer

---

to Question without Notice C 192. As part 2 of the questions sought specific information about Ms Turnseck’s discussions with others, Mr Home sought advice from her. The initial contact was by email.

5.10 At 12.14pm Mr Home contacted Ms Turnseck by responding to the email chain as follows:

Rachael,

I’m knocking an answer together on these. Can you please call me asap.

Steve

5.11 Mr Home confirmed in his evidence that following this email he had a telephone conversation with Ms Turnseck and from that discussion he produced a first draft of an answer to Question without Notice C 192. His evidence is in the following exchange:

Hon SUE ELLERY: Thank you. I wanted to take you, if I may, to one particular email where you email Ms Turnseck and say—this is at 12.14, so it is reasonably early in the chain—to her, “Can you please call me asap.” Do you recall if she did call you?

Mr Home: Yes, we spoke. I cannot remember whether she called me or I called her, but we certainly spoke.

Hon SUE ELLERY: If you are able to recall what was discussed?

Mr Home: She had already seen the question, as you would be aware, so I had emailed her and told her that I was coordinating the answer for it. So we spoke and, on the basis of that conversation, I constructed that answer to the first and second parts of that question.

Hon SUE ELLERY: We know from the email train that she expressed in the emails that she did not want to be “telling the Parliament or the general public about any conversation I may or may not have had about the personal circumstances of anyone”—in this case, the Treasurer. Can you tell us anything more about that conversation you had with her about whether she disclosed to you that she did not intend to provide a full answer to the question?

Mr Home: No. In the conversation we had, she mentioned that she had had conversations. My memory, but I accept that it was now incorrect, was that she said she had spoken to the former Treasurer’s mother and his ex-wife. I think it was actually his mother and his
sister. So she certainly disclosed that to me and it was on that basis that I put the answer in “other than with members of his direct family”. She then emailed me back and said she would prefer not to make reference to the personal contacts and I agreed to take it out.34

5.12 It was after this conversation that Mr Home prepared the first draft of the answer to Question without Notice C 192. At 12.47pm Mr Home replied to the email chain as follows:

Draft for urgent comment please.

I have not bothered to address any conversations past 10 March’s announcement as clearly and obviously many conversations would have been had by everyone regarding what was publicly stated by the Premier on the 10th.

Steve

5.13 The draft answer to Question without Notice C 192 referred to by Mr Home, and included in the email at 12.47pm, was as follows:

Hon Sue Ellery to the Leader of the House representing the Premier

1. Has the Premier or anyone from his office asked the former Treasurer’s Chief of Staff Ms Rachael Turnseck whether she discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his Chief of Staff and Ms Narelle Cant, and if not why not?

2. Has Ms Turnseck discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his Chief of Staff and Ms Narelle Cant, and if so with whom and when?

1. No. The concern of the Premier and his office has been the welfare of the Treasurer.

2. Prior to the Treasurer’s resignation, no, other than with the Treasurer’s direct family.

34 Evidence to Standing Committee on Procedure and Privileges, Legislative Council, Perth, 20 June 2016, p 3 (Stephen Home).
5.14 At this time, the reference to the Treasurer’s family was included in the draft answer to Question without Notice C 192.

**Finding 1: The Committee finds:**

That during a telephone conversation that occurred between 12.14pm and 12.47pm on 12 March 2014 Ms Rachael Turnseck told Mr Stephen Home that she had discussed the events in the days leading up to the former Treasurer taking personal leave with members of Mr Buswell’s family.

5.15 At 12.54pm Ms Turnseck responded to the email chain as follows:

*Hi S*

*My preference is to make no mention of Troy’s family*

*Ta*

5.16 At page 3 of a written statement provided by Mr Home to the Committee, Mr Home provided his response to Ms Turnseck’s request at 12.55pm as follows:

*Ok, will delete.*

*Steve*

5.17 Mr Home subsequently amended the draft answer to omit the reference to discussions Ms Turnseck had with the Treasurer’s direct family by deleting the words “other than with the Treasurer’s direct family”.

5.18 In evidence provided to the Committee by Mr Home, the rationale for removing the reference to the Treasurer’s family was explained in the following exchange:

**Hon SUE ELLERY:** We know from the email train that she expressed in the emails that she did not want to be “telling the Parliament or the general public about any conversation I may or may not have had about the personal circumstances of anyone”—in this case, the Treasurer. Can you tell us anything more about that conversation you had with her about whether she disclosed to you that she did not intend to provide a full answer to the question?

**Mr Home:** No. In the conversation we had, she mentioned that she had had conversations. My memory, but I accept that it was now

---

incorrect, was that she said she had spoken to the former Treasurer’s mother and his ex-wife. I think it was actually his mother and his sister. So she certainly disclosed that to me and it was on that basis that I put the answer in “other than with members of his direct family”. She then emailed me back and said she would prefer not to make reference to the personal contacts and I agreed to take it out.36

…

Hon SUE ELLERY: When Ms Turnseck said to you, “I’m not going to reveal information about—had these conversations with two members of his family, but I’m not going to reveal—I don’t want to reveal that information”, did that raise any doubt in your mind that you should perhaps push the issue a little bit further to see that you were getting the full answer?

Mr Home: My memory of it is not all that clear, but I do not think I did. I do not think I did because the context of everything that had preceded it, being what had happened on the Sunday, was when the story broke, if you like, in the media. Monday was when the Premier made his statement and announced the former Treasurer’s resignation. Tuesday question time in the Legislative Assembly was dominated by questions around the Premier’s office, and I think I just assumed that this was a question about political knowledge of these events, and I did not think the member’s mother and Rachael Turnseck talking to the premier, the member’s mother and sister was germane to the question. On a literal reading, I was wrong, but that was the interpretation I took.37

…

Hon SUE ELLERY: What you say in the final paragraph of the statement that you provided to us is —

... I assure the Committee that I did not consciously deny the Member, and thereby the Council, any information that I thought was being sought.


37 Ibid p 4.
Can I put it to you and ask for your comment: you did make a conscious decision not to include the information about the contact with family members.

Mr Home: I certainly did consciously not include it, but I did not consciously exclude material that I thought the question was seeking. I would have taken for granted that with the events that took place and the state of the member’s mental health, conversations with all manner of medical people, members of family, would have taken place. I did not see that as relevant. Whether it is my call to determine what is relevant or not is another thing, but I think the decision I took was based on a belief that the question was directed at people other than members of the family, who you would assume would have had conversations at that time with Ms Turnseck.\(^\text{38}\)

(emphasis added)

5.19 In various other passages of Mr Home’s evidence to the Committee, this evidence was further explained:

Mr Home: ... Every effort is made to get an answer. Sometimes those answers require some interpretation of what the question is seeking to draw\(^\text{39}\) ... Conversations with a mother and a sister in the context of those other events and consequences, I do not see as particularly strong\(^\text{40}\) ... I did not see the fact that Ms Turnseck had had a discussion at a time when there was a medical crisis with members of the family as being particularly relevant or in the public interest. I accept that on a literal reading, it should have gone in.\(^\text{41}\)

5.20 When questioned as to whether he had ever been asked to amend a draft answer and declined to do so, Mr Home responded as follows:

Hon NICK GOIRAN: Can you advise the committee if you have ever been asked to amend a draft answer and declined to do so?

Mr Home: No.

Hon NICK GOIRAN: Is it standard practice, then, that whatever amendments are sought are automatically accepted?

\(^{38}\) Ibid p 5.  
\(^{39}\) Ibid p 4.  
\(^{40}\) Ibid p 6.  
\(^{41}\) Ibid p 6.
Mr Home: It depends on where the request to vary it comes from. Generally, as you will see from these questions here, multiple people who have different backgrounds and knowledge run their eye over a question. You might get an edit from any number of sources. It might be a simple, “This doesn’t make sense” or “The table needs reconstruction because it’s vague”, or it might be, “It’s more information than was asked for, so prune it back.” It could come from anywhere and for a variety of reasons.42

5.21 Mr Home’s explanation as to how drafts of answers to parliamentary questions are produced indicates that this is a collaborative exercise. This was the case with the answer to Question without Notice C 192.

5.22 Following the 12.54pm email from Ms Turnseck and Mr Home’s response at 12.55pm, the answer to part (2) of Question without Notice C 192 was amended by Mr Home to remove the reference to the former Treasurer’s family.

Finding 2: The Committee finds:

That Mr Stephen Home consciously and deliberately amended the draft answer to Legislative Council Question without Notice C 192 to delete the reference to the former Treasurer’s family at the request of Ms Rachael Turnseck.

5.23 At 1.28pm Mr Home responded to the email chain as follows:

From: Home, Stephen <Stephen.Home@dpc.wa.gov.au>

Sent: Wednesday, 12 March 2014 1:28 PM


The attached suggested response has been widely consulted over, but if anyone has any issues please urgently advise Roxy.

Steve

42 Ibid p 7.
5.24 Question without Notice C 192 was answered by Hon Peter Collier MLC, representing the Premier, during Legislative Council Question Time on 12 March 2014. The answer reflected the final draft produced by Mr Home save for the inclusion of the word ‘former’ to describe the fact that Hon Troy Buswell MLA had resigned as Treasurer. The answer is recorded in *Hansard* as Question without Notice No. 176.

5.25 The evidence given by Mr Home provides an explanation for his decision to amend the draft answer to Question without Notice C 192 in accordance with Ms Turnseck’s request. Ultimately this was a matter for Mr Home’s interpretation of the question and his judgement influenced by a peer and not a subordinate. Ms Turseck at the outset had expressed to Mr Home and others included in the chain of emails on 12 March 2014 a clear desire to not provide full and frank information about her conversations with others. In her initial email response to a request for information Ms Turnseck said as follows:

> ... I am not going to be telling the Parliament or the general public about any conversation I may or may not have had about the personal circumstances of anyone, particularly not the former Treasurer, who by the way, continues to receive medical care for a very serious health condition. I’m not sure how you want to draft that response!

5.26 However, this was the very nature of what was asked in part (2) of Question without Notice C 192. The personal circumstances of the Hon Troy Buswell intersected with his public office through the use by him of his government vehicle and the significant damage caused to it and other vehicles when he drove it following his attendance at a private function.

5.27 Ms Turnseck’s email response should have alerted Mr Home to the need for any answer to include all relevant information regarding those discussions and relayed to him by Ms Turnseck. The fact that the Treasurer of the State had resigned under very controversial circumstances only two days before meant that the matter was of acute public interest and Mr Home was very much aware of the inevitability of questions being asked of the Premier about the circumstances surrounding the events of 22-23 February and their aftermath.

5.28 Mr Home clearly considered that Ms Turnseck’s conversations with Hon Troy Buswell’s family members were a relevant fact because he included this information in the first draft of the answer. This accorded with a plain and literal reading of part (2) of Question without Notice C 192. Mr Home’s evidence is that he did this consciously and deliberately, though without an intent to deny the Member, and thereby the Legislative Council, the information sought. Mr Home accepted, however, that ultimately this was the outcome of the amendment that he made to the
first draft which ultimately became the answer delivered in the Legislative Council as Question without Notice No. 176.

5.29 The Committee does not accept Mr Home’s contention that the question in part (2) was “vague” or that it “was almost impossible to accurately answer because with the media events that broke from Sunday when the story went to air about the vehicle damage in Subiaco, Rachael Turnseck could have been involved in conversation almost any minute in relation to it with members of her family, with friends and with contacts from her work.” The clear evidence is that Ms Turnseck advised Mr Home about her conversations with Hon Troy Buswell’s family. If this information had been retained in the answer to Question without Notice C 192 then it would have adequately addressed the question regarding who Ms Turnseck had spoken with regarding the events leading to the former Treasurer taking personal leave.

5.30 Mr Home had been employed in his role in the Premier’s office for 20 months and had been responsible for co-ordinating answers to questions on multiple occasions. On this particular occasion the committee is satisfied that Mr Home amended part (2) of the first draft answer to Question without Notice C 192 knowing that in doing so a factually inaccurate and incomplete answer would be given in the Legislative Council and that the House would be misled as to the true state of affairs.

Finding 3: The Committee finds:

That Mr Stephen Home knew that by amending the draft answer to Legislative Council Question without Notice C 192 to delete the reference to the former Treasurer’s family the answer provided to the Legislative Council would be incomplete and misleading.

5.31 The corrected answer to Question without Notice No. 176 (C 192) given in the Legislative Council on 16 March 2016 clearly demonstrated that the answer given to the House on 12 March 2014 provided incorrect information. This incorrect information included the omission of the reference to Mr Buswell’s family members which Mr Home had removed from the first draft of Question without Notice C 192 at the request and urging of Ms Turnseck. This rendered part (2) of the answer to Question without Notice C 192 false in a material particular.

Finding 4: The Committee finds:

That the deletion by Mr Stephen Home of the reference to the former Treasurer’s family in the answer he drafted to Legislative Council Question without Notice C 192 resulted in the answer provided to the Legislative Council being incomplete and misleading.
The Committee is of the view that the conscious and deliberate provision of incorrect, incomplete or misleading information in a parliamentary question on this occasion constituted a substantial interference with a proceeding of the Legislative Council.

Finding 5: The Committee finds:

That Mr Stephen Home’s actions in relation to Legislative Council Question without Notice C 192 constituted a substantial interference with a proceeding of the Legislative Council.

The Committee concludes that Mr Home’s actions therefore constituted a contempt of the Legislative Council.

Prior to it reporting to the Legislative Council, the Committee provided Mr Home with its draft findings and recommendations to enable him to provide any comment on them or further relevant information to the Committee. The response from Mr Home is contained at Appendix 5.

The Committee has considered the response from Mr Home but has not made any changes to its findings and recommendations as a result of his comments. The Committee’s reply to Mr Home is also contained in Appendix 5.
CHAPTER 6
THE EVIDENCE OF MS RACHAEL TURNSECK

PRIVATE HEARING WITH MS RACHAEL TURNSECK

6.1 Ms Rachael Turnseck, accompanied by legal counsel, Mr Grant Donaldson SC, appeared as a witness at a hearing before the Committee held on Friday, 24 June 2016. At the hearing Ms Turnseck provided a statement to the Committee which is contained at Appendix 3.

PREPARATION OF THE ANSWER

The CCC Report and Ms Turnseck’s Initial Response

6.2 The CCC report\textsuperscript{43} examined the provision of information to the Parliament in Chapter 2.5. This Chapter describes how Ms Turnseck and other staff emailed versions of answers to the parliamentary questions amongst themselves in preparation for briefing the Minister on the proposed answers to be delivered in the Legislative Council.

6.3 The CCC report at paragraphs 64 and 65, page 11, outlines Ms Turnseck’s initial response to an email sent to her by Roxana Pike in the Premier’s Office on Wednesday, 12 March 2014 at 11.19am. The subject line of this email read “URGENT: LC QWN SNG x 3: Contact / information surrounding Treasurer’s personal leave”. It contained the text of the parliamentary questions asked by Hon Sue Ellery MLC C 190; C 191; and C 192. The paragraphs of the CCC report are as follows:

\begin{quote}
\textbf{[64]} One question was asked by the Hon. Sue Ellery, Leader of the Opposition in the Legislative Council:

\begin{quote}
Has Ms Turnseck discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his Chief of Staff and Ms Narelle Cant, and if so with whom and when?
\end{quote}
\end{quote}

This question was clearly directed to Ms Turnseck herself and the correct answer could only be known to Ms Turnseck. **Ms Turnseck’s emailed reply to all recipients:**

> I am not going to be telling the Parliament or the general public about any conversation I may or may not have had about the personal circumstances of anyone, particularly not the former Treasurer, who by the way, continues to receive medical care for a very serious health condition. I’m not sure how you want to draft that response!

(emphasis added)

6.4 Ms Turnseck’s initial response was sent at 11.25am some 6 minutes after the first email. In her evidence to the Committee Ms Turnseck explained her response in the following exchange with Hon Sue Ellery:

**Hon SUE ELLERY:** I am asking about the email at 11.25 am. The statement that you provided us this morning says —

> I trust that the members of this Committee will accept that at no time did I seek to mislead the Council.

I take you to the bit of the email at 11.25 am where you say —

> I am not going to be telling the Parliament or the general public about any conversation I may or may not have had about the personal circumstances of anyone, particularly not the former Treasurer, who by the way, continues to receive medical care for a very serious health condition. I’m not sure how you want to draft that response!

My question to you is: can you appreciate that reading that I could draw the conclusion that you, indeed, were making it clear that you did not intend to provide—you did not want to provide—the Parliament or anybody else about any conversation you may or may not have had about the personal circumstances of anyone, particularly not the former Treasurer. Have you got any comment to make about that?

**Ms Turnseck:** When I look at that comment, I think the point I am trying to make is I am not giving information about the health circumstances or the private circumstances of the Treasurer’s health is my concern there, not about—if I can put it in a better context. At the time an argument was being prosecuted that there had been a
cover-up, that I surely had conversations with a number of people in government, not necessarily about the circumstances of the Treasurer’s health but the damage to his car, and that was not the case. Yes, I can understand that you might draw the conclusion reading that comment that that is what I was referring to generally, but my clarification here is when I say “personal circumstances”, I meant his health condition at the time rather than any conversations I have had about his car.44

6.5 It is possible that Ms Turnseck’s initial email response at 11.25am referred broadly to the three questions contained in Ms Pike’s email, rather than specifically to part (2) of question C 192. However, Ms Turnseck’s initial response was indicative of her overall attitude at that time in providing the full and accurate information required to answer the questions, including part (2) of C 192. This was borne out in the CCC inquiry and its report. In terms of determining the veracity of Ms Turnseck’s evidence the Committee also had regard to the CCC report and the difficulties the Commission initially encountered in obtaining a full and frank account from Ms Turnseck.

The information provided by Ms Turnseck in answer to Question without Notice C 192

6.6 During the hearing Ms Turnseck told the Committee that she could not recall having a telephone conversation with Mr Home following his email to her at 12.14pm referred to in paragraph 5.10 above advising that he was drafting an answer to Question without Notice C 192.

6.7 It is clear, however, that a conversation must have occurred. Mr Home had produced and circulated at 12.47pm via email to Ms Turnseck and others a draft answer to Question without Notice C 192 which in part (2) made reference to Ms Turnseck’s discussions with Mr Buswell’s direct family. The Committee accepted Mr Home’s evidence that the telephone conversation took place with Ms Turnseck.45 The Committee is satisfied that the information regarding the Treasurer’s family could only have been included in the first draft answer to Question without Notice C 192 following information provided by Ms Turnseck during such a conversation. The Committee is satisfied that this telephone conversation must have occurred between 12.14pm and 12.47pm on 12 March 2014.


45 See paragraph 5.11.
Finding 6: The Committee finds:

That during a telephone conversation that occurred between 12.14pm and 12.47pm on 12 March 2014 Ms Rachael Turnseck told Mr Stephen Home that she had discussed the events in the days leading up to the former Treasurer taking personal leave with members of Mr Buswell’s family.

6.8 At 12.54pm Ms Turnseck responded to the email chain as follows:

Hi S

My preference is to make no mention of Troy’s family

Ta

6.9 Following Ms Turnseck’s email request, the draft answer was amended according to Ms Turnseck’s preference by Mr Home omitting the reference to the former Treasurer’s family. Mr Home, as the Premier’s Deputy Chief of Staff, was under no obligation to accept Ms Turnseck’s request as there were no direct lines of authority or reporting between the two and Ms Turnseck and Mr Home were not in a relationship of subordinate and superior. Mr Home’s explanation to the Committee of how an answer to a parliamentary question is often formulated indicates that this process is consultative and collegiate in nature. The Committee notes that Mr Home’s inclusion of the information regarding the former Treasurer’s family in the first draft of Question without Notice C 192 clearly indicated that he believed it to be relevant to the question.

Finding 7: The Committee finds:

That Ms Rachael Turnseck subsequently indicated her preference to Mr Stephen Home to omit from his draft answer to Legislative Council Question without Notice C 192 any reference in that draft to the former Treasurer’s family and Mr Home did in fact make this omission.

6.10 While the Committee is satisfied that Mr Home erred in amending the draft answer, the Committee has formed the opinion that Ms Turnseck knew that her preference, if accepted, would result in a factually incorrect and misleading answer being provided to the Legislative Council. The Committee has drawn this conclusion from Ms Turnseck’s own statement as follows:

... from my experience, I knew that the opposition was not interested in when Mr Buswell’s family became aware of events. I was involved in politics for a long time. I am aware that it is accepted by all participants in politics that politicians’ families are not targeted.
I had no doubt that Hon Sue Ellery’s questions did not seek to uncover information concerning Mr Buswell’s family members’ knowledge of matters. In the first draft answer to question 2 of Question without Notice C192 there was a reference to Mr Buswell’s family. This is annexed to the email of 12 March 2014 at 12.47 pm. Everyone who read this email and the draft answer knew that I had spoken with Mr Buswell’s family members. Obviously from the fact that the reference to family members was deleted, all people who received this email did not understand question 2 of Question without Notice C192 to be seeking information about Mr Buswell’s family members’ knowledge of matters.

6.11 The Committee notes that contrary to Ms Turnseck’s assertion, the question was not seeking the knowledge of the former Treasurer’s family but her knowledge, that is, who she had spoken to regarding the events leading up to the former Treasurer taking personal leave. Regardless of Ms Turnseck’s interpretation of what information the question was seeking, as an experienced Chief of Staff with a long involvement in politics, she would have known that the deletion of this part of the answer would result in a factually incorrect and misleading answer being given to the Legislative Council.

Finding 8: The Committee finds:

That Ms Rachael Turnseck knew that Mr Stephen Home’s acceptance of her request to omit from the draft answer to Legislative Council Question without Notice C192 the reference to the former Treasurer’s family would result in an incomplete and misleading answer being provided to the Legislative Council.

THE OMISSION OF INFORMATION CONCERNING MR LEO GIBBONS

6.12 At page 12, paragraph 71, of the CCC report the following is reported:

[71] The answer provided to Parliament was false and Ms Turnseck knew that at the time. She also knew that it was likely to be incorporated into a recommended answer given by a Minister. In addition to members of Mr Buswell’s family, Ms Turnseck had discussed the vehicle damage with Mr Gibbons and Mr Buswell. She had also met with the Mental Health Commissioner, Mr Marney.

6.13 The fact that Ms Turnseck omitted from her advice to Mr Home the information about her conversations with Mr Leo Gibbons, the Electorate Officer to Hon Troy Buswell, is confirmed by Ms Turnseck in the CCC report as follows:

Tell me now what is the correct answer to the question. So I'll ask it again and tell us what in fact the answer is. “Has Ms Turnseck
discussed the events in the days leading up to the former treasurer taking personal leave with anyone other than the premier, his chief of staff and Ms Narelle Cant, and if so with whom and when?”. So what is the correct answer to that question? — Yes, I’d spoken to Leo.

So Leo Gibbons? — Leo, yes.

You had spoken to Margaret Buswell? — Yes.

And you had spoken to Mr Buswell’s sister? — Yes.

Anyone else? — No.

So you had spoken to two family members, yes? — M’m’hm46

6.14 In the evidence provided to the Committee, Ms Turnseck rationalises her evidence to the CCC relating to the omission in the following context:

At the time that I was involved in assisting to draft the answer to question 2 of Question without Notice C192, I was quite sure that the question was not seeking information about Mr Buswell’s close friends’ knowledge of matters. Even though Mr Gibbons was an electorate officer, I understood that the question was seeking information about who in the senior levels of the government and the Liberal Party headquarters other than Mr Pontifex, Ms Cant and Mr Morton was aware of events in the days leading up to Mr Buswell commencing personal leave, and when they became aware of them. Whatever Mr Gibbons or members of Mr Buswell’s family knew about the events in the days leading up to Mr Buswell commencing personal leave and when they became aware of them was irrelevant to the questioner. This is because whatever Mr Gibbons or members of Mr Buswell’s family knew and when they knew it was irrelevant to the questioner, because whatever they knew and whenever they knew it could not cause political damage to the government.47

... 

I accept that I should have advised Stephen Home I had spoken with Mr Gibbons, as I had advised him and others that I had spoken with

---


members of Mr Buswell’s family. Even if I had done this, I would still not have wanted Mr Gibbons or members of Mr Buswell’s family mentioned in the answer. They were family or, in Mr Gibbon’s case, as close as family. Upon reflection, I accept that I should have provided an answer something along the lines of: no, other than with members of Mr Buswell’s family and a close personal friend.48

6.15 Further to that statement, Ms Turnseck advised the Committee that other staff should have known that the answer to be provided to the Council was literally incorrect or factually incomplete:

Hon SUE ELLERY: Okay. So, if I go further on in the statement that you provided us with today, on the second page, I guess in the top third, there is a paragraph that begins “In the first draft answer to question 2” and you go on to say, the third sentence in —

Everyone who read this email and the draft answer knew that I had spoken with Mr Buswell’s family members.

Reading the emails, the only way that we have of knowing whether or not you had discussed with family, with anyone, is the email that says, that I have just referred to —

I am not going to be telling the Parliament … about any conversation I may or may not have had about the personal circumstances …

Then further on, in another email you say, when the draft is prepared that does refer to the family, “I’d rather not mention the family”, or words to that effect; I am paraphrasing. In those two email exchanges, is that what you are referring to when you say, “Everyone who read this email and the draft answer knew that I had spoken with Mr Buswell’s family members”?

Ms Turnseck: Obviously, the Premier, when I had had a conversation with him, knew that I had been in touch with Troy’s family. I would have said that. Similarly, with Brian and Narelle. So, that exchange of emails would not have been the first time that those three individuals knew that I had communicated with his family. 49

…

48 Ibid p 3.
49 Ibid p 5.
Hon MARTIN ALDRIDGE: The answer to, I think, a question from Hon Sue Ellery was that you were not able to recall a conversation with Mr Home on the day that that question —

Ms Turnseck: No, I do not recall that.

Hon MARTIN ALDRIDGE: But you are certain that you did speak to the three people you mentioned—the Premier, Ms Cant and Mr Pontifex—in relation to your contact with Mr Buswell’s family?

Ms Turnseck: Yes, I would have mentioned that I had been in contact with his family.

Hon MARTIN ALDRIDGE: But not Mr Gibbons? The references in those conversations were just to his family.

Ms Turnseck: Look, I do not recall directly mentioning Leo in conversations. I am assuming they would have been aware that I had been in contact with the electorate office, although I do not recall having that specific conversation.50

(emphasis added)

6.16 Regardless of Ms Turnseck’s interpretation of the information sought in the question, and her contention that other staff in the Premier’s office should have known that the answer was incomplete, the Committee is satisfied that Ms Turnseck’s actual motive regarding the omission was revealed in the CCC report.

6.17 This is reported at page 24, paragraph 131, of the CCC report as follows:

[131] Can I ask you this, why didn't you tell Mr Home that he should include Mr Gibbons? Is that for the same reason you have just given us? — Well, in all honesty, I didn’t really want to drag Leo into it.

So what was it you didn't want to drag Leo into? — Well, the entire event.

---

50 Ibid p 10.
Because apart from Mr Gibbons, you were really the only other person who would know for certainty what had been discussed between you and him. Correct? — Yes.51

(emphasis added)

6.18 The evidence obtained from the CCC and the information provided to the Committee provides clear evidence that the information regarding Mr Leo Gibbons was deliberately omitted by Ms Turnseck from the information supplied to Mr Home in preparation of the answer to Question without Notice C 192.

Finding 9: The Committee finds:

That Ms Rachael Turnseck consciously and deliberately withheld relevant information from Mr Stephen Home regarding the material fact that she had spoken with the former Treasurer’s electorate officer Mr Leo Gibbons about the events in the days leading up to the former Treasurer taking personal leave.

6.19 It is clear from the evidence that as an experienced Chief of Staff, Ms Turnseck would have known that by failing to provide Mr Home with information about her conversation with Mr Leo Gibbons that the subsequent answer to Question without Notice C 192 given in the Legislative Council would be incomplete and misleading. Ms Turnseck’s objective was to ensure that Mr Leo Gibbons was not “dragged into” the situation.

Finding 10: The Committee finds:

That Ms Rachael Turnseck knew that her actions in consciously and deliberately withholding relevant information from Mr Stephen Home regarding her conversation with Mr Leo Gibbons would result in an incomplete and misleading answer being provided to the Legislative Council.

6.20 The corrected answer to Question without Notice No. 176 (C 192) given in the Legislative Council on 16 March 2016 clearly demonstrated that the answer given to the House on 12 March 2014 provided incorrect information. This incorrect information included the omission of the reference to Ms Turnseck’s conversation with Mr Leo Gibbons which was not included in the answer to Question without Notice No. 176 (C 192). This rendered part (2) of the answer to Question without Notice C 192 false in a material particular.

Finding 11: The Committee finds:

That the information omitted by Ms Rachael Turnseck resulted in the answer to Legislative Council Question without Notice C 192 being incomplete and misleading.

SUMMARY

6.21 The draft answer to Question without Notice C 192 required a collaborative effort on behalf of Mr Home and Ms Turnseck. This collaboration was typical of the process regarding the preparation of an answer to a parliamentary question. However, in this instance the collaboration led to an incomplete and misleading answer being provided to the Legislative Council.

6.22 It is clear from the evidence that Mr Home relied on the truthfulness and accuracy of the information provided by Ms Turnseck to draft the answer to Legislative Council Question without Notice C 192. It is also clear that Ms Turnseck consciously and deliberately withheld from Mr Home relevant information relating to her conversation with Mr Leo Gibbons.

6.23 Ms Turnseck sought to explain her deliberate omission of this relevant fact based on her interpretation of what Legislative Council Question without Notice C 192 was seeking. While Ms Turnseck would appear to acknowledge her responsibility to provide complete and accurate information to Mr Home, Ms Turnseck’s evidence left the Committee with the clear impression that the onus for the accuracy and completeness of the final answer to Question without Notice C 192 rested with Mr Home and other staff in the Premier’s office. In the Committee’s view this is an untenable argument given that it was Ms Turnseck alone who had the necessary personal knowledge to enable all the relevant facts to be provided so that an answer was complete and accurate. Such an argument could only be sustained if Ms Turnseck had actually provided all relevant information and Mr Home had then unilaterally omitted relevant information. The facts do not bear this out.

6.24 It is clear from the evidence that Mr Home acted to remove the reference to Mr Buswell’s family from his first draft answer to part (2) of Question without Notice C 192 because Ms Turnseck indicated her preference for him to do so. This was part of the collaborative process by them to formulate a suitable answer for consideration by the Premier and the Leader of the Government in the Legislative Council (who ultimately delivered the authorised answer). Both Ms Turnseck and Mr Home knew that this would be the outcome if the Premier authorised the answer. Their combined actions in this regard contributed to an incomplete and misleading answer being

---

52 See for example: Corruption and Crime Commission, Transcript of Proceedings, Private Examination of Ms Rachael Turnseck on 5 June 2015, p 81.
provided to the Legislative Council. Mr Home was not responsible for the omission from the answer of relevant information relating to Mr Leo Gibbons given that this information was deliberately withheld from him by Ms Turnseck.

6.25 The Committee in reaching its conclusions also acknowledges the difficult and unique circumstances in which Ms Turnseck found herself following the events of 22-23 February 2014. She was Mr Buswell’s friend and confidant as well as his Chief of Staff and she acted so as to assist him with a serious mental health issue and no doubt to protect him from the political consequences of his actions. Ultimately, Ms Turnseck’s actions had traumatic and stressful consequences to her. However, Ms Turnseck also had obligations and duties as a Chief of Staff and public officer, not only to her employer, the Premier, but to the Parliament in relation to the questions that had been asked. The Committee agrees with the view expressed by the CCC that Ms Turnseck did not manage the conflict between her loyalty to a Minister and her responsibility as a public officer well.53

6.26 The Committee is of the view that the conscious and deliberate provision of incorrect, incomplete or misleading information or the conscious and deliberate omission of relevant information in a parliamentary question on this occasion constituted a substantial interference with a proceeding of the Legislative Council.

Finding 12: The Committee finds:

That Ms Rachael Turnseck’s actions in relation to Question without Notice C 192 constituted a substantial interference with a proceeding of the Legislative Council.

6.27 The Committee concludes that Ms Turnseck’s actions therefore constituted a contempt of the Legislative Council.

6.28 Prior to it reporting to the Legislative Council, the Committee provided Ms Turnseck with its draft findings and recommendations to enable her to provide any comment on them or further relevant information to the Committee. Ms Turnseck did not provide a response to the Committee’s correspondence by the requested deadline.

---

CHAPTER 7
OTHER PERSONS CONNECTED TO QUESTION WITHOUT NOTICE NO. 176 (C 192)

EMAILS

7.1 The emails exchanged between Mr Home, Ms Turnseck and others listed as senders or recipients indicated that several persons were aware on 12 March 2014 of the efforts by Mr Home to draft a suitable answer to Legislative Council Question without Notice C 192.54 These persons were Mr Brian Pontifex, Ms Narelle Cant, Ms Dixie Marshall, Mr Zak Kirkup and Ms Roxana Pike.

7.2 The usual practice with questions being delivered by representative Ministers or Parliamentary Secretaries is that the responsible Minister authorises their answer prior to it being given. If this practice was followed, the Premier as the Minister responsible for the Department of the Premier and Cabinet would have been the person to authorise the answer.

7.3 Accordingly, the Committee wrote to those staff in the Premier’s office listed in the relevant emails and to the Premier to determine their knowledge and whether or not there was evidence to support a finding that any of these individuals had committed a contempt or breached the privileges of the Legislative Council arising from the answer to Question without Notice No. 176. The relevant correspondence to the Premier and the individuals listed as senders or recipients of the relevant emails is set out in Appendix 4.

7.4 Paragraph 6.15 refers to evidence given by Ms Turnseck to the Committee in answer to questioning by Hon Sue Ellery and Hon Martin Aldridge. Her evidence was that she did tell the Premier (and others) that she had communicated with members of Mr Buswell’s family about the events that were later the subject of Legislative Council Question without Notice No. 176 (C 192).

7.5 The Committee’s correspondence to the Premier, as set out in Appendix 4, included the extract of the transcript of Ms Turnseck’s evidence where she asserts “The Premier, when I had a conversation with him, knew I had been in touch with Troy’s family”. The Premier was also provided with the chain of emails referred to by Ms Turnseck in her evidence.

54 See paragraph 5.23.
7.6 The Committee asked the Premier, in that correspondence, a series of questions about his knowledge of the matters related to Legislative Council Question without Notice No. 176 (C’192), the preparation of the answer and the processes associated with preparing answers for questions in Parliament. In relation to the evidence from Ms Turnseck that she had told the Premier that she had discussed the events related to Mr Buswell taking personal leave following the events of the night of 22-23 February 2014 with Mr Buswell’s family, the Committee asked the Premier the following question:

(1) Were you aware that Ms Rachel Turnseck had spoken to members of Mr Buswell’s family?

7.7 The Premier’s answer, as set out in Appendix 4, to that question was “I would expect in matters such as this a person’s family would be advised”.

7.8 The Committee notes that the Premier did not either refute or accept Ms Turnseck’s evidence that he had been told by her that she had spoken to members of Mr Buswell’s family.

Finding 13: The Committee finds:

That there is no evidence to support a finding that any other natural person has committed a contempt or breach of privilege in relation to the answer to Legislative Council Question without Notice No. 176 (C 192) given in the Legislative Council on 12 March 2014.
CHAPTER 8
THE CORRUPTION AND CRIME COMMISSION

THE CCC’S INVESTIGATION

8.1 The CCC investigation into the matters surrounding Legislative Council Question without Notice C 192 involved the gathering of evidence from the Department of Premier and Cabinet including the emails referred to earlier, the three questions asked by Hon Sue Ellery MLC and the two drafts of proposed answers to Question without Notice C 192 prepared by Mr Home with the assistance of Ms Turnseck. The CCC also interviewed Ms Turnseck.

8.2 Ms Turnseck gave evidence to the CCC on three separate occasions, being 16 December 2014, 27 May 2015 and 5 June 2015. On each occasion Ms Turnseck was subject to a compulsory questioning process following the issue of a summons by the CCC. It was, however, only during her final examination on 5 June 2015 that the matter concerning Legislative Council Question without Notice C 192 was raised with Ms Turnseck.

8.3 Counsel for the CCC was in possession of the two draft answers to Question without Notice C 192 prepared by Mr Home and the associated emails between him and Ms Turnseck and others. These were used by Counsel to question Mr Turnseck. The outcome of this evidence gathering by the CCC was the forming of its opinion of misconduct regarding Ms Turnseck and the inclusion of this opinion in the report provided to the Premier and which he subsequently tabled.

8.4 The Committee acknowledges and thanks the CCC and Commissioner, Hon John McKechnie QC for the assistance provided in releasing to the Committee relevant evidence gathered by the CCC in the course of its investigation. In the absence of the investigation conducted by the CCC and the tabling of its report by the Premier the Committee is of the view that the Legislative Council would have remained unaware of the potential contempts committed against it.


Finding 14: The Committee finds:

That evidence obtained by the Corruption and Crime Commission in the course of its investigation and the provision of this evidence to the Committee revealed possible contempts which would not otherwise have come to the attention of the Legislative Council.

THE BILL OF RIGHTS 1688 (UK) AND PARLIAMENTARY PRIVILEGE

8.5 As described in Chapter 3, the Bill of Rights 1688 (UK) is part of the law of Western Australia as it is incorporated as a privilege of the Houses of the Parliament of Western Australia by reason of s.1 of the Parliamentary Privileges Act 1891. To the extent that it has not been altered or abrogated by statute, the CCC will be subject to this law and the immunity it provides to those involved in parliamentary proceedings.

8.6 Article 9 of the Bill of Rights provides (in modern language):

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.

8.7 It is settled law in Western Australia that Article 9 is to be given a wide interpretation — see Halden v Marks (1995) 17 WAR 447 at 461. Blackstone in his Commentaries on the Laws of England, 17th ed. (1830), vol 1, p. 163 expressed the essence of parliamentary privilege as follows:

... the whole of the law and custom of Parliament has its origin from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.

8.8 In accordance with its inquiry Term of Reference No. 3, the Committee examined whether any of the actions of the CCC resulted in it committing a contempt or breach of the privileges of the Legislative Council. This involved an examination of the essential elements of Article 9 of the Bill of Rights 1688 (UK), the relevant law and legal principles at play and then applying them to the circumstances of this case.

IS THE CCC A ‘PLACE OUT OF PARLIAMENT’?

8.9 The prohibition against impeaching or questioning freedom of speech, debates or proceedings in parliament applies to courts or a ‘place out of parliament’.
8.10 The CCC is clearly not a court. It has no capacity to make a determination of legal rights and obligations between parties in litigation. The preliminary question for the Committee was therefore whether the CCC was a ‘place out of parliament’.

8.11 The CCC is a permanent commission established by statute with powerful investigative powers.\(^58\) It is authorised to make assessments and opinions regarding misconduct of public officers following an investigation.\(^59\) An opinion regarding misconduct is not to be taken as a finding or opinion that a particular person has committed, or is committing, or is about to commit a criminal offence or disciplinary offence.\(^60\) The CCC has some features common to courts, the most obvious being the capacity to take evidence on oath and to prosecute for offences against the Act in the nature of contempt, although this power to prosecute has not been judicially determined.\(^61\)

8.12 In Western Australia, royal commissions have been accepted as a ‘place out of parliament’ for the purpose of Article 9 of the Bill of Rights 1688 (UK).\(^62\) Similar to the CCC, royal commissions have been given statutory powers to require evidence to be given by witnesses on oath. Royal commissions may make recommendations but like the CCC have no power to make final determinations. The CCC’s powers concerning witnesses are substantial and include the abrogation of the common law right of a witness to refuse to give evidence that may incriminate them and of an accused person to refuse to give evidence at all.\(^63\) There is legal authority in Western Australia supporting the view that a disciplinary tribunal and the State Administrative Tribunal are each respectively a ‘place out of parliament’ within the meaning of Article 9.\(^64\)

8.13 In his opinion to the Committee, Mr Bret Walker SC was emphatic in his view that the CCC was ‘a place out of parliament’ for the purposes of Article 9. He says:

*The CCC, like other tribunals, royal commissions and various investigative bodies of the executive, is clearly a ‘place out of Parliament’. Article 9 plainly covers a place as official as the CCC in*

---

\(^{58}\) *CCC Act 2003*, s 7B.

\(^{59}\) Ibid, s 22.

\(^{60}\) Ibid, s 23(2).

\(^{61}\) *A v Maughan* [2016] WASCA 128.


\(^{63}\) See collectively Parts 6 to 10 of the *Corruption, Crime and Misconduct Act 2003*.

\(^{64}\) *Jenkins v McCusker* [2010] WASAT 100.
which what amounts to executive power is used separately from Parliament.\textsuperscript{65}

\begin{boxedtext}
\textbf{Finding 15: The Committee finds:}

That the Corruption and Crime Commission is a place out of parliament within the meaning of Article 9 of the \textit{Bill of Rights 1688} (UK).
\end{boxedtext}

\textbf{WERE THE DRAFTS OF LEGISLATIVE COUNCIL QUESTION WITHOUT NOTICE C 192 AND/OR ASSOCIATED EMAILS ‘PROCEEDINGS IN PARLIAMENT’?}

8.14 The second and most important question for the Committee was whether the draft parliamentary questions used by the CCC in its investigation were proceedings in parliament and therefore subject to the Article 9 immunity if questioned or impeached.

8.15 Erskine May describes the expression ‘\textit{proceedings in parliament}’ as:

\begin{quote}
... some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to forms of business in which the House takes action, and the whole process, the principle part of which is debate, by which it reaches a decision. An individual member takes part in a proceeding usually by a speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee ... Officers of the House take part in its proceedings principally carrying out its orders, general or particular. Strangers also may take part in the proceedings of the House, for example by giving evidence before it or one of its committees, or by securing presentation of a petition.\textsuperscript{66}
\end{quote}

8.16 In \textit{New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services} (1992) 26 NSWLR 114, Hungerford J at p 123 referred to with approval a statement in \textit{Halsbury’s Laws of England} (4th ed 1980) which included the asking of a question and the giving written notice of a question and matters transacted external to the debating chamber and committee room as follows:

\textsuperscript{65} Opinion from Mr Bret Walker SC to the Legislative Council \textit{Procedure and Privileges Committee}, 3 November 2016, paragraph 30, p 9.

In its wider sense “proceedings in Parliament” has been used to include matters connected with, or ancillary to, the formal transaction of business. A select committee of the Commons, citing and approving a Canadian dictum, stated in its report that it would be unreasonable to conclude that no act is within the scope of a member’s duties in the course of parliamentary business unless it is done in the House or in a committee of it and while the House or a committee is sitting.

8.17 In a modern parliament there are ministerial, electorate and research staff that prepare drafts of speeches, questions, motions and other forms of the House on behalf of members of parliament. Much of this administrative work occurs when the House is not sitting. In these circumstances, for the immunity under Article 9 to protect only those activities that occur in the Chamber or committee room would not achieve its objective of protecting the legislature from actions by the executive or others that would have a tendency to impair its functioning and the free flow of information. In each activity that occurs outside a parliamentary chamber or committee room the question is one of degree of connection to actual parliamentary proceedings. If the necessary connection is not established the matter is not a proceeding in parliament and is not protected. An example of a matter found by a court not to be protected is the expenses claims of Members of Parliament.67

8.18 The committee notes in this case that Question without Notice C 192 was submitted by Hon Sue Ellery prior to 11.00am on Tuesday, 12 March 2014 for answer in the Legislative Council by the representative Minister, Hon Peter Collier. The draft answer was prepared by the Premier’s Deputy Chief of Staff, Mr Stephen Home, with the assistance of Ms Rachael Turnseck. An answer, though misleading and factually incorrect, was given that afternoon.

8.19 In Prebble v Television New Zealand [1995] 1 AC 321, s 16 of the Parliamentary Privileges Act 1987 (Cth) was acknowledged as reflecting the “the true principle to be applied” when considering the scope of Article 9.68 Although not part of the law of Western Australia, judicial decision in relation to the Commonwealth privileges Act may provide greater clarity as to what activities constitute ‘proceedings in parliament’.

8.20 Section 16(2) of the Parliamentary Privileges Act 1987 (Cth) provides a definition of proceedings in parliament as follows:

For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes

---


of this section, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

8.21 The definition in paragraph (c) above is the one most relevant to the present case involving Question without Notice C 192. In O’Chee v Rowley (1997) 150 ALR 199, the Queensland Court of Appeal considered the effect of section 16(2)(c) on the capacity of the court to order the production of documents claimed by a Senator to be ‘proceedings in parliament’ and therefore privileged from production. McPherson JA engrafted the immunity provided by Article 9 to the wording of paragraph (c), resulting in the immunity being expressed as follows:

[the preparation of a document for purposes of or incidental to the transacting of any ...business] (of a House) shall not be impeached or questioned in any court ... out of Parliament.69

8.22 The court determined that proceedings in parliament included the preparation of a document for the purposes of or incidental to the transacting of any business of a House. It also found that bringing documents into existence with such purpose, or for those purposes, the collection or assembling of those documents, or coming into possession of them, are all circumstances capable of amounting to proceedings in parliament.70 Importantly, the court observed that to be effective, the Article 9 immunity was required to be retrospective; that is, it needed to apply to documents that related to matters that were no longer current business before the Senate.71

70 Ibid p 199.
71 Ibid p 211.
8.23 There are several cases referred to in the 13th Edition of Odgers’ Australian Senate Practice in which courts have determined that documents, including drafts of documents prepared outside the Senate for subsequent use in the Senate Chamber or committees, have been immune from production by reason of them being ‘proceedings in parliament’ under the Parliamentary Privileges Act 1987 (Cth), s 16(2) definition, including:

- draft answers to estimates questions on notice, draft answers to anticipated oral questions at estimates hearings, and material for answering a possible parliamentary question: National Tertiary Education Industry Union v Commonwealth\(^\text{72}\);

- briefs prepared for estimates hearings: Australian Communications Authority v Bedford\(^\text{73}\);

- a document prepared for estimates hearings: Community and Public Sector Union v Commonwealth\(^\text{74}\); and

- estimates and question time briefs: Niyonsaba v Commonwealth\(^\text{75}\).

8.24 All of these cases go to the acceptance of such material being ‘proceedings in Parliament’ within the meaning of s 16 of the Parliamentary Privileges Act 1987 (Cth).\(^\text{76}\)

8.25 There has been discussion in judicial and academic circles as to whether s 16(2) of the Parliamentary Privileges Act 1987 (Cth) expands the privilege provided by Article 9 of the Bill of Rights 1688 (UK) by capturing all acts done that are incidental to the transaction of business in the House. The Committee is of the view that this is a moot point in this particular case. This is because whether or not s 16(2) of the Parliamentary Privileges Act 1987 (Cth) accurately reflects the proper scope of parliamentary privilege, it is clear that even if there has been only the most minimal extension of parliamentary privilege over the past four hundred years to things that are said or produced outside of a physical Chamber or committee room, then it would certainly cover the kind of activities and material that are in question in this case. The direct influence that wrongdoing in advising on an answer to a parliamentary question has on the proceedings in the Chamber is the touchstone for saying that the activity in question falls within the protection of ‘proceedings in parliament’.

\(^{72}\) [2001] FCA 610.

\(^{73}\) Unreported, Federal Magistrates Court, 28 March 2006.

\(^{74}\) Unreported, Federal Court of Australia, 11 July 2007.

\(^{75}\) Unreported, Federal Court of Australia, 2007.

\(^{76}\) Odgers’ Senate Practice, 13th Edition, p.60.
Mr Walker’s written advice to the Committee is unequivocal that drafts of parliamentary questions are ‘proceedings in parliament’ for the purposes of Article 9 of the *Bill of Rights 1688* (UK) when he states:

> ...the expression ‘proceeding in parliament’, will at its most limited scope include the preparation of a document by or on behalf of a Member for the purposes of transacting parliamentary business. This will include cases where the document is a draft and never actually used in any parliamentary proceeding.\(^77\)

Mr Walker’s view has satisfied the Committee that the drafts of Question without Notice C 192 are ‘proceedings in parliament’ within the meaning of Article 9 of the *Bill of Rights 1688* (UK). In addition, emails exchanged between Mr Home and Ms Turnseck to enable the drafts of Question without Notice C 192 to be formulated, and to which the parliamentary questions and draft answers were attachments, are intrinsically part of this drafting process and, in the Committee’s view, are similarly protected.

**Finding 16: The Committee finds:**

That Legislative Council Question without Notice C 192, the draft answers and associated email exchanges between public officers tasked with constructing the answers and providing them to Members of Parliament for their consideration and eventual answer in the Legislative Council were *proceedings in parliament* within the meaning of Article 9 of the *Bill of Rights 1688* (UK).

**DID THE CCC’S USE OF THE DRAFTS OF LEGISLATIVE COUNCIL QUESTION WITHOUT NOTICE C 192 AND ASSOCIATED EMAILS ‘QUESTION OR IMPEACH’ A ‘PROCEEDING IN PARLIAMENT’?**

As discussed in Chapter 3, the purpose of parliamentary privilege, and specifically the Article 9 immunity, is to prevent retribution by the executive and others against Members and those involved in parliamentary proceedings and to protect the free flow of information necessary in a deliberative democracy. An erosion of the immunity would likely have a ‘chilling’ effect on the information available to Members and the legislature.\(^78\)

---

\(^{77}\) Opinion from Mr Bret Walker SC to the Legislative Council *Procedure and Privileges Committee*, 3 November 2016, paragraph 23, p 8.

8.29 One aspect of parliamentary privilege and the immunity on questioning or impeaching parliamentary proceedings is the restriction placed on the use by courts or extra-judicial bodies of evidence of parliamentary proceedings other than to prove an historical fact\(^79\) or as an aid to statutory interpretation.\(^80\) This exclusionary principle was expressed by the full court of the WA Supreme Court in *Halden v Marks* as follows:

...there are cases where a question of parliamentary privilege is raised in a case already before the court, as, for example, where a party seeks to rely on something said or done in Parliament. In the exercise of its general jurisdiction, and in the regulation of its own proceedings, the court will decide whether the relevant action will breach parliamentary privilege and will refuse to allow the particular matter to be ventilated, or the particular evidence to be tendered, if the court concludes that to do so would be a breach of privilege. In regulating its conduct in this way, the court is endeavouring to ensure that neither it nor the parties before it question or impeach any speech, debate or proceedings in Parliament - *R v Jackson* (1987) 8 NSWLR 116; *Prebble v Television New Zealand Ltd* (supra); *ABC v Chatterton* (1986) 46 SASR 1; *Grassby* (1991) 55 A Crim R 419; *NSW Branch of the Australian Medical Association v Minister for Health* (1992) 26 NSWLR 114.\(^81\)

8.30 The rationale for this principle was explained in *Prebble v Television New Zealand* [1995] 1 AC 321 as follows:

“...to allow it to be suggested in cross-examination or submission that a member or witness was lying to the House could lead to exactly that conflict between the courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House: if a court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue.”\(^82\) (emphasis added).\(^83\)

8.31 Because the law of parliament is part of the general law, its privileges are observed by the court in the course of litigation and are enforced by the court without the need to

---

83. Quoted with approval in *Hamilton v Al Fayed* [2000] 2 All ER 224.
have the issue raised specifically. Unlike the doctrine of Executive Privilege\(^84\) enunciated in the High Court of Australia in *Sankey v Whitlam* (1978) 21 ALR 505, which is founded on the court determining a balancing of competing public interests, by contrast, the privilege of Parliament is absolute.

8.32 Section 16(3) of the *Parliamentary Privileges Act 1987* (Cth), which in the case of *Prebble v Television New Zealand* [1995] 1 AC 321 was referred to by the Privy Council as “the true principle to be applied”\(^85\) when considering the operation of Article 9 provides:

\[
\text{(3)} \quad \text{In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:}
\]

\[
\begin{align*}
(a) & \quad \text{questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;} \\
(b) & \quad \text{otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or} \\
(c) & \quad \text{drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.}
\end{align*}
\]

8.33 Usefully, the Commonwealth Act defines ‘tribunal’ as “any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a Royal Commission or other commission of inquiry of the Commonwealth or of a State or Territory having that power.”\(^86\) If the Commonwealth Act reflects the true principles applicable to Article 9, then the CCC falls squarely within the definition of ‘tribunal’ and therefore is ‘a place out of parliament’.

**Meaning of ‘impeached or questioned’**

8.34 In *O’Chee v Rowley* (1997) 150 ALR 199, McPherson JA considered the meaning of ‘impeaching’ parliamentary proceedings and particularly whether the compulsory production of documents in court proceedings fell within the scope of the Article 9

---

84 Now known as public interest immunity.
86 *Parliamentary Privileges Act 1987* (Cth), s 3(1).
immunity. In following his previous engraf ting process relating to s 16(2)(c) referred to earlier, he reasoned that the prohibition should be expressed as follows:

That [... acts done ... for purposes of or incidental to, the transaction of the business of a House] ought not to be impeached or questioned in any court ... out of Parliament.\textsuperscript{87}

8.35 McPherson JA determined the two meanings ascribed to ‘impeach’ as at 1688 were: (1) “to impede, hinder, prevent”, and (2) “to hinder the action, progress, or well-being of; to affect detrimentally or prejudicially; to hurt, harm, injure, endamage, impair.”\textsuperscript{88} In the result he concluded that to order disclosure of the documents would cause conflict between the legislature and judiciary and have “an obvious potential to deter [the Senator] ... and other Parliamentarians from preparing or assembling documentary information for future debates and questions in the House.”\textsuperscript{89} The case recognises the resulting chilling affect that would occur in the event that the immunity provided by Article 9 was limited or ignored.

8.36 Other Australian corruption bodies have considered themselves subject to the evidentiary restrictions in Article 9. In 2002, the Legislative Assembly of NSW requested that ICAC investigate the regulation of secondary employment by its members, specifically the conduct of the Leader of the Opposition in his role as a ‘public affairs’ consultant and allegations that he had used questions in parliament that further the interest of his employer. As reported in the article in the Australasian Parliamentary Review:

ICAC...felt that it was unable to comment on the conduct of the Leader of the Opposition as it could not 'use its statutory investigative powers as [it]... did not have the statutory authority to investigate matters where parliamentary privilege applies. The Commissioner explained that 'the jurisdiction of the ICAC did not extend to questioning the motive, intention or good faith of anything forming part of the proceedings in Parliament, or questioning or... drawing inferences from anything forming part of Parliamentary proceedings'.\textsuperscript{90}

\textsuperscript{87} 150 ALR 199 at 208.
\textsuperscript{88} 150 ALR 199 at 210.
\textsuperscript{89} 150 ALR 199 at 212.
8.37 The statement above reflects the statutory preservation of parliamentary privilege contained in the *Independent Commission Against Corruption Act 1988* which provides at s 122:

> Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

**CCC’s use of proceedings in parliament**

8.38 The CCC used the evidence of the parliamentary questions, including the draft answers to those questions and the answer to Question without Notice C 192 (No. 176) given in the Legislative Council and associated emails during its examination of Ms Turnseck. Counsel for the CCC was well aware that a person who provided false information to a parliamentary question could result in the serious matter of Parliament being misled by the answer. This was evident in the CCC transcript of the examination of Ms Turnseck when she was shown a copy of the initial email from Mr Home dated 12 March 2014 that contained the three parliamentary questions asked by Hon Sue Ellery, including Question without Notice C 192. The exchange between Counsel and Ms Turnseck regarding this parliamentary question was as follows:

> …I’m suggesting to you that if you had been asked this question, which I tell you you have - - - ? - - - Yeah, yeah.

> - - - it’s something you would remember? - - - Yes.

> Do you remember it?---Well, I remember it now that you're showing me the email.

> Right?---There were a number of questions asked by parliament in a formal document called a Question without Notice of which some notice is given, correct?---Mm;hm.

> You know the answer that is given is the answer that’s going to be given to the parliament?---Yes.

> You know that if the answer is wrong or misleading or incomplete, that would then potentially mislead the parliament. Correct? ...

8.39 Later Counsel for the CCC put the issue of the inconsistency between Mr Home’s first draft of the answer to Question without Notice C 192 which included in part two of that answer the reference to Ms Turnseck’s conversation with Mr Buswell’s family

---

91 CCC transcript of private examination dated 5 June 2015, p 79.
members and the later draft which omitted this information and became the official
answer given in the Legislative Council. The only difference between the final draft
prepared by Mr Home and the answer given in the Legislative Council was the
addition of the word “former” before “treasurer” to indicate Mr Buswell’s resignation
from the Ministry. The relevant parts of Ms Turnseck’s examination were as follows:

_Do you recall receiving a draft response from Mr Home?

- - - Yes, there were a number of questions that Stephen would have
sent me drafts.

And in the draft responses the answer suggested by Mr Home to the
question I read to you was, “Prior to the treasurer’s resignation no,
other than with the treasurer’s direct family.” Do you agree that was
what was in the draft response of Mr Home? - - - Sorry, can you just
repeat the question.

Certainly? - - - The actual parliamentary question.

The question first was “Has Ms Turnseck discussed the events in the
days leading up to the former treasurer taking personal leave with
anyone other than the premier, his chief of staff and Ms Narelle Cant,
and if so with whom and when.” Yes? - - - Yes.

Because I appreciate and I’ll read it as many time as you need? - - -
Yeah, yeah. No, no I’ve got it. That’s fine.

....

The draft answer I’m suggesting to you was, “Prior to the treasurer’s
resignation no, other than with the treasurer’s direct family.” Do you
recall receiving that draft? - - - Yes.

Tell me now what is the correct answer to the question. So I’ll ask it
again and tell us what in fact the answer is. “Has Ms Turnseck discussed the events of the days leading up to the former treasurer
taking personal leave with anyone other than the premier, his chief of
staff and Ms Narelle Cant, and if so with whom and when.” So what
is the correct answer to that question? - - - Yes, I’d spoken with Leo.

So Leo Gibbons? - - - Leo, yes.

You had spoken with Margaret Buswell? - - - Yes.

And you had spoken to Mr Buswell’s sister? - - - Yes.
Anyone else? - - - No.

So you had spoken to two family members, yes? - - - Mm’hm

And you had spoken to Mr Gibbons, who was not a family member was he? - - - Yes.\textsuperscript{92}

8.40 The CCC knew the official answer to Question without Notice C 192 was given in the Legislative Council on 12 March 2014 as Question without Notice No 176. The references in the questioning by Counsel to the former Treasurer make this abundantly clear. The CCC also knew that the official answer was materially different from the first draft produced by Mr Home which had included the information supplied to him by Ms Turnseck about her discussions with Mr Buswell’s family members. The circumstances as to how the differences between the first draft and the final official answer came about and whether other facts where known by Ms Turnseck but not revealed were explored by the CCC using the draft answers to these parliamentary questions and the related emails in its examination of Ms Turnseck. The Committee has found that these documents were \textit{proceedings in parliament} for the purposes of Article 9 of the \textit{Bill of Rights 1688} (UK). Following its examination of Ms Turnseck using the parliamentary questions, their draft answers and the related emails, the CCC then drew inferences and conclusions regarding Ms Turseck’s candour and also by implication the correctness and truthfulness of the draft answers to form its opinion of misconduct in relation to Ms Turnseck’s conduct.

8.41 These inferences and conclusions were made and could only have been made by the CCC putting questions to Ms Turnseck about the draft answers to Question without Notice C 192 prepared by Mr Home that questioned their accuracy and by necessary inference Ms Turnseck’s motive, intention, good faith and honesty. The draft answers to C 192 were prepared as part of a process the sole purpose of which was to produce a final draft for consideration by two Members of Parliament, the Hon Colin Barnett MLA as the Premier and Hon Peter Collier MLC, the Leader of the Government in the Legislative Council and Minister representing the Premier in that House. Each of these Members authorised the answer. The authorised, though factually incorrect and misleading, answer to Question without Notice C 192 was then given in the Legislative Council as Question without Notice No. 176.

8.42 The Committee is of the view that the two draft answers to Question without Notice C 192 were clearly each a ‘\textit{proceeding in parliament}’ and therefore by their very nature were subject to parliamentary privilege. The final version of the answer to Question without Notice C 192 given as Question without Notice No. 176 in the Legislative Council was also a ‘\textit{proceeding in parliament}’. The use by the CCC of the draft answers did all of the things prohibited by Article 9 in that this use:

\textsuperscript{92} CCC transcript of private examination dated 5 June 2015, p 80.
(a) questioned the truth of the draft answers which formed part of a proceeding in parliament;

(b) sought to impugn the credibility, motive, intention or good faith of Ms Rachael Turnseck; and

(c) sought to draw inferences and conclusions about Ms Turnseck’s conduct wholly or partly from those proceedings in Parliament.

8.43 Furthermore, a conclusion as to whether the actions of any person resulted in the Legislative Council being misled by an answer to a parliamentary question is a matter falling within the exclusive jurisdiction of the Legislative Council as a House of Parliament. The deliberate misleading of a House of Parliament is a contempt. The contempt jurisdiction of a House is not limited to its Members.

8.44 In his opinion to the Committee, Mr Bret Walker SC made it clear that it makes no difference to the issue of whether a questioning or impeaching of parliamentary proceedings has occurred that there is a consistency of opinion or finding in respect to a particular matter. Mr Walker states:

In particular, the point needs to be rejected as a matter of doctrine that something is not calling into question or impeaching unless it is necessarily at odds with, or an inquiry that is directly in opposition to, the expressed will of the House of Parliament. That is not the way the immunity or prohibition works. The investigation and expression of opinion by the CCC in its report in this case bore no resemblance to the limited or specific uses that some courts have sometimes held can be made of parliamentary utterances. I have no doubt that the CCC’s investigation and report was a calling into question or an impeachment in an “other place” of parliamentary proceedings, not least by undertaking an investigation and expressing conclusions about the merits and propriety of parliamentary conduct.93

DO THE STATUTORY PROVISIONS GOVERNING THE POWERS OF THE CCC ALTER PARLIAMENTARY PRIVILEGE?

8.45 As part of its consideration of this and the other questions relating to Article 9 of the Bill of Rights 1688 (UK), the Committee considered whether the legislation governing the CCC abrogated or altered any privilege, power or immunity possessed by the Houses of the Parliament such that the CCC’s use of proceedings in parliament, being

---

93 Opinion from Mr Bret Walker SC to the Legislative Council Procedure and Privileges Committee, 3 November 2016, paragraph 37, p 11.
the draft answers to Questions without Notice and associated emails would otherwise not breach parliamentary privilege.

8.46 The examination of this issue is complicated by the fact that the relevant section of the Corruption and Crime Commission Act 2003 (‘CCC Act’) relating to the preservation of the privileges of parliament was amended by the Corruption and Crime Commission Amendment (Misconduct) Act 2014. This amendment Act renamed the CCC Act to the Corruption, Crime and Misconduct Act 2003 (CCM Act).

8.47 Transitional provisions in this amendment Act meant that an allegation of misconduct received or initiated before 1 July 2015 had to be dealt with under the Act as it existed prior to it being amended. The inquiry by the CCC in relation to this matter therefore proceeded under the previous statutory regime. In relation to its effect on parliamentary privilege at the relevant time, the CCC Act provided in s 3(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 exclusively by a House of Parliament, unless that House so resolves. (emphasis added)

8.48 The words emphasised above recognised the powers and functions of the CCC in dealing with allegations of ‘minor’ misconduct against Members and the Clerk of a House or other commissioned officer involving parliamentary privilege under s 27A and s 27B of the CCC Act. The intrusion of the CCC into an area otherwise subject to the exclusive jurisdiction of the House by the operation of s. 27B(3) was cited in debate as the reason for this curious wording. Sections 27A and 27B were repealed by the 2014 amendment Act. The Committee notes that neither Ms Turnseck nor Mr Home are Members of Parliament or commissioned officers of a House of Parliament and therefore s 27A and s 27B had no application to the present case. The question of whether a person’s conduct constitutes a contempt or breach of privileges absent the operation of s 27A and s 27B of the CCC Act is therefore a matter exclusively for a House of Parliament.

8.49 The Committee notes that there is an element of concurrent or ‘shared’ jurisdiction with prosecutorial authorities in certain circumstances provided for in Part II, Chapter VIII of The Criminal Code and s.15 of the Parliamentary Privileges Act 1891. Part II, Chapter VIII of The Criminal Code contains the offences of interfering with the
legislature\(^96\) and giving false evidence before parliament\(^97\), both of which would constitute contempts of a House of Parliament. Each House of Parliament, at its discretion, may authorise Members and/or officers to give evidence of matters that would otherwise be privileged in the prosecution of offences under the sections of the Code referred to above. The statutory basis for such an action by a House of Parliament is contained in s 15 of the *Parliamentary Privileges Act 1891* which provides that a House of Parliament may direct the Attorney General to prosecute a person guilty of a contempt against a House which is punishable by law.

**8.50** There is a precedent for this action by the Legislative Council in *R v Smith* (1991) (1015/1990) (Unreported, District Court of Western Australia, O’Dea DCJ, 21 October 1991). On that occasion the Legislative Council resolved that the Attorney General be directed to prosecute an apparent instance of giving false testimony to a parliamentary committee by Mr Robert Mark Smith\(^98\). The Legislative Council granted leave for the Chief *Hansard* Reporter to attend the subsequent District Court trial to authenticate relevant *Hansard* transcripts\(^99\) and for four Members of the Legislative Council to attend trial to give evidence of what had occurred during the committee process\(^100\). The court subsequently convicted Mr Smith of two counts of giving false evidence before parliament contrary to s 57 of *The Criminal Code* and sentenced him to two concurrent terms of 10 months imprisonment.

**8.51** In respect of the matter of parliamentary questions involving Ms Turnseck there is no concurrent or ‘shared’ jurisdiction between the Houses of Parliament and the CCC provided by the Commission’s governing statute or any other law. Indeed, under its current statutory regime, the CCC would seem to have only, at best, a limited authority to prosecute for offences related to the administration and enforcement of its governing legislation\(^101\).

\(^{96}\) *The Criminal Code*, s 55.

\(^{97}\) *The Criminal Code*, s 57.


\(^{101}\) *A v Maughan* [2016] WASCA 128 at paragraph 2. The Court of Appeal determined that on the proper construction of the *Corruption and Crime Commission Act 2003* and the *Corruption, Crime and Misconduct Act 2003* the CCC’s powers and functions do not extend to the prosecution of persons in respect of matters investigated by the Commission which are otherwise unrelated to the administration and enforcement of the legislation establishing the Commission. The court also observed that the question of whether the Commission has authority to prosecute offences related to the administration and enforcement of the legislation establishing the Commission is a matter for judicial determination when this issue arises. See footnote 3, paragraph 2 per Martin CJ.
8.52 The jurisdiction of the CCC in relation to allegations of misconduct involving parliamentary privilege would appear to have been narrowed following the repeal of s 27A and s 27B and the amendment of s 3(2) made by the Corruption and Crime Commission Amendment (Misconduct) Act 2014 by which s 3(2) was reformulated as follows:

*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.* (emphasis added)

8.53 In his reply to the second reading debate in the Legislative Council on the Corruption and Crime Commission Amendment (Misconduct) Bill 2014 the Attorney General read a statement given by the Premier in the Legislative Assembly the purpose of which was to clarify the effect of the proposed amendment to section 3(2) of the then Corruption and Crime Commission Act 2003.

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

8.54 This statement and the amendments made by the Corruption and Crime Commission Amendment (Misconduct) Act 2014 reflect the limitations on the CCC’s broad investigatory powers which are wholly statutory in nature. The scope of the CCC’s powers in respect to its capacity to initiate prosecutions was explored in the recent decision of *A v Maughan* [2016] WASCA 128, in which the ‘principle of legality’ in statutory construction was discussed in some detail in the judgment of Martin CJ.

---

103 *A v Maughan* [2016] WASCA 128 at paragraphs 28 to 43.
This enduring principle was enunciated over a century ago by O'Connor J in *Potter v Minahan*:104

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used. (footnotes omitted)

8.55 As a result of the very broad scope of the CCC powers expressed in its governing statute, the parliament found it necessary when amending the CCC Act in 2014 to take the unusual step of expressing in irresistibly clear language that its privileges are not to be affected by the CCM Act. On the question as to whether the previous statutory regime under which the CCC’s investigation proceeded abrogated or altered any privilege power or immunity possessed by the Houses of the Parliament, the legal opinion of Mr Bret Walker SC was as follows:

> In my opinion nothing in the present case is affected by the fact that the pre-amended Corruption and Crime Commission Act 2003 (WA) was in force at the relevant time rather than the current Corruption, Crime and Misconduct Act 2003 (WA). The present case does not involve allegations of misconduct by Members of Parliament or officers of the Parliament.105

8.56 Mr Walker SC also makes the additional point that:

> In relation to the privilege of parliamentary Houses to protect themselves against contempt of their own proceedings there is really no scope, in the absence of plain statutory enactment, for some other organ of government to presume to deal with the matter. Such enactments do reveal that some contempts of Parliament are also serious crimes under the Criminal Code, such as bribery of a Member or threats of violence against Members or witnesses before parliamentary committees. Threatening a Member in relation to a past or future vote is an extremely serious contempt of Parliament, but the intent of criminal legislation is that it can also be prosecuted

---


105 Opinion from Mr Bret Walker SC to the Legislative Council Procedure and Privileges Committee, 3 November 2016, paragraph 47, p 14.
in the courts. However, the preparation of an answer to a parliamentary question does not find a purchase in the Criminal Code at all. The dispositive general proposition is that, properly construed, the Corruption and Crime Commission Act 2003 (WA) simply does not extend into such areas which do not fall within its expressed or necessarily implied wording, even when acknowledging the statute’s expansive concept of misconduct.\textsuperscript{106}

8.57 As a result of the forgoing discussion and findings the Committee has formed the view that the CCC has breached one of the essential privileges of the Legislative Council.

**Finding 17: The Committee finds:**

That the use by the Corruption and Crime Commission of proceedings in parliament, being the drafts of answers to Question without Notice C 192 and associated emails, to form an opinion of misconduct against Ms Turnseck impeached or questioned those proceedings. This is contrary to the immunity provided by Article 9 of the Bill of Rights 1688 (UK). The actions of the Corruption and Crime Commission therefore constituted a breach of parliamentary privilege.

**DID THE CCC’S USE OF PROCEEDINGS IN PARLIAMENT RESULT IN A SUBSTANTIAL INTERFERENCE WITH A PROCEEDING OF THE LEGISLATIVE COUNCIL?**

8.58 The final consideration for the Committee was whether or not the breach of privilege by the CCC resulted in a substantial interference with the performance of the functions of the Legislative Council, its Members or committees, or had a tendency to do so. The Committee has no doubt that the actions of the CCC were undertaken in good faith, notwithstanding the fact that it exceeded its jurisdiction.

8.59 The CCC has co-operated with and provided invaluable assistance to this Committee. The material provided by the CCC has allowed the Committee to thoroughly investigate the potential contempts and breaches of privilege against the Legislative Council in accordance with the Committee’s remit.

8.60 The Committee’s view is that the actions of the CCC have not, on this occasion, resulted in any substantial interference with the performance of the Legislative Council’s functions and nor have they had a tendency to do so. However, future actions by the CCC of infringing the privileges of the Parliament may not have the same benign outcome. The actions by the CCC in this particular matter should therefore not be treated by it as a precedent or be repeated.

\textsuperscript{106} Ibid, paragraph 38, p 9.
Consideration of how to manage similar investigations in the future was a matter reflected upon by Mr Bret Walker SC in his opinion to the Committee. He said:

> Pragmatically, there needs to be careful consideration of trying to combine practical and ideal elements. The practical element is that there has been valuable work done by the CCC in investigating the matter which ought to be taken for whatever it is worth by the Legislative Council’s Procedure and Privileges Committee, just as it might take for its own use a police report in another case, or a legal opinion. The ideal point, however, also needs to be emphasised that it is to be deprecated that there was apparently an assumption of power by the CCC which is very problematic. Consideration should be given to a more measured course of decision-making by the CCC when they are asked to, or otherwise minded to, inquire into occurrences which either are or have an obvious relation to proceedings in Parliament. It would be important, I think, to mark as explicitly as possible that this is not a precedent to be emulated. Without impugning the CCC’s good faith, it is a pity that it occurred.\(^{107}\)

---

**Finding 18: The Committee finds:**

That on this occasion the use by the Corruption and Crime Commission of the drafts of Legislative Council Question without Notice C 192 and associated emails did not substantially interfere with a proceeding of the Legislative Council.

---

8.62 The careful consideration of the *practical and ideal elements* referred to by Mr Walker SC has resulted in the Committee making a recommendation to assist with future cases of this nature.

**CCC COMMENT ON DRAFT FINDINGS AND RECOMMENDATIONS**

8.63 Prior to it reporting to the Legislative Council, the Committee provided the CCC with its draft findings and recommendations relating to the CCC to provide any comment on them or further relevant information to the Committee. The response from the CCC is contained at Appendix 5.

8.64 The Committee has considered the response but has not made any changes to its findings and recommendations as a result of the CCC’s comments. The Committee’s

---

\(^{107}\) Ibid, paragraph 40, p 12.
reply to the Commissioner, Hon John McKechnie QC, is also contained in Appendix 5.

8.65 The submission provided by the Commissioner of the CCC in response to the Committee’s preliminary findings and recommendations concerning the CCC was that:

(1) the CCC is not a “place” out of Parliament;

(2) the email and other exchanges by Ms Turnseck are not proceedings in Parliament; and

(3) if the Committee does not accept submission two logically, the CCC’s investigation and report are also proceedings of Parliament so the CCC’s place is not ‘out of Parliament’.

8.66 The Committee respectfully disagrees with each of these submissions.

8.67 Although there is no exhaustive statutory or judicial definition of a “place out of Parliament” for the purposes of Article 9 of the Bill of Rights 1688 (UK), the phrase has been generally accepted by Westminster parliaments worldwide to include any judicial or executive body that has the power to adversely affect Members of Parliament and other individuals participating in the work of the Parliament. It is not practical to limit the definition just to courts and tribunals, as the clear purpose of Article 9 has always been to protect parliamentary proceedings from interference by both the judiciary and the executive. The CCC, like other tribunals, royal commissions and various investigative bodies of the executive is clearly a “place out of Parliament” that is capable of infringing Article 9. Article 9 plainly covers a place as official as the CCC where what amounts to executive power is exercised separately from the Parliament.

8.68 The Committee is of the view that, in the absence of any exhaustive judicial or statutory definition as to what constitutes a “proceeding in Parliament” in Western Australia, the preferred position is that s 16(2) of the Parliamentary Privileges Act 1987 (Cth) accurately reflects the law: Prebble v Television New Zealand [1995] 1 AC 321. This definition relevantly includes “the preparation of a document for purposes of or incidental to the transacting of” any business of the Parliament. It is the Committee’s view, therefore, that a rather arbitrary line has been drawn by the CCC to distinguish between Mr Home’s physical drafting of a final draft answer to a Question without Notice, which the CCC agrees is a “proceeding in Parliament”, and the earlier draft attached to an email to Ms Turnseck and others, and telephone conversations between Mr Home and Ms Turnseck which provided Mr Home with the information that he needed to draft the answer and provide advice to Members of Parliament. The CCC asserts that the earlier draft of Questions without Notice C 192 and other communications necessary to compile this draft were not a “proceeding in
"Parliament". In the Committee’s view Ms Turnseck’s contribution was of the utmost importance to the answering of the parliamentary question, as she alone had the knowledge required to provide the answer. Ms Turnseck’s communications with Mr Home were therefore by any reasonable assessment clearly directly connected, rather than merely incidental or remote, to the answering of the parliamentary question. The earlier draft of Question without Notice C 192 and other related communications were thereby a part of the proceedings in Parliament.

8.69 There is no doubt, however, that the CCC on its own assessment used a proceeding in parliament, being the final draft produced by Mr Home in its examination of Ms Turnseck. One result of this examination and the CCC’s investigation was not only that Ms Turnseck had not been candid but that this final draft was wrong and that by extension the answer given in the Legislative Council was also wrong. This is the impeaching of proceedings intended to be avoided by compliance with Article 9.

8.70 The last of the CCC’s submissions was novel. It suggested that the CCC, or indeed by extension any statutory body that has a provision enabling it to present reports to the Parliament, may by the act of tabling such a report thereby retrospectively make both itself and the investigation a part of the “proceedings of Parliament”. The CCC would then become via this process practically incapable of infringing Parliament’s privileges under Article 9 of the Bill of Rights 1688 (UK). This submission is not one that can be supported by the Committee. Once again, the Committee finds this submission to be directly at odds with the purpose of Article 9, which is to protect the Parliament from infringements upon its privileges by the judicial and executive arms of government.
CHAPTER 9
CONCLUSIONS

9.1 The Committee has found that both Mr Stephen Home and Ms Rachael Turnseck have committed contempts of the Legislative Council. The contempts in question were the conduct by each of them in deliberately constructing an incomplete, misleading and ultimately false answer to a parliamentary question. This conduct is a substantial interference with the parliament’s information gathering and accountability functions. The facts supporting these findings are set out in this report. The available evidence does not support a finding of contempt or breach of privilege against any other natural person.

9.2 In relation to the the CCC, the Committee acknowledges that in the absence of the CCC investigation, it would have been unlikely that the evidence supporting the Committee’s findings of contempt against Mr Home and Ms Turnseck would have come to light. This evidence included draft answers to a parliamentary question prepared by Mr Home with the assistance of Ms Turnseck for the consideration and approval of the Premier and the Leader of the Government in the Legislative Council. The sole purpose of these activities was so that an answer to the question could be provided in the Legislative Council. The Committee has found that the draft answers to the parliamentary questions and associated emails were proceedings in parliament.

9.3 The CCC used the draft answers to the parliamentary question and associated emails to form an opinion of misconduct against Ms Turnseck by reason of her failure to adhere to the required standards of behaviour of a public officer. This outcome provides a stark reminder to all public officers involved in the drafting of answers to parliamentary questions of their obligations of honesty, fairness and impartiality in the discharge of their duties as well as the dire consequences of departing from those principles of conduct.

9.4 Article 9 of the Bill of Rights 1688 (UK) states that: “The freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.” The immunity afforded by Article 9 is provided to the Houses of Parliament, its Members and others involved in parliamentary proceedings. Article 9 is part of the law of this State. The Committee has found that the CCC has breached this essential immunity by its use of parliamentary proceedings and in doing so intruded into an area of the Parliament’s exclusive jurisdiction. The Committee cannot overstate the importance of the immunity provided under Article 9 as a bulwark against oppression of the Legislature by the Executive and Judicial arms of government. This remains the raison d’etre of the continuing relevance of a 330 year old UK statute to our parliamentary democracy.
9.5 On occasion, the demarcation of the jurisdictions of the Parliament and of investigative bodies such as the CCC may be difficult to discern. It is not always a bright line of separation. However, in this instance, there was such a clear bright line. The evidence relied on by the CCC to form its adverse opinion about Ms Turnseck’s conduct was so closely and directly connected to actions occurring in the Legislative Council as to make it obvious that this evidence constituted a proceeding in Parliament. The Committee would have expected the CCC to have known that using such materials to form an opinion on the conduct of a public officer in these circumstances would breach the immunity provided by Article 9.

9.6 By adopting the findings and recommendations of this Committee and enforcing any related orders, the Legislative Council will remind all those involved in parliamentary proceedings to conduct themselves with honesty, fairness and impartiality when carrying out their official duties. This task falls squarely within the exclusive jurisdiction of the Houses of Parliament. The CCC has no concurrent or ‘shared’ jurisdiction with the Parliament to investigate and pursue matters of this nature.

9.7 The Legislative Council, as in the past, will welcome any assistance that the CCC may provide to enable the House to determine whether a contempt or breach of its privileges has occurred. However, the CCC is not empowered by its statute to intrude upon the privileges of the Legislative Council. The Houses of Parliament, when first enacting the Corruption and Crime Commission Act 2003 and recent amendments made to it by the Corruption and Crime Commission Amendment (Misconduct) Act 2014 were careful to ensure that Parliamentary Privilege was expressly preserved. Section 3(2) of the Corruption, Crime and Misconduct Act 2003 is a clear expression of both the Parliament’s will and the law of this State in this regard.

9.8 Due deference is essential to avoid unnecessary conflict between the three arms of government. It is precisely for this reason that Article 9 of the Bill of Rights 1688 (UK) has been consistently asserted by Westminster based Parliaments, and observed by the Courts, quasi-judicial bodies, Royal Commissions, tribunals and other corruption bodies all of which fall within the meaning of a “court or place out of Parliament”. The potential for conflict to occur in this instance would have been eliminated if the CCC had complied with the exclusionary rule that applies to evidence of proceedings in Parliament under Article 9. Doing so would have required the CCC to decline to form an opinion regarding the conduct of Ms Turnseck in relation to Legislative Council Question without notice C 192 (No.176), and to refer the matter of her conduct together with any evidence it had obtained to the Legislative Council. This would have been consistent with previous action by the CCC where the activities of individuals involved possible contempts or breaches of the privileges of the Legislative Council.

9.9 The Committee is concerned by the decision of the Commissioner of the CCC to provide this part of the CCC report to the Premier rather than to the Parliament. If it
were not for the actions of the Premier in making the CCC report public by tabling it in the Legislative Assembly on 16 March 2016, the Legislative Council would have remained unaware of the possible contempts committed against it. This aspect of the CCC report was not a matter solely for the Premier as the Minister responsible for the Department of Premier and Cabinet and the employer of Mr Home and Ms Turnseck.\footnote{Public Sector Management Act 1994, s 68.} It was a matter that concerned the integrity of Question Time, one of the important mechanisms of the Legislature for obtaining information from the Executive and bringing it to account as an incidence of democratic governance in Western Australia. It was therefore also a matter that the Commissioner should have brought to the attention of the Legislative Council.

9.10 The Committee therefore strongly disagrees with the view expressed by the CCC in its report that there is no particular public interest in a report to Parliament on the conduct of Ms Turnseck when this conduct resulted in an incomplete, misleading and ultimately false answer to a parliamentary question being provided to the Legislative Council.\footnote{CCC Report, paragraph 19.} Where such conduct directly affects the integrity of a parliamentary proceeding, the CCC should advise the relevant House of the Legislature and, where practicable, provide it with all relevant evidence that it has obtained. This will enable the relevant House to deal with the matter under its inquiry and contempt powers as it has done in this particular case.

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

**Recommendation 1:** The Committee recommends:
That Mr Stephen Home be adjudged guilty of a contempt of the Legislative Council.

**Recommendation 2:** The Committee recommends:
That Mr Stephen Home do within 7 days unreservedly apologise in writing to the Legislative Council for providing incomplete and misleading information in answer to Question without Notice No. 176 (C 192) which rendered part 2 of the answer false in a material particular.

**Recommendation 3:** The Committee recommends:
That Ms Rachael Turnseck be adjudged guilty of a contempt of the Legislative Council.

**Recommendation 4:** The Committee recommends:
That Ms Rachael Turnseck do within 7 days unreservedly apologise in writing to the Legislative Council for providing incomplete and misleading information in answer to Question without Notice No. 176 (C 192) which rendered part 2 of the answer false in a material particular.
Recommendation 5: The Committee Recommends:

That a Memorandum of Understanding be developed between the Houses of the Parliament of Western Australia and the Corruption and Crime Commission to ensure that:

(a) in forming an opinion of misconduct against a public officer the CCC does not breach the privileges of the Parliament;

(c) conduct of public officers which constitutes a contempt or breach of privilege of the Houses of Parliament is dealt with by the relevant House of Parliament under the powers provided to the Houses by the *Parliamentary Privileges Act 1891*; and

(c) the CCC, where practicable, provide evidence in its custody, control or power to assist a House of Parliament to investigate and determine offences of contempt or breach of privilege.

Hon. Barry House MLC
Chair
8 November 2016
APPENDIX 1
LIST OF WITNESSES AND MEETINGS/HEARINGS HELD

WITNESSES AND HEARINGS HELD


DAYS OF MEETINGS

The Committee met on nine occasions.

- 23 March 2016;
- 27 April 2016;
- 20 June 2016;
- 24 June 2016;
- 18 July 2016;
- 17 August 2016;
- 21 September 2016;
- 19 October 2016; and
- 4 November 2016.
APPENDIX 2
STATEMENT FROM MR STEPHEN HOME

STATEMENT TO THE LEGISLATIVE COUNCIL PROCEDURE AND PRIVILEGES COMMITTEE
OF STEPHEN HOME, DEPUTY CHIEF OF STAFF, OFFICE OF THE PREMIER

I provide the following Statement to the Legislative Council Procedure and Privileges Committee to explain those actions of mine that are referred to in the recent Corruption and Crime Commission Report on the Investigation of Alleged Public Sector Misconduct in Relation to an Incident Involving the Hon Troy Buswell That Occurred on 23 February 2014.

It is my understanding that the decision of the President of the Legislative Council, under standing order 93(5), that a matter of privilege should be referred to the Procedure and Privileges Committee, is related solely to references in that Report to communications between the former Chief of Staff to Mr Buswell, Ms Rachael Turnseck, and myself about Parliamentary Question C192 submitted by Hon Sue Ellery MLC on 12 March 2014, and the subsequent response to that Question provided to and later read in the Legislative Council by the Hon Peter Collier MLC.

This Statement is accordingly limited to those references, and I make and offer no comment in relation to any matters outside the specific subject of the President's referral.

I preface this statement by advising that I am involved in the answering of numerous Parliamentary Questions, and my recollection of coordinating and providing the answer to this one, specific Parliamentary Question more than two years ago is imperfect. The facts that follow are my best recollections, as well as excerpts from relevant documents.

I believe it is important to consider this matter in the context of the relevant day. Wednesday 12 March 2014 was three days after the first media reports regarding the incident referred to in the CCC Report, and three days after the resignation of Troy Buswell from his Ministerial portfolios. It was two days after the Premier convened a media conference to announce Mr Buswell’s resignation and to outline what was known of the events leading up to this.

I was by that time aware of the parlous state of Mr Buswell's health immediately following the events of 22 and 23 February 2014, and of the crucial and possibly life-saving role played by Ms Turnseck in responding to the mental health crisis experienced by Mr Buswell.

A number of investigations into the incident had already commenced or were being foreshadowed, including a police investigation, and there was intense media attention including attempts by the media to locate Mr Buswell and Ms Turnseck.

Question Time in the Legislative Assembly the previous day had been dominated by questions regarding the incident involving Mr Buswell, including questions about whether anyone within the Premier's Office, Mr Buswell's Office and the Police Minister's Office had been informed about particular events at particular times.

Parliamentary Question C192 was received by the Premier's Office late on the morning of Wednesday 12 March, as follows:
Hon Sue Ellery to the Leader of the House representing the Premier

1. Has the Premier or anyone from his office asked the former Treasurer's Chief of Staff Ms Rachael Turnseck whether she discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his Chief of Staff and Ms Narelle Cant, and if not why not?

2. Has Ms Turnseck discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his Chief of Staff and Ms Narelle Cant, and if so with whom and when?

The officer responsible for ensuring answers to Legislative Council Questions circulated that question within the Premier's Office as is the normal process at 11.19am on 12 March. She included Rachael Turnseck in the distribution.

In a response to all on the distribution list sent at 11.25am Ms Turnseck stated:

*I am not going to be telling the Parliament or the general public about any conversation I may or may not have had about the personal circumstances of anyone, particularly not the former Treasurer, who by the way, continues to receive medical care for a very serious health condition. I'm not sure how you want to draft that response!*

I was asked (and I do not recall by whom) to coordinate and prepare a response to that question and two others, and emailed Ms Turnseck at 12.14pm as follows:

_Rachael_

_I'm knocking an answer together on these. Can you please call me asap._

_Steve_

I spoke to Ms Turnseck before drafting a response. In that conversation she informed me that she had had discussions with two members of Mr Buswell's immediate family in the period between 23 February and 10 March 2014.

At 12.47pm I circulated an email to all of those on the distribution list, stating:

_Draft for urgent comment please._

_I have not bothered to address any conversations past 10 March's announcement as clearly and obviously many conversations would have been had by everyone regarding what was publicly stated by the Premier on the 10th._

_Steve_

I attached a suggested answer to PQ C192 reflecting my conversation with Ms Turnseck as follows:

1. No. The concern of the Premier and his office has been the welfare of the Treasurer.

2. Prior to the Treasurer's resignation, no, other than with the Treasurer's direct family.
The reference in my email to not including conversations past 10 March's announcement relates to the fact that a literal reading of the Member's Question would include any number of conversations Ms Turnseck might have had after the Premier's public pronouncements on 10 March and the subsequent enquiries and discussions that ensued. I formed the view that the Member's Question was seeking to identify conversations or communications prior to the public revelations. To interpret it otherwise would have necessitated the inclusion of even the conversations being had on 12 March in the preparation of the response to the Question itself.

Ms Turnseck responded as follows at 12.54pm:

Hi S

My preference is to make no mention of Troy's family

Ta

I responded at 12.55pm, stating:

OK, will delete.

Steve

I subsequently amended the answer to part 2 to read:

Prior to the Treasurer's resignation, no.

That answer was then referred to the Premier's Office in Parliament House for consideration by the Premier and, with the inclusion of the word "former" in reference to the Treasurer, was ultimately read by the Hon Peter Collier MLC during the Legislative Council Question Time.

There is no evidence of, nor do I recall, any comment or contribution by anyone else to that answer. Further, I do not recall discussing the amendment with anyone else. My rationale for agreeing to remove the reference to discussions by Ms Turnseck with Mr Buswell's family derived from the context of the questions previously asked in the Parliament and the inferences and allegations being made at that time. I think I formed the view that discussions with the immediate family of someone suffering an acute mental health episode would simply be assumed, would be treated as personal, and fell outside the range of discussions the Member was hoping to unearth.

Having regard for the nature of subsequent questions and allegations regarding Mr Buswell and the events of February and March 2014 I accept that this assumption was misplaced. I further accept that the answer was not consistent with a literal reading of the question. I take responsibility for the exclusion of reference to Mr Buswell's family from the draft answer submitted. While I relied on Ms Turnseck's advice I was not subject to her direction in any way, and her "preference" that I make no mention of the former Minister's family was simply that, a preference. It was me who drafted and submitted the answer, not her.

I was unaware of any discussions, subsequently revealed in the CCC Report, between Ms Turnseck and Mr Leo Gibbons until I read that report in March of this year.

With respect to the omission that I did agree to, I strongly make the point that it is not rare for Parliamentary Questions received in the Premier's Office to be poorly or ambiguously constructed and interpretations of intent often have to be made before answers are sought and provided.

Question C192 is itself an example, with a literal reading of the second part meaning that all and any discussions by Ms Turnseck on the 10th, 11th and 12th March 2014, right up to the Legislative Council Question Time at 4.30pm, would fall within its scope. Interpreted literally in this way the question would be almost impossible to answer with complete confidence. Any
"discussions" Ms Turnseck might have had after the submission of a completed answer and before Question Time itself would, on a literal reading, render the answer incorrect.

I would also draw to the Committee's attention the fact that the procedures and timeframes for questions asked of Legislative Assembly Ministers via colleagues in the Legislative Council mean that persons preparing answers, in addition to often making interpretations as to the intent of the question (particularly those that may be opened ended or ambiguous) in very short timeframes, have little if any scope to seek clarification from the questioner relating to the scope of a question, or to provide detailed information to the Minister providing the answer so that he or she is fully aware of any ambiguity or other issue that bears on the answer. The task of the person preparing answers is to answer as accurately and as quickly as is possible in the circumstances.

The issue, as I understand it, that the Committee is considering is the misleading of the Council by omission in the answer to Question C192 of reference to discussions by Rachael Turnseck with immediate family members and the electorate officer of the then Minister and Member for Vasse at a time when, based on information I had and accept, and continue to accept unreservedly, he had suffered a serious breakdown and his very welfare was at risk.

The relevance and materiality of information about discussions with family members, and the right and appropriateness to seek its disclosure, is a matter on which I think people will have widely varying opinions.

I have had good cause and much time since the release of the CCC Report to reflect on the Parliamentary Question that is the subject of this proceeding. If that question had been asked of the Premier on that day, without notice, in the Legislative Assembly, it is quite clear that he would have been unable to answer it. He would not be able, nor could he be expected, to know of all and any discussions relevant to the question that had been had by Ms Turnseck. Further, in the context of the actions that she had taken post the events of 22 and 23 February not (on any reasonable expectation) forming part of the normal duties of a Chief of Staff, many discussions would have been personal in nature and not something that I believe the Premier would have required her to divulge.

In hindsight I do not believe it is a question that on its construction should have been answered at all, and I should have proposed this, with an explanation, for consideration by Minister Collier.

In conclusion I assure the Committee that I did not consciously deny the Member, and thereby the Council, any information that I thought was being sought. The information that I agreed to exclude from the answer to Question C192 was highly personal, at a time when Mr Buswell's mental health was still tenuous, and was not germane to the questions, allegations and insinuations emerging in the highly charged political environment of the time. I took Ms Turnseck's request to exclude the information about discussions with Mr Buswell's family from the answer to be solely out of concern for her former Minister and respect for the privacy of his immediate family, and still believe this to be the case.

Stephen Home

Deputy Chief of Staff

Office of the Premier

7 April 2016
APPENDIX 3

STATEMENT FROM MS RACHAEL TURNSECK

STATEMENT TO THE LEGISLATIVE COUNCIL PROCEDURE AND PRIVILEGES COMMITTEE OF MS RACHAEL TURNSECK (GIVEN 24 JUNE 2016)

Mr Chairman, honourable members of the committee, this matter concerns one of the answers given by Hon Peter Collier in the Council in response to Question without Notice C192. Along with others, I was involved in preparing drafts of the answer finally given. I accept and very much regret that the answer in the preparation of which I was involved was literally incorrect. I apologise unreservedly for this. I trust that the members of this committee will accept that at no time did I seek to mislead the Council. I hope that this committee will view my part in this incorrect answer being given to the Council in its proper context and, in particular, that the committee will accept that I interpreted the question being asked having regard to this context. I am grateful to the committee for providing me with the material that accompanied Mr Hitchcock’s letter of 14 June 2016. This material makes the explanation of these matters of context easier.

The first matter of context: the question was one of a series. Question 2 of Question without Notice C192 was one of a series of questions in Questions without Notice C190, C191 and C192. All questions concerned whether information concerning the events in the days leading up to Mr Buswell commencing personal leave. These events are now well known. All of the questions sought answers about whether information concerning these events had been provided to certain senior people in the government and the Liberal Party. Question without Notice C190 sought information about whether information had been provided to Mr Morton or anyone else at Liberal Party headquarters. Question without Notice C191 sought information about whether information had been provided by me to the Premier’s chief of staff, Mr Pontifex, or his senior adviser, Ms Cant. Plainly, the point of these questions was to determine who in the senior levels of the government and the Liberal Party headquarters was aware of events in the days leading up to Mr Buswell commencing personal leave and when they became aware of them. I understood when I was asked to comment on responses to Questions without Notice C190, C191 and C192 that Question without Notice C192 was directed at the same thing; that is, who in the senior levels of the government and the Liberal Party headquarters other than Mr Pontifex, Ms Cant and Mr Morton was aware of events in the days leading up to Mr Buswell commencing personal leave, and when they became aware of them.

A second matter of context: from my experience, I knew that the opposition was not interested in when Mr Buswell’s family became aware of events. I was involved in politics for a long time. I am aware that it is accepted by all participants in politics that politicians’ families are not targeted. I had no doubt that Hon Sue Ellery’s questions did not seek to uncover information concerning Mr Buswell’s family members’ knowledge of matters. In the first draft
answer to question 2 of Question without Notice C192 there was a reference to Mr Buswell’s family. This is annexed to the email of 12 March 2014 at 12.47 pm. Everyone who read this email and the draft answer knew that I had spoken with Mr Buswell’s family members. Obviously from the fact that the reference to family members was deleted, all people who received this email did not understand question 2 of Question without Notice C192 to be seeking information about Mr Buswell’s family members’ knowledge of matters.

A third matter of context: Mr Buswell’s relationship with Leo Gibbons. Leo Gibbons was at the relevant time an electorate officer of Mr Buswell who lived and worked in Mr Buswell’s electorate. Mr Gibbons was not a senior person in government or the Liberal Party headquarters. Unlike Mr Pontifex and Ms Cant, Mr Gibbons was not a senior member of the Premier’s staff or a senior person in government at all. Unlike Mr Morton, Mr Gibbons was not a senior officer of the Liberal Party. Indeed, Mr Gibbons was not part of the government at all. He was a member of the electorate staff. I also knew that although Mr Gibbons was at the time an electorate officer, his relationship with Mr Buswell was overwhelmingly a personal one, rather than a political one. They were close friends. In fact, Mr Gibbons accompanied Mr Buswell to Sydney for his treatment in a private psychiatric facility there. At the time that I was involved in assisting to draft the answer to question 2 of Question without Notice C192, I was quite sure that the question was not seeking information about Mr Buswell’s close friends’ knowledge of matters. Even though Mr Gibbons was an electorate officer, I understood that the question was seeking information about who in the senior levels of the government and the Liberal Party headquarters other than Mr Pontifex, Ms Cant and Mr Morton was aware of events in the days leading up to Mr Buswell commencing personal leave, and when they became aware of them. Whatever Mr Gibbons or members of Mr Buswell’s family knew about the events in the days leading up to Mr Buswell commencing personal leave and when they became aware of them was irrelevant to the questioner. This is because whatever Mr Gibbons or members of Mr Buswell’s family knew and when they knew it was irrelevant to the questioner, because whatever they knew and whenever they knew it could not cause political damage to the government.

So, having regard to these matters of context, I assisted with the drafting of the incorrect answer in the manner that can be seen in the emails of 12 March 2014. I did not believe that the question sought, in a literal sense, for me to name every person with whom I had spoken about the circumstances of the former Treasurer. Because I was Mr Buswell’s chief of staff at the time, I am sure that no member of Parliament would have thought that I would not have communicated with his family and close friends about Mr Buswell’s health. Correct or not, it was my belief that the parliamentary question sought to gain information about who at a senior level in government, in addition to the three people named in the question—the Premier, Brian Pontifex and Narelle Cant—I had spoken to about the former Treasurer prior to him taking leave. The three additional people beyond the former Treasurer I did speak to did not fit this definition.

I very much regret that I gave an unhelpful answer to a question when examined at the CCC. This is my answer at the top of page 83. The CCC concluded I had deliberately misled the
Council because of this answer. I think that this is most unfair. That answer should be read with the evidence that immediately followed it where I made the point that I did not think the question was relevant to him in the context of my understanding of what was being asked. I hope that members of this committee can accept that being called before private examinations of the CCC is a most confronting and stressful experience. I found it traumatic. I wish that I had expressed my evidence about this matter more articulately than I did. When I look back at this terrible experience, I accept that I should have advised Stephen Home I had spoken with Mr Gibbons, as I had advised him and others that I had spoken with members of Mr Buswell’s family. Even if I had done this, I would still not have wanted Mr Gibbons or members of Mr Buswell’s family mentioned in the answer. They were family or, in Mr Gibbon’s case, as close as family. Upon reflection, I accept that I should have provided an answer something along the lines of: no, other than with members of Mr Buswell’s family and a close personal friend. Or better still: not with anyone in the Premier’s office, with any member of Parliament or anyone in Liberal Party headquarters. I apologise that the answer provided was literally incorrect.
APPENDIX 4
RESPONSES TO THE COMMITTEE’S CORRESPONDENCE BY
OTHER PERSONS CONNECTED TO QUESTION WITHOUT
NOTICE NO. 176 (C 192)

1  CORRESPONDENCE SENT TO THE PREMIER, HON COLIN BARNETT MLA

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

27 July 2016

Hon Colin Barnett MLA
Premier
1 Parliament Place
WEST PERTH WA 6005

Dear Premier

RE: Matter of Privilege — Referral of a Matter of Privilege raised by Hon Sue Ellery MLC

On Thursday, 17 March 2016 Hon Sue Ellery raised a Matter of Privilege in the Legislative Council pursuant to Standing Order 93. A ‘Matter of Privilege’ concerns the alleged breach of a legal immunity or privilege enjoyed by a House of Parliament, their members or committees; and/or the commission of a contempt.

The Corruption and Crime Commission Report on the Investigation of Alleged Public Sector Misconduct in Relation to an Incident Involving the Hon Troy Buswell that Occurred on 23 February 2014 (29 February 2016) tabled on Wednesday, 16 March 2016 forms the basis of the matters raised by the Hon Sue Ellery. On Tuesday, 22 March 2016, in my capacity as President, I referred the Matter of Privilege to the Procedure and Privileges Committee to inquire and report to the Legislative Council. The Committee has agreed on terms of reference for its inquiry and on Thursday, 24 March 2016 reported them to the Legislative Council as follows:
In relation to Legislative Council Question without Notice No.176 asked by the Leader of the Opposition, Hon Sue Ellery, and answered on 12 March 2014 by the Leader of the House, the Hon Peter Collier, in his capacity as the Minister representing the Premier:

1. Did Ms Rachael Turnseck commit a contempt of this House or any breach of its privileges?
2. Did Mr Stephen Home commit a contempt of this House or any breach of its privileges?
3. Did any other person or body commit a contempt of this House or any breach of its privileges?

On Monday, 20 June 2016 and Friday, 24 June 2016 the Committee held private hearings to obtain evidence from witnesses in relation to its inquiry.

During the course of these hearings the Committee received evidence from a witness regarding how and when Ms Rachael Turnseck had communicated her knowledge of events (the subject of the answer to Legislative Council Question without Notice No. 176) to certain people, other than those persons named in the question. You should note that the number allocated to this question for Department of Premier and Cabinet internal administrative purposes prior to it being answered in the Legislative Council was C192.

Specifically, the evidence received from the witness was as follows:

Ms Turnseck: Obviously, the Premier, when I had had a conversation with him, knew that I had been in touch with Troy’s family. I would have said that. Similarly, with Brian and Narelle. So, that exchange of emails would not have been the first time that those three individuals knew that I had communicated with his family.

AND

Hon MARTIN ALDRIDGE: So your role in relation to C192 was obviously providing advice to what would appear to be Mr Home, who had responsibility for drafting the question, and, one would assume, the Premier, who would have to give approval for the question to be transmitted.

Ms Turnseck: Yes.

I have attached for your assistance copies of:

1. The chain of emails referred to by Ms Turnseck in her evidence above; and
2. An extract from Hansard regarding the answer to Question without Notice No. 176 (C192) given on 12 March 2014.

In order to progress its inquiry, the Committee has resolved to write to you requesting answers to the following questions arising out of the private evidence received by the Committee:

Prior to Legislative Council Question without Notice No.176 (C192) being answered in the Legislative Council on 12 March 2014 —

(1) Were you aware that Ms Rachael Turnseck had spoken to members of Mr Buswell’s family?
(2) Were you aware that Ms Rachael Turnseck had spoken to Mr Leo
Gibbons?

(3) If yes to (1) or (2), when and how did you become aware that Ms Rachael Turnseck had spoken with members of Mr Buswell’s family and Mr Leo Gibbons?

(4) What specific information, advice, assistance or direction did you provide in formulating the answer to that question?

(5) To whom was the information, advice, assistance or direction provided?

(6) Did you authorise the answer to Question without Notice No. 176 (C192) prior to it being answered by the Leader of the House, Hon Peter Collier MLC, in the Legislative Council on 12 March 2014, and if so, in what way?

(7) Staff within Nick Hagley’s office circulates the authorised answer to the relevant Minister or Member to answer in the Legislative Council. Can you please identify the specific person(s) who circulated the finalised answer to the Leader of the House in this instance?

(8) Can you please advise whether it is the practice of Cabinet Services to scan and retain electronic copies of the hardcopy of signed answers?

(9) Does the Department of Premier and Cabinet have a disposal and retention policy under the State Records Act 2000, or independent of this Act, that applies to signed answers to parliamentary questions, and if it does, can you please provide a copy?

(10) Was the signed original of the answer to Question without Notice No. 176 disposed of in accordance with a disposal and retention policy?

(11) When and how was the signed original of the answer to Question without Notice No. 176 disposed of?

Please note that this correspondence is privileged and confidential and refers to evidence that remains private to the Committee. You may only disclose or copy this material to your legal adviser. If further disclosure to officers and agencies is necessary to obtain the information sought by the Committee in this correspondence, you must first seek the approval of the Committee.

It would be appreciated if you could provide the answers to the question to the Usher of the Black Rod by **5.00pm on Wednesday, 10 August 2016**. If you have any questions about this correspondence, please contact Mr Grant Hitchcock, Usher of the Black Rod, on (08) 9222 7891 or email: ghitchcock@parliament.wa.gov.au
Yours sincerely,

HON. BARRY HOUSE MLC
PRESIDENT
CHAIR, PROCEDURE AND PRIVILEGES COMMITTEE

Enc. Email chain
Extract from Hansard: Question without Notice No. 176 (C192)
RESPONSE RECEIVED FROM THE PREMIER, HON COLIN BARNETT MLA

Hon Barry House MLC
President
Chair, Procedure and Privileges Committee
Legislative Council, Western Australia
Parliament House
Harvest Terrace
WEST PERTH WA 6005

Dear President

In response to your letter of 27 July 2016, please find enclosed answers to the questions asked of me by the Committee.

Yours sincerely

[Signature]

Colin Barnett MLA
PREMIER

10 AUG 2016
1. I would expect in matters such as this a person’s family would be advised.

2. No.

3. I do not recall Ms Turnseck specifically advising me of that.

4. None. I initialled the answer before it was passed to the relevant Minister as is the usual practice.

5. Not applicable.

6. Yes, see 4 above.

7. I am not aware who circulated the finalised answer.

8. I am not aware. You should refer the request to Cabinet Services who handle such matters.

9. The Department of the Premier and Cabinet have a records plan. You should refer the request to the Department.

10. I am not aware of this matter.

11. I am not aware of this matter.
STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

27 July 2016

Mr Brian Pontifex
Ms Narelle Cant

Dear

RE: Matter of Privilege — Referral of a Matter of Privilege raised by Hon Sue Ellery MLC

On Thursday, 17 March 2016 Hon Sue Ellery raised a Matter of Privilege in the Legislative Council pursuant to Standing Order 93. A ‘Matter of Privilege’ concerns the alleged breach of a legal immunity or privilege enjoyed by a House of Parliament, their members or committees; and/or the commission of a contempt.

The Corruption and Crime Commission Report on the Investigation of Alleged Public Sector Misconduct in Relation to an Incident Involving the Hon Troy Buswell that Occurred on 23 February 2014 (29 February 2016) tabled on Wednesday, 16 March 2016 forms the basis of the matters raised by the Hon Sue Ellery. On Tuesday, 22 March 2016, in my capacity as President, I referred the Matter of Privilege to the Procedure and Privileges Committee to inquire and report to the Legislative Council. The Committee has agreed on terms of reference for its inquiry and on Thursday, 24 March 2016 reported them to the Legislative Council as follows:

In relation to Legislative Council Question without Notice No.176 asked by the Leader of the Opposition, Hon Sue Ellery, and answered on 12 March 2014 by the Leader of the House, the Hon Peter Collier, in his capacity as the Minister representing the Premier:

1. Did Ms Rachael Turnseck commit a contempt of this House or any breach of its privileges?
2. Did Mr Stephen Home commit a contempt of this House or any breach of its privileges?

3. Did any other person or body commit a contempt of this House or any breach of its privileges?

On Monday, 20 June 2016 and Friday, 24 June 2016 the Committee held private hearings to obtain evidence from witnesses in relation to its inquiry.

During the course of these hearings the Committee received evidence from a witness regarding how and when Ms Rachael Turnseck had communicated her knowledge of events (the subject of the answer to Legislative Council Question without Notice No. 176) to certain people, other than those persons named in the question. You should note that the number allocated to this question for Department of Premier and Cabinet internal administrative purposes prior to it being answered in the Legislative Council was C192.

Specifically, the evidence received from the witness was as follows:

Ms Turnseck: Obviously, the Premier, when I had had a conversation with him, knew that I had been in touch with Troy’s family. I would have said that. Similarly, with Brian and Narelle. So, that exchange of emails would not have been the first time that those three individuals knew that I had communicated with his family.

I have attached for your assistance copies of:

3. The chain of emails referred to by Ms Turnseck in her evidence above; and
4. An extract from Hansard regarding the answer to Question without Notice No. 176 (C192) given on 12 March 2014.

In order to progress its inquiry, the Committee has resolved to write to you requesting answers to the following questions arising out of the private evidence received by the Committee:

Prior to Legislative Council Question without Notice No. 176 (C192) being answered in the Legislative Council on 12 March 2014 —

(1) Were you aware that Ms Rachael Turnseck had spoken to members of Mr Buswell’s family?

(2) Were you aware that Ms Rachael Turnseck had spoken to Mr Leo Gibbons?

(3) If yes to (1) or (2), when and how did you become aware that Ms Rachael Turnseck had spoken with members of Mr Buswell’s family and Mr Leo Gibbons?

(4) What specific information, advice, assistance or direction did you provide in formulating the answer to that question?

(5) To whom was the information, advice, assistance or direction provided?
Please note that this correspondence is privileged and confidential and refers to evidence that remains private to the Committee. You may only disclose or copy this material to your legal adviser. If further disclosure to officers and agencies is necessary to obtain the information sought by the Committee in this correspondence, you must first seek the approval of the Committee.

It would be appreciated if you could provide the answers to the question to the Usher of the Black Rod by 5.00pm on Wednesday, 10 August 2016. If you have any questions about this correspondence, please contact Mr Grant Hitchcock, Usher of the Black Rod, on (08) 9222 7891 or email: ghitchcock@parliament.wa.gov.au

Yours sincerely,

HON. BARRY HOUSE MLC
PRESIDENT
CHAIR, PROCEDURE AND PRIVILEGES COMMITTEE

Enc. Email chain
Extract from Hansard: Question without Notice No. 176 (C192)
Mr Brian Pontifex

9 August 2016

Hon. Barry House MLC
President
Chair, Procedure and Privileges Committee
Parliament of Western Australia

Dear Hon. Barry House MLC,

I refer to your letter dated 27 July 2016 requesting me to answer five questions arising out of evidence received by the Committee as part of an ongoing inquiry of the Procedures and Privileges Committee of the Legislative Council. My response to the questions are as follows:

(1) Yes, as per response to question (3) below.

(2) No.

(3) With respect to (1) above, on 25 February 2014, at a meeting attended by Ms Turnseck, Ms Cant and myself, I recall that Ms Turnseck indicated that she had spoken to members of Mr Buswell’s family about Mr Buswell’s immediate medical condition and treatment. Apart from that information, I do not recall Ms Turnseck indicating that she had discussed the events in the days leading up to the former Treasurer taking personal leave, with Mr Buswell’s family.

(4) I do not recall providing any specific information, advice, assistance or direction in formulating the answer to that question.

(5) Refer to answer (4) above.

I trust this response is of assistance to the Committee.

Yours sincerely,

Brian Pontifex
Ms Narelle Cant

Answers to questions asked by the Standing Committee on Procedure and Privileges:

1. Yes.
2. To the best of my recollection, no.
3. To the best of my recollection, I became aware that Ms Rachael Turnseck had spoken with members of Mr Buswell’s family during discussions about Mr Buswell’s welfare on Tuesday 25 February, 2014.
4. To the best of my recollection, I did not provide advice, assistance or direction in formulating the answer to question without notice No. 176 (C192).
5. N/A.

Narelle Cant
CORRESPONDENCE SENT TO MS ROXANA PIKE, MS DIXIE MARSHALL AND MR ZAK KIRKUP

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

27 July 2016

Ms Roxana Pike
Ms Dixie Marshall
Mr Zak Kirkup

Dear

RE: Matter of Privilege — Referral of a Matter of Privilege raised by Hon Sue Ellery MLC

On Thursday, 17 March 2016 Hon Sue Ellery raised a Matter of Privilege in the Legislative Council pursuant to Standing Order 93. A ‘Matter of Privilege’ concerns the alleged breach of a legal immunity or privilege enjoyed by a House of Parliament, their members or committees; and/or the commission of a contempt.

The Corruption and Crime Commission Report on the Investigation of Alleged Public Sector Misconduct in Relation to an Incident Involving the Hon Troy Buswell that Occurred on 23 February 2014 (29 February 2016) tabled on Wednesday, 16 March 2016 forms the basis of the matters raised by the Hon Sue Ellery. On Tuesday, 22 March 2016, in my capacity as President, I referred the Matter of Privilege to the Procedure and Privileges Committee to inquire and report to the Legislative Council. The Committee has agreed on terms of reference for its inquiry and on Thursday, 24 March 2016 reported them to the Legislative Council as follows:

In relation to Legislative Council Question without Notice No.176 asked by the Leader of the Opposition, Hon Sue Ellery, and answered on 12 March 2014 by the Leader of the House, the Hon Peter Collier, in his capacity as the Minister representing the Premier:

1. Did Ms Rachael Turnseck commit a contempt of this House or any breach of its privileges?

106
2. Did Mr Stephen Home commit a contempt of this House or any breach of its privileges?

3. Did any other person or body commit a contempt of this House or any breach of its privileges?

In order to progress its inquiry, the Committee has resolved to write to you requesting an answer to the following questions relevant to the Committee’s inquiry. It would assist the Committee if your answers are typewritten on one side of an A4 size sheet of paper. Please sign and date the answers.

(1) In relation to Legislative Council Question without Notice No. 176 asked by the Leader of the Opposition, Hon Sue Ellery, and answered on 12 March 2014 by the Leader of the House, the Hon Peter Collier, in his capacity as the Minister representing the Premier, did you provide any specific information, advice, assistance or direction in formulating the answer to that question?

(2) If yes to (1), what specific information, advice, assistance or direction did you provide in formulating the answer to that question?

(3) If yes to (1), to whom was the information, advice, assistance or direction provided?

I have attached for your assistance copies of:

5. A chain of relevant email correspondence; and
6. An extract from Hansard regarding the answer to Question without Notice No. 176 (C192) given on 12 March 2014.

Please note that this correspondence is privileged and confidential and refers to evidence that remains private to the Committee. You may only disclose or copy this material to your legal adviser. If further disclosure to officers and agencies is necessary to obtain the information sought by the Committee in this correspondence, you must first seek the approval of the Committee.

It would be appreciated if you could provide the answers to the question to the Usher of the Black Rod by **5.00pm on Wednesday, 10 August 2016**. If you have any questions about this correspondence, please contact Mr Grant Hitchcock, Usher of the Black Rod, on (08) 9222 7891 or email: ghitchcock@parliament.wa.gov.au
Yours sincerely,

HON. BARRY HOUSE MLC
PRESIDENT
CHAIR, PROCEDURE AND PRIVILEGES COMMITTEE

Enc. Email chain
Extract from *Hansard*: Question without Notice No. 176 (C192)
RESPONSES RECEIVED FROM MS ROXANA PIKE, MS DIXIE MARSHALL AND MR ZAK KIRKUP

Ms Roxana Pike

Procedure and Privileges Committee (Legislative Council)
Referral of a Matter of Privilege raised by Hon Sue Ellery MLC

In response to your queries:

1. No
2. N/A
3. N/A

Please do not hesitate to contact me if I can be of any further assistance.

Kind regards

Roxana Pike

8/8/2016
Hon. Barry House MLC
President
Chair, Procedure and Privileges Committee

In answer to your questions:

1. No
2. Not applicable
3. Not applicable

Dixie Marshall
8 August, 2016
1 September 2016

The Honourable Barry John House MLC BEc, JP
President of the Legislative Council
Chair, Procedure and Privileges Committee
Parliament House
WESTERN AUSTRALIA

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

Dear Hon. President

Referral of a Matter of Privilege raised by Hon. Suzanne Ellery MLC

Thank you for your correspondence dated 27 July 2016, received 31 August 2016 via my campaign email account zk@kirkup.com.au.

Notwithstanding that QWN no.176 was answered by the Minister representing the Premier some 904 days ago, I can confidently submit the following answer:

(1) No.
(2) Not applicable.
(3) Not applicable.

Yours sincerely

Zak Kirkup
Liberal Candidate for Dawesville
APPENDIX 5
RESPONSES TO THE COMMITTEE’S PRELIMINARY FINDINGS
AND RECOMMENDATIONS

1 RESPONSE FROM MR STEPHEN HOME

Hon Barry House MLC
President; Chair, Procedure and Privileges Committee
Legislative Council
Parliament House
Harvest Terrace
PERTH WA 6000

Dear Mr House

Matter of Privilege

I refer to your letter of 19 October 2016.

I note that the Committee has chosen not to provide me with the reasoning behind its specific findings and recommendations. In the absence of such reasoning I dispute that the amendment I made to the answer in question was “substantial”, and that the consequential omission, being the failure to reference discussions of a deeply personal nature between Ms Rachael Turnseck and family members of the former Treasurer Mr Troy Buswell, was “material”.

I would appreciate being advised when or before the Committee’s report is presented what is the consequence of the provision by me of an unreserved apology. By that I mean I wish to know before I consider providing such an apology whether the apology would be the end of this matter.

Yours sincerely

Stephen Home
DEPUTY CHIEF OF STAFF
27/10/16
STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

7 November 2016

Mr Stephen Home
c/o Premier’s Office
Department of Premier and Cabinet
Dumas House
2 Havelock Street
WEST PERTH WA 6005

Dear Mr Home

RE: A Matter of Privilege raised by Hon Sue Ellery MLC

Thank you for your letter dated 27 October 2016.

The Committee only has a power to make findings and recommendations to the Legislative Council in accordance with its terms of reference. The Committee’s findings and recommendations have been made as a result of its consideration of evidence it has received.

This evidence includes the relevant email exchanges between you and Ms Rachael Turnseck of which you are aware, the oral evidence you gave to the Committee on Friday, 20 June 2016, and publicly available material contained in the Corruption and Crime Commission’s Report of Alleged Public Sector Misconduct in Relation to an Incident Involving the Hon. Troy Buswell that Occurred on 23 February 2014. It is for the Legislative Council to make any orders flowing from the Committee’s findings and recommendations.

Should the Legislative Council order you to make an unreserved apology, the order would be served on you and any time limit specified in the order would commence on the day immediately following service. Compliance with the order would involve you writing to the President of the Legislative Council and making an apology that complies with the terms of the order. That correspondence would be tabled in the Legislative Council and, if accepted by the House, may be the end of this matter.

Please note that under the Parliamentary Privileges Act 1891 a failure to comply with an order of a House of Parliament would constitute a contempt.

I will ensure that you are emailed a copy of the Committee’s final report immediately after it is tabled in the House.

Yours sincerely,

HON BARRY HOUSE MLC
PRESIDENT
CHAIR, PROCEDURE AND PRIVILEGES COMMITTEE
3 RESPONSE FROM THE COMMISSIONER OF THE CORRUPTION AND CRIME COMMISSION

3 November 2016
Hon. Barry House, MLC
President of the Legislative Council
Chair, Procedure and Privileges Committee
Parliament House
Harvest Terrace
PERTH WA 6000

Dear Mr House

RE: MATTER OF PRIVILEGE - REFERRAL OF A MATTER OF PRIVILEGE RAISED BY
HON SUE ELLERY MLC

Thank you for your letter of 19 October 2016.

The Commission makes no comment on preliminary findings 14, 18 and preliminary recommendation 5.

The Commission’s submissions in respect to preliminary findings 15, 16 and 17 are attached.

In summary the Commission respectfully submits:

1. The Commission is not a “place” out of Parliament;
2. The email and other exchanges by Ms Turnseck are not proceedings of Parliament; and
3. If the Committee does not accept submission two logically, the Commission’s Investigation and report are also proceedings of Parliament so the Commission’s place is not ‘out of Parliament’.

The Commission respectfully requests the Committee does not finalise its report in terms of those preliminary findings.

Yours sincerely

John McKechnie, QC
COMMISSIONER
Encl.
Submissions to the Procedure and Privileges Committee of the Legislative Council on a number of preliminary findings made by the Committee on a matter of privilege raised by the Hon. Sue Ellery MLC.

Introduction

1. On 28 February 2016 the Commission reported to the Honourable Premier on alleged Public Sector misconduct in relation to an incident involving the Hon. Troy Buswell that occurred on 23 February 2014.¹


3. The Procedures and Privileges Committee wrote to the Commission on 19 October 2016 outlining a number of preliminary findings and recommendations, providing the Commission with the opportunity to respond by 5.00pm on Thursday, 3 November 2016.

4. The Commission makes no response to the preliminary findings 14 and 18.

5. It makes no response to preliminary recommendation 5. It will wait to see the terms of any proposed memorandum of understanding before making any response.

The Commission's Response in Summary

6. The Commission does respond to preliminary findings 15, 16, 17 and respectfully requests the Committee to withdraw the findings. It is respectfully submitted that the Committee has misconceived the purpose and powers of the Commission and has thereby led itself into error in concluding it is a 'place out of Parliament'. It has with respect also erred in concluding that the matters outlined in preliminary finding 16 in concluding that the matters outlined in the finding were 'proceedings in Parliament'. If, contrary to the Commission's submissions, those matters were 'proceedings in Parliament' then, by the same logic, so was the Commission's investigation and report and the Commission did not then breach privilege. The Commission respectfully submits that the Commission has not breached the privileges of Parliament. It is not a 'place out of Parliament'; it is a servant of Parliament.

Submission 1 - The Commission is not 'a place out of Parliament'.

7. The Committee has made preliminary finding 15.

That the Corruption and Crime Commission is a place out of Parliament within the meaning of Article 9 of the Bill of Rights 1688 UK.

¹ Corruption Crime and Misconduct Act 2003 s. 89.
8. The Commission accepts that Article 9 of the Bill of Rights UK is one of a bundle of rights\(^2\) that are compendiously referred to as the privileges of WA Parliament.\(^3\)

9. The Commission contends that the Commission is not a 'place out of Parliament' and that Article 9 is therefore of no effect.

10. The Commission accepts that the prohibition in Article 9 is not confined to the questioning of parliamentary proceedings in courts. It applies also to any 'place out of Parliament'. As the United Kingdom Joint Committee of the House of Lords and House of Commons on Parliamentary Privilege noted in its 1999 report, 'place out of Parliament' is an obscure expression of uncertain meaning.\(^4\)

11. None of the Australian enactments on parliamentary privilege contain a definition of the expression 'place out of Parliament'. In her text 'Parliamentary Privilege' Professor Campbell notes that this question has 'not been answered completely by judicial decisions'.\(^5\)

12. Read literally, 'place out of Parliament' would prevent critical discussion of anything said or done in Parliament anywhere other than in Parliament itself. As the United Kingdom Joint Committee concluded in its report 'That cannot be right, and this meaning has never been suggested'.\(^6\)

13. The history of Article 9 and its purpose indicate a much narrower approach to 'place'.

14. The primary object of Article 9 becomes clear when regard is had to the history of the glorious revolution, the abdication of James 1 and the terms on which William and Mary of Orange were offered the throne. It drew inspiration among other sources from John Locke Two Treatises on Government especially the second treatise from p. 269. Article 9 was a response to the misuse by the King of the Prerogative and the Kings Courts. It was an affirmation of the equality of the Houses of Parliament especially the House of Commons, with the Crown in governing the country.

15. Erskine May makes the observation that the privilege which formerly protected members against action by the Crown now serves largely as protection against their prosecution by individuals or corporate bodies. Consistently with this

---


\(^3\) Halden v Marks (1995) 17 WAR 447 (461).


\(^6\) Supra n 4.
trend, sight may have been lost of the original conception of the privilege as a protection devised in the interests of the public, rather than for the protection of the individual member against the public.  

16. The Privy Council in *Prebble v TV New Zealand* [1995] 1 AC 321 stated the basic concept underlying Article 9 as:

   ... the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts.  

17. In articulating the purpose of Article 9, the Privy Council in *Prebble* referred specifically to ‘the courts’ and to the general principle that no one should incur legal liability for things said or done in the course of parliamentary proceedings.

18. In *R v Murphy* (1986) NSWLR 18 Hunt J applied a *ejusdem generis* approach to the interpretation of the word ‘place’ in the phrase ‘court or place out of Parliament’. Hunt J considered that the ordinary rules of statutory interpretation require that the meaning attributable to the word ‘place’ be construed by reference to the preceding words, its context and intended object. Accordingly, Hunt J narrowly interpreted Article 9 as preventing the visiting of legal consequences upon a person for having made parliamentary statements.


20. The Commonwealth Act s. 16(1) confirms that the provisions of Article 9 apply in relation to the Parliament of the Commonwealth. It goes further and explains the privilege. The Commonwealth Act s. 16(3) states that:

   (3) **In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:**

   (a) **questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;**

   (b) **otherwise questioning or establishing the credibility, motive, intention or good faith of any person;**

   (c) **or drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.**

---

7 Supra n 2 at 82.
8 *Prebble v TV New Zealand* [1995] 1 AC 321 at 334.
9 *R v Murphy* (1986) NSWLR 18 at 29-30 per Hunt J.
10 ibid.
21. The Commonwealth Act s. 3 defines 'tribunal' to mean 'any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a royal commission or other commission of inquiry of the Commonwealth or of a State or Territory having that power'. The fact that the Commonwealth specifically legislated to include these bodies suggests that it was not generally accepted that otherwise they fell within Article 9 and the definition of 'place'.

22. The Privy Council in Prebble regarded Hunt J's view in Murphy as erroneous, noting that the Commonwealth Act s. 16(3) contained the 'true principle to be applied'.

23. There is no equivalent to the Commonwealth Act s. 16 in Western Australia.

24. In Rann v Olsen [2000] SASC 83 Doyle CJ noted that different approaches are required for the interpretation of Article 9 and the Commonwealth Act. Doyle CJ noted that:

   Article 9 states a broad principle, and is more readily interpreted by reference to the object of that principle. It is simply not possible to approach the specific terms of s16(3) in the same fashion. Article 9 is, on its terms, brief and general, and lends itself to development and application in terms of traditional common law reasoning.

25. In the Commission's submission the purpose and objects of Article 9 indicate that 'place' is to be interpreted ejusdem generis with 'court'. However, rather than confining Article 9 to the prevention of the visiting of legal consequences upon a person as Hunt J did in Murphy, in the Commission's submission, the ordinary rules of statutory interpretation require that the meaning attributable to the word 'place' is to a class of proceedings where a person is exposed to the risk of some kind of sanction, determination or finding that has an operative legal effect.

26. The Privy Council's main criticism of the reasoning of Hunt J in Murphy was based on his analysis on a narrow construction of Article 9 derived from the fact that the object of Article 9 was to ensure that a member of Parliament could not be liable for what he or she said in Parliament. However, in the Commission's submission, to attract the protection of Article 9, a tribunal must at the least be a body which can pronounce rights, apportion liability or impose some form of sanctions before it meets the definition of 'place'.

---

11 Supra n 8 at 333.
12 Rann v Olsen [2000] SASC 83 at [108] per Doyle CJ.
13 Supra n 8.
A concession made is withdrawn

27. In her Review of the Corruption and Crime Commission Act 2003 ("CCM Act") Ms Gail Archer SC, while concluding that Parliament intended that the Commission be constrained by Article 9, recommended that 'assuming that Parliament continues to consider that the CCC should be constrained by Article 9 of the Bill of Rights, the Act should be amended to make that clear'.

28. In its submission to the Joint Standing Committee on the Corruption and Crime Commission ("JSCCCC") in response to Ms Archer SC's review, the Commission stated that 'The Commission considers it is bound by Article 9 of the Bill of Rights but in the interests of clarity supports the recommendation.' That submission accorded with the view of the then Hon. Commissioner Roberts-Smith QC.

29. Partly because of the Commission's submission, in its report 'Analysis of Recommended Reforms to the Corruption and Crime Commission Act 2003' the JSCCCC opposed Ms Archer SC's recommendation on the basis that it was unnecessary.

30. Largely on the basis of the Commission's concession, no change to the CCM Act s. 3(2) has been considered by the JSCCCC.

31. With respect to the Commission's previous position, the Commission now holds a different view.

32. At the time of the concession the Commission held the view that it had power to lay charges and prosecute persons accused of a criminal offence. That view was incorrect: A v Maughan.

33. That mistaken view may have helped inform the concession.

34. If the Commission did have power of its own motion to prosecute before a Court then a contention that the Commission was a place out of Parliament might be strengthened. But it does not.

35. The Commission's review was completed in early 2008, well before the Court of Appeal decision in Cox v Corruption and Crime Commission [2008]

---

16 As noted by Gail Archer SC in her review, Supra n 14, 221 [697].
17 Supra n 15.
18 (2016) WASCA 128.
WASCA 199. That decision clarified the role of the Commission confirming its lack of power to impose sanctions or make determinations:

The third reason the argument must be rejected requires attention to be directed to the nature of the function performed by the Commission in its report. The Commission does not perform the function of making binding adjudications or determinations of right. It is neither a court nor an administrative body or tribunal in the usual sense of those expressions. In the performance of the misconduct function it is an investigative agency. After conducting investigations, its role is limited to making assessments, expressing opinions and putting forward recommendations as to the steps which should be taken by others. In characterising the findings made by the Commission as 'assessments' and 'opinions' it is clear that the legislature intended that the conclusions of the Commission should not be regarded as determinative or binding in any subsequent proceedings. So, if the Commission expresses an opinion that a member of the public service has been guilty of misconduct and that disciplinary proceedings are warranted, the question of whether or not a breach of discipline has been committed can only be authoritatively determined in the course of subsequent disciplinary proceedings instituted by the relevant employing authority, and not by the Commission.

"... Put another way the ambit of the jurisdiction conferred upon the Commission is to be assessed having regard to the essential character of its misconduct function, which is to make assessments, form opinions and perhaps put forward recommendations, and not, at least in this context, to make authoritative determinations which affect legal rights or obligations."

36. The Commission's relevant powers are to:

(a) make assessments and form opinions;

(b) investigate or take other action in relation to allegations and matters related to serious misconduct;

(c) make recommendations and furnish reports, including to Parliament; and

(d) furnish to an independent agency evidence which may be admissible in the prosecution of a person for a criminal offence.

37. The Commission investigates and relevantly reports to Parliament or another body with authority to make decisions.

38. The Commission furnishes evidence to another body who makes decisions on a prosecution.

---


20 CCM Act s. 18, 84.
39. As in the case of the report the subject of the Committee’s enquiry, the Commission exercises no power in respect of any person. It is for the Minister or Parliament, if they choose, to exercise disciplinary or other action.

40. The Commission has no coercive powers to request an appropriate authority to take action. It is limited to reporting to Parliament any perceived lack of action.21

41. It is submitted that this confirms that the Commission is not a place ‘out of Parliament’ but rather is deeply embedded within Parliament. It is established specifically to investigate and report to Parliament. It does not impeach or question proceedings out of Parliament; it becomes part of the proceedings of Parliament.

42. While the Commission accepts that the CCM Act s. 3(2) preserves the application of parliamentary privilege, in the Commission’s respectful submission, that is not to the point. The Commission is not ‘a place outside Parliament’ for the purposes of Article 9 so the privileges of Parliament are left untouched.

43. The Commission’s submission is in keeping with the provisions of the Parliamentary Privileges Act 1891 (“PPA”), the true purpose and object of Article 9 as identified earlier in these submissions and the common law.

44. If, as the Commission submits, the word ‘place’ in the phrase ‘court or place out of Parliament’ is to be interpreted ejusdem generis with ‘court’, but restricted to a class of proceedings where a person is exposed to the risk of some kind of sanction, determination or finding that has an operative effect, the Commission is not such a place and a Commission investigation is not such a proceeding.

The Commission Contrasted with a Royal Commission

45. The Commission submits that its functions and powers are so different from those of a royal commission that a royal commission cannot be regarded as analogous.

46. The Commission's powers and functions can be contrasted with previous royal commissions which have different functions.

47. A royal commission is appointed by the Governor to make inquiry and report. A royal commission is governed by its terms of reference. Sometimes these have been reproduced in an Act.

21 CCM Act s. 40, 85.
48. The Commission’s functions are entirely statutory and do not include the power to find there has been, for example, corruption or illegal conduct. Reference can be made to three royal commissions to establish the point of difference.

49. The Royal Commission in Commercial Actions of Government was re-empowered by an Act of the same name, sometime after it had been established by the Governor.\textsuperscript{22}

50. The terms of reference in paragraph 1 required the Commission (among other things) to:

\textit{Inquire whether there has been -}

(a) corruption;
(b) illegal conduct; or
(c) improper conduct,

by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies, instrumentalities and corporations.

51. The Commissioner’s report said:

1.2.6 \textit{It would now seem to be perfectly clear that the Commission is required to inquire and report whether there has been, in the context of the specified terms of reference, corruption, illegal conduct or improper conduct …}

52. The Royal Commission into the Presentation of a Petition to the Legislative Council on 5 November 1992 (The Marks Royal Commission) was empowered to inquire and report on whether the circumstances and events preceding and following the presentation of a petition to the Legislative Council of the Parliament of Western Australia on 5 November 1992 by the Honourable John Halden MLC on behalf of Brian Mahon Easton involved conduct that was an improper or inappropriate use of executive power or public office or was motivated by improper or inappropriate considerations, and for that purpose to:

(a) Identify all persons who were at the relevant time -

Ministers of the Crown;

members of Parliament;

staff of such Ministers or members acting on or purporting to act on behalf of or on the instructions of such Ministers or members; or

\textsuperscript{22} \textit{Royal Commission into Commercial Actions of Government Act 1992.}
holders of public office,

and who-

(i) were directly or indirectly involved in those circumstances or events, whether in connection with the preparation of the petition or its presentation or the timing of its presentation or in any other manner; or

(ii) knew of or considered the petition or any of its contents or proposed contents prior to its presentation to the Legislative Council;

(b) Determine the nature and extent of such involvement, knowledge or consideration and the circumstances in which such knowledge was obtained or such consideration took place;

(c) Determine the motivation for the conduct of those persons in the course of such involvement; and

(d) Determine whether and if so when and to what extent such persons communicated information in respect of the petition or of its contents or proposed contents to members of the news media.

53. The Commissioner reported:

The problems to which I have adverted could only be met after the facts became established. I interpret the Terms of Reference to require me in essence to undertake the following tasks:

(1) To determine the circumstances and events, that is, what happened, before and after the presentation of the petition.

(2) To determine only those circumstances and events which bear on the petition having come to be presented and on it having been presented.

(3) To determine whether there was any (and presumably what) improper or inappropriate use of executive power or of public office involved in those circumstances and in the happening of the events.

(4) To determine in the alternative whether any use of executive power or of public office which was involved in those circumstances and the happening of the events was motivated by improper or inappropriate considerations.

(5) To provide (for the purpose of the inquiry and report) the information required under paragraphs 1 (a)(i) and (ii).

(6) To make the determinations required by 1 (b), (c) and (d).

54. The Marks Royal Commission required the Commissioner to make findings - 'identify all persons' - and determinations. A determination is 'the settlement of
a suit or controversy by the authoritative decision of a judge or arbiter; a settlement or decision, an authoritative opinion.’ (Oxford English Dictionary)

55. The Royal Commission into the Commercial Activities of Government and the Royal Commission in the WA Police required the Commissions to inquire into and report on whether there has been corrupt, criminal or illegal conduct. This required the Royal Commission to make a positive finding of corruption or criminal conduct.

56. These requirements are sufficient to categorise those Royal Commissions as a ‘place outside Parliament’ because in a similar manner to a Court, they were required to make findings and determinations.

57. They can be contrasted with the Commission in the manner already outlined.

58. Moreover, the Commission, has no power to report an opinion that a particular person is guilty of an offence. It is expressly forbidden to do so.

59. Notwithstanding the use of the word in the CCM Act, s. 217A the Commission has no power to make ‘findings’. A Court can find facts. Such findings bind the parties and perhaps others.

60. In contrast the Commission is empowered to include in a report only:

   (a) statements as to any of the Commission’s assessments, opinions and recommendations; and

   (b) statements as to any of the Commission’s reasons for the assessments, opinions and recommendations.

61. In light of the decision in Cox and on analysis of the CCM Act, it is submitted that the clear parliamentary intention was not to establish a body with any of the indicia of a court, tribunal or a body such as a royal commission that might meet the description of ‘a place’ within Article 9. The parliamentary intention was to establish a body that would investigate serious misconduct, perhaps in respect of a member and report to Parliament so that Parliament can decide what, if any, action it may choose to take. In this respect, far from being a place out of Parliament, it is a servant of Parliament.

62. If this submission is accepted, the Commission is not in breach of Article 9.

---

23 CCM Act s. 217 A.
Submission 2 - The drafts and emails are not 'proceedings in Parliament'

63. Preliminary Finding 16:

That Legislative Council Question Without Notice C 192, the draft answers and associated email exchanges between public officers tasked with constructing the answers and providing them to Members of Parliament for their consideration and eventual answer in the Legislative Council were proceedings in parliament within the meaning of Article 9 of the Bill of Rights 1688 (UK).

64. The Commission respectfully submits this finding is in error.

65. The primary object of Article 9 was to protect members of Parliament against legal liability for what they said or did in the course of debate. As indicated earlier, it was originally a protection against the Crown but has evolved more widely.

66. For the protection provided by Article 9 to attach to the draft emails between Ms Turnseck and Mr Home, the draft emails must be 'proceedings in Parliament'.

67. 'Proceedings in Parliament' is defined in Erskine May as:

Some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action and the whole process, the principal part of which is the debate, by which it reaches a decision.

68. The House of Commons and The Select Committee on the Official Secrets Act in 1938-39 attempted to elucidate the meaning of 'proceedings in Parliament'. They argued that that 'proceedings' covered both the asking of a question and the giving of written notice of the question, and includes everything said or done by a Member in the exercise of his functions as a Member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.24 The Committee concluded (and these conclusions were later agreed to by the House) that:

...cases may be easily imagined of communications between one Member and another or between a Member and a minister so closely related to the matter pending in or expected to be brought before the House that, although they do not take place in the Chamber or a committee room, they form part of the business of the House, as for example where a Member sends to a minister the draft of a question he is thinking of putting down, or shows it to another Member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed.

69. The Commonwealth Joint Select Committee on Parliamentary Privilege (JSC) considered that 'proceedings in Parliament':

...as a technical parliamentary term, primarily denotes the formal transaction of business in one of the Houses, or of a committee of one or both of the Houses, such as voting, or the giving of notices of motion. More widely, it clearly covers the asking of and reply to oral parliamentary questions, the giving of written questions and of notices printed on the Notice Paper, and everything done or said by a Member as a Member of a committee of one or both of the Houses.  

70. The JSC indicated that while such matters were clearly protected by parliamentary privilege, there are 'areas of great doubt and difficulty'.

71. In particular the JSC stated:

*It is open to doubt whether the protection extends to drafts of oral questions or questions on notice or to the drafts of motions, which a Member may wish to show to another to seek his advice as to form, content or propriety. The same comment applies to a draft of a speech intended to be made in Parliament, on which advice may also be sought, and which may for reasons quite beyond the control of the individual Member, never be made. A clear example of our doubt as to the current legal position is evidence by the practice presently adopted in dealing with Questions on Notice: namely, during adjournments answers are given to Members who have asked for them but these answers are not distributed to the media.*

72. Drafts of speeches and submissions, and material collected to inform such drafts remains an area of significant ambiguity for the application of parliamentary privilege (see Parliamentary Privilege Green Paper 2012 (United Kingdom) (*"Green Paper")*).

73. The provision of information from non-members to Members also remains a disputed area of the law, and difficulties of interpretation arise where it must be decided whether documents fall within 'proceedings of Parliament'.

74. The Commonwealth Act represents an attempt to reform the laws about parliamentary privilege.

75. One of the reforms was the inclusion in the Commonwealth Act of a definition of 'proceedings in Parliament' in subsection 16(2):

---

26 Ibid.
27 Ibid.
28 At [57], [59].
For the purposes of the provisions of Article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, "proceedings in Parliament" means all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of business of a House or committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for the purposes of or incidental to the transacting of any such business; and the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee.

76. The Green Paper, having considered the Commonwealth's approach in The Commonwealth Act s. 16 noted that it does not eliminate the ambiguity, and by making this a statutory provision, the determination whether any particular material was subject to privilege or not would be considered by the courts as a matter of statutory interpretation which may have the unintended effect of eroding or weakening parliamentary privilege.

77. Western Australia has not elected to amend the PPA to follow the Commonwealth Act and accordingly, the definition of 'proceedings in Parliament' in the Commonwealth Act s. 16(2) is not part of Western Australian law.

78. This was recognised by the Full Court in Re: The Royal Commission into the Use of Executive Power; The Queen v Parry and others. In his judgment Malcolm CJ noted the provisions of the Commonwealth Act s. 16(2) extended the definition of 'proceedings in Parliament' in such a way as it may include correspondence and communications for the purposes of or incidental to the transacting of the business of the House or of a committee of the and so extending it beyond the members' actions in the House, but went on to say:

"This step has not been taken in Western Australia where s1 of the Parliamentary Privileges Act remains in its original form."

79. His Honour's judgment in Re: Parry cited with approval the view expressed in Prebble and other decisions that:

---

29 The Full Court of the Supreme Court of Western Australia, Unreported 3 December 1996, 1 May 1997.
(a) Article 9 is to be given a wide interpretation; and

(b) the central focus of Article 9 is 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.

80. In Re: Parry, the argument advanced by Mr Smith’s counsel was that he was immune from answering such questions by reason of parliament privilege as defined in Article 9.

81. The relevant proceeding was identified by the Court as being the actual presentation and tabling of the petition. Discussions or correspondence between Members, or between a member of the public and Members, outside the chambers of Parliament, do not ordinarily form part of the proceedings of Parliament which qualify for privilege. Accordingly, it was held that the parliamentary privilege attaching to the presentation of the petition on 5 November 1992 did not extend to the earlier Cabinet discussion of 2 November 1992 where the proposed petition was discussed.

82. In the Commission’s submission, the decision in Re: Parry is authority against preliminary finding 16.

Other Communications not protected by the Article 9 Privilege

83. A number of cases demonstrate that the boundaries of privilege are not clear when it comes to communications by non-members of Parliament, or by members where the communications are not connected with parliamentary business.

84. In 1958 a member of the House of Commons, Mr George Strauss, wrote an allegedly defamatory letter to a Minister of the Crown on a matter he might later have wished to raise in the House. The letter was critical of the policies of the London Electricity Board, and Mr Strauss asked the Minister to look into the Board’s actions. The Minister brought Mr Strauss’ views to the attention of the Board. The Board took legal advice and threatened to sue Mr Strauss for libel unless he withdrew or apologised. Mr Strauss maintained his position and complained to the Privileges Committee of the House. The Committee considered that in writing his letter to the Minister, Mr Strauss was engaged in ‘proceedings in Parliament’. The House, however, resolved that the letter was

30 Supra n 29 at 66.
31 Supra n 29 at 70.
32 Supra n 29 at 69.
not a proceeding in Parliament as it did not relate to anything then before the
House. Subsequent committees of the House of Commons in 1967, 1970 and
1977 considered the House's decision was right in law.

85. In 1977 a constituent of Mr O'Connell (a member of the NSW Legislative
Assembly) complained to him about the alleged rudeness of an officer of the
Housing Commission. The officer worked in an office in Mr O'Connell's
electorate. Mr O'Connell had heard similar allegations from other sources as
well, and in October 1977, wrote to the Minister for Housing in a letter marked
'Personal'. Mr O'Connell expressed in the letter that the officer was totally
unsuitable for his job. Mr O'Connell's letter was passed down through the
Housing Commission for comment and the subject officer heard about it. The
officer's solicitors threatened Mr O'Connell with an action for defamation. The
matter was not ultimately determined as the officer moved from Mr O'Connell's
electorate and no further action was taken. However, the Joint Select
Committee on Parliamentary Privilege (Cth) in its Final Report in October 1984
considered that had the matter come to court, the defence available to Mr
O'Connell would have been one of qualified, not absolute, privilege.

86. *R v Rule*[^34^]; is authority for the proposition that letters from constituents to
members of Parliament are not 'proceedings in Parliament'. Instead letters from
constituents might enjoy qualified privilege in the law of defamation, if they are
about matters of public concern, local or national, or might reasonably be said
to relate to the member's (or Minister's) functions and responsibilities.

87. The United Kingdom Joint Committee of the House of Lords and House of
Commons in its 1999 First Report[^35^] noted the distinction between a member's
letter and a member's speech or parliamentary question can be somewhat
arbitrary, saying:

> A letter may relate to the same subject matter as an existing proceeding, and
> may simply be for the member a more convenient or sensible way of
> pursuing the same objective. It is anomalous that a member who, for
> example, received information that children were being abused in a named
> institution, would have the benefit of Article 9 if he tabled a question but not if
> he wrote to the responsible minister first. But the boundary of privilege has to
> be drawn somewhere, and the present boundary is clear and defensible.[^36^]

88. *Rowley v Armstrong*[^37^] concerned an action for damages in defamation in
relation to two oral publications by Armstrong making reference to Rowley's
involvement in illegal commercial fishing activities - one publication was to

[^34^][1937] 2 KB 375.
[^37^][2000] QSC 088.
Senator O’Chee and the other to Mr Trevor Perrott MLA. This resulted in the topic being raised in the Senate of the Australian Parliament and in the Queensland Legislative Assembly. Prior to the publication in the Senate, Senator O’Chee had made comments during a radio broadcast about this topic. The plaintiff instituted defamation proceedings against Senator O’Chee, and the Senator moved a reference to the Senate Privileges Committee to investigate whether the threat of those proceedings constituted a contempt of Parliament (which was found).

89. The defence in *Rowley v Armstrong* argued that the provision of information to a person in his or her capacity as a parliamentary representative for the purpose of use in parliamentary proceedings extends to that communication the protection of parliamentary privilege. Jones J decided, however, that the defendant's act of communicating with the Senator was not a ‘parliamentary proceeding’ as that term is contemplated by the statute. He held that an informant making a communication to a parliamentary representative is not regarded as participating in ‘proceedings in Parliament’, and the provisions of the Commonwealth Act do not apply.

90. Caucus meetings were considered not to be ‘proceedings in Parliament’ in *Huata v Prebble & Anor.*[^38] The New Zealand Court of Appeal noted:

> Importantly, Mr McGee goes on to say that even where caucus discussed legislation before the House privilege would not attach to the discussions. The concept of proceedings in Parliament was limited to 'essential steps to parliamentary action' and caucus discussions could not be viewed in that light...

**Draft Documents & Other Preparatory Materials**

91. There has been limited judicial consideration as to the reach of *Article 9* in respect of draft documents, outside of cases where paragraph 16(2)(c) of the Commonwealth Act has been the basis for interpretation of 'proceedings in Parliament'.[^39]

92. *Sportsbet Pty Limited v State of New South Wales (No 3)*[^40] relevantly considered three categories of draft documents in the context of an application

[^38]: [2004] NZCA 147.

[^39]: Most decided cases have been based upon section 16 of the Commonwealth Act. See for example, *Rowley v O’Chee* (1997) 150 ALR 199; *British American Tobacco Australia v Department of Health and Ageing* [2011] FCAFC 107; and *Sherman v Commonwealth* (as represented by the Department of Broadband Communications and the Digital Economy), Supreme Court of NSW (unreported) 4 March 2010. In *Sherman* an email from the Assistant Secretary, PM & C to various persons was considered to fall within s.16(2)(c) as it disclosed a Question Time brief containing information for the Minister's use in Question Time in the Senate, and by the Prime Minister in the House of Representatives. Both were considered to be documents prepared for or incidental to the transacting of business of the House.

for disclosure: the first concerned documents constituting or recording communications with Parliamentary Counsel for the purpose of preparing a draft Bill; the second concerned documents created for the purpose of a Minister’s use in Parliament; and the third concerned documents relating to the preparation of a draft Bill being a briefing note.

93. Sportsbet contended that the documents related to executive rather than legislative steps, with the possible exception of the category 2 documents.

94. The documents in categories 1 and 3 were found to not infringe parliamentary privilege - category 1 documents on the basis that they were ‘simply communications about the terms of the draft legislation’; and category 3 on the basis that it was not apparent that it was intended for use in Parliament (as opposed to other uses) and the email could not be considered to have any particular connection with the conduct of business in Parliament ‘other than in the most tenuous sense’.41

95. Jagot J accepted, however, that the category 2 documents being the briefing notes prepared for the Minister’s use in Parliament should be inferred to have been created for the purpose of a Minister conducting business in Parliament. These documents were considered to be protected by parliamentary privilege.42

What is the relevant proceeding which Finding 16 identifies?

96. The relevant proceeding in relation to the Commission’s report is the response by the Hon. Peter Collier MLC provided in Parliament to the Parliamentary Question raised by the Hon. Sue Ellery Leader of the Opposition in the Legislative Council:

Has Ms Turnseck discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his Chief of Staff and Ms Narelle Cant, and if so with whom and when?

97. The Commission accepts that the Minister’s response to the Parliamentary Question is protected by parliamentary privilege, as is the question itself.

98. Events preceding and following the Hon. Peter Collier’s response, except to the extent that they are necessarily incidental to the performance of the function of a Member in the House, however, do not attract the Article 9 privilege.43

99. The ordinary natural meaning of ‘incidental to’ is ‘liable to happen in connection with; appertaining to’. ‘Incidental to’ is qualified by the word ‘necessarily’ which

41 At [20]-[21].
42 Sportsbet Pty Limited v State of New South Wales (No 3) [2009] FCA 1283 at [21].
43 See Prebble cited with approval in Re: Parry.
is defined to mean 'by and of necessity'. The effect of this qualification is to limit the reach of privilege to only those acts or communications which must take place in order that the Hon. Peter Collier's response is provided. This is consistent with the approach taken in Re: Parry and Sportsbet.

100. The doubts expressed by the various committees as to whether the reach of privilege extends to draft documents prepared by members or by their staff, raises a serious question in relation to draft finding 16. At what point does communication between executive staff members outside of Parliament cease to attract the privilege in Article 9?

101. The extension of proceedings of Parliament outside the Chamber and into the heart of the executive arm of government may have unintended consequences. If public officers who are writers of emails and memoranda believe they have the immunity that parliamentary privilege confers on members; they may act with less circumspection and restraint, secure in the knowledge that they can neither be sued in a court or investigated for misconduct. There are good reasons why parliamentary privilege should be confined to members elected to represent their constituents.

The Draft Email chain

102. The draft emails referred to in the Commission's report were circulated between members of the Executive arm of government, namely between Ms Turnseck as Mr Buswell's Chief of Staff, Mr Home as the Deputy Chief of Staff to the Premier, and others. The Commission's report describes these emails as having been created 'as preparation for briefing a Minister to answer a series of Parliamentary questions'.

103. Each end of the spectrum of communications, from those which attract parliamentary privilege by virtue of Article 9 as 'proceedings in Parliament', to those which clearly do not attract parliamentary privilege, may be readily ascertained. Clearly, at one end of the spectrum, the answer by the Minister in response to the Parliamentary Question involves 'proceedings in Parliament'. At the other end of the spectrum, a letter from a stranger to Parliament, such as from a constituent to a member about the events contemplated by the Parliamentary Question, does not attract the absolute privilege of Article 9 (although it may attract qualified privilege).

104. The Parliamentary Question was asked by the Hon. Sue Ellery.

105. The following relevant communications then ensued, listed in descending order of proximity to the response to Parliament by the Hon. Peter Collier MLC:

---

45 At [63].
(a) The Hon. Peter Collier MLC answers the Parliamentary Question in the Legislative Council;

(b) The Hon. Peter Collier MLC amended a draft response to the Parliamentary Question prepared by Mr Home to include the word "former";

(c) Mr Home prepared a final draft response provided to the Hon. Peter Collier MLC which read, "Prior to the Treasurer's resignation, no";

(d) Mr Home sent an email with the proposed draft answer "Prior to the Treasurer's resignation, no" to Ms Turnseck and others;

(e) Ms Turnseck sent an email to Mr Home directly saying: "My preference is to make no mention of Troy's family", and her attached amended draft response was "No";

(f) Mr Home prepared an initial draft answer which he sent to Ms Turnseck and others, as follows: "Prior to the Treasurer's resignation, no, other than with the Treasurer's direct family";

(g) Ms Turnseck sent an email to all recipients saying: "I am not going to be telling the Parliament or the general public about any conversation I may or may not have had about the personal circumstances of anyone, particularly not the former Treasurer, who by the way, continues to receive medical care for a very serious health condition. I'm not sure how you want to draft that response!".

106. The nexus with parliamentary business is clear in respect of the action at paragraph 105 (a) and Article 9 would afford protection to this communication on the basis that it occurred in the course of debate.

107. The communication at paragraph 105 (b) being the Minister's amendment to the draft response to the Parliamentary Question is also sufficiently proximate and necessarily incidental to the 'proceedings in Parliament' as to attract the privilege.

108. Mr Home prepared the final draft response to the Parliamentary Question which was provided to the Minister. In the Commission's submission, the communication at paragraph 105 (c), is the outer limit of the reach of parliamentary business which can properly said to be 'proceedings in Parliament' attracting the Article 9 privilege. This is because this email is necessarily incidental to the 'proceedings in Parliament' (being the Hon. Peter Collier's response to the Parliamentary Question) and was required in order that the Hon. Peter Collier could discharge his functions as a member of Parliament. This is consistent with the finding in Sportsbet that the notes for the Minister attracted the privilege.
109. The communications at paragraph 105 (d), (e) and (f) are properly categorised as executive steps preparatory to the drafting of the response to the Parliamentary Question. These emails are not ‘necessarily incidental to’ the Hon. Peter Collier providing his response in Parliament. They were simply communications preparatory to the draft response seeking or providing input to the draft response prepared by Mr Home. On their face these were not intended to be used in Parliament.

110. Ms Turnseck's email at paragraph 105 (g) does not meet the description of a preparatory executive step as it is, in effect, a refusal to tell the Parliament or the general public anything. Following the reasoning in *Sportsbet*, it is apparent that this document was not intended for use in Parliament.

111. The Commission’s use of the emails described at paragraph 105 (d), (e), (f) and (g) to form an opinion of misconduct against Ms Turnseck therefore does not impeach or question ‘proceedings in Parliament’, as these emails fall outside that definition.

**Lack of procedural fairness by the Committee in respect to the draft finding**

112. In an area of parliamentary privilege where eminent authority has acknowledged the ambiguity of the term ‘proceedings in Parliament’, it is respectfully submitted that the Committee should be slow to find that a breach of parliamentary privilege has occurred.

113. This is particularly so in circumstances where the result of a finding may be proceedings for contempt which may result in sanctions.

114. It is also so in circumstances where it might be thought that the Committee has failed to accord the Commission procedural fairness. Although the Committee has provided the Commission with an opportunity to respond to preliminary findings, it has not exposed the considerations, evidence or reasoning that has led to these findings.

115. *Annetts v McCann* (1990) 170 CLR 596 did not concern a court, but a coronial enquiry and whether the terms of the *Coroners Act 1920* displayed a legislative intention to exclude the rules of natural justice and in particular the common law right to be heard in opposition to any potential finding which would appear to prejudice a person's interests.

116. Mason CJ, Deane J and McHugh J said that "*It could now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment*." [598]
117. Therefore, in the ordinary course, procedural fairness would require that the Commission be given the opportunity to know and be able to answer all the allegations and evidence and submissions which are put forward to support a finding that the Commission has breached parliamentary privilege. Merely being apprised of the preliminary findings in the absence of the evidence and submissions or reasons to support the findings may be seen to breach rules of procedural fairness.

118. The Commission is left to guess at what lies behind the finding in a way that is, with respect, unfair.

Submission 3 - If the drafts of answers are 'proceedings in Parliament' so are the investigations and reports of the Commission

119. If, contrary to the Commission’s submission, the final finding is that the draft answers and associated email exchanges were ‘proceedings in Parliament’ and attracting privilege, then it follows that so also was the Commission’s investigation and report.

120. The Commission may prepare a report on any matter that has been the subject of an investigation in respect of serious misconduct. The report may be made directly to Parliament or to a Minister who as in this case may table the report.

121. There has never been doubt that documents tabled before a House become ‘proceedings in Parliament', whatever their source and whatever their content.

122. Campbell and Groves state:

> Even if there is no order that a tabled paper be published, the acts of tabling and the subsequent use of the paper in the Parliament are treated as proceedings in Parliament for the purposes of art 9 of the Bill of Rights 1689.


124. In Cornwall v Rowan (2004) 90 SASR 269, the respondent, Rowan, was the administrator of the Christies Beach Women’s and Children’s Emergency Shelter. Dr Cornwall, in his capacity as Minister for Community Welfare,

---

46 CCM Act s. 84.
47 CCM Act. s. 84, 89.
50 Hansard, Legislative Assembly, 16 March 2016, p1167d-1168a.
instigated a review of management of shelters. The Review Committee’s report was tabled in the South Australian Parliament in August 1987.

125. The trial judge found Dr Cornwall guilty of misfeasance in public office because of malicious use of unsubstantiated allegations contained in the report when deciding to withdraw government funding. Dr Cornwall appealed.

126. It was not in issue that the tabling of the report by Dr Cornwall in Parliament was protected by parliamentary privilege. The other relevant publication was by Dr Cornwall to Cabinet ‘for the purpose of approving the tabling of the report in Parliament’. The Full Court stated that absolute privilege extended beyond anything said or done by Dr Cornwall in Parliament to include ‘any necessary publication incidental to such publication’.51

Documents prepared for Parliament

127. In Criminal Justice Commission v Nationwide News Pty Ltd (1985) 74 A Crim R 569, an injunction was sought to restrain publication by a newspaper of a confidential document the Criminal Justice Commission ("CJC") had prepared for the Parliamentary Criminal Justice Committee.

128. Fitzgerald P, Pincus JA and Davies JA accepted that a confidential document which has been provided to a committee of Parliament is part of the proceedings of Parliament for the purposes of Article 9.52

129. The court concluded that it had jurisdiction to restrain unlawful disclosure of the confidential CJC document.

130. The logic which motivated the Committee to make preliminary finding 16 that the matters within the finding were ‘proceedings in Parliament’ must apply with equal logic to investigations and other preliminary stages such as drafts of reports and advices of the Commission in respect of a report that is tabled in Parliament. They are not then a place ‘out of Parliament’. Article 9 does not apply.

131. It would be anomalous that the protection afforded to information given to a minister for the purposes of an answer given on an occasion of absolute privilege, was not extended to information obtained from an investigation which is then the subject of a report which, when tabled, also attracts absolute privilege.

52 Criminal Justice Commission v Nationwide News Pty Ltd [1996] 2 Qd R 444 per Fitzgerald P at 454; Pincus JA at 457; Davies JA at 459.
Conclusion

132. For the reasons set out in these submissions the Commission respectfully asks the Committee not to convert the preliminary findings into final findings.

Hon. John McKechnie, QC
COMMISSIONER
4 THE COMMITTEE’S REPLY TO THE COMMISSIONER OF THE CORRUPTION AND CRIME COMMISSION

7 November 2016

Hon John McKechnie QC
Commissioner
Corruption and Crime Commission
186 St Georges Terrace
PERTH WA 6000

BY COURIER

RE: A Matter of Privilege raised by Hon Sue Ellery MLC

Thank you for your letter dated 3 November 2016 and the submission provided in response to the Committee’s preliminary findings and recommendations concerning the CCC.

In summary, the Commission’s submission is that:

1. the CCC is not a “place” out of Parliament;
2. the email and other exchanges by Ms Turnseck are not proceedings in Parliament; and
3. if the Committee does not accept submission two logically, the CCC’s investigation and report are also proceedings of Parliament so the CCC’s place is not ‘out of Parliament’.

The Committee respectfully disagrees with each of (1) to (3) above.

Although there is no exhaustive statutory or judicial definition of a “place out of Parliament” for the purposes of Article 9 of the Bill of Rights 1688 (UK), the phrase has been generally accepted by Westminster parliaments worldwide to include any judicial or executive body that has the power to adversely affect Members of Parliament and other individuals participating in the work of the Parliament. It is not practical to limit the definition just to courts and tribunals, as the clear purpose of Article 9 has always been to protect parliamentary proceedings from interference by both the judiciary and the executive. The CCC, like other tribunals, royal commissions and various investigative bodies of the executive is clearly a “place out of Parliament” that is capable of infringing Article 9. Article 9 plainly covers a place as official as the CCC where what amounts to executive power is exercised separately from the Parliament.

The Committee is of the view that, in the absence of any exhaustive judicial or statutory definition as to what constitutes a “proceeding in Parliament” in Western Australia, the preferred position is that s 16(2) of the Parliamentary Privileges Act 1987 (Cth) accurately reflects the law: Prebble v

Page 1
Television New Zealand [1995] 1 AC 321. This definition relevantly includes “the preparation of a document for purposes of or incidental to the transacting of” any business of the Parliament. It is the Committee’s view, therefore, that a rather arbitrary line has been drawn by the CCC to distinguish between Mr Home’s physical drafting of a final draft answer to a Question without Notice, which the CCC agrees is a “proceeding in Parliament”, and the earlier draft attached to an email to Ms Turnseck and others, and telephone conversations between Mr Home and Ms Turnseck which provided Mr Home with the information that he needed to draft the answer and provide advice to Members of Parliament. The CCC asserts that the earlier draft of Questions without Notice C 192 and other communications necessary to compile this draft were not a “proceeding in Parliament”. In the Committee’s view Ms Turnseck’s contribution was of the utmost importance to the answering of the parliamentary question, as she alone had the knowledge required to provide the answer. Ms Turnseck’s communications with Mr Home were therefore by any reasonable assessment clearly directly connected, rather than merely incidental or remote, to the answering of the parliamentary question. The earlier draft of Question without Notice C 192 and other related communications were thereby a part of the proceedings in Parliament.

There is no doubt, however, that the CCC on its own assessment used a proceeding in parliament, being the final draft produced by Mr Home in its examination of Ms Turnseck. One result of this examination and the CCC’s investigation was not only that Ms Turnseck had not been candid but that this final draft was wrong and that by extension the answer given in the Legislative Council was also wrong. This is the impeaching of proceedings intended to be avoided by compliance with Article 9.

The last of the CCC’s submissions was novel. It suggested that the CCC, or indeed by extension any statutory body that has a provision enabling it to present reports to the Parliament, may by the act of tabling such a report thereby retrospectively make both itself and the investigation a part of the "proceedings of Parliament". The CCC would then become via this process practically incapable of infringing Parliament’s privileges under Article 9 of the Bill of Rights 1688 (UK). This submission is not one that can be supported by the Committee. Once again, the Committee finds this submission to be directly at odds with the purpose of Article 9, which is to protect the Parliament from infringements upon its privileges by the judicial and executive arms of government.

I will ensure that you are emailed a copy of the Committee’s final report immediately after it is tabled in the House.

Yours sincerely,

[Signature]

HON. BARRY HOUSE MLC
PRESIDENT
CHAIR, PROCEDURE AND PRIVILEGES COMMITTEE
APPENDIX 6

OPINION FROM MR BRET WALKER SC

1  OPINION FROM MR BRET WALKER SC

Memorandum of Advice

TO:  Nigel Pratt
      Clerk of the Legislative Council, Parliament of Western Australia

FROM:  Bret Walker SC

SUBJECT:  Advice in Conference - Legal Advice Sought by the Procedure and Privileges Committee (Legislative Council) on Several Matters of Parliamentary Privilege

Advice in Conference

1.  This memorandum summarises the advice that I provided by way of telephone conference, on Monday, 29 August 2016, at 2:30pm.

Background Facts

2.  On the evening of 22 February 2014 the then Treasurer and Minister for Transport for Western Australia, Hon Troy Buswell MLA, caused damage to his government vehicle along with several parked vehicles and the front gate to his driveway when driving home after attending a wedding. The police were not advised of this damage.

3.  On the following morning, Hon Troy Buswell MLA phoned his Chief of Staff, Ms Rachel Turnseck. Ms Turnseck subsequently spent several hours that day at the house of Hon Troy Buswell MLA, during which time she organised for the Minister’s family to come to the house and take him to Busselton to commence personal leave.

4.  On Tuesday, 11 March 2014 the media reported on the events of the night of 22 February 2014. Later that day, the Premier, Hon Colin Barnett MLA, announced that Hon Troy Buswell MLA had resigned as Treasurer and Minister for Transport.

5.  On Wednesday, 12 March 2014, Hon Sue Ellery MLC asked a series of questions without notice (of which some notice had been given) of Hon Peter Collier MLC, the Leader of the House representing the Premier in the Legislative Council of Western Australia. Drafts of the questions had been provided to the Department of Premier and Cabinet prior to 11:00am that day and Question Time in the Legislative Council was at 4:30pm. There were a series of emails (and possibly telephone conversations) between Ms Turnseck and officers of the Department of Premier and
Cabinet on that day regarding the drafting of answers to Hon Sue Ellery’s questions. One of the series of questions and resulting answers was as follows:

**MEMBER FOR VASSE — TRAFFIC INCIDENT — RACHAEL TURNSECK**

176. Hon SUE ELLERY to the Leader of the House representing the Premier:

(1) Has the Premier or anyone from his office asked the former Treasurer’s chief of staff, Ms Rachael Turnseck, whether she discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his chief of staff and Ms Narelle Cant; and, if not, why not?

(2) Has Ms Turnseck discussed the events in the days leading up to the former Treasurer taking personal leave with anyone other than the Premier, his chief of staff and Ms Narelle Cant; and, if so, with whom and when?

Hon PETER COLLIER replied:

(1) No. The concern of the Premier and his office has been the welfare of the former Treasurer.

(2) Prior to the former Treasurer’s resignation, no.

6. Subsequent events were to establish that this answer was incorrect. Ms Turnseck had, in fact, also discussed the relevant events with Mr Buswell’s electorate officer and several family members.

7. Between December 2014 and June 2015 Ms Turnseck was examined on three separate occasions by the Corruption and Crime Commission of Western Australia (CCC). On 16 March 2016 the CCC tabled a report in both Houses of the Parliament of Western Australia. Whilst dealing generally with the events on and following the night of 22 February 2014, the CCC’s report expressed the opinion that some of Ms Turnseck’s actions constituted ‘misconduct’. In a statement to the Parliament, the Premier stated that:

Ms Turnseck was found to have withheld information, thereby misleading her employer, indirectly the Parliament and later the commission itself.

Notwithstanding this, the commission sees no particular public interest in itself reporting to Parliament on her actions, partly as she has also left the public service and was never a public figure.

The commission’s provision of its report to me is in the context of its finding that Ms Turnseck put her loyalty to a minister above her duty to the state, and the need for all ministerial officers to learn lessons in this respect. I accept the commission’s findings, and the lessons it highlights will be learned. The CCC addresses itself in the report to the unique and complex role of a chief of staff in supporting and protecting a minister—part gatekeeper, part...
confidante and adviser, and part crisis manager. Critically, however, the commission states that a chief of staff’s loyalty to a minister should not override their responsibilities as a public officer.

8. On 16 March 2016 during Question Time in the Legislative Council, Hon Peter Collier, Leader of the House representing the Premier provided the following correction to the answers given to Hon Sue Ellery on 12 March 2014:

FORMER MEMBER FOR VASSE — ROAD TRAFFIC INCIDENT — RACHAEL TURNSECK

Question without Notice 176 — Correction of Answer

HON PETER COLLIER (North Metropolitan — Leader of the House) [5.07 pm]: in a response provided by me, in my capacity as Leader of the House representing the Premier, to question without notice 176, answered on 12 March 2014, it has recently become apparent that incorrect information was provided in the answer. Part (1) of the answer remains unchanged. The corrected answer to part (2) of the question is—

(2) Yes, with two members of Mr Buswell’s family, and with Mr Buswell’s then electorate officer.

9. On Thursday, 17 March 2016, Hon Sue Ellery MLC expressed the view that the CCC report raised a matter of privilege under Standing Order 93 of the Legislative Council, in that the CCC report may disclose that a contempt of the Legislative Council has been committed. In accordance with Standing Order 93, the President of the Legislative Council confirmed that a prima facie matter of privilege had been established and so he referred the matter to the Procedure and Privileges Committee of the Legislative Council (Committee) for inquiry. The Committee subsequently adopted the following terms of reference for its inquiry:

In relation to an answer to Legislative Council question without notice No. 176 asked by the Leader of the Opposition, Hon Sue Ellery, and answered on 12 March 2014 by the Leader of the House, the Hon Peter Collier, in his capacity as the Minister representing the Premier —

(1) Did Ms Rachael Turnseck commit a contempt of this House or any breach of its privileges?

(2) Did Mr Stephen Home commit a contempt of this House or any breach of its privileges?

(3) Did any other person or body commit a contempt of this House or any breach of its privileges?
The Committee’s Request for Legal Advice

10. The Committee requests legal advice on the following specific questions:

(1) Pursuant to Article 9 of the Bill of Rights 1688 (UK) or any other privilege, power or immunity possessed by the Houses of the Parliament of Western Australia under the Parliamentary Privileges Act 1891:

a) Were the drafts of the answers to Legislative Council QWN No. 176 (C 192), the other answers (C 190 & C191) or the email conversations between ministerial officers to which the draft answers were attached a ‘proceeding in parliament’?

b) Is the CCC a ‘place out of Parliament’?

c) Did any of the actions of the CCC in reaching a finding of misconduct against Ms Turnseck relating to QWN No. 176 (C 192) ‘question or impeach’ a proceeding in parliament?

(2) Does the Corruption and Crime Commission Act 2003 abrogate or alter the immunity provided by Article 9 of the Bill of Rights 1688 (UK) or other privilege, power or immunity possessed by the WA Houses of Parliament such that the actions of the CCC in respect to its investigation and finding relating to QWN 176 (C 192) were lawful?

(3) Would your answer to [(2)] be different if the Corruption Crime and Misconduct Act 2003 was the applicable law at the time of the CCC’s investigation?

Parliamentary Privilege

11. The Bill of Rights 1688 (UK) is law in Western Australia by reason of s.1 of the Parliamentary Privileges Act 1891 (WA). Article 9 of the Bill of Rights 1688 (UK) provides the basis for the most important aspect of parliamentary privilege (expressed in modern language) as follows:

Freedom of Speech — 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.

4
12. Any action in contravention of Article 9 will generally be considered a breach of the privileges of Parliament. The terms ‘breach of privilege’ and ‘contempt of Parliament’ are often used interchangeably. However, technically speaking, although all breaches of privilege are generally a contempt of Parliament, not all contems are a breach of privilege.¹

13. Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament states that:

> When any of these rights and immunities, both of the Members, individually, and of the assembly in its collective capacity, which are known by the general name of privileges, are disregarded or attacked by any individual or authority, the offence is called a breach of privilege, and is punished under the law of Parliament. Each House also claims the right to punish actions, which, while not breaches of any specific privilege, are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its officers or its Members. Such actions, though often called ‘breaches of privilege’, are more properly distinguished as ‘contempts’.²

14. Erskine May further defines ‘contempt of Parliament’ as:

> ...any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.³

15. In Western Australia, although the privilege of freedom of speech for Members and witnesses before parliamentary committees has been accepted and it is settled law in Western Australia that Article 9 is to be given a wide interpretation: see Halden v Marks (1995) 17 WAR 447 at 461, there is no statutory definition of the meaning of ‘proceedings in parliament’, ‘place out of Parliament’ or ‘impeached or questioned’. The scope of the Article 9 immunity has therefore not been finally determined in this State.

Proceedings in Parliament

16. Erskine May describes the expression ‘proceedings in parliament’ as:

> ...some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to forms of business in which the House...
takes action, and the whole process, the principle part of which is debate, by which it reaches a decision. An individual member takes part in a proceeding usually by a speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee. Officers of the House take part in its proceedings principally carrying out its orders, general or particular. Strangers also may take part in the proceedings of the House, for example by giving evidence before it or one of its committees, or by securing presentation of a petition.  

17. In *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114, Hungerford J at p.123 referred to with approval a statement in *Halsbury’s Laws of England* (4th ed 1980) which included the asking of a question and giving written notice of a question and matters transacted external to the debating chamber and committee room as follows:

> In its wider sense “proceedings in Parliament” has been used to include matters connected with, or ancillary to, the formal transaction of business. A select committee of the Commons, citing and approving a Canadian dictum, stated in its report that it would be unreasonable to conclude that no act is within the scope of a member’s duties in the course of parliamentary business unless it is done in the House or in a committee of it and while the House or a committee is sitting.

18. Given that in a modern parliament there are electorate and research staff that prepare drafts of speeches, questions, motions and other forms of the House on behalf of Members, for the immunity under Article 9 to protect only those activities that occur in the Chamber or committee room would not achieve its objective. In each activity that occurs outside these venues the question is one of degree of connection to actual parliamentary proceedings. If the necessary connection is not established the matter is not protected. An example of matters found by a court not to be protected are the expenses claims of Members of Parliament.  

19. In *Prebble v Television New Zealand* [1995] 1 AC 321, s 16 of the *Parliamentary Privileges Act 1987* (Cth) was acknowledged as reflecting the common law understanding of Article 9. Although not part of the law of Western Australia, judicial decision in relation to that Act may provide greater clarity around the meaning of ‘proceedings in parliament’.

---


20. Section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) provides a definition of proceedings in parliament as follows:

   *For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:*

   (a) the giving of evidence before a House or a committee, and evidence so given;

   (b) the presentation or submission of a document to a House or a committee;

   (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

   (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

21. The expression in paragraph (c) provides for the wider meaning of proceedings outlined in the NSW decision and text references cited above. In *O'Chee v Rowley* (1997) 150 ALR 199, the Queensland Court of Appeal considered the effect of section 16(2)(c) on the capacity of the court to order the production of documents claimed by a Senator to be 'proceedings in parliament' and therefore privileged from production. McPherson JA engrafted the immunity provided by Article 9 to the wording of paragraph (c), resulting in the immunity being expressed as follows:

   [the preparation of a document for purposes of or incidental to the transacting of any ...business] (of a House) shall not be impeached or questioned in any court ... out of Parliament."  

22. There are several cases referred to in the 13th Edition of *Odger's Australian Senate Practice* in which courts have determined that documents prepared for use in the House have been immune from production by reason of them being proceedings in parliament under the *Parliamentary Privileges Act 1987* (Cth), s.16(2) definition, including:

---

• draft answers to estimates questions on notice, draft answers to anticipated oral questions at estimates hearings, and material for answering a possible parliamentary question: National Tertiary Education Industry Union v Commonwealth⁷;
• briefs prepared for estimates hearings: Australian Communications Authority v Bedford⁸;
• a document prepared for estimates hearings: Community and Public Sector Union v Commonwealth⁹; and
• estimates and question time briefs: Niyonsaba v Commonwealth.¹⁰

All of these cases go to the acceptance of such material being ‘proceedings in Parliament’ within the meaning of s. 16 of the Parliamentary Privileges Act 1987 (Cth).¹¹

23. There has been disagreement in judicial and academic circles on whether s.16(2) of the Parliamentary Privileges Act 1987 (Cth) expands the privilege provided by Article 9 of the Bill of Rights 1688 (UK) by capturing all acts done that are incidental to the transaction of business in the House. However, the expression ‘proceeding in parliament’, will at its most limited scope include the preparation of a document by or on behalf of a Member for the purposes of transacting parliamentary business. This will include cases where the document is a draft and never actually used in any parliamentary proceeding.

24. Whether or not the Parliamentary Privileges Act 1987 (Cth) accurately reflects, as suggested by the Privy Council in Prebble v Television New Zealand, the common law of parliamentary privilege it is clear that if there has been any extension or expansion of parliamentary privilege to things that are said or produced outside of a physical Chamber or committee room, then it would certainly cover the kind of activities and material that are in question in this case. The direct influence that wrongdoing in advising on an answer to a question on notice has on the proceedings in the Chamber is an appropriate touchstone for the conduct to be within the protection of ‘proceedings in Parliament’.

Court or place out of Parliament

25. The prohibition on impeaching or questioning freedom of speech, debates or proceedings in Parliament is expressed to be against courts or a ‘place out of parliament’.

⁷ [2001] FCA 610.
⁸ Unreported, Federal Magistrates Court, 28 March 2006.
26. The CCC is a permanent commission established by statute with powerful investigative powers. It is authorised to make assessments and opinions regarding misconduct following investigation. An opinion regarding misconduct is not to be taken as a finding or opinion that a particular person has committed, or is committing or is about to commit a criminal offence or disciplinary offence.

27. The CCC is clearly not a court. It has no capacity to make a final determination of legal rights and obligations between parties in litigation. It is a statutory investigation agency with the capacity to make non-binding determinations regarding the misconduct of public officers.

28. In Western Australia royal commissions have been accepted as a ‘place out of parliament’ for the purpose of Article 9 of the Bill of Rights 1688 (UK): Halden v Marks (1995) 17 WAR 447. Similar to the CCC, Royal Commissions have been given statutory powers to require evidence to be given by witnesses on oath. Royal Commissions may make recommendations but like the CCC have no power to make final determinations.

29. There is also legal authority supporting the proposition that a ‘place out of parliament’ will include a disciplinary tribunal: Jenkins v McCusker [2010] WASAT 100.

30. The CCC, like other tribunals, royal commissions and various investigative bodies of the executive, is clearly a ‘place out of Parliament’. Article 9 plainly covers a place as official as the CCC in which what amounts to executive power is used separately from Parliament.

**Question or impeach**

31. If read literally, Article 9 could be argued to mean, say, that we are not all, as citizens and voters, entitled to discuss (very often in very derogatory terms) the antics of our elected representatives and, in particular, ministers, including by reflection upon what they say or do in a House. Indeed, recording, as is sometimes done, those who cross the floor, for example, is most unlikely to be unaccompanied by partisan expressions of praise or blame for them doing so. Article 9, it can be seen, cannot possibly mean what it literally says.

32. Courts do not admit into evidence proceedings in Parliament other than to prove historical facts, such as that a Bill was passed, a motion moved, or a question asked or, importantly, as an aid to statutory interpretation. This exclusionary principle

---


14 *Pepper v Hart* [1993] AC 593.
was expressed by the Full Court of the WA Supreme Court in *Halden v Marks* as follows:

...there are cases where a question of parliamentary privilege is raised in a case already before the court, as, for example, where a party seeks to rely on something said or done in Parliament. In the exercise of its general jurisdiction, and in the regulation of its own proceedings, the court will decide whether the relevant action will breach parliamentary privilege and will refuse to allow the particular matter to be ventilated, or the particular evidence to be tendered, if the court concludes that to do so would be a breach of privilege. In regulating its conduct in this way, the court is endeavouring to ensure that neither it nor the parties before it question or impeach any speech, debate or proceedings in Parliament - *R v Jackson* (1987) 8 NSWR 116; *Prebble v Television New Zealand Ltd* (supra); *ABC v Chatterton* (1986) 46 SASR 1; *Grassby* (1991) 55 A Crim R 419; *NSW Branch of the Australian Medical Association v Minister for Health* (1992) 26 NSWR 114.

33. Section 16(3) of the *Parliamentary Privileges Act 1987* (Cth), which in the case of *Prebble v Television New Zealand* [1995] 1 AC 321 was referred to by the Privy Council as embodying “the true principle to be applied” in the operation of Article 9, provides:

34. In *O’Chee v Rowley* (1997) 150 ALR 199, McPherson JA considered the meaning of ‘impeaching’ proceedings and particularly whether the compulsory production of documents in court proceedings fell within the scope of the parliamentary immunity. In following his previous engrafting process relating to s 16(2)(c) he reasoned that the prohibition should be expressed as follows:

10
That [... acts done ... for purposes of or incidental to, the transaction of the business of a House] ought not to be impeached or questioned in any court ... out of Parliament.\textsuperscript{14}

35. McPherson JA determined the two meanings ascribed to ‘impeach’ as at 1688 were: (1) “to impede, hinder, prevent”, and (2) “to hinder the action, progress, or well-being of; to affect detrimentally or prejudicially; to hurt, harm, injure, endanger, impair.”\textsuperscript{15} In the result he concluded that to order disclosure of the documents would cause conflict between the legislature and judiciary and have “an obvious potential to deter [the Senator] ... and other Parliamentarians from preparing or assembling documentary information for future debates and questions in the House.”\textsuperscript{16}

36. The issue is then whether or not what the CCC did in this case is a calling into question or impeaching a proceeding in parliament. The answer is, clearly, “Yes”.

37. In particular, the point needs to be rejected as a matter of doctrine that something is not calling into question or impeaching unless it is necessarily at odds with, or an inquiry that is directly in opposition to, the expressed will of the House of Parliament. That is not the way the immunity or prohibition works. The investigation and expression of opinion by the CCC in its report in this case bore no resemblance to the limited or specific uses that some courts have sometimes held can be made of parliamentary utterances. I have no doubt that the CCC’s investigation and report was a calling into question or an impeachment in an “other place” of parliamentary proceedings, not least by undertaking an investigation and expressing conclusions about the merits and propriety of parliamentary conduct.

38. In relation to the privilege of parliamentary Houses to protect themselves against contempt of their own proceedings there is really no scope, in the absence of plain statutory enactment, for some other organ of government to presume to deal with the matter. Such enactments do reveal that some contempt of Parliament are also serious crimes under the Criminal Code, such as bribery of a Member or threats of violence against Members or witnesses before parliamentary committees. Threatening a Member in relation to a past or future vote is an extremely serious contempt of Parliament, but the intent of criminal legislation is that it can also be prosecuted in the courts. However, the preparation of an answer to a parliamentary question does not find a purchase in the Criminal Code at all. The dispositive general proposition is that, properly construed, the Corruption and Crime Commission Act 2003 (WA) simply does not extend into such areas which do not fall within its express or necessarily implied wording, even acknowledging the statute’s expansive concept of misconduct.

\textsuperscript{14} 150 AIR 199 at 208.
\textsuperscript{15} 150 AIR 199 at 210
\textsuperscript{16} 150 AIR 199 at 212.
39. The limitations of the CCC’s broad investigative powers in the area of misconduct, specifically in the ability to initiate a prosecution, was the subject of the recent decision of *A v Maughan* [2016] WASCA 128, in which the ‘principle of legality’ in statutory construction was discussed in some detail in the judgment of Martin CJ.\(^{17}\) This principle is enunciated by O’Connor J in *Potter v Minahan*:\(^{18}\)

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used. (footnotes omitted)

40. Pragmatically there needs to be careful consideration of trying to combine practical and ideal elements. The practical element is that there has been valuable work done by the CCC in investigating the matter which ought to be taken for whatever it is worth by the Legislative Council’s Procedure and Privileges Committee, just as it might take for its own use a police report in another case, or a legal opinion. The ideal point, however, also needs to be emphasised that it is to be deprecated that there was apparently an assumption of power by the CCC which is very problematic. Consideration should be given to a more measured course of decision-making by the CCC when they are asked to, or otherwise minded to, inquire into occurrences which either are or have an obvious relation to proceedings in parliament. It would be important, I think, to mark as explicitly as possible that this is not a precedent to be emulated. Without impugning the CCC’s good faith, it is a pity that it occurred.

The Effect of Amendments to the CCC Act

41. The examination of this issue is somewhat complicated by the fact that the relevant section of the *Corruption and Crime Commission Act 2003* (WA) relating to the preservation of the privileges of parliament was amended by the *Corruption and Crime Commission Amendment (Misconduct) Act 2014* (WA). This amendment Act renamed the *Corruption and Crime Commission Act 2003* (WA) to the *Corruption, Crime and Misconduct Act 2003* (WA).

42. The *Parliamentary Privileges Act 1891* (WA) gives the Legislative Council and Legislative Assembly of Western Australia respectively complete control over the regulation of their own proceedings, generally free from interference from the courts, tribunals and executive investigative bodies: *Aboriginal Legal Service of

\(^{17}\) *A v Maughan* [2016] WASCA 128 at paras 28 to 43.

Western Australia Inc v State of Western Australia (1993) 9 WAR 297 at 304 – 305. See also Jenkins v McCusker [2010] WASAT 100 (12 July 2010), paragraph 27.

43. The exclusive jurisdiction of the Parliament in respect to its internal affairs was modified, however, by the Corruption and Crime Commission Act 2003 (WA), s.27A and s.27B. These provisions enabled the CCC to require to have referred to it by the Parliament all of the powers of a parliamentary committee when investigating certain types of alleged misconduct by Members of Parliament or parliamentary staff.

44. Transitional provisions in the amendment Act meant that the allegation of misconduct received or initiated before 1 July 2015 had to be dealt with under the Act as it existed prior to it being amended. The inquiry by the CCC in relation to this matter therefore proceeded under the previous statutory regime. In relation to the effect of the Corruption and Crime Commission Act 2003 (WA) on parliamentary privilege that Act provided in s.3(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 exclusively by a House of Parliament, unless that House so resolves.

45. The words emphasised above recognised the powers and functions of the CCC in dealing with allegations of ‘minor’ misconduct against Members and the Clerk or other commissioned officers of a House involving parliamentary privilege under s.27A and s.27B of the Corruption and Crime Commission Act 2003 (WA). The intrusion of the CCC into an area otherwise subject to the exclusive jurisdiction of the House by the operation of s.27B(3) was cited in debate as the reason for this particular wording. Sections 27A and 278 were repealed by the 2014 amendment Act.

46. The jurisdiction of the CCC in relation to allegations of misconduct involving parliamentary privilege would therefore appear to have been narrowed following the repeal of s.27A and s.27B and the amendment of s.3(2) made by the Corruption and Crime Commission Amendment (Misconduct) Act 2014 (WA) by which s.3(2) was reformulated as follows:

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.
47. In my opinion nothing in the present case is affected by the fact that the pre-amended *Corruption and Crime Commission Act 2003* (WA) was in force at the relevant time rather than the current *Corruption, Crime and Misconduct Act 2003* (WA). The present case does not involve allegations of misconduct by Members of Parliament or officers of the Parliament.

**Conclusion**

48. Based upon the above, I therefore provide the following responses to your specific questions:

1. **Pursuant to Article 9 of the Bill of Rights 1688 (UK) or any other privilege, power or immunity possessed by the Houses of the Parliament of Western Australia under the Parliamentary Privileges Act 1891:**
   
   a) Were the drafts of the answers to Legislative Council QWN No. 176 (C 192), the other answers (C 190 & C191) or the email conversations between ministerial officers to which the draft answers were attached a ‘proceeding in parliament’?

   Yes.

   b) Is the CCC a ‘place out of Parliament’?

   Yes.

   c) Did any of the actions of the CCC in reaching a finding of misconduct against Ms Turnseck relating to QWN No. 176 (C 192) ‘question or impeach’ a proceeding in parliament?

   Yes.

2. **Does the Corruption and Crime Commission Act 2003 abrogate or alter the immunity provided by Article 9 of the Bill of Rights 1688 (UK) or other privilege, power or immunity possessed by the WA Houses of Parliament such that the actions of the CCC in respect to its investigation and finding relating to QWN 176 (C 192) were lawful?**

   No.
(3) Would your answer to [(2)] be different if the Corruption Crime and Misconduct Act 2003 was the applicable law at the time of the CCC’s investigation?

No.

Bret Walker
Fifth Floor St James’ Hall
3rd November 2016