Report 48

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

Corruption, Crime and Misconduct Amendment Bill 2017

Presented by
Hon Kate Doust (Chair)
May 2018
Standing Committee on Procedure and Privileges

Members as at the time of this inquiry:
Hon Kate Doust MLC (Chair)          Hon Simon O’Brien MLC (Deputy Chairman)
Hon Martin Aldridge MLC             Hon Adele Farina MLC
Hon Rick Mazza MLC

Staff as at the time of this inquiry:
Mr Nigel Pratt, BA, BJuris, LLB (Clerk of the Legislative Council)
Mr Paul Grant, BA (Hons), LLB (Deputy Clerk)
Mr Grant Hitchcock, BA (Usher of the Black Rod)

Address:
Parliament House
4 Harvest Terrace, West Perth WA 6005
Telephone: 08 9222 7300
Email: lcco@parliament.wa.gov.au
Website: www.parliament.wa.gov.au

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EXECUTIVE SUMMARY

1. There are a number of criminal offences related to the Western Australian State Parliament, Members and officers of the Parliament, and other persons involved in the proceedings of the Parliament. These offences are contained in the Parliamentary Privileges Act 1891 and the Criminal Code. This includes the general offence of corruption by a public officer (s 83, Criminal Code) in those circumstances where the public officer is a Member or officer of the Parliament. The Houses of Parliament and the Western Australia Police are the only bodies that are able to investigate these offences.

2. The Corruption, Crime and Misconduct Amendment Bill 2017 seeks to restore the power and jurisdiction of the Corruption and Crime Commission of Western Australia (CCC) to investigate the conduct of Members of the Parliament of Western Australia for those offences of the Criminal Code that correspond with the contempts of Parliament expressly listed in section 8 of the Parliamentary Privileges Act 1891. The CCC’s power and jurisdiction in this regard was lost as a result of changes made in December 2014 to the Corruption Crime and Misconduct Act 2003.

3. Although the proposed amendment is relatively simple, it is not straightforward when the possible impact on parliamentary privilege is considered.

4. The Committee obtained a legal opinion from eminent barrister, Mr Bret Walker SC, as to the possible impact of the proposed amendment on parliamentary privilege and future CCC investigations that may involve proceedings in Parliament.

5. The Committee is satisfied that the proposed amendment, if passed, would not adversely impact upon parliamentary privilege.

6. Nevertheless, based on past experience the following issues will not be addressed by the proposed amendment:
   - a lack of clarity regarding the extent that evidence arising from parliamentary proceedings may be used in Criminal Code offence prosecutions; and
   - the timing of CCC notifications to the Parliament when a CCC investigation starts to examine evidence that may be subject to parliamentary privilege.

7. A memorandum of understanding between the CCC and the Parliament may go some way to addressing the issue of early notification by the CCC of investigations that may involve a claim of parliamentary privilege.

Finding

The finding appears in the text at the page number indicated:

**FINDING 1**

The Bill will not result in a diminution in the scope or operation of parliamentary privilege.
CHAPTER 1
Corruption, Crime and Misconduct Amendment Bill 2017

Referral to the Committee
1.1 On Tuesday, 20 March 2018, on the motion of the Leader of the House, the Legislative Council ordered that the Corruption, Crime and Misconduct Amendment Bill 2017 (Bill) be discharged and referred to the Committee for consideration and report by no later than Tuesday, 10 April 2018.

1.2 On Thursday, 29 March 2018 the House extended the Committee’s reporting date on the Bill from 10 April 2018 to 10 May 2018.1

The Bill
1.3 The Bill was introduced into the Legislative Assembly on 18 October 2017. The Bill was passed by that House and transmitted to the Legislative Council for concurrence on 28 November 2017. The stated purpose of the Bill is to restore the power and jurisdiction of the Corruption and Crime Commission of Western Australia (CCC) to investigate the conduct of Members of the Parliament of Western Australia which could constitute certain Criminal Code offences.

1.4 This power and jurisdiction was lost due to an amendment made in December 2014 to section 3(2) of the Corruption, Crime and Misconduct Act 2003 (CCM Act) by the deletion of a single word; “exclusively”. Section 3(2) of the CCM Act was enacted to preserve the law of parliamentary privilege and ensure that, other than where expressly provided for in the CCM Act, it continued to have effect. Its original form was as follows:

(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]

1.5 According to the Government the amendment to s 3(2) of the CCM Act by the Corruption and Crime Commission Amendment (Misconduct) Act 2014 to remove the word “exclusively” from that subsection had the effect of ousting the jurisdiction and powers of the CCC in relation to all conduct that the Houses of Parliament have an express power to punish summarily by virtue of s 8 of the Parliamentary Privileges Act 1891.2

1.6 The Bill was not the first bill of 2017 proposing the reinsertion of the word “exclusively” into the CCM Act. The same proposed amendment had been incorporated within the lengthier Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017, which was introduced into the Legislative Assembly on 16 August 2017. That Bill was amended in the Legislative Assembly on 9 September 2017, however, so that the proposal to amend s 3(2) of the CCM Act could be contained in its own discrete Bill to be considered in detail separately.

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Prior to the removal of the word “exclusively” in 2014, s 3(2) did not prevent the CCC from having jurisdiction and exercising powers where the conduct of Members of Parliament could constitute both an offence under the Parliamentary Privileges Act 1891 and an equivalent offence under the Criminal Code. The CCC has jurisdiction because the definition of misconduct in the CCM Act includes an offence punishable by two or more years imprisonment. In these circumstances it could be said that the Houses of Parliament, the CCC and the WA Police had concurrent jurisdictions. Where the question of whether conduct by a Member of Parliament may constitute an offence is not one “determinable exclusively by a House of Parliament”, the CCC was not prevented from exercising its jurisdiction and powers.

The Committee tested this argument by examining the relevant sections of the Parliamentary Privileges Act 1891 and the Criminal Code and obtaining independent legal advice.

Section 8 of the Parliamentary Privileges Act 1891 provides:

8. Houses empowered to punish summarily for certain contempts

Each House of the said Parliament is hereby empowered to punish in a summary manner as for contempt by fine according to the Standing Orders of either House, and in the event of such fine not being immediately paid, by imprisonment in the custody of its own officer in such place within the Colony as the House may direct until such fine shall have been paid, or until the end of the then existing session or any portion thereof, any of the offences hereinafter enumerated whether committed by a member of the House or by any other person —

(a) disobedience to any order of either House or of any Committee duly authorised in that behalf to attend or to produce papers, books, records, or other documents, before the House or such Committee, unless excused by the House in manner aforesaid;

(b) refusing to be examined before, or to answer any lawful and relevant question put by the House or any such Committee, unless excused by the House in manner aforesaid;

(c) assaulting, obstructing, or insulting any member in his coming to or going from the House, or on account of his behaviour in Parliament or endeavouring to compel any member by force, insult, or menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before either House;

(d) sending to a member any threatening letter on account of his behaviour in Parliament;

(e) sending a challenge to fight a member;

(f) offering a bribe to, or attempting to bribe a member;

(g) creating or joining in any disturbance in the House, or in the vicinity of the House while the same is sitting, whereby the proceedings of such House may be interrupted.

The ‘non-exclusive’ offences of the Criminal Code that reflect the contempts in section 8 of the Parliamentary Privileges Act 1891 are:

- Section 55. Interfering with legislature;
- Section 56. Disturbing Parliament;
- Section 57. False evidence before Parliament;
Section 58. Threatening witness before Parliament;
Section 59. Witness not attending or giving evidence before Parliament;
Section 60. Member of Parliament receiving bribe; and
Section 61. Bribery of member of Parliament.

1.11 The Second Reading speech for the Bill states that:³

... certain misconduct by Members of Parliament under s 8 of the Parliamentary Privileges Act 1891 could also amount to an offence under the Criminal Code. This is particularly so with respect to sections 55 to 61 of the Criminal Code, which are offences involving interference with the proper operation of Parliament, including corruption offences such as members of Parliament receiving bribes.

There are also offences contained in Chapter XIII of the Criminal Code which provide a series of offences in relation to corruption and abuse of office. Given the definition of “public officer” in the Criminal Code, it is clear that many of those offences would relate to offences of corruption committed by members of Parliament in that capacity.

Many of these Criminal Code offences comprise elements which are substantially identical to some of the offences set out in s 8 of the Parliamentary Privileges Act 1891, or breaches of Parliamentary Privilege generally. Bribery of a Member of Parliament is probably the clearest example of conduct which would comprise both an offence against s 61 of the Criminal Code and an offence punishable by Parliament under s 8 of the Parliamentary Privileges Act 1891.

In creating the Criminal Code offences referred to, Parliament has ceded its previously exclusive authority to deal with conduct of the character referred to in s 8 of the Parliamentary Privileges Act 1891. Offences under these provisions of the Criminal Code may properly be investigated by the police and prosecuted in the Courts. Insofar as conduct by a Member of Parliament or another person constitutes both an offence against the Criminal Code and s 8 of the Parliamentary Privileges Act 1891, the Courts and the relevant Houses of Parliament may have been said to have had concurrent jurisdiction.

... The removal of the word “exclusively” from the Corruption and Crime Commission Amendment (Misconduct) Act 2014, had the potential effect that - even though suspected conduct may well amount to an offence against the Criminal Code and, indeed, “misconduct” for the purposes of the CCM Act - if that conduct would also amount to a breach of Parliamentary Privilege, it could not be the subject of a CCC investigation. This is because the matter would be determinable by a House of Parliament.

Reinsertion of the word “exclusively”, would remove that potential effect, so that the CCC would be able to investigate conduct over which there was concurrent jurisdiction of the Courts and Parliament.

1.12 The Government has reassured the Parliament that the reinsertion of the word “exclusively” in subsection 3(2) of the CCM Act would have no impact on parliamentary privilege.⁴

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³ ibid.
⁴ ibid.
The amendment would leave the powers and privileges of Parliament unaffected. Indeed, the broader purpose of s 3(2) of the CCM Act is to ensure that the privileges of Parliament are not affected by the CCM Act.

For example, the Parliament, and its Privileges Committees, would retain their full authority in relation to the investigation and determination of breaches of the privileges of Parliament, including all of the offences under s 8 of the Parliamentary Privileges Act 1891. The amendment does not affect those powers at all.

Similarly, Parliamentary Privilege would still have a role to play in the investigation and prosecution of these Code offences, whether by the CCC, as part of a misconduct investigation, or an investigation by the police, as part of a criminal investigation. For example, Parliamentary Privilege may preclude the obtaining and adducing of various types of evidence.

1.13 The Committee notes that the Second Reading speech for the Bill has been extracted from a briefing note written on 25 August 2017 by the Solicitor General, Mr Peter Quinlan SC. This briefing note originally provided an opinion to the Government on the proposal to reinsert the word “exclusively” into the CCM Act when the proposed amendment was part of the lengthier Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017. The Solicitor General concluded that parliamentary privilege would not be affected by the proposed reinsertion.

Proposed amendments to the Bill

1.14 The Committee notes that at the time of referral of the Bill there was a proposed amendment published in Supplementary Notice Paper No. 41 Issue 1 on 12 March 2018.

1.15 The proposed amendment, to be moved by Hon Alison Xamon, seeks to insert a new section 27A into the CCM Act which states:

**27A. Allegation about Member of Parliament**

The Commission, when performing its functions in relation to the conduct of a Member of Parliament must —

(a) forthwith inform the Parliamentary Inspector of the name of the Member of Parliament, the grounds on which the allegation is made and the nature of the crime or misconduct by reference to the relevant statutory provision; and

(b) act in accordance with any memorandum of understanding or other agreement as to conditions and procedures between the Commission and the Presiding Officers and/or the committee of the House whose functions include matters relating to the practice, procedure and privileges of the House.

1.16 The first part of the amendment proposes introducing a requirement that from the outset of any CCC investigation into a Member of Parliament, the Parliamentary Inspector must be informed.

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7 ibid p 3.
1.17 The proposed amendment also seeks to introduce a requirement that the CCC undertake such investigations in accordance with any memorandum of understanding or other agreement relating to such investigations entered into between the CCC and the Presiding Officers of the Parliament and/or the relevant House Procedure and Privileges Committee. This proposal is related to Recommendation No. 5 of Report 44 of the Committee, which states:

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.

1.18 The Committee notes that a memorandum of understanding to give effect to Recommendation 5 of Report 44 has yet to be finalised. It is anticipated that the memorandum of understanding will cover issues such as early notification of investigations and evidence sharing. The Committee further notes that this memorandum of understanding will not cover wider issues relating to the execution of CCC search warrants on parliamentary or electorate offices or the CCC’s ability to use proceedings of the Parliament as evidence in its investigations.

1.19 Some discussion of these issues is set out in the report of the Australian Senate Privileges Committee’s inquiry into the execution of Federal Police search warrants on the offices of Members of Parliament. The Senate Privileges Committee observed:

Any protocol relating to the exercise of intrusive powers and parliamentary privilege should have proper regard to the fact that the ability to exercise intrusive powers, and to do so covertly when appropriate, is an important part of the law enforcement and intelligence toolkit.

Equally, instances where matters of parliamentary privilege are raised by the exercise of intrusive powers are likely to be rare. To the extent that law enforcement and intelligence agencies are required to follow additional processes in their exercise of intrusive powers under a protocol, any associated costs in time or resources needs to be weighed against the likelihood that such processes would only be necessary on a very occasional basis.

Opinion of Mr Bret Walker SC

1.20 As explained at the outset, the purpose of this inquiry is for the Committee to determine whether the Bill may have an adverse impact on parliamentary privilege. To this end, the

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8 Western Australia, Legislative Council, Standing Committee on Procedure and Privileges, Report 44, A Matter of Privilege Raised by Hon Sue Ellery, November 2016.
10 ibid, pp 20-21.
Committee obtained an opinion from one of the most eminent barristers in the public law field in Australia, Mr Bret Walker SC.\textsuperscript{11}

1.21 Mr Walker advised:\textsuperscript{12}

I agree with the opinion of the Solicitor General that, whether intended or not, whilst the word “exclusively” does not appear in s 3(2) of the CCC Act, the CCC is precluded from inquiring into those \textit{Criminal Code} offences that are congruent with the ‘contempt’ offences listed in s 8 of the \textit{Parliamentary Privileges Act 1891}. This is necessarily the case as the investigation of a \textit{Criminal Code} offence that was similar to a \textit{Parliamentary Privileges Act 1891} offence would plainly relate to a matter “determinable by a house of Parliament”.

In my view clause 3(2) of the CCC Act preserves parliamentary privilege and the proposed amendment will not alter this position. The only likely impact on parliamentary privilege of the proposed amendment is that it will give rise to some incidental issues relating to the identification of parliamentary privilege and the proper use of evidence in the course of the CCC’s exercise of its investigative function.

1.22 Regarding some of the practical aspects of the proposed amendment, Mr Walker advised as follows:\textsuperscript{13}

\textit{The Parliamentary Privileges Act 1891} establishes an exclusive jurisdiction of each House of Parliament in relation to the investigation and punishment of certain offences and contempts.

Section 8 of the \textit{Parliamentary Privileges Act 1891} lists certain offences over which each house of Parliament can exercise a summary jurisdiction. This jurisdiction is exclusive in the sense that no-one else can do it in that way – but that is not necessarily the only meaning of exclusivity in this context. Interestingly, however, ss 14 and 15 of the \textit{Parliamentary Privileges Act 1891} also contemplate an alternative route by way of a direction to the Attorney General to prosecute such a case in the Supreme Court. Accordingly, the s 8 offences are also plainly determinable by the Supreme Court. Even if the Supreme Court’s jurisdiction is viewed as being dependent upon first obtaining the fiat of a house of Parliament; that is no more significant a limitation than to say of any trial on indictment that it requires first the fiat or the act of a prosecutor. The section 8 offences under the \textit{Parliamentary Privileges Act 1891} also tend to reflect, in large part, the \textit{Criminal Code} offences relating to Parliament. In my opinion, the amendment would have the beneficial result of permitting CCC investigation of them.

In terms of the criminal offending that is likely to draw the attention of the CCC, there are a few matters, but not a great many, that may fall within the definition of exclusively determinable by a house of Parliament. Matters exclusively determinable by a House of Parliament would, practically speaking, be only those interferences with parliamentary proceedings that amount to a contempt but that are not otherwise punishable by the courts. That is not an easily discernible class, at present.

Each of the houses of Parliament are empowered to establish and alter, from time to time, through the processes of their privileges committees and the adoption of their committees’ reports, standards and rules of conduct for their respective

\textsuperscript{11} Memorandum of Advice, 6 December 2017, Mr Bret Walker SC.

\textsuperscript{12} ibid p 4.

\textsuperscript{13} ibid p 5.
Members. These standards and rules may also extend to Member’s staff, witnesses and other persons that may find themselves involved in parliamentary proceedings. These are matters that, in my view, are definitely exclusively determinable by a house and should not as a general rule be the subject of an investigation under the CCC Act as it is proposed to be amended.

It is difficult, of course, to attempt to define with any specificity what such matters of exclusive jurisdiction are or may be, because in essence each of the houses can from time to time mould and adapt the norms of conduct enforceable as a matter of privilege to circumstances as they unfold. It is because of that potential to add new matters to this category, whilst at the same time more clearly defining the investigative jurisdiction of the CCC, that I am of the view that the proposed amendment to subsection 3(2) of the CCC Act should be supported.

1.23 Mr Walker also considered whether it would be a preferable option to simply delete subsection 3(2) in its entirety so as to preserve parliamentary privilege. He advised:

I would not recommend the deletion of subsection 3(2) of the CCC Act to remove any reference to separate jurisdictions or to parliamentary privilege at all.

As noted above, the potential for unanticipated matters to arise which may not be a crime but which may nevertheless constitute a contempt of the Parliament, means that it is important that the houses have the power to address such matters internally case-by-case. It would also be quite inappropriate to give the CCC the function of making determinations as to exactly what conduct of Members of Parliament not amounting to a crime falls within the CCC’s jurisdiction to investigate under the CCC Act.

Conclusion

1.24 The Committee notes that the legal opinions of both the Solicitor General and Mr Bret Walker SC are supportive of the aims of the proposed amendment. The Bill will enable the CCC to investigate conduct of Members of Parliament where this conduct may amount to misconduct under the CCM Act because it constitutes an offence under Part VIII of the Criminal Code.

1.25 The Committee is satisfied that, although the CCC’s jurisdiction will be expanded if the Bill is passed:

- it will not result in a diminution in the scope or operation of parliamentary privilege. The CCC will remain subject to the law of parliamentary privilege in undertaking its investigations or exercising its powers.
- the Houses of the Parliament of Western Australia will continue to have a degree of exclusive jurisdiction over certain contempts and breaches of discipline by Members and other participants in parliamentary proceedings. The proposed amendment has no effect on the capacity of the Houses to exercise this exclusive jurisdiction, or to investigate and impose penalties for offences under section 8 of the Parliamentary Privileges Act 1891.

**FINDING 1**

The Bill will not result in a diminution in the scope or operation of parliamentary privilege.

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14 ibid.
Further analysis by the Committee

1.26 The Committee notes that during the debate on the referral of the Bill to the Committee, Members’ comments canvassed a range of issues regarding parliamentary privilege and the history of the WA Parliament’s interaction with the CCC.

1.27 The Committee sought and obtained a resolution of the House to extend the reporting date on the Bill in order to provide a more comprehensive analysis of the issues identified by Members during the course of the referral debate. This analysis is produced for the benefit of Members in the following chapters.

Hon Kate Doust MLC

Chair
CHAPTER 2
Parliamentary Privilege

What is parliamentary privilege?

2.1 As noted by Lord Rodger of the United Kingdom Supreme Court:

An invocation of parliamentary privilege is apt to dazzle lawyers and judges outside Parliament.¹⁵

2.2 The term “privilege”, in relation to parliamentary privilege, refers to certain exceptional powers and immunities from the ordinary law for things said or done in connection with the work of the Parliament. It is recognised by the law as providing protection to the Houses of Parliament, their Members and other participants engaged in “proceedings of Parliament”. It is a special advantage deemed necessary for the Parliament and its Members to function unimpeded.

2.3 These powers and immunities must be considered in the light of the central functions of Parliament to legislate for the public good, to debate important issues and to scrutinise the Government. Parliament could not perform these functions effectively if it was subject to undue interference from outside bodies, such as the police or courts.

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

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.¹⁶

2.5 The Supreme Court of Canada noted that such privileges were considered necessary:

[T]o protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly’s work in holding the government to account for the conduct of the country’s business.¹⁷

2.6 William Blackstone in his Commentaries on the Laws of England, noted that:

Privilege of Parliament was principally established, in order to protect its members not only from being molested by their fellow subjects, but also more especially from being oppressed by the power of the crown. ¹⁸

2.7 Odgers’ Australian Senate Practice states:

Parliamentary privilege exists for the purpose of enabling the Senate effectively to carry out its functions. The primary functions of the Senate are to inquire, to

¹⁶ United Kingdom, Joint Committee on Parliamentary Privilege, Report 1, Parliamentary Privilege, 30 March 1999, Chapter 1, para 3.
¹⁷ Canada (House of Commons) v Vaid [2005] 1 SCR 667 at para 41.
debate and to legislate, and any analysis of parliamentary privilege must be related to the way in which it assists and protects those functions.\textsuperscript{19}

2.8 Practically speaking, parliamentary privilege is a right attaching to each House and not to its individual Members; meaning that individual Members can only make claims of privilege in so far as any denial of their rights or threats made to them, would impede the functioning of the House as a whole.\textsuperscript{20}

2.9 Parliamentary privilege basically involves two significant aspects:\textsuperscript{21}

- The privileges or immunities of the Houses of the Parliament arising from Article 9 of the \textit{Bill of Rights 1688}\textsuperscript{22} relating to freedom of speech and absolute immunity from legal action relating to things said and done in the course of parliamentary proceedings; and

- The inherent powers of the Houses of Parliament to protect the integrity of their own processes, known technically as "exclusive cognisance".

2.10 The immunities and powers comprising parliamentary privilege are very extensive, have varied over time, and are not exhaustively defined.

2.11 Parliamentary privilege may be compared with other immunities recognised by the law:

2.11.1 Participants in court proceedings (judges, barristers and witnesses) enjoy protection against civil claims for defamation during those proceedings - this is known as "absolute privilege" or "absolute immunity".

2.11.2 "Crown privilege", or "executive privilege" in modern terminology refers to a claim of the executive government, i.e. Government Ministers, that they are immune from being required to present certain documents or information to the courts on the grounds that its disclosure would not be in the public interest. Executive privilege might be claimed in relation to:

1. ministerial or departmental advice to, or communications with, the Crown;

2. Cabinet documents and proceedings;

3. Executive Council documents and proceedings;

4. internal workings of the Government; law enforcement; public health and safety;

5. opinions or advice of law officers; or

6. information obtained from individuals or organisations in confidence.

2.11.3 Reports of legal or parliamentary proceedings by third parties, such as in newspapers and on websites, may attract what the law knows as "qualified privilege"; that is, an immunity from legal action which is not absolute and may be lost on proof of malice or other improper motive in making the publication. The law relating to qualified privilege is part of the ordinary law of defamation.

\textsuperscript{19} \textit{Odgers' Australian Senate Practice}, 14th Edition, p. 42.


\textsuperscript{22} Note, the Bill of Rights is often cited alternatively as the \textit{Bill of Rights 1688} or the \textit{Bill of Rights 1689} depending on whether the Julian or Gregorian calendar is followed.
Chapter 2  Parliamentary Privilege

Origins of parliamentary privilege

2.12 Parliamentary privilege is an ancient concept. The 1999 United Kingdom Joint Committee on Parliamentary Privilege noted:

Tradition still plays a significant part in the way Parliament does its job, in the powers it exercises and in its constitutional relationship with the Crown and the courts. Much of the strength of parliamentary privilege, not least the extent to which it is widely recognised and accepted, lies in its antiquity; the same is true of its weaknesses, in particular the obscurity and obsolescence of certain areas of privilege.\(^{23}\)

2.13 Conflict between Parliament and the courts was inevitable. As Carl Wittke notes in his *The History of English Parliamentary Privilege*:

Parliament was the “highest court in the realm.” As such, it dealt with cases too difficult for the judges of the ordinary courts, and with cases involving new points of law. In a sense, it resembled a court of equity jurisdiction. With the development of other courts, conflicts arose between them and Parliament.

... 

Nowhere has the theory that Parliament is a court – the highest court of the realm, often acting in a judicial capacity and in a judicial manner – persisted longer than in the history of privilege of Parliament.\(^{24}\)

2.14 As early as 1290 King Edward I agreed that representatives coming to London to attend Parliament should not be open to legal action which might result in them being imprisoned. In the 15th century it was confirmed that both Members and their servants should be free of legal actions which might fetter parliamentary representation while a Parliament was sitting. As Wittke states:

Very early in the history of Parliament, it became evident that members, to be of any real service, must be free to attend all sessions, unmolested by threats, insults, attacks, or arrests, whether they originated from the Crown, the courts of law controlled by the Crown, or from private citizens. This was especially true in Tudor and Stuart England, where Parliament, and more particularly the Commons, were struggling for recognition and supremacy against the prerogative and the royalty-controlled courts. It was necessary to insist that all legal actions, from whatever source they might come, should be opposed if they hindered members from being actually present in Parliament. ... It was regarded as essential that members should be free to deliberate on public questions without concern for their private estates; their minds must be free from concern for their private fortune while they are engaged in the public service. So it became a “breach of privilege” to institute actions which might involve members’ estates while those members were sitting in Parliament. The same reasoning was applied to members’ servants who were in attendance upon their masters while Parliament was in session. These two privileges were included in the Speaker’s petition at the opening of Parliament until well into the nineteenth century.\(^{25}\)

2.15 The House of Lords was recognised as having certain privileges and immunities from the start. This no doubt derived from the Lords’ status as the most senior advisers (barons and


\(^{25}\) ibid pp 15-16.
churche men) to the Sovereign and also because the House of Lords was the highest court in the land. Even though both Houses of Parliament in their early days together functioned more like a court than a legislature (with King, Parliament and the courts all housed in a single building and dealing with petitions),\(^\text{26}\) the House of Commons has had to repeatedly assert and claim its privileges and immunities against the Crown.

2.16 The first reasoned plea for the right of Members to speak freely to matters before them was delivered by Speaker Sir Thomas More in his address for privileges in 1523 in which he requested that King Henry VIII (1509-47) accept what members said in good part and in good faith for the prosperity of the realm. By 1541 the request for freedom of speech also appeared routinely in the Speaker’s petition to the King at the opening of Parliament.

2.17 A number of early cases demonstrate that the courts did not always recognise the privilege of freedom against arrest:

- **Strode’s case** (1512): the Court of Stannay administering justice in the tin mines of Cornwall fined and imprisoned Strode, a Member of Parliament, for having proposed in the House of Commons a Bill to regulate tinners;
- **Sir John Eliot’s case** (1629) (*R v Eliot, Holles and Valentine*\(^\text{27}\) ): an information was prosecuted in the Court of King’s Bench against three Members of Parliament for their conduct in Parliament and for which they were imprisoned;
- **Jay v Topham** (1689): the Serjeant-at-Arms of the House of Commons was sued for damages after having taken into custody several persons who had been committed by the House for breach of privilege; and
- **Sir William Williams’ case** (1684): the former Speaker of the Commons was prosecuted and fined for having ordered the publication of a paper which defamed the Duke of York (later King James II).\(^\text{28}\)

2.18 The problem of a lack of independence in the judiciary under the Tudor and Stuart monarchs has been noted by a number of academics. Judges held office during the King’s pleasure and particularly in the latter half of the seventeenth century under Charles II and James II royal control of the judiciary was pushed to its furthest limit, with judges regularly appointed and dismissed for political reasons and with no guarantee in trials involving parliamentarians that the judges would act otherwise than as agents of the Monarch.\(^\text{29}\)

2.19 The most significant event of the struggle for freedom of speech was in January 1642. King Charles I ordered the Attorney-General to indict for treason the five members of the House of Commons and one member of the House of Lords who were most prominent in Parliament’s attempt to transfer control of the armed forces away from the Crown. The King believed that these members had encouraged the Scots to invade England and that they were intent on stirring up riots and tumults against him in London. A rumour that they were planning to impeach the Queen for alleged involvement in Catholic plots prompted Charles into taking drastic action.

2.20 On 3 January 1642, a herald was sent to the House of Commons to order that the Five Members be handed over to answer the charges against them. The House refused to comply with the King’s command because it was an infringement of parliamentary privilege. The


\(^{27}\) (1629) 3 St Tr 293-336.

\(^{28}\) GF Lock, ‘Parliamentary privilege and the courts: the avoidance of conflict’ (Spring 1985) Public Law 64 at 87-88; *R v Murphy* (1986) 5 NSWLR 18 at 31 (per Hunt J).

following afternoon, 4 January 1642, Charles marched to Westminster at the head of a body of approximately 400 soldiers and retainers, intending to arrest the Five Members in person. Leaving the soldiers at the door, he entered the Chamber of the House of Commons and occupied the Speaker’s chair. This intrusion was the first time that a monarch had entered the Chamber; it was a major breach of parliamentary privilege.

2.21 Warned of the King’s approach by the Earl of Essex, the Five Members had already escaped and gone into hiding in London. Nevertheless, the King was confronted with defiance by the Members of the House of Commons:

No King of England had ever interrupted a session of the House of Commons, and at first the members sat stunned when Charles swept down the centre aisle. Then they remembered their duty and stood bareheaded as the King demanded that Speaker William Lenthall point out the five members he had come to arrest. Lenthall answered, “I have neither eyes to see, nor tongue to speak but as this House is pleased to direct me”. Rebuffed, the King gazed along the serried rows of members. “Well,” he concluded, “I see all the birds are flown. I cannot do what I came for.” With that Charles strode out of the House as the cry of “Privilege, privilege” rose up behind him.

2.22 The King’s disregard of parliamentary privilege did great political damage to his cause. The House of Commons presented the intrusion as an armed assault on Parliament itself, and the King’s reputation never recovered.

2.23 After the English Civil War and the return of the Stuart monarchs in 1660 the House of Commons attempted to enshrine the privilege of freedom of speech in statute. Within months of the restoration of the monarchy a Bill was read to maintain and confirm the House’s privileges, stating that “the Parliaments of England and the Members thereof shall forever hereafter fully and freely enjoy all their ancient and just rights and privileges in as ample a manner as... formerly”. The Bill, however, was never passed by the House of Lords.

2.24 In 1680 a pamphlet containing libels on the Duke of York, later King James II, was printed among the papers of the House of Commons and its publication was authorised by the Speaker, Mr William Williams. In 1686, by which time the Duke had become King, Mr Williams was prosecuted for his actions as Speaker and fined £10,000. This prosecution was seen as an attack on the freedom of the Parliament to conduct its business without undue interference by the Crown. This event came at a time of heightened religious tensions between the Catholic King James II and the Protestant-dominated Parliament.

2.25 William of Orange, Protestant son-in-law to Catholic King James II, was invited to intervene and accept the Crown. In what became known as the “Glorious Revolution”, on 5 November 1688 William invaded England with 15,000 troops in an action that ultimately deposed King James II and won him the crowns of England, Scotland and Ireland. King James II fled to France. The Bill of Rights 1688 (UK) was Parliament’s response to the actions of the deposed King James II. Article 9 directly addressed the concerns raised in the case of Speaker Williams and other similar cases. The Bill of Rights 1688 stated:

Whereas the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of the kingdom ...

By prosecutions in the Court of King’s Bench for matters and causes cognisable only in parliament; and by divers other arbitrary and illegal courses...

And thereupon the said lords spiritual and temporal and Commons ... do in the first place (as their ancestors in like cases have usually done) for the vindicating and asserting their ancient rights and liberties, declare:

... 

9. 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.

2.26 The primary object of Article 9 was to reinforce and to protect freedom of speech in the House of Commons. In the case of Pepper v Hart Lord Browne-Wilkinson made the following comment on the object of article 9:

Article 9 is a provision of the highest constitutional importance and should not be narrowly construed. It ensures the ability of democratically elected Members of Parliament to discuss what they will (freedom of debate) and to say what they will (freedom of speech)...In my judgment, the plain meaning of article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal, for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed. 33

2.27 After 1701, with the appointment of judges with security of tenure and the establishment of a prosecution service independent of the Crown, the need for the immunity from being hindered from attending Parliament because of litigation retreated, and in the course of the 19th century various statutes abolished the privileges in respect of litigation against Members and their servants.

2.28 In the late 17th and early 18th centuries, some claims of privilege went beyond those in the Bill of Rights 1688. For instance, some members sought to extend privilege to cover claims of trespassing and poaching on their lands. Such claims were ultimately curtailed as a serious obstruction to the ordinary course of justice, and privilege came to be recognised as only that which is absolutely necessary for Parliament to function effectively and for Members to carry out their responsibilities. 34

2.29 In 1869 in Ex parte Wason (1869) LR 4 QB 573 a private individual attempted to bring criminal charges of conspiracy to pervert the course of justice against three persons, two of whom were Members of the House of Lords. The Court held that Members of either House were not civilly or criminally liable for any statements made in the House, or for a conspiracy to make such statements.

2.30 In 1887 in Dillon v Balfour (1887) 20 Irish LR 600 civil proceedings were brought against a Member of the House of Commons for words spoken in a debate in the House. The Court ruled that it had no jurisdiction to entertain the claim.

2.31 Four major cases in the 19th Century consolidated parliamentary privilege within the common law, as courts accepted that Parliament had a limited jurisdiction that was absolute and

32 [1993] AC 593.
33 At p 638.
34 Marleau R and Montpetit C (eds), House of Commons Procedure and Practice (Canada), Cheneliere/McGraw-Hill, Montreal, 2000, p 55.
exclusive, but that the courts maintained a role in defining the limits of that jurisdiction. Those cases were:

- *Burdett v Abott* (1811).\(^{35}\)
- *Stockdale v Hansard* (1836-1837).\(^{36}\)
- *Howard v Gosset* (1845).\(^{37}\)
- *Bradlaugh v Gosset* (1884).\(^{38}\)

2.32 The general rule developed through these cases is that the courts will inquire into the existence and extent of parliamentary privilege, but not its exercise.\(^{39}\) In the NSW case of *Egan v Willis and Cahill*, Gleeson CJ summed up this relationship as far as parliamentary privilege is concerned as follows:

... after a long period of controversy in England, it was established that disputes as to the existence of a power, privilege or immunity of a House of Parliament are justiciable in a court of law. The same principle applies in Australia. However, whilst it is for the courts to judge the existence in a House of Parliament of a privilege, if a privilege exists it is for the House to determine the occasion and the manner of its exercise.\(^{40}\)

2.33 Over the past 150 years or so such dispute has been avoided by the courts and parliaments generally exercising mutual respect and understanding for their respective rights and privileges.\(^{41}\)

2.34 Dr Gerard Carney writes:

> While the history of parliamentary privilege may portray at times a petulant obsession on the part of parliament with its dignity, this was the lesson of bitter experience at the hands of the Crown. Those lessons ought not to be forgotten or regarded as irrelevant.\(^{42}\)

**Sources of parliamentary privilege in Western Australia**

2.35 To a significant extent modern parliamentary privilege flows from Article 9 of the English *Bill of Rights 1688*. Article 9 states:

> 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.

2.36 By this declaration the English Parliament claimed immunity from all other courts and the common law of the realm, relying upon its original status as the highest court in the land.

2.37 Article 9 continues to apply as law in both the United Kingdom and Western Australia.

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\(^{35}\) 14 East 1.
\(^{36}\) The principal case was (1839) 9 Ad & E 1.
\(^{37}\) 10 QB 359.
\(^{38}\) 12 QBD 271.
\(^{39}\) New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly) [1993] 1 SCR 319 at 350 (per Lamer CJ).
\(^{40}\) *Egan v Willis and Cahill* (1996) NSWLR 650 at 653(per Gleeson CJ). See also *R v Richards; Ex parte Fitzpatrick & Browne* (1955) 92 CLR 157.
\(^{41}\) PM Leopold, ‘Proceedings in parliament: the grey area’ (Winter 1990), Public Law 475.
2.38 In order to maintain the currency of Article 9 in Western Australia, s 36 of the *Constitution Act 1889* provides that:

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

2.39 The Western Australian *Parliamentary Privileges Act 1891* was subsequently enacted. Section 1 of the *Parliamentary Privileges Act 1891* defines parliamentary privilege in Western Australia as that as expressly set out within that Act in addition to all of the privileges, immunities and powers held by the United Kingdom House of Commons as at 1 January 1989 (to the extent which the latter is not inconsistent with what the Western Australian Parliament has expressly enacted in the *Parliamentary Privileges Act 1891*).

2.40 Some of the provisions of the *Parliamentary Privileges Act 1891* have expressly modified the scope of privilege that the Western Australian Parliament inherited from the House of Commons. For example, s 8 of that Act enables either House to impose fines on its Members and others for committing any of the seven specific contempts set out in that section. The power to fine is a power which has been argued to have been lost by the United Kingdom House of Commons since the case of *R v Pitt and R v Mead* in 1762, although the House of Commons itself recently reaffirmed its view that it still holds such a power.\(^{43}\)

2.41 The 2014 United Kingdom Joint Committee on Parliamentary Privilege stated:

> It is unfortunate that Parliament’s restraint has led to doubt about the continuing existence of its powers. They are a part of United Kingdom law and have been so for centuries. ...

> The first and most important challenge is to assert the continuing existence of each House’s jurisdiction over contempt. This is, fundamentally, a test of institutional confidence. We urge the two Houses to rise to this challenge. As the Clerk of the House of Commons has said, the question is not whether the Houses’ penal powers exist; it is whether they can be enforced. Desuetude is not a legal doctrine in England and Wales, and there is no need for statute to confirm what already exists. The power to fine (based on the power possessed by the United Kingdom House of Commons) has only recently been asserted and used in New Zealand.\(^{44}\)

2.42 Other statutes that are relevant to parliamentary privilege in Western Australia are the *Parliamentary Papers Act 1891*, the *Defamation Act 2005*, the *Criminal Code*, the *Constitution Act 1889*, and the *Constitution Acts Amendment Act 1899*.

### The Article 9 immunity and freedom of speech

2.43 Today the most important of Parliament’s immunities is the freedom of parliamentary debates and proceedings from question and impeachment in the courts; the most significant effect of which is that Members of Parliament cannot be sued or prosecuted for anything they say in debate in the Houses. This immunity extends to the evidence of witnesses and comments made by Members during committee proceedings. This immunity exists because of:

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\(^{43}\) United Kingdom, House of Lords and House of Commons, Joint Committee on Parliamentary Privilege, Parliamentary Privilege, Report of Session 2013-14, HL Paper 30, HC 100, 3 July 2013.

\(^{44}\) ibid, p 23.
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 be later held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say.  

2.44 This freedom includes the freedom to make mistakes, since “[t]here would be no freedom of speech if everything had to be proved to be true before it was uttered”. Furthermore, Members can make statements that they know to be false, although they do so at the risk of repercussions from their own House’s disciplinary processes. As Dr Gerard Carney notes:

> The privilege of freedom of speech only protects members from being questioned by the Courts and by other outside bodies. They remain, however, subject to the jurisdiction of their own House.

2.45 The right of freedom of speech is therefore not completely unfettered, and is regulated by the Standing Orders and Customs of each House, which control who may speak at any time, how long a Member may speak, prohibit certain inappropriate words or language as “unparliamentary” and which restrict comments that may be made against other Members and non-Members. It is accordingly the custom that Members will seek to apologise to the House and correct the record at the earliest opportunity when they have been found to have spoken in error.

2.46 The Article 9 privilege extends not just to the actual debates in the Houses and the proceedings of committees, but to documents and oral statements used, or to be used, in connection with proceedings in Parliament. Privilege extends to the matters covered in petitions, publication of matter to parliament while it is sitting, the evidence of non-Members to parliamentary committees, and the drafts and notes prepared for and by Members for use in debate and for questions in the House.

2.47 McPherson JA observed in *Rowley v O’Chee*:

> Proceedings in Parliament will inevitably be hindered, impeded or impaired if members realise that acts of the kind done here for the purposes of Parliamentary debates or question time are vulnerable to compulsory court process of that kind. That is a state of affairs which, I am persuaded, both the Bill of Rights and the Act of 1987 are intended to prevent.

2.48 The application of the term “proceedings in Parliament” is less clear-cut in relation to matters only connected with, or ancillary to, the formal transaction of parliamentary business. For instance, there have been conflicting court decisions in recent years as to whether the work of catering staff at a Parliament House is defined for the purposes of a worker’s compensation claim as a “proceeding in Parliament”. Whereas parliamentary committee staff have been denied access to an industrial tribunal for matters related to their employment due to the connection of that employment to the business of the Parliament. The relevant test is therefore function and not geography. In other words, the question to be asked should be “Are the proceedings part of the transactions of parliamentary business?”, and not “Were the proceedings held inside the Houses of Parliament?”

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45 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 334.
49 *President of the Legislative Council (SA) v Kosmas* [2008] SAIRC 41.
2.49 Because of the limits of the phrase “proceeding in Parliament”, certain important work of the Parliament is clearly not protected by Article 9. Correspondence by a Member of Parliament to a constituent or a Minister is not regarded as a “proceeding in parliament”, and so are not protected by absolute immunity. Nor do Members have absolute privilege if they disclose or circulate a petition, question, letter, or other document, other than in the established parliamentary manner. Thus circulating to the news media a petition or a letter addressed to the President of the Legislative Council is not protected by absolute privilege. The issue as to whether communications with constituents should be covered by parliamentary privilege was canvassed in a recent inquiry by a UK parliamentary committee into phone-hacking, which noted:

We agree with the Clerk of the House that the question of whether Members’ performance of their constituency-related duties is part of the work of Parliament is “difficult.” It has become increasingly difficult as the proportion of time spent by MPs on constituency-related work has grown. But the principle is well established: unless a Member’s constituency-related work is carried out on the floor of the House, in one of its committees, or through the tabling of a motion, question or amendment, it is not a proceeding in Parliament and it is not, therefore, protected by privilege. Such was the conclusion of the Joint Committee in 1999, which was itself founded on previous findings of the House, of committees of the House and of the courts. The question that remains is whether a principle that is founded on a set of circumstances far removed from those that now apply, and which were codified in a statute more than four centuries ago, remains entirely fit for purpose. That is a question that goes far beyond the scope of this Report.  

2.50 The Privileges Committee of the Australian Senate also recently considered the access by covert investigative bodies to the metadata contained on the computers of Members of Parliament. The Senate committee noted that such metadata itself could contain material that is protected by parliamentary privilege:

The committee now turns to the information held by parliamentary departments, departments of state or private agencies in relation to members of Parliament or their staff which can be acquired without a warrant. This includes the information commonly referred to as metadata that is collected under the Telecommunications (Interception and Access) Act 1979, as well as electronic information captured in the use of such things as electronic keys. Access to such information does not necessarily require the use of intrusive powers whether covertly or otherwise as such information can be obtained during routine investigations.

In addressing the extent to which ‘metadata’ might be subject to the claims of parliamentary privilege, the Clerks of the Australian Parliament have argued that in considering whether parliamentary privilege relates to certain information, the format of information is ultimately irrelevant. This principle serves as a response to the erroneous view that claims of parliamentary privilege relates to certain information, the distinction between ‘metadata’ and ‘content’ is questionable. Clearly, metadata can be very revealing, and legitimate concerns have been raised that the exposure of a Member’s

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metadata to the intrusive powers of law enforcement and intelligence agencies could have a chilling effect on the work of the parliament.  

2.51 Members do not have explicit immunity against the execution of subpoenas, search warrants or orders for discovery of documents from any law enforcement agency. The law of parliamentary privilege, however, restricts the use before a court or tribunal of material obtained in this way. It is, nevertheless, a contempt of Parliament to attempt to serve a summons or other legal process on a Member of Parliament or require them to attend a court whilst their House is actually sitting. This is because the Parliament has priority with respect to the attendance of its Members. For the same reasons Members and senior parliamentary staff are exempt from jury duty. In March 2010 a Perth law firm attempted to serve a witness summons for civil proceedings on Hon Jon Ford MLC at Parliament House during Question Time. The Procedure and Privileges Committee of the Legislative Council found the law firm to be in contempt of Parliament, but recommended that no action be taken after a written apology was received from the lawyer concerned.

2.52 Members are not immune from arrest for a criminal matter. Parliament is not a sanctuary or place where Members can hide from the criminal law. In 2010 three Members of the UK House of Commons and one Member of the House of Lords were committed to trial on charges of false accounting under the Theft Act 1968 (UK) arising from claims they made in respect of parliamentary expenses. All four Members claimed that criminal proceedings could not be brought against them because such proceedings would infringe parliamentary privilege (based both on the Article 9 immunity and the exclusive cognisance of the House). This claim was dismissed by the Crown Court, the Court of Appeal and the UK Supreme Court in the case of R v Chaytor and others [2010] UKSC 52. The Supreme Court held that submitting claims for allowances and expenses does not form part of, nor is it incidental to, the core or essential business of Parliament, which consists of collective deliberation and decision making. The submission of claims is an activity which is an incident of the administration of Parliament; it is not part of the proceedings in Parliament.

2.53 Criminal acts within the precincts of Parliament, absent any question of parliamentary privilege, have always fallen within the jurisdiction of criminal courts and this has never been challenged by Parliament. In 1812 John Bellingham was indicted, tried and convicted of the murder of the Prime Minister, Spencer Perceval, at the entrance to the lobby of the House of Commons. Bellingham was not a Member of Parliament, but it would have made no difference had he been.

2.54 In November 2008 MP Damian Green’s office at the UK Parliament was searched by police without a search warrant. The Speaker of the House of Commons subsequently announced a protocol in which a warrant must be issued for all future police searches within the Parliament and that the Speaker may attach any conditions to a warrant with respect to police handling parliamentary materials that may be subject to parliamentary privilege.

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52 Odgers’ Senate Practice (2008), p 46.
53 Juries Act 1957, Item 1 Schedule 1.
54 Western Australia, Legislative Council, Procedure and Privileges Committee, Report 21, Referral of a Matter of Privilege Raised By Hon Jon Ford MLC, March 2010.
Exclusive cognisance

2.55 The phrase “exclusive cognisance” arises from those cases where the courts have ruled that an issue should be left to be resolved by Parliament rather than determined judicially. Exclusive cognisance refers not simply to Parliament, but to the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament. The concept of exclusive cognisance was explained in the 1999 report of the United Kingdom Parliament Joint Committee on Parliamentary Privilege as follows:

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. 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.56

2.56 The boundaries of exclusive cognisance result from accord between the two Houses and the courts as to what falls within the exclusive province of the former. Not only is Parliament independent from the government and judiciary, but in bicameral parliaments exclusive cognisance extends to each House’s independence from the other House. Each House has the right to judge the lawfulness of its own proceedings and has the power to require the attendance of witnesses and the production of documents. As Sir William Blackstone said in his Commentaries on the Laws of England:

the whole of the law and custom of Parliament has its origins from this one maxim, that whatever matter arises concerning either House of Parliament, ought to be examined, discussed and adjudged in that House and not elsewhere.57

2.57 As noted above, a crime committed in the Parliament is not immune from prosecution. The crime may also, however, constitute a contempt of Parliament. Both the contempt and the offence may be independently punished by the Parliament and the courts and double jeopardy does not apply. The recent assault of Mr Rupert Murdoch during a UK House of Commons’ select committee hearing is such an example. In that case the courts and the Parliament would have overlapping jurisdictions. In that case the courts convicted the assailant and sentenced him to a period of six weeks imprisonment.58 In 1988 Mr Ron Brown MP damaged the mace in the course of a heated debate in the Commons’ Chamber and declined to apologise. The House exercised its penal powers in relation to both the damage

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to the mace and the lack of respect for the authority of the Chair. The Director of Public Prosecutions subsequently halted an attempt to bring a private prosecution.\(^{59}\)

2.58 Thus the House does not assert an exclusive jurisdiction to deal with criminal conduct, even where this relates to or interferes with proceedings in committees or in the House.

2.59 Courts are also unlikely to accept the argument of exclusive cognisance in relation to actions in contract or tort arising out of the internal administration of the Parliament.\(^{60}\) A number of cases relating to the employment conditions of parliamentary employees support this position.\(^{61}\) There are also now various statutes relating to the administration of Parliaments (such as the Parliamentary and Electorate Staff (Employment) Act 1992) that are open to interpretation by the courts and which have thereby eroded any potential claims to exclusive cognisance.


\(^{60}\) ibid, paragraph 75.

\(^{61}\) The Clerk of the UK House of Commons has been sued in his statutory capacity of Corporate Officer of the House: Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons (No. 2) 2000 72 ConCR 21; Bear v State of South Australia (1981) 48 SAIR Pt 2 604; Canada (House of Commons) v Vaid (2005) 252 DLR (4th) 529; R v Graham-Campbell; ex parte Herbert [1935] 1 KB 594.
CHAPTER 3
Breach of privilege and contempt of parliament

Breach of privilege and contempt of parliament

3.1 A distinction is to be made between two terms which tend to be used interchangeably, namely, ‘breach of privilege’ and ‘contempt of parliament’:

- A breach of privilege involves a breach of a specified privilege of Parliament, such as where it appears to a court that a parliamentary debate has been called into question during the course of a trial or where one of the special rights of the House or its members is infringed.
- A contempt of Parliament is conduct which obstructs or impedes a House or one of its members in the conduct of parliamentary functions or duties.

3.2 A breach of privilege may result in a contempt, but a contempt will not necessarily involve a breach of privilege. Thus a contempt can occur without there being a breach of any specific right or immunity of Parliament. Further, whereas a breach of privilege must fall within one of the already existing categories, the Houses of Parliament are said to have complete discretion to decide (without legislation) what is or is not ‘contempt of the House’.

3.3 Erskine May 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’. \(^{62}\)

3.4 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. \(^{63}\)

Available penalties for breach of privilege or contempt

3.5 This list of penalties available to the Parliament is not exhaustive. By way of example, the following penalties may be imposed by either of the Houses of the WA Parliament for a breach of privilege or contempt:


in addition to the arguable general power to fine inherited from the House of Commons under s. 1 of the Parliamentary Privileges Act 1891, there is a list of contempts set out in s 8 of the Parliamentary Privileges Act 1891 that the Houses of the Western Australian Parliament may punish by way of fine:

8. Houses empowered to punish summarily for certain contempts

Each House of the said Parliament is hereby empowered to punish in a summary manner as for contempt by fine according to the Standing Orders of either House, and in the event of such fine not being immediately paid, by imprisonment in the custody of its own officer in such place within the Colony as the House may direct until such fine shall have been paid, or until the end of the then existing session or any portion thereof, any of the offences hereinafter enumerated whether committed by a member of the House or by any other person -

(a) disobedience to any order of either House or of any Committee duly authorised in that behalf to attend or to produce papers, books, records, or other documents, before the House or such Committee, unless excused by the House in manner aforesaid;

(b) refusing to be examined before, or to answer any lawful and relevant question put by the House or any such Committee, unless excused by the House in manner aforesaid;

(c) assaulting, obstructing, or insulting any member in his coming to or going from the House, or on account of his behaviour in Parliament or endeavouring to compel any member by force, insult, or menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before either House;

(d) sending to a member any threatening letter on account of his behaviour in Parliament;

(e) sending a challenge to fight a member;

(f) offering of a bribe to, or attempting to bribe a member;

(g) creating or joining in any disturbance in the House, or in the vicinity of the House while the same is sitting, whereby the proceedings of such House may be interrupted.

The significant point to note about s 8 is that no maximum amount is prescribed, leaving the determination of an appropriate amount for a fine to the discretion of the House. In the event of the non-payment of a fine imposed under s 8, a penalty of imprisonment may be imposed.

In 1998 there was a failure by Dr Peter Murphy of the Department of Resources Development to produce documents under summons to the Legislative Council Estimates and Financial Operations Committee. Dr Murphy was found to be in contempt of Parliament and was fined $1500 by the Legislative Council.

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64 The power to fine was denied to the House of Commons in 1762 by Lord Mansfield in R v Pitt and R v Mead (3 Burr 1335) but the House of Commons continues to argue that it retains this power.

65 Western Australia, Legislative Council, Select Committee of Privilege on a Failure to Produce Documents under Summons, 8 December 1998.
Imprisonment

3.9 It is clear that the House of Commons has power to commit a Member or non-Member for contempt of Parliament. While the Commons can no longer claim to be a court of record (as in the case of the House of Lords), its power to commit for contempt has long been recognised by the courts and exercised by the House.66

3.10 The inherent power to imprison for contempt is a curious one given that the House of Commons is not a court of record like the House of Lords. Erskine May notes that:

It was probably owing to the medieval inability to conceive of a constitutional authority otherwise than as in some sense a court of justice that the Commons succeeded in asserting their right to commit offenders on the same terms as the Lords. In any case they are found freely exercising this right from the beginning of Elizabeth’s reign, and even earlier if Holinshed’s account of their proceeding in Ferrer’s Case [in 1543] is to be trusted … It is calculated that over a thousand instances of its exercise up to the middle of the nineteenth century are to be collected from the Journals.67

3.11 Parliament is only empowered to imprison for the remaining term of the current session of Parliament. Denman C.J. stated the following in Stockdale v Hansard:

however flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offence being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every Court in Westminster Hall and every Judge of all the Courts would be bound to discharge him by habeas corpus.68

3.12 A session of Parliament has tended to last four years in Western Australia in recent times. This principle is also recognised in Erskine May,69 which goes on to state:

The more recent practice of the Commons has been not to commit offenders for any specified time, but generally or during pleasure; and to keep them in custody until they present petitions expressing proper contrition for their offences and praying for their release, or until, upon motion made in the House, it is resolved that they shall be discharged.70

3.13 The most notable example of imprisonment by the Parliament in WA was the case of Mr Brian Easton, following Mr Easton’s use of the petitions process to table inappropriate material in the Legislative Council. In December 1994 the Legislative Council ordered that Mr Easton apologise in writing to the House within 14 days of the order. The Legislative Council ultimately imprisoned Mr Easton in 1995 for seven days for failing to provide the apology. Mr Easton was also prohibited henceforth from ever again petitioning the Legislative Council without the consent of the House.71

3.14 Interestingly, Mr Easton was not imprisoned under the authority of s.8 of the Parliamentary Privileges Act 1891, but rather under the general powers inherited from the United Kingdom

68 (1839) 9 AD &E 1 at 114; 112 ER 1112 at 1156.
House of Commons in s 1 of the *Parliamentary Privileges Act 1891* for his failure to apologise for a contempt. That s 8 was not intended to be an exhaustive list of the Parliament’s punitive powers is indicated in the Second Reading Speech of the then Attorney General (Hon S. Burt) on the Parliamentary Privileges Bill 1889 in the Legislative Assembly:

[W]e have specified, and thought it better to specify, in this Act certain matters in respect of which Parliament may deal, such as contempt committed by a member, or strangers in the House. These provisions, it will be seen, are provided in s 8 of the Bill: and in cases where these powers are particularly defined, in the sections of the Bill following s 8, the provisions of this Act shall prevail; that is to say, if the House desires to exercise the summary power of committing for contempt, it shall not go back to ascertain what the power of the House of Commons would be, if we find that that particular matter is dealt with in the sections of this Bill following the 8th section.\(^\text{72}\)

3.15 The Committee also notes the fact that s 8 of the *Parliamentary Privileges Act 1891* creates a punitive power for the Western Australian Parliament that at the time there was much speculation that the United Kingdom House of Commons did not then possess - the power to fine. In that context, s 8 should be viewed as adding to or expanding the punitive powers inherited from the House of Commons, and not limiting them. This view is supported by the Full Court of the Supreme Court of Western Australia’s approach to the interaction between ss 1 and 4 of the *Parliamentary Privileges Act 1891* in the decision in *Aboriginal Legal Service of Western Australia Inc v Western Australia* (1993) 9 WAR 297.

**Apology, reprimand, admonishment or censure**

3.16 The admonishment or reprimand by the President of a Member standing in their place, or of a private individual at the bar of the House, is another penalty available to the Legislative Council. Erskine May notes of the UK House of Commons that:

> What is said by Mr Speaker in reprimanding or admonishing offenders is always ordered to be entered in the Journals.\(^\text{73}\)

3.17 At their seat in the House (if a Member) or ordering the offender to apologise to the House in writing or at the bar of the House or reprimand, admonishment or censure at the bar of the House (if a non-Member). Until 1772 it was a requirement for offenders to kneel at the Bar. Some relevant precedents are:\(^\text{74}\)

- In 1992, Mr Harry Williams was ordered to apologise to the Legislative Council in writing after being found in contempt for serving a writ upon a Member within the precincts of Parliament House.
- In 1962 *The West Australian* newspaper was directed by the Legislative Council to publish an apology for an inaccurate and misleading article in a prominent position in the following day’s newspaper.
- In 1986 Mr Peter Ellett was found in contempt for refusing to answer questions in the course of an inquiry by a Select Committee. Mr Ellett was ordered to attend before the

\(^{72}\) Western Australia, Legislative Assembly, *Hansard*, page 96, 28 January 1891.


Bar of the Legislative Council, and a censure motion against Mr Ellett was put and passed.\(^{75}\)

- In December 2007 the Legislative Council ordered non-Members to provide written apologies to the Council for breaches of parliamentary privilege as set out in the report of the Select Committee on a Matter Arising in the Standing Committee on Estimates and Financial Operations. The Council also ordered two Members to stand in their places to apologise for their part in the breaches and prohibited them from serving on committees.

- In 2016 Ms Rachael Turnseck and Mr Stephen Home were ordered to apologise to the Legislative Council in writing after being found in contempt for their parts in constructing a deliberately misleading answer to a parliamentary question without notice.\(^{76}\)

**Suspension of a Member**

3.18 With or without pay.

**Expulsion of a Member**

3.19 The ultimate penalty that the Legislative Council has available to it with respect to its Members is expulsion. The UK House of Commons has expelled Members for such crimes as perjury, forgery, fraud and corruption. Three UK Members have been expelled in the last century.\(^{77}\) In 1920 the Australian House of Representatives expelled Mr Hugh Mahon, the Member for Kalgoorlie for “seditious and disloyal utterances” after he made a speech criticising Britain’s policies towards Ireland and had called for Australia to become a republic.\(^{78}\)

**Administrative Penalties**

3.20 A variety of other penalties of an administrative nature may be imposed, such as prohibiting a Member from holding a certain position or from serving on parliamentary committees for the rest of a parliamentary session (by implication, this carries a financial penalty as Members are paid extra to serve on committees).

**Banning from premises**

3.21 Offending persons (particularly in the case of journalists or former Members of Parliament) may be banned from the parliament building, subject to the agreement of both Presiding Officers.

**Retention of Parliament’s Penal Powers**

3.22 The argument is often put that a House of Parliament inquiring into an alleged breach of privilege or contempt of Parliament is inherently biased as it is acting as the “judge, jury and executioner”. However, the Legislative Council in the exercise of its privilege jurisdiction is no more inherently biased than a Supreme Court Justice who jails a person for contempt in

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\(^{75}\) ibid, p 5.

\(^{76}\) Western Australia, Legislative Council, Standing Committee on Procedure and Privileges, Report 44, *Matter of privilege raised by Hon Sue Ellery MLC*, November 2016, p 83.


their court. It is therefore not surprising that parliaments around the world have shown great reluctance to surrender their contempt jurisdiction to the courts.

3.23 Then Clerk of the Australian Senate, Mr Harry Evans, argued against the transfer of Parliament’s penal jurisdiction to the courts and highlighted the following difficulties which could arise if this took place:

- The balance of power between legislature, executive and judiciary would be affected. It would greatly expand the scope for judicial inquiry into and judgement upon parliamentary proceedings, which is what parliamentary privilege is intended to prevent.
- Unless the statutory provisions were to include some catch all provision, the category of contempts in respect of which a penalty could be imposed would be closed, and a House would be powerless to deal with obstructions and interferences not covered by the specific statutory provisions.
- Issues would arise in court proceedings such as what defences would apply and how would claims of executive privilege or public interest immunity be dealt with?
- What would happen in relation to remedies for continuing offences and remedies against offences directed at potential future proceedings, in the absence of the current parliamentary power of committal?

3.24 Mr Evans concluded that these considerations support the preservation of the current parliamentary power of committal for contempt, as a reserve power, even where, like in Western Australia, there is the presence of statutory prescription of criminal offences corresponding to many of the common contempts. 79

3.25 A 2009 Report the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament recommended that the Houses of the Western Australian Parliament should retain the bulk of their penal powers to deal with breaches of privilege and contempts and not transfer them to the courts. 80

**Criminal Prosecution**

3.26 In addition to the imposition of any other penalty by the Legislative Council, there is also the option of directing the Attorney General to prosecute any contempt which is punishable by law (such as under the *Criminal Code*) pursuant to s 15 of the *Parliamentary Privileges Act 1891*.

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80 *ibid* pp 13-16.
CHAPTER 4
Criminal Code offences relating to parliament

Criminal Code offences relating to parliament

4.1 Many of the Criminal Code offences comprise elements all of which are substantially identical to some of the offences set out in s.8 of the Parliamentary Privileges Act 1891 as contempts of Parliament. These Criminal Code offences are:

- s. 55: interference with the legislature;
- s. 56: disturbing Parliament;
- s. 57: false evidence before Parliament;
- s. 58: threatening witness before Parliament;
- s. 59: witnesses refusing to attend or give evidence before Parliament;
- s. 60: Member of Parliament receiving bribes; and
- s. 61: bribery of Member of Parliament.

4.2 For instance, bribery of a Member of Parliament is probably the clearest illustration of conduct that would be both an offence against s 61 of the Criminal Code and an offence punishable by Parliament under s 8 of the Parliamentary Privileges Act 1891. This therefore establishes a concurrent jurisdiction between Parliament on the one side and the police/Director of Public Prosecutions and the courts on the other side.

4.3 The 2009 Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament noted that this concurrent jurisdiction conflicts with the fundamental parliamentary privilege of freedom of speech embodied in Article 9 of the Bill of Rights 1688 (UK) and also with the general principles of common law regarding the ability of courts to intervene in parliamentary proceedings, which include that:

- It is for the courts to determine the powers of a Parliament but for the Parliament to determine the appropriate exercise of such powers;
- Parliament has exclusive jurisdiction to determine the law regarding its internal proceedings as long as such determinations do not cause substantive violations of individual rights; and
- as far as possible, the courts will resolve disputes without ruling on the validity of parliamentary proceedings.

4.4 The 2009 Select Committee also observed:

How then, can offences such as wilfully giving false evidence to the House or a committee (s57, The Criminal Code) be effectively prosecuted, given the restrictions on questioning the proceedings of Parliament in a court? Prosecutions under sections 57 and 58 of The Criminal Code create problems for the court because in order to mount a prosecution the court will need access to material that is subject to parliamentary privilege. This means it is available for a defendant

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81 Ibid p 17.
to argue that the use of certain evidence in any court proceedings would breach parliamentary privilege.\textsuperscript{82}

4.5 As was described in \textit{Halden v Marks} as follows: at 462:

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 see \textit{R v Jackson} (1987) 8 NSWLR 116; \textit{Prebble v Television New Zealand Ltd}; \textit{Australian Broadcasting Corporation v Chatterton} (1986) 46 SASR 1; \textit{R v Grassby} (1991) 55 A Crim R 419; \textit{Australian Medical Association (NSW Branch) v Minister for Health (No. 2)} (1992) 26 NSWLR 114.\textsuperscript{83}

4.6 In such cases it is clear that in the regulation of its own proceedings the court must make its own assessment as to whether it would be in breach of parliamentary privilege. This is consistent with a 2009 memorandum of advice by the UK Attorney General — the principal conclusion of the memorandum was that the determination of whether material was inadmissible as evidence in a criminal trial by virtue of Article 9 was a question of law for the court.\textsuperscript{84} The court is not required to in effect seek an advisory opinion as to the matter from Parliament itself. It is therefore possible that where no objection is taken to the use of evidence that relates to a proceeding in Parliament by a party involved in the proceedings, no such assessment by the court may take place. There is also, of course, no preclusion against alleging the fact of the occurrence of events or the saying of words in Parliament so long as there is no accompanying allegation of impropriety or any other questioning of those events.\textsuperscript{85} That is, the prohibition against the use of parliamentary proceedings in legal proceedings only where those proceedings may be “questioned or impeached”. Thus, to use parliamentary material to establish as a fact that something occurred in Parliament is permissible — for example, using a published division list to establish that a Member had actually voted in Parliament on a day on which he was disqualified: \textit{Forbes v Samuel} [1913] 3 KB 706.

4.7 The absence of ability to use as part of a prosecution material which is part of proceedings in Parliament does not inevitably make conviction for the \textit{Criminal Code} offences impossible. Proof of the commission of such offences would in most cases not require that the court impeach or question the relevant parliamentary events. Although, in some cases it may create a substantial practical difficulty.

### Implied Repeal of Privilege

4.8 It is open to a legislature to create statutory exceptions to the exclusive jurisdiction which a House of Parliament has by reason of parliamentary privilege.\textsuperscript{86} The question is whether and to what extent Parliament has sought to amend or qualify the exclusivity of parliamentary

\textsuperscript{82} ibid p 18.
\textsuperscript{84} Prebble v Television New Zealand Ltd (1995) 1 AC 321 at 337; Sankey v Whitlam (1978) 142 CLR 1 at 35 36; Egan v Willis (1998) 195 CLR 424 at 490; Rann v Olsen (2000) 76 SASR 450 at 141
It is well established as a general approach to legislation that a clear indication is required that the intent of legislation is to abrogate or curtail a fundamental right before it will be concluded that such was intended. So for example in *Coco v The Queen* (1994) 179 CLR 427 at 437 Mason, Brennan, Gaudron and McHugh JJ. stated that it must be apparent that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights freedoms or immunities but has also determined upon abrogation or curtailment of them. The Court should not impute to the legislation an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because in the context in which they appear they will often be ambiguous on the aspect of interference with fundamental rights.

That does not exclude the possibility that the presumption against statutory interference with fundamental rights may be displaced by implication but the test is a very stringent one and would only occur if it were necessary to prevent the statutory provisions from becoming inoperative or meaningless. See also *Durham Holdings Pty Ltd v New South Wales* 1999 47 NSWLR 340 at 353 354.

In *Hammond v The Commonwealth* (1982) 152 CLR 188 at 200 Murphy J observed that the privileges of Parliament are jealously preserved and rightly so, Parliament will not be held to have diminished any of its privileges unless it has done so by unmistakable language.

As some of the *Criminal Code* offences could not be practicably prosecuted without access to the proceedings of the Parliament (for instance, the s 57 offence of false evidence before Parliament), it is arguable that there is an abrogation of parliamentary privilege in relation to such evidence by virtue of the interpretative rule of necessary implication. In the case of common law rights, privileges and immunities, the High Court of Australia has held that necessary implication may be used:

> ... whenever the legislative provision would be rendered inoperative or its object largely frustrated in its practical application, if the right, freedom or immunity were to prevail over the legislation.\(^\text{87}\)

In relation to the use of parliamentary proceedings to support prosecutions under the *Criminal Code*, the then Clerk of the Legislative Council noted the following in a submission on the *Corruption and Crime Commission Bill 2003*:

> Offences in the *Criminal Code* such as ss 57, 60 and Chapter XIII (Corruption of Public Officers) create a concurrent jurisdiction between the Houses and the courts. Code offences such as section 60 [Bribery of a Member] “stop short of the chamber door” in that they deal with matters that predetermine what a member will do or say with respect to the transaction of an item of business upon its future consideration by the House or a committee. The offence of bribery is committed when, in exchange for a valuable benefit, a member agrees to vote or speak as directed by another person rather than as a representative of an electorate. Proving the offence, as discussed below, may permit a record of a proceeding to be used as evidence going beyond proof of fact. Certainly, a prosecution under section 57 necessarily brings the relevant parliamentary proceeding into consideration.

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\(^{87}\) *Daniels Corporations International Pty Ltd and Anor v ACCC* [2002] HCA 49, per Gleeson CJ, Gaudron, Gummow and Hayne JJ at p43.
As well, a blanket declaration, whatever its basis, must be read subject to statutory exceptions, particularly provisions that are “member-specific”. Section 60 of the Criminal Code suggests a legislative intention to punish members taking or soliciting bribes as the paramount consideration to which §9 [of the Bill of Rights 1689] is subordinate. The issue has yet to be considered by a court, given that no prosecution has been taken under section 60. In that event, it would be unsurprising to find chamber or committee proceedings used as evidence to support the prosecution’s case.88

4.14 In November 2007, the Select Committee of Privilege into a matter Arising from the Standing Committee on Estimates and Financial Operations made the following recommendation:

Recommendation 27: The Committee recommends that the Attorney General examine the provisions of the Criminal Code relating to offences against the Parliament to establish whether an amendment to the Criminal Code is necessary in order to expressly abrogate parliamentary privilege, and that the Attorney General report back to both Houses.89

4.15 The 2009 Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament recommended the repeal of the bulk of the Criminal Code offences relating to Parliament:

The Select Committee is of the view that a number of the relevant offences relate to matters which directly concern the internal operations of the Parliament, and for which any inquiry or prosecution would often involve the questioning of parliamentary proceedings. Accordingly, the Select Committee proposes that the following offences be repealed from The Criminal Code:

• s. 55: Interference with the legislature
• s. 56: Disturbing Parliament
• s. 57: False evidence before Parliament
• s. 58: Threatening witness before Parliament
• s. 59: Witnesses refusing to attend or give evidence before Parliament

The remaining two offences deal with inter alia bribery and Members of Parliament. The nature of the offences outlined in ss60 and 61 of The Criminal Code are such that the investigation and prosecution of many relevant allegations would not require the examination of parliamentary proceedings, and therefore not infringe upon parliamentary privilege. However, there may be other instances where parliamentary privilege would arguably constrain such an investigation or prosecution.

The serious nature of these offences is such that the Select Committee considers it preferable that these matters are dealt with by the courts, consistent with other bribery offences relating to public officers.90 The retention of these offences in The Criminal Code, and the consequent maintenance of a concurrent jurisdiction in

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88 Western Australia, former Standing Committee on Legislation, Corruption and Crime Commission Bill 2003, Appendix 9, pp 231-233, Submission from L.B. Marquet, Clerk of the Legislative Council and Clerk of the Parliaments, 10 October 2003, pp 3 and 5.

89 Western Australia, Legislative Council, Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, Report (November 2007).

90 Section 82, Criminal Code.
relation to these offences, would allow matters to be dealt with by the courts
where parliamentary proceedings are not required to support an investigation or
prosecution, or otherwise by the Parliament where parliamentary privilege
precludes such action.

Accordingly, the Select Committee is of the view that the following offences
remain in *The Criminal Code*:

• s. 60: Member of Parliament receiving bribes
• s. 61: Bribery of member of Parliament.

4.16 This recommendation has yet to be considered by the House. The Procedure and Privileges
Committee, however, reviewed the Select Committee recommendations in 2014 and
expressed a preference to retain the *Criminal Code* offences:

As to the purported lack of clarity surrounding the use of privileged
documentation in criminal proceedings, the PPC is satisfied that the inclusion of
the statutory offences in the Criminal Code is a sufficient indication of the
Parliament’s intent to waive parliamentary privilege for the limited purpose of
permitting the use of House and committee transcripts and evidence, which would
otherwise be inadmissible, to prosecute those Criminal Code offences relating
expressly to proceedings in Parliament. This view is consistent with the approach
of the courts to a claimed abrogation or modification of a common law privilege
or immunity which is:

“... that the legislature does not intend to abrogate a common law right or
privilege unless a contrary intention is clearly expressed or implied in statute.”

To the extent that there may be some lingering doubt on this issue, the PPC would
favour a clarifying amendment to these *Criminal Code* provisions rather than the
repeal of these offences.

The PPC is therefore of the view that any repeal of the offence provisions in ss 55
to 59 of the *Criminal Code* is unnecessary and undesirable at this time. The
Committee considers that the offences are properly included within the *Criminal
Code* and should not be repealed.

**Finding 2: The Committee does not support the repeal of sections 55, 56, 57,
58 and 59 of the *Criminal Code* at this time.**

4.17 This finding has yet to be debated by the House.

4.18 The Legislative Assembly Procedure and Privileges Committee, for its part, has rejected the
argument that a clarifying amendment to the *Criminal Code* is necessary to allow
proceedings of Parliament to be adduced as evidence. Its position is based on reliance on
the statutory interpretation principle of necessary implication:

It is your Committee’s view that sections 55 to 59 of the Criminal Code would be
rendered nugatory without the necessary implication that parliamentary privilege
would be set aside to the extent that parliamentary proceedings could be led as

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91 Western Australia, Legislative Council, Select Committee into the Appropriateness of Powers and Penalties for

92 Western Australia, Legislative Council, Procedure and Privileges Committee, Report 29 (May 2014), *Review of the
Report of the Report of the Select Committee into the Appropriateness of Powers and Penalties for Breaches of
Indeed, your Committee is of the view that doing so runs the risk of generating greater uncertainty with other statutory provisions which may need to operate on the basis of necessary implication but which have not had clarifying amendments made to them.

Your Committee also notes that sections 55 to 59 of the Criminal Code are almost never invoked, and does not, therefore, consider there is a pressing case for effecting legislative change.93

4.19 In 1991 Mr Robert Smith was found guilty in the WA District Court of giving false evidence to a select committee of privilege of the Legislative Council in 1988. Mr Smith had told the select committee of privilege that he had never been involved in illegal phone tapping and did not use any devices for seeking information from phones. In 1990 Mr Smith was convicted of two counts of illegal phone tapping. His false evidence trial was held before a jury in the District Court in October 1991. Mr Smith was not represented at trial by legal counsel, and so no arguments appear to have been raised regarding the admissibility of parliamentary committee hearing transcripts. After the jury convicted Mr Smith on both charges, Judge O’Dea handed down a 16 month sentence for each charge, to be served concurrently - effectively a five month sentence with parole. On 22 October 1991, the President of the Legislative Council at that time, Hon Clive Griffiths, made the following statement in the House:

THE PRESIDENT: This morning’s The West Australian carries an article on page 13 dealing with the sentence passed on Robert Smith consequent on his conviction for lying to a committee of this House. The article reports the District Court judge as stating in the course of passing that sentence - ... the charges were not as serious as perjury - lying in court - but - it was important to the function of Parliament and its committees that people called before it told the truth.

If the article is an accurate report of what the judge said, I must respectfully disagree with those sentiments. It is a serious offence for any person, including a member of the House, to mislead the House deliberately. Parliament, as much as the courts, relies on the accuracy and probity of the information it receives in reaching a decision. Although parliamentary procedure differs in many respects from that applying in the courts, the intent in both cases is the same: To reach decisions based on the best information that it is possible to obtain. Any departure from those standards places us, as members, on the slippery slope of corruption of office. This House is entitled to expect that persons offering or required to give it information will not set out to mislead it and thus open it to ridicule.


Parliament did not expressly abrogate privilege in relation to those offences.

Nor is the privilege abrogated by implication. While in some cases it may be practically difficult to prove an alleged offence, that does not mean that the Code

offences would be inoperative or meaningless if parliamentary privilege was not abrogated.

Accordingly, if, for example, a prosecution would need to prove that a person had made a speech in Parliament for improper reasons, the conduct could only be dealt with by the Parliament under section 8 of the Parliamentary Privileges Act.

4.21 The Committee also notes the Queensland experience. The equivalent provision in Queensland (s 57, Criminal Code 1899 (Qld)), was repealed in 2006 amid concerns that the provision could not be successfully used to prosecute the Minister of Health, Mr Gordon Nuttall, for giving false evidence to an estimates committee. The offence was, however, restored to the Criminal Code 1899 (Qld) in 2012 as an election commitment of the incoming State Government.

4.22 Section 57 of the Criminal Code 1899 (Qld) had been repealed by the Criminal Code Amendment Act 2006 (Qld). The Explanatory Notes issued with the 2006 Bill noted that, because giving false answers to parliament is also contempt of Parliament to be dealt with by Parliament, “the confusion caused by these contradictory processes needs to be rectified.” The Explanatory Notes also stated:

Section 57 of the Criminal Code is also inconsistent with the fundamental tenet of the Westminster system, embodied in section 8 of the Parliament of Queensland Act 2001, that debates or proceedings in Parliament cannot be impeached or questioned in any court or place out of the Parliament. A criminal provision such as section 57, which allows the possibility of the prosecution of a Member for what the Member says in the House, is inconsistent with the principle established by Article 9 of the Bill of Rights (1688).

4.23 The 2012 Bill re-introducing the provision also introduced the following new s 53, which applies to all of the Criminal Code 1899 (Qld) offences relating to the Parliament:

53 Evidence of proceedings in the Assembly allowed for prosecution

(1) Despite the Parliament of Queensland Act 2001, section 8, evidence of anything said or done during proceedings in the Assembly may be given in a proceeding against a person for an offence under this chapter to the extent necessary to prosecute the person for the offence.

(2) Subsection (1) does not limit the Parliament of Queensland Act 2001, section 36.

(3) In this section—

“proceedings in the Assembly” see the Parliament of Queensland Act 2001, section 9 and schedule.

4.24 This is an express abrogation of parliamentary privilege so that evidence of proceedings in Parliament could be used in the prosecution of the Criminal Code offences relating to Parliament. The Explanatory Notes to the Criminal Law (False Evidence Before Parliament) Amendment Bill 2012 (Qld) state the following reasons for the Bill:

The Bill re-introduces section 57 (False evidence before Parliament), with amendment, into the Criminal Code. This will serve to enhance the reputation of

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96 Criminal Code Amendment Bill 2006 (Qld), Explanatory Notes, p 1.
97 ibid.
Parliament. The Queensland community expects its Parliamentarians to act responsibly and with the highest of integrity.

The amendments expressly reflect the intention that the parliamentary privilege of freedom of speech and debate is abrogated to the extent required by the offence and clarify that the offence applies to Members of Parliament as well as non-members.
CHAPTER 5
How does the word ‘exclusively’ affect the CCC’s capacity to investigate – examples

Examples

5.1 The effect of the change in law arising from the removal of the word “exclusively” from s 3(2) of the CCM Act and the re-insertion of that word, should the Corruption Crime and Misconduct Amendment Bill 2017 become law, may be demonstrated by the following examples.

Example 1 - Bribery

5.2 A Member of the Legislative Council receives money and free accommodation from a property developer in exchange for the Member asking parliamentary questions of ministers and speaking in favour of and voting in support of a Bill at its second and third readings. The Bill passes by one vote in the Legislative Council and becomes law. The passage of the Bill results in the developer obtaining a significant financial benefit arising from the new law and the information obtained in the answers to questions.

5.3 A Member receiving a bribe is a crime under the Criminal Code, s 60. A person bribing a Member of Parliament is also a crime under s 61. Each offence carries a penalty on conviction of 7 years imprisonment. The Code sections are reproduced below:

60. Member of Parliament receiving bribe

Any person who, being a member of either House of Parliament, asks, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind, whether pecuniary or otherwise, for himself or any other person upon any understanding that his vote, opinion, judgment, or action, in the House of which he is a member, or in any committee thereof, or in any joint committee of both Houses, shall be influenced thereby, or shall be given in any particular manner or in favour of any particular side of any question or matter, is guilty of a crime, and is liable to imprisonment for 7 years.

61. Bribery of member of Parliament

Any person who, —

(1) In order to influence a member of either House of Parliament in his vote, opinion, judgment, or action, upon any question or matter arising in the House of which he is a member or in any committee thereof, or in any joint committee of both Houses, or in order to induce him to absent himself from the House or from any such committee, gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit of any kind, whether pecuniary or otherwise, to, upon, or for such member, or to, upon, or for, any other person; or

(2) Attempts, directly or indirectly, by fraud, or by threats or intimidation of any kind, to influence a member of either House of Parliament in his vote, opinion, judgment, or action, upon any such question or matter, or to induce him to so absent himself,

is guilty of a crime, and is liable to imprisonment for 7 years.

5.4 The Code offence of bribing a Member of Parliament is substantially the same as the summary offences contained in the Parliamentary Privileges Act 1891 (PP Act) s 8 at paragraph (c) and (f) in that substantially the same elements of the offence must be proven.
to obtain a conviction. The relevant paragraphs of the PP Act grant a House of Parliament a jurisdiction to punish an offender for contempt for the following conduct:

(c) assaulting, obstructing, or insulting any member in his coming to or going from the House, or on account of his behaviour in Parliament or endeavouring to compel any member by force, insult, or menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before either House

(f) offering a bribe to, or attempting to bribe a member;

5.5 There is no express jurisdiction in s 8 PP Act to punish a Member for receiving a bribe equivalent to s 61 of the Code. However, the absence in s 8 of the offence of a Member of Parliament receiving a bribe does not result in a House of Parliament having no power to punish a Member for such an offence. The capacity of a House to punish its own Members and others is retained by s 1 of the PP Act which grants to each House the privileges, immunities and powers by custom, statute or otherwise of the House of Commons Parliament as at 1 January 1989.98 The proviso is that such inherited privileges, immunities and powers must not be inconsistent with the PP Act.

5.6 In the House of Commons, the acceptance by any Member of either House of a bribe to influence them in their conduct as a Member is a breach of privilege and the Commons has exercised its powers to expel members guilty of such conduct.99 Retaining such powers is not inconsistent with the PP Act s 8 offences and the latter does not limit the House's penal powers to those summary offences.100 Any argument to the contrary ignores the fundamental constitutional importance of the power of a House of Parliament to punish for contempt and the unlikelihood that the Western Australian Parliament would circumscribe its powers to vindicate its own authority and to enforce its orders. Courts have also consistently ruled that if such a fundamental power were to be abrogated or eroded the legislature would need to express this in unmistakable language.101

5.7 The Legislative Council has exercised these s 1 contempt powers when jailing a non-member for failing to comply with an order to apologise to the House.102 The view that s 8 adds to rather than limits the contempt powers of the Parliament is also supported by the decision in Aboriginal Legal Service v Western Australia [1993] 9 WAR 297. In that case the Western Australian Supreme Court considered s 4 of the PP Act which specified a procedure to compel attendance of witnesses and documents. The question for the court concerned whether s 4 exhaustively defined the Houses’ powers or whether there was a residual power in the broad grant in s 1, which would enable a House to compel attendance in circumstances not covered by s 4. The question was thus analogous to whether the s 8 summary offences exhaustively defined the Houses’ contempt powers.

5.8 The court found that the effect of s 1 of the PP Act was to grant the Houses an unfettered ability to regulate their own affairs. It was therefore within the power of the Legislative

98 This power is acknowledged in Schedule 4 of the Standing Orders of the Legislative Council, which lists conduct that the Council may consider a contempt. This includes a Member receiving any property or benefit on the understanding that the Member will be influenced in the discharge of their duties.


100 Interpretations of the PP Act asserting the contrary are wrong. For an example, see Parliamentary Privilege, Enid Campbell, Federation Press 2003, p 189.


102 Brian Mahon Easton was jailed by the Legislative Council for 7 days in January 1995 for refusing to apologise to the House for an abuse of the right to petition, which is a contempt. See also Erskine May, Parliamentary Practice, 21st Edition, p 118.
Council to direct production of documents in a manner not in strict compliance with s.4 of the PP Act but nevertheless consistent with the power of the House of Commons inherited by operation of s 1 of the PP Act.\textsuperscript{103} For these reasons, a House of the Parliament of Western Australia has jurisdiction under s 1 and s 8 of the PP Act to investigate and punish Members and non-members for offences that are materially identical to the offences in s 60 and s61 of the Criminal Code.

5.9 The CCC argues that because of the jurisdiction retained by each House of Parliament under the PP Act, it cannot lawfully investigate Members of Parliament for these offences. This is because the CCM Act provides at s 3(2) that in respect to the PP Act it is prohibited from exercising a power, right or function under the CCM Act to the extent that this exercise would relate to a matter determinable by a House of Parliament. Because the offence of a Member receiving a bribe is a matter determinable by a House of Parliament, the effect of s 3(2) is that the CCC’s jurisdiction is ousted. The Solicitor General in his briefing note is less emphatic, speaking of the “potential” effect of the omission of the word “exclusively”.\textsuperscript{104} This may be due to a countervailing argument that the House has a jurisdiction to investigate and punish contempts under the PP Act, which is a quite different and separate matter to investigating and forming an opinion of misconduct under the CCM Act, or indeed ascribing criminal responsibility for a crime under Part II Chapter VIII of the Criminal Code.

5.10 If the CCC does not have jurisdiction this has no effect on the capacity of the Western Australia Police to investigate and gather evidence to support a referral to the DPP for prosecution. If the CCC’s powers to investigate Members for misconduct are enlivened by the proposed amendment to insert “exclusively” in s 3(2) of the CCM Act, investigatory and prosecuting bodies will remain subject to the law of Parliamentary Privilege. The Solicitor General acknowledges this in his briefing note to the Attorney General of 25 August 2017 in which he expresses the view that the proposed amendment would have no effect on how Parliamentary Privilege affects the capacity of investigating and prosecuting bodies to obtain and adduce certain types of evidence.

Similarly, Parliamentary Privilege would still have a role to play in the investigation and prosecution of these Code offences, whether by the CCC, as part of a misconduct investigation, or an investigation by police, as part of a criminal investigation. For example, Parliamentary Privilege may preclude the obtaining and adducing of various types of evidence.\textsuperscript{105}

5.11 Evidentiary difficulties that may be encountered by investigative and prosecuting bodies arising from Parliamentary Privilege would include the incapacity to adduce evidence of parliamentary proceedings where the use of this evidence questions or impeaches those proceedings contrary to the Bill of Rights 1688 (UK). For example, in the absence of a direction to prosecute by the House under s 15 of the PP Act, the Crown may be prevented by a court from adducing evidence of what was said by the bribed member in Parliament in order to demonstrate a causal connection between the receipt of money and the actions of the Member.\textsuperscript{106} These difficulties were recognised in a UK Home Office discussion paper on the law relating to the bribery of Members of Parliament when it said:

\textsuperscript{103} Aboriginal Legal Service v Western Australia [1993] 9 WAR 297 per Rowland, Nicholson and Walsh JJ at 298. In this case the House ordered that summonsed documents be delivered to the Clerk of the House rather than to the House or a committee of the House as specified in s 4.

\textsuperscript{104} Mr Daniel Emerson, The West Australian, online edition, “MPs exempt from CCC probe”, 20 March 2017, 1.10am.

\textsuperscript{105} Briefing Note of Solicitor General to Attorney General dated 25 August 2017, paragraph 18, p 4 (LA TP 581).

\textsuperscript{106} In a scandal known as the ‘cash for questions’ affair in the UK, The Guardian newspaper reported that House of Commons MP, Neil Hamilton, had received bribes for tabling parliamentary questions. The initial defamation action was stayed on the grounds the claims and defences raised issues whose investigation would infringe Parliamentary privilege and that in the absence of the evidence excluded by Parliamentary privilege the action
5.12 Similarly, in conducting an investigation, the police and the CCC could not use those parliamentary proceedings to examine a Member for questioning or establishing their credibility, motive, intention or good faith as this would constitute a breach of Article 9. These evidentiary difficulties are discussed further in the example of lying before Parliament below.

Example 2 - Lying before Parliament

5.13 A witness before a parliamentary committee who is a public officer knowingly gives false evidence by (1) denying they have ever been involved in illegal phone tapping; and (2) telling the committee that they did not use any devices for seeking information from telephones.

5.14 A person giving false information before Parliament is a crime under s 57 of the Criminal Code. The offence carries a penalty on conviction of 7 years imprisonment. The Code section is reproduced below:

57. **False evidence before Parliament**

Any person who in the course of an examination before either House of Parliament, or before a committee of either House, or before a joint committee of both Houses, knowingly gives a false answer to any lawful and relevant question put to him in the course of the examination, is guilty of a crime, and is liable to imprisonment for 7 years.

5.15 As in the bribery example above relating to a Member of Parliament receiving a bribe, there is no equivalent summary offence contained in s 8 of the PP Act. In the House of Commons a witness who gives false evidence to the House or a committee is guilty of contempt and may be punished under the House’s contempt powers. This power to punish for contempt is also inherited by the Houses of the Western Australian Parliament under s 1 of the PP Act. There is no inconsistency between retaining this power under s 1 and the other provisions of the PP Act.

5.16 Because lying before Parliament is an offence punishable by each House of Parliament and so would relate to a matter determinable by a House of Parliament, the potential effect of s 3(2) of the CCM Act is that the CCC’s jurisdiction is ousted. As is the case with bribery, an
absence of the CCC’s jurisdiction has no effect on the capacity of the Western Australia Police to investigate and gather evidence to support a prosecution.

5.17 However, investigative agencies face evidentiary hurdles in proving the elements of either a criminal offence, in the case of a police prosecution; or forming an opinion of misconduct, in the case of the CCC. To obtain a criminal conviction the prosecution needs to prove two things. Firstly, it must show that the accused said the things to the committee that the accused has alleged to have said (that constitute the lie). Secondly, it must show that what the accused said to the committee was, to the accused’s knowledge, untrue. If the proposed amendment to insert “exclusively” in s 3(2) of the CCM Act proceeds, the CCC would need to be satisfied that the evidence established that a public officer’s conduct constituted misconduct. This is defined to include conduct that would constitute an offence punishable by 2 or more years’ imprisonment.\(^\text{111}\)

5.18 Evidence given before a committee of the parliament is a proceeding in parliament. Proceedings in Parliament are subject to the *Bill of Rights 1688* (UK). This Act is part of the law of Western Australia by reason of s.1 of the PP Act. It is settled law that Article 9 is to be given a wide interpretation – see *Halden v Marks* (1995) WAR 447 at 461. To the extent that it is not altered or abrogated by statute\(^\text{112}\) or necessary implication, the CCC is subject to this law and the immunity it provides to those involved in parliamentary proceedings.

5.19 The object of the *Bill of Rights* is to protect the legislature and those involved in parliamentary proceedings from oppression by the executive arm of government. This protection ensures the free flow of information to the Parliament and the people’s representatives. This protection is expressed in the well-known freedom of speech granted to Members of Parliament during debates but also in the prohibition on the use of parliamentary proceedings in courts, tribunals and other like organs of the executive, such as the CCC, by way of or for the purposes of:

a) Questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings;

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

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

5.20 The above prohibition would mean that ordinarily the evidence required to prove the elements of the offence of lying before a House of Parliament or a committee would be excluded by a court. Similarly, the CCC could not use parliamentary proceedings to form an opinion of misconduct where doing so would question or impeach these proceedings or to question or establish the credibility, motive, intention or good faith of any person. It may be argued that the apparent difficulties of prosecuting such an offence without access to parliamentary proceedings evinces an intention on the part of the Parliament when it enacted the offences in Part II, Chapter VIII of the *Criminal Code* that parliamentary privilege would not apply.

5.21 Although this question of interpretation has not been judicially determined, the Parliament when enacting Part II, Chapter VIII of the *Code* in 1913\(^\text{113}\) would have been well aware of the

\(^{111}\) See s 4(c) CCM Act 2003.

\(^{112}\) An example of an express statutory power to use parliamentary proceedings is as an aid to interpretation of statutes. See s 19 *Interpretation Act 1984*.

\(^{113}\) No. 28 of 1913. Assented to 30 December 1913.
capacity of a House of Parliament to direct the Attorney General to prosecute offences under s 15 of the PP Act, which provides:

15. **House may direct Attorney General to prosecute for other contempts**

   It shall be lawful for either House to direct the Attorney General to prosecute before the Supreme Court any such person guilty of any other contempt against the House which is punishable by law.

5.22 As all of the criminal offences in Part II, Chapter VIII of the Code are capable of constituting a contempt punishable by a House of Parliament under the PP Act, these may be prosecuted in the courts but it would seem only with the fiat of the House of Parliament. It is only then that evidence of parliamentary proceedings may be lawfully adduced at trial.

5.23 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. The Legislative Council granted leave for the Chief Hansard Reporter to attend the subsequent District Court trial to authenticate relevant Hansard transcripts and for four Members of the Legislative Council to attend trial to give evidence of what had occurred during the committee process. 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.

5.24 The court in *Smith* did not directly address the question of admissibility of evidence that constituted parliamentary proceedings. The accused did not object to this evidence being led and was not represented at trial. The court’s approach was most likely because the matter had been referred for prosecution by the House in question in directing the Attorney General to prosecute under s 15 of the PP Act. In the absence of such a direction and other orders made by the House to enable members of the committee and offices to give evidence of the proceedings, including transcripts of proceedings and minutes of committee meetings, a successful prosecution would have been impossible.

5.25 The CCC has no concurrent capacity with the Parliament to prosecute offences under the Part II, Chapter VIII Code offences. 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. Given the extraordinary powers possessed by the CCC, the requirement for it to refer matters to the DPP for

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118 On Wednesday, 5 June 1991, the Legislative Council gave leave for the Chief Hansard Reporter to attend the subsequent District Court trial to authenticate relevant Hansard transcripts (*Hansard*, p2668). On Thursday, 13 June 1991 and Thursday, 22 August 1991, Members of the Council were granted leave to attend the trial as witnesses of fact (*Hansard*, pp 3268, 3279 and 3731).

119 *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 did 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.
prosecution ensures that any brief is thoroughly reviewed and the decision to prosecute made by the agency established for this purpose. This provides a sensible check on the CCC given the comparatively meagre resources available for its oversight.\(^\text{120}\)

5.26 If the preceding analysis is correct and the Parliament did not abrogate parliamentary privilege when enacting the Part II, Chapter VIII Code of offences, evidence of parliamentary proceedings could only be adduced in ways authorised by law. This includes the express authority under s 19 of the Interpretation Act 1984 to assist in the interpretation of statutes, or for the purpose of proving a historical material fact.\(^\text{121}\) Other than for these lawful uses, the CCC could not use evidence of parliamentary proceedings in a manner contrary to the Bill of Rights 1688 (UK) in order to form an opinion of misconduct against a public officer who had allegedly lied to a parliamentary committee. If it did so, the CCC would not only be acting unlawfully but would also breach the privileges of Parliament.

**Example 3 – Providing false and misleading information in an answer to a Parliamentary question**

5.27 A Member of Parliament asks a parliamentary question of the Premier. Some notice is given of the question to enable a considered response to be provided during question time in a House of Parliament. Staff employed in the Premier’s Office and a Ministerial Office collaborate to produce a draft response for the Premier and a representative Minister that they know omits relevant and material information and will result in the answer, if given in the form drafted, being false and misleading in a material particular. The answer is in fact given in Parliament in the form of the final draft.

5.28 The staff members omit the material information from the draft answer with the intention of mitigating or avoiding political controversy in respect to a Minister’s behaviour relevant to one of the Minister’s portfolio responsibilities. Neither the Premier nor the Minister concerned is aware of the actions of the staff members and do not know that the answer provided in the House of Parliament is false and misleading. Neither staff member nor any other person obtain any benefit arising from their actions. The actions of the staff do not constitute a criminal offence.

5.29 The conduct of the ministerial staff constitutes a contempt of the Parliament as their actions have the effect of substantially interfering with a proceeding of a House of Parliament, on this occasion the procedure for Questions without Notice, because false and misleading information is knowingly provided to the House. The House of Commons has an undoubted power to find members and non-members in contempt where their act or omissions obstruct or impede a House of Parliament in the performance of its functions or impede a Member or an officer of such House in the discharge of their duties.\(^\text{122}\) The power is therefore one held by the Houses of the Western Australian Parliament under s 1 of the PP Act as it is not inconsistent with any provision of that Act. As the conduct relating to interference with the parliamentary questions proceeding is a contempt the matter is determinable by a House of Parliament. The effect of the Parliament’s jurisdiction under s 3(2) of the CCM Act is that the jurisdiction of the CCC is ousted.

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120 Budget for the CCC in 2017-18 was $30,173,000. Budget for the Parliamentary Inspector of the Corruption and Crime Commission in 2017-18 was $872,000. Source: Budget Paper No. 2, Western Australia State Budget, Division 26 (CCC) and Division 31 (PICCC), 7 September 2017.

121 Forbes v Samuel [1913] 3 KB 706. The lawyer acting for the informant in this case petitioned the House of Commons for leave to the proper officer of the House to attend a trial, produce documents and give evidence in the High Court. See HC Deb 29 April 1913 vol 52 c966.

5.30 The amendment to s 3(2) to insert “exclusively” would permit the CCC to exercise its powers and functions where the conduct is one that falls outside the exclusive jurisdiction of the Houses of Parliament. Determining with certainty where the jurisdiction of the Parliament and that of the CCC start and end may present challenges where an investigation by the CCC concerns Members of Parliament or those involved in activities that are for the purposes of or incidental to the transaction of business in the House. Great care needs to be taken by investigating bodies where the conduct could constitute a contempt or breach of privilege. This example is one where caution would be warranted, particularly where the conduct does not constitute a crime that falls within the definition of misconduct in s.4 of the CCM Act.

5.31 Recent experience has shown, however, that the CCC has exercised its powers in a manner that has breached the privileges of the Legislative Council. It did so by using drafts of answers to parliamentary questions and the answers given in the House to examine witnesses in a manner contrary to the prohibition contained in Article 9 of the Bill of Rights 1688 (UK) for the purpose of forming an opinion of misconduct.

5.32 The CCC’s function is to reach opinions on whether misconduct has occurred within the meaning of the CCM Act. In this example the likely focus of any investigation would be whether the actions of public officers constituted misconduct under s.4(d) of the CCM Act by being conduct that:

- constitutes or involves the performance of his or her functions in a manner that is not honest or impartial; or
- constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer.

Since the 2014 amendments to the CCM Act these ‘minor’ misconduct matters fall within the jurisdiction of the Public Sector Commission.

5.33 The CCC may exercise its powers to investigate whether misconduct by a public officer has occurred where this constitutes ‘serious’ misconduct. Since the 2014 amendments this requires corrupt intent and/or criminal conduct. There will be occasions, however, where there is an intersect between what constitutes misconduct under the CCM Act and conduct that would constitute a contempt or breach of privilege of a House of Parliament or a parliamentary committee. The CCC, where it has jurisdiction, must be mindful in these circumstances not to carry out a misconduct investigation in a manner contrary to law. The CCC cannot, as it has in the past, use proceedings in parliament, in this example, draft answers to questions and answers given in the House, to:

1. Question the truth of the draft answers or the final answer;
2. Impugn the credibility, motive, intention or good faith of a witness; or
3. Draw inferences and conclusions about a witness’s conduct.

5.34 If the amendment to insert “exclusively” in s 3(2) of the CCM Act is made, Parliamentary Privilege will still apply to the exercise of a power or function of the CCC when it investigates. It will also still apply to the prosecution of Part II, Chapter VIII Code offences, subject to a judicial determination as to whether Parliamentary Privilege has been abrogated by necessary implication.

5.35 Parliamentary Privilege will also have a critical role in misconduct investigations by the CCC where these intersect with the work of Parliament. The restrictions on the admission into evidence and use of proceedings in parliament would constitute significant practical hurdles.

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123 Standing Committee on Procedure and Privileges, Report 44, A Matter of Privilege Raised by Hon Sue Ellery MLC (LC TP 4807).
to the capacity of the CCC to form an opinion of misconduct in some circumstances, this example being one of them. For this reason, the CCC could progress an investigation and possible punishment of a person by providing assistance to any parliamentary committee investigating a possible contempt or breach of privilege. This has occurred in the past and the PPC has encouraged this to occur in the future. The suggested co-operative arrangement between the Houses of Parliament and the CCC would also have the beneficial effect of avoiding further instances of the CCC acting contrary to law and breaching the privileges of Parliament.

124 The CCC provided significant assistance to a select committee of privilege by providing covert telephone intercept recordings and transcripts. See Report of the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, November 2007 (LC TP 3466).

125 Standing Committee on Procedure and Privileges, Report 44, A Matter of Privilege Raised by Hon Sue Ellery MLC (LC TP 4807), recommendation 5.
CHAPTER 6
The CCC’s interaction with parliamentary privilege before the 2014 amendments


6.1 The Corruption and Crime Commission Amendment and Repeal Act 2003 contained the most significant express abrogation of parliamentary privilege in Western Australian history, as set out in sections 27A and 27B as inserted into the Corruption and Crime Commission Act 2003 (CCC Act). These sections were inserted into the CCC Act on the recommendation of the Legislative Council Standing Committee on Legislation in an attempt to correct issues with parliamentary privilege identified in the CCC Act where some provisions expressly referred to the application of the privilege and others inexplicably did not.

6.2 Sections 27A and 27B stated:

27A. Allegations involving parliamentary privilege

(1) Despite any contrary provision in this Act, an allegation of misconduct, not being serious misconduct —

(a) made against a member of the Legislative Council or the Legislative Assembly in the performance by him or her of the functions of that office; or

(b) made against an officer liable to be removed from office under section 35 of the Constitution Act 1889,

is to be referred by the Commission to the presiding officer.

(2) A referral under subsection (1) is to name the member or officer and state the grounds on which the allegation is made and the nature of the misconduct by reference to a provision of section 4. The Commission is not required to disclose how it came to make the allegation.

(3) Section 22(3) and Division 4 of Part 2 are excluded in their operation with respect to an allegation made under subsection (1).

(4) In this section and section 27B —

“presiding officer” —

(a) is the President where the allegation relates to a member or officer of the Legislative Council, or the Speaker in relation to a member or officer of the Legislative Assembly;

(b) if —

(i) the office of President or Speaker is vacant, or becomes vacant in the course of an inquiry under section 27B; or

(ii) the member subject to an allegation under subsection (1)(a) is the President or the Speaker,

is the member appointed by each House to perform the functions and exercise the powers of the President or the Speaker during his or her temporary absence or when either office is vacant.
Nothing in this section prevents a member or officer who is subject to a referral under subsection (1) from being charged with an offence whether or not the charge relates to the matters that form the basis of the allegation so referred.

**27B. Dealing with allegation of member’s misconduct**

(1) The presiding officer, on receipt of a referral made under section 27A(1), must —

(a) where the allegation is made under paragraph (a), require a committee of the House whose functions include considering matters relating to the practice, procedure and privileges of the House (the “Privileges Committee”), to inquire into the matter;

(b) where the allegation is made under paragraph (b), require the Commission to conduct an inquiry.

(2) If the Privileges Committee resolves to carry out its own inquiry, it must do so by directing the Commission to act on its behalf.

(3) For the purposes of an inquiry under this section, the Commission —

(a) has the powers, privileges, rights and immunities of a committee under the *Parliamentary Privileges Act 1891*;

(b) is to refer a matter, including an objection made under section 7 of the *Parliamentary Privileges Act 1891*, to the presiding officer for decision in a case where a committee is required to obtain a decision of the House;

(c) may order without summons a member or officer of either House to appear and give evidence or produce documents;

(d) may be assisted by parliamentary and Commission officers;

(e) cannot delegate the performance of a function that cannot be delegated by a committee of a House;

(f) is to report to the presiding officer and the Privileges Committee when so requested or at predetermined intervals or both.

(4) The Commission is to act in conformity with the *Parliamentary Privileges Act 1891*.

(5) An inquiry cannot be discontinued by direction of the presiding officer or the Privileges Committee unless the Commission consents.

(6) A recommendation under section 43(1) is to be contained in a report (whether interim or final) to the presiding officer and the Privileges Committee and, either in substitution for, or in addition to the recommendations that may be made under that subsection, may recommend that a member be expelled or an officer be removed under section 35 of the *Constitution Act 1889*.

(7) The presiding officer must present to the House a report provided under subsection (6), in the form in which it was received, on the sitting day next following its receipt.
(8) The Commission must not make a recommendation to an independent agency under section 43(4) unless expressly authorized by resolution of the House.

6.3 The Legislation Committee set out the rationale for its recommended process in ss 27A and 27B as follows:

Given that any non-criminal allegations regarding a Member of Parliament would be referred to the House, the Committee does not consider that the CCC should be able to direct either House of Parliament as to the manner in which it deals with the allegation. Therefore, the Committee supports the process contained in Recommendation 34 whereby the CCC refers allegations to the relevant presiding officer to be dealt with by a committee of the House whose functions include considering matters relating to the practice, procedure and privileges of the House ("Privileges Committee"). The Committee proposes that the Privileges Committee have the ability to authorise the CCC to conduct the inquiry on behalf of the House. Allegations involving criminal matters would, of course, be referred to prosecuting authorities.¹²⁶

Recommendation 34: The Committee recommends that the Parliament be excluded from the definition of "appropriate authority" and that the process in proposed new sections 27A and 27B be utilised in relation to allegations concerning Members of Parliament. ...¹²⁷

6.4 The draft Amendment Bill as considered by the Legislation Committee also did not include an equivalent of s 3(2). The draft Bill included in clauses 94 and 100 proposed sub section (5) which provided that:

[N]othing in this section affects the operation of the Parliamentary Privileges Act 1891.

6.5 It appeared from advice provided to the Legislation Committee by the Crown Solicitor’s Office that those sub sections were included in ss 94 and 100 but not in ss 95, 96 and 101, which also involve coercive powers. This was because ss 94 and 100 (but not the other sections) included a sub section (4) providing that the powers conferred could be exercised despite any privilege of a public officer which the officer could have claimed in a court of law.

6.6 As the then Clerk of the Legislative Council submitted:

This Bill is a monument to “necessary intendment” and the imprecision that necessarily accompanies any application of that interpretative rule. The process is not assisted, for example, by the express exclusion of use of the powers conferred by clauses 94, 100 where the 1891 Act applies but leaving use of other powers where that Act would otherwise prevent such use, open to conjecture.¹²⁸

6.7 The Legislation Committee stated:

The Committee notes that these are the only provisions of the CCC Act and the CCC Amendment Bill where the operation of the Parliamentary Privileges Act 1891 is expressly preserved. The Committee is concerned that the fact that the


¹²⁷ ibid, p131.

**Parliamentary Privileges Act 1891** is expressly referred to means that it could be argued that parliamentary privilege is by implication abrogated elsewhere in the CCC Act.\(^{129}\)

6.8 Subsection 3(2) was therefore recommended by the Legislation Committee to address the Committee’s concerns about parliamentary privilege being abrogated by necessary intention. Subsection 3(2) stated:

\[(2)\] 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.

6.9 It was felt by the Legislation Committee that a general provision confirming the application of the privilege to the whole Act was necessary to avoid the suggestion of a wider abrogation than that contained in the circumstances set out in ss 27A and 27B.\(^{130}\) If and to the extent that questions of parliamentary privilege were to arise in the course of a CCC investigation the CCC would be required to give consideration to such questions with a view to ensuring that it complied with the law of parliamentary privilege as preserved by s 3(2).

6.10 New ss 3(2), 27A and 27B, along with other amendments recommended by the Legislation Committee, were agreed to by the Legislative Council as a bundle with only limited debate.

6.11 Over time, however, this combination in the one Act of an express abrogation of parliamentary privilege in certain circumstances along with an express general confirmation of parliamentary privilege would lead to differing interpretations of the legislation.

6.12 On 28 February 2007, during a public hearing of the CCC into the activities of political lobbyists, counsel assisting the CCC announced that he would be questioning a current Member of Parliament, Hon Shelley Archer MLC, about her role in a Legislative Council standing committee’s deliberations on commencing an inquiry into the iron ore industry. Counsel assisting the CCC, Mr Philip Urquhart stated at the hearing:

This hearing will examine the communications Mr Burke had with various public officers in order to identify whether these officers have engaged in any misconduct. Turning now to the last matter which involves the Standing Committee on Estimates and Financial Operations.

Kazaley Resources is a small mining company. In a widely publicised move in 2005 it pegged the northwest Shovelanna iron ore deposit after the mining giant Rio Tinto failed to renew its lease in time. In April 2006 the then Minister for Resources terminated Kazaley’s claim to this iron ore deposit. The matter subsequently became the subject of Supreme Court proceedings initiated by Kazaley to have the minister’s decision set aside. These proceedings are still ongoing.

Mr Burke and Mr Grill were retained by Kazaley during the course of 2006. This part of the hearing will examine the approach by Mr Burke to the Parliamentary Standing Committee on Estimates and Financial Operations to hold an inquiry into the iron ore policy of this state. As Mr Hall has already stated to the Commission in one of his openings earlier this week, standing committees of Parliament have

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\(^{130}\) ibid p134-135. See also: Western Australia, Legislative Council, *Hansard*, 5 April 2007, p 1260-61.
significant powers including the holding of public hearings and the presentation of reports to the relevant house.

In this instance the standing committee was comprised of members of the Legislative Council and its functions included examining any matters relating to the financial administration of the state. This hearing will examine the motive behind the request for this hearing and whether there was an ulterior and improper purpose behind the requests for this inquiry.

Yesterday’s hearing examined the 2004 inquiry by the Economics and Industry Standing Committee of the Legislative Assembly into vanadium resources at Windimurra. One matter that arises is whether there has been an attempt to misuse the functions of the Standing Committee on Estimates and Financial Operations and whether any public officer has engaged in misconduct in that attempt.131

6.13 This public hearing was abruptly adjourned. The fact that the CCC’s inquiries had reached the stage of public hearings before the Presiding Officers of the Parliament had become aware that evidence of confidential parliamentary proceedings was about to be examined was of some considerable concern to the Parliament.

6.14 On 12 March 2007 the then Commissioner of the CCC, Mr Kevin Hammond, wrote to the President of the Legislative Council. The letter indicated that the CCC was then currently conducting an investigation into whether misconduct by public officers arising in connection with the activities of other persons, including but not limited to lobbyists, has or may have occurred or is occurring, stating:

One matter under investigation by the CCC is in relation to a proposed inquiry by the Legislative Council’s Estimates and Financial Operations Standing Committee into the State’s iron ore policy.

...In order for the Commission to advance its investigations, for the purposes of conducting further public hearings and/or bringing disciplinary and/or criminal charges if appropriate, it requires access to and use of the following:

- All minutes and records of the Committee’s proceedings and deliberations touching on the proposed inquiry into the State’s iron ore policy.
- All Committee members and staff attached to the Committee at the relevant time for the purposes of interviewing and taking statements from them.132

6.15 Both the President of the Legislative Council and the Procedure and Privileges Committee advised the Commissioner that whilst the House had the power to release material, such a release would not waive, nor is it capable of waiving, parliamentary privilege so as to enable the CCC or another authority to deal with material inconsistently with Article 9 of the Bill of Rights 1688.133 The House subsequently ordered the release of certain documents (and granted leave for Council officers to give evidence to the CCC), on the basis that the CCC “in

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131 CCC public hearing transcript, 28 February 2007.
133 ibid, pp 4-5.
dealing with the Documents shall not act in breach of the powers, privileges, rights and immunities of this House”\textsuperscript{134}

6.16 On 21 March 2007 the Legislative Council appointed a Select Committee of Privilege to investigate suspected breaches of parliamentary privilege and contempts of parliament arising from contacts by lobbyists with members of a parliamentary committee. With the assistance of a large amount of CCC surveillance material, which was provided as evidence to the Select Committee, the Select Committee of Privilege was able to effectively investigate the matter and recommend appropriate penalties to be imposed by the House.\textsuperscript{135}

6.17 Although ultimately CCC’s evidence greatly assisted the Legislative Council, in reality this was not the procedure envisaged by ss 27A and 27B. The Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations noted the following in its report:

\begin{quote}
The CCC has access to the most advanced investigative techniques, including undercover operatives, telephone intercept devices and surveillance devices.

Within the past three years the State has witnessed several high profile public hearings of the CCC involving allegations against Members of Parliament, including Government Ministers, and senior public officers.

Members of Parliament need to be aware that their conversations and actions are open to far greater scrutiny than has ever previously been the case. There is also a very real risk that if the Parliament itself does not deal satisfactorily with breaches of its privileges, then the CCC, with its extensive powers, will take up the shortfall.

It could also be argued that the Western Australian Parliament no longer has the option of following the lead of so many other parliaments that have set very high thresholds for breaches of privilege and contempts before they will establish committees of privilege to consider them. Section 27A and 27B of the Corruption and Crime Commission Act 2003 could effectively subvert the adoption of such a threshold test by the Western Australian Parliament, as under those sections the CCC has the power to refer allegations of misconduct “not being serious misconduct” involving Members of Parliament to the Parliament for consideration by the relevant privileges committees as to whether an inquiry by the CCC itself on behalf of the Parliament (with all the powers of a committee of privilege) into the misconduct is necessary.

The CCC has already in the past few months demonstrated a preparedness to refer allegations of misconduct to the Parliament under s 27A, and to have conferred upon it by the Parliament the powers of a committee of privilege.\textsuperscript{136}
\end{quote}

6.18 Although the CCC never conducted an investigation on behalf of the Legislative Council using the powers in ss 27A and 27B, they did do so twice on behalf of the Legislative Assembly in 2008 in relation to matters arising from CCC investigations into the activities of political lobbyists.\textsuperscript{137}

\textsuperscript{134} ibid, pp 7-8.

\textsuperscript{135} Western Australia, Legislative Council, Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, Report (November 2007).

\textsuperscript{136} “Commission investigation to start next week”, media statement, Corruption and Crime Commission of Western Australia, 21 September 2007.

The outcome of a tumultuous 2007-2008 with respect to the relationship between the Parliament and the CCC, was a general view that the CCC had adopted the following position on parliamentary privilege and its impact on their investigations:

- That there had been an implied repeal of parliamentary privilege arising from the enactment of the offences in Chapter II, Part VIII of the Criminal Code;
- The CCC appeared reluctant to advise the Parliament of a CCC investigation in relation to parliamentary proceedings until the point where they required the Parliament’s assistance to identify and obtain relevant evidence; and
- The powers granted to the CCC in the CCC Act were extremely broad and, to give proper effect to them, the express general reservation of parliamentary privilege in s 3(2) of the CCC Act must be read down as a form of ‘waiver’ so as to permit the CCC to most efficiently use otherwise privileged material in its investigations and hearings.

Review of the CCC Act


The report found that the application of parliamentary privilege to CCC investigations was not clear. Ms Archer noted that she had received submissions both for and against the propositions that:

- parliamentary privilege was abrogated by necessary implication in the CCC Act; and
- the CCC was not “a place out of Parliament” as envisaged by Article 9 of the Bill of Rights 1688.

In his submission to the Review of the CCC Act, the then Acting Clerk of the Legislative Council noted the lack of clarity on parliamentary privilege in the CCC’s Hearing Practice Directions, which stated at p13 with respect to s 3(2) of the CCC Act that:

The Commission does not take this provision per se to bring it within the ambit of the expression “court or other place out of parliament” for the purposes of Article 9 of the Bill of Rights 1689, the statutory instrument by which parliamentary privilege is incorporated into Australian law. Whether an investigation or hearing by a body such as the Commission is a place out of parliament in relation to which the privilege will apply would seem to remain unsettled under Western Australia law.

Until such time as the question is definitively resolved, the Commission considers itself bound by the privilege.

Where a question of parliamentary privilege arises during an investigation or hearing of the Commission, the Commission will invite the Speaker of the Legislative Assembly or the President of the Legislative Council (as the case may be), to make submissions on the relevant issue and, if need be, to appear at a private hearing to determine the question.138

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It was the view of the Acting Clerk of the Legislative Council that the offences listed in s 8 of the Parliamentary Privileges Act 1891 were ‘exclusive’ to the jurisdiction of the Parliament, but that the corresponding Criminal Code provisions were open to investigation by the CCC, subject to the observance of parliamentary privilege:

It is submitted that nothing contained within the Criminal Code Part II, Division VIII and Part III, Division XIII can be seen to in any way abolish or restrict the operation of parliamentary privilege. Rather, a criminal jurisdiction has been created to operate concurrently with the jurisdiction of the Parliament on the basis of certain technical criminal offences which may, or may not, relate to the entirely separate issue of parliamentary privilege. This concurrent jurisdiction has existed for many years with the police service and courts on the one side and the Houses of Parliament on the other. [Note in particular Egan v Willis (1998) 195 CLR 424 at 490; Prebble v Television New Zealand Ltd [1995] 1 AC 321 at 337-9; Rann v Olsen No. SCGRG-97-913 [2000] SASC 83 at para 121; and Arena v Nader (1997) 71 ALJR 1604 at 1605].

It is conceivable that, under the present s 4 of CCC Act, the CCC might also seek to extend its activities into the legislative realm contained within the Criminal Code Part II, Division VIII and Part III, Division XIII by virtue of the reference to “a written law”. Such a cross-jurisdictional overlay together with its many opportunities for confusion and delay would it is submitted, be both unnecessary and undesirable.\(^{139}\)

The Acting Clerk suggested the following amendments to the CCC Act:\(^{140}\)

- The CCC Act should be amended at s 27A to expressly require the Commissioner to notify the Presiding Officers of the Parliament of Western Australia of the commencement of an investigation by the CCC into all forms of alleged misconduct by members of the Parliament so that matters affecting parliamentary privilege can be fully and properly addressed at that stage.
- The CCC Act should be amended to expressly provide that the determination of the Presiding Officer, made in consultation with the Privileges Committee of the House shall be determinative on all matters affecting parliamentary privilege raised by a referral by the Commissioner under s 27A and will be binding on the CCC.
- The CCC Act should be amended to expressly provide a prescribed form for a Commissioner’s referral s 27A showing the mandatory minimum detail that such a reference must contain.
- The CCC Act should be amended to expressly provide that the CCC has no jurisdiction to investigate any of the matters contained within s 8 of the Parliamentary Privileges Act 1891.
- The CCC Act should be amended to expressly provide that any allegation received by the CCC involving any of the matters contained within the Criminal Code Part II, Division VIII and Part III, Division XIII must be referred immediately to the Western Australian Police Commissioner for investigation and prosecution.
- The CCC Act should be amended at s 4(d)(vi) to make it clear that the provision does not apply to Members of Parliament while engaged in parliamentary duties.

Ms Archer observed that in her view the CCC retained its full powers of investigation so long as it did not impeach anything said in parliamentary proceedings or otherwise infringe parliamentary privilege, except in those circumstances set out in s27B.\(^{141}\) She stated:

\(^{139}\) ibid, p 7.

\(^{140}\) ibid, pp 8-9.

There is nothing in the Act that prevents the CCC from investigating the alleged misconduct of a politician, whether or not the alleged misconduct was serious misconduct and whether or not the mechanism in section 27B had been engaged. However, the Act does not permit the CCC to infringe parliamentary privilege in its investigations (other than under the mechanism in section 27B). Accordingly, while the CCC cannot impeach anything said in Parliament (other than under the mechanism in section 27B), it can still investigate.\footnote{ibid.}

6.26 With respect to the application of parliamentary privilege to any CCC investigation, Ms Archer stated:

It was suggested that the position would be clearer if section 3(2) simply stated that parliamentary privilege is not affected by the Act. However, that was a specific issue considered in the Legislative Council debates. It appears that the section was retained in the form recommended by the Legislation Committee to accommodate the fact that some matters would not be exclusively determined by the House as a result of the proposed section 27B(3).\footnote{ibid, p 221.}

6.27 Ms Archer made the following comment on the CCC’s ability to investigate the Criminal Code offences relating to Parliament:

Under the current law, the CCC could only go behind parliamentary privilege in relation to an allegation that could constitute an offence under one of those Code provisions if the Privileges Committee resolved to carry out an inquiry under the mechanism in section 27B. Unless that mechanism is engaged, the CCC has no more capacity to go behind parliamentary privilege than the WAPOL.\footnote{ibid, p 227.}

6.28 Ms Archer 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.\footnote{ibid, p 221.}

6.29 There was significant opposition contained in submissions to the Archer Review from the Legislative Assembly Procedure and Privileges Committee and the then Acting Clerk of the Legislative Council to any amendments to the CCC Act that would have further impact on parliamentary privilege. Nevertheless, Ms Archer recommended that ss 27A and 27B of the CCC Act be amended to also enable serious misconduct and criminal conduct by Members or parliamentary officers to be investigated by the CCC using all of the powers of a parliamentary committee.\footnote{ibid, pp 233-246.}

6.30 Upon tabling the Archer Review Report the Attorney General advised the Parliament that the government would be seeking advice on the parliamentary privilege aspects of the Report from the Joint Standing Committee on the Corruption and Crime Commission.\footnote{Western Australia, Legislative Assembly, \textit{Hansard}, Hon Jim McGinty MLA, Attorney General, p 1040.}

6.31 The Joint Standing Committee on the Corruption and Crime Commission subsequently responded to each of the Archer Report’s recommendations relating to parliamentary privilege as follows:
(a) Archer Report recommendation

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.

(b) CCC response

The CCC supports this recommendation:

The Commission considers it is bound by Article 9 of the Bill of Rights but in the interests of clarity supports the recommendation.

(c) [Parliamentary Inspector] response

The Parliamentary Inspector supports this recommendation.

(d) Committee response

The JSCCCC is opposed to this recommendation, on the basis that it is unnecessary. The Committee believes that it is already clear that the CCC is constrained by Article 9 of the Bill of Rights, and the CCC regards this as being the case in any event.148

6.32 The Joint Standing Committee on the Corruption and Crime Commission also supported the recommendations of the Archer Report relating to expanding the procedure under ss 27A and 27B to CCC investigations into serious misconduct and criminal conduct.149

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149 ibid pp 50-56.
CHAPTER 7
The 2014 amendments

The 2014 Amendments

7.1 In June 2012 the Premier introduced the Corruption and Crime Commission Amendment Bill 2012 to the Parliament. That Bill proposed, in addition to transferring oversight of minor misconduct by public officers from the CCC to the Public Sector Commissioner, a number of other changes to the CCC. The 2012 bill did not proceed past the second reading stage due to the 2013 State election.

7.2 In 2014 a new amendment Bill was introduced – the Corruption and Crime Commission Amendment (Misconduct) Bill 2014. It had a similar intent to the 2012 Bill with respect to the investigation of minor misconduct. The Second Reading Speech stated:

This bill aims to amend the Corruption and Crime Commission Act 2003 to transfer the oversight of minor misconduct by public officers from the Corruption and Crime Commission to the Public Sector Commissioner. The CCC’s misconduct prevention and education function will also be transferred to, and exercised by, the Public Sector Commissioner. In this aspect, the CCC’s role will be redefined to oversight of serious misconduct of public officers. However, the CCC’s current jurisdiction over all matters of police misconduct, including prevention and education, will be retained. In this way the CCC will continue to oversee the conduct of police officers and other government officers employed by WA Police.  

7.3 The Second Reading Speech went on to state:

The bill that I am now introducing entails transferring the oversight of minor misconduct by public officers from the CCC to the Public Sector Commissioner and largely reflects the 2012 bill with respect to the transfer of functions to the Public Sector Commissioner. The Public Sector Commissioner’s minor misconduct jurisdiction will not include police misconduct, misconduct by members or the Clerks of the Parliament or local government members or councillors. ... Serious misconduct is therefore misconduct that involves corruption or a criminal offence punishable by two or more years’ imprisonment. The CCC’s jurisdiction with respect to serious misconduct remains unchanged with respect to public officers other than members of Parliament. The role of the CCC in relation to members of Parliament has been clarified to avoid any concurrent role for the CCC over matters in which the Parliament is able to exercise its authority pursuant to parliamentary privilege. Because members and the Clerks of the Parliament will also be excluded from the ambit of the Public Sector Commissioner’s minor misconduct role, sections 27A and 27B will serve no further purpose and are to be repealed.

7.4 The Explanatory Memorandum for the Corruption and Crime Commission Amendment (Misconduct) Bill 2014 stated that with respect to the deletion of ss 27A and 27B:

As it only related to the procedure by which the Corruption and Crime Commission dealt with allegations of minor misconduct against a Member of

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150 Western Australia, Legislative Council, Hansard, Hon Michael Mischin MLC, Attorney General, 16 October 2014, p 7408.

151 ibid, p 7409.
Parliament, a function the Commission will no longer exercise, [ss 27A and 27B are] deleted.

7.5 In relation to the amendments to s 3(2) the Explanatory Memorandum stated:

Subsection (2) is amended by deleting the words “exclusively” and “unless that House so resolves”. The existing provisions of subsection 3(2) of the Act have been virtually ineffectual in defining the scope of the CCC’s jurisdiction with respect to allegations of misconduct against Members of Parliament. This is because, despite the Parliamentary Privileges Act 1891 and the Parliamentary Papers Act 1891, there currently exists overlapping regulation of unacceptable activities in Parliament through various offences under the Criminal Code. The current provisions also wrongly imply that Parliament can waive all privilege by resolution.

7.6 On 14 October 2014 the Premier, Hon Colin Barnett MLA, made the following comments regarding parliamentary privilege and the proposed amendments to the CCC Act:

Parliamentary Privilege — Clause 6

Mr C.J. BARNETT — by leave: This statement relates to the legislation and the issue of parliamentary privilege, and I make it to place it on the public record for the purposes of clarification. It is a long statement, so I have sought leave to read the statement. It relates to clause 6. The amendments proposed by clause 6(5) to section 3(2) of the principal act are being made to further clarify and to confirm that parliamentary privilege is not affected by the operation of the Corruption and Crime Commission Act.

In brief, the law of parliamentary privilege in Western Australia is that which applied as at 1 January 1989 to the United Kingdom’s House of Commons, its members and committees. Article 9 of the Bill of Rights 1689 is the relevant source of that privilege, and provides that proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. A proceeding in Parliament therefore enjoys the protection afforded by parliamentary privilege. As a result, members of Parliament cannot be questioned on their motives or actions in undertaking work directly and immediately connected with the work of the house or a parliamentary committee. The same protection is afforded to witnesses before a house or a committee. A statute may make it clear, either by express words or necessary implication, that parliamentary privilege does not apply. For example, there are offences under chapter VIII of the Criminal Code providing for offences against the legislature. Among them is section 57, which makes it an offence to give false evidence before Parliament. In order to mount a successful prosecution, it would be necessary to lead evidence of the proceedings in Parliament and expose that evidence to cross-examination and contradiction.

Given that proceedings of Parliament are protected by parliamentary privilege and so cannot be impeached or questioned, it would be impossible to mount a successful prosecution unless section 57 indicated that parliamentary privilege does not apply to that section. Given this evidentiary position and the nature of the offence created by section 57, it is arguable that in enacting section 57, Parliament waived its privilege, given the impossibility of obtaining a conviction for such an offence without the prosecution leading evidence of what the accused had said before Parliament. Ordinarily, dealing with false evidence before Parliament or one of its committees is something Parliament would deal with. The “implicit waiver” interpretation of section 57 leaves it open for the police to make inquiries if a charge were being considered. However, it is not a matter for inquiry by any other body, such as the CCC. Its jurisdiction is confined to that provided for in the principal act. The act makes no express or implied waiver of parliamentary
privilege. Indeed, the contrary intention is expressed in section 3(2), which provides that —

Nothing in this Act affects, or is intended to affect, the operation of the Parliamentary Privileges Act 1891 or the Parliamentary Papers Act 1891...

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.¹⁵²

7.7 It appears to have been the clear intention of the Parliament that from 2014 onwards the Parliament alone would have the power to investigate matters to which parliamentary privilege applied, and that the WA Police alone would be responsible for investigating the Criminal Code offences to the extent which that could be practically done – implied waiver of privilege or not.

¹⁵² Western Australia, Legislative Assembly, Hansard, 14 October 2014, p 7137.
The ‘Turnseck’ investigation

8.1 Report 44 of this Committee was presented in November 2016. That report dealt with yet another CCC investigation involving the extensive use of evidence that was subject to parliamentary privilege that belatedly came to the attention of the Legislative Council.153

8.2 The report dealt with false answers being prepared to parliamentary questions by government ministerial and departmental staffers. The misconduct investigated by the CCC fell squarely within activities undertaken for the purposes of “proceedings in Parliament”. The Committee observed that the CCC investigating these events and reporting directly to the Premier on them was a breach of parliamentary privilege by the CCC:

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.

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.

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.

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,

153 Western Australia, Legislative Council, Procedure and Privileges Committee, Report No. 44, A Matter of Privilege Raised by Hon Sue Ellery MLC, November 2016.
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.

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
Chapter 8  The ‘Turnseck’ investigation

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.154

8.3 In a lecture at Curtin University on 7 March 2017, during the State election campaign, the Commissioner of the CCC, Mr John McKechnie SC, drew attention to the fact that a 2015 overhaul of the Corruption, Crime and Misconduct Act 2003 effectively meant that Parliament would deal with offending Members of Parliament in-house. Mr McKechnie stated:

The consequence is that the commission has jurisdiction to investigate allegations of serious misconduct in respect of all public officers except members of Parliament.155

8.4 Mr McKechnie went on to recount that the CCC had been taken “to task” by the Parliament for straying outside its jurisdiction in investigating government officials involved in the preparing of answers to questions asked in the Parliament. He stated that:

I will adopt a prudent, some might say timorous course in future on any matter which could conceivably fall within parliamentary privilege.156

154 Western Australia, Legislative Council, Standing Committee on Procedure and Privileges, Report 44, A Matter of Privilege Raised by Hon Sue Ellery, November 2016, pp i-iii.


156 Ibid.
APPENDIX 1

SOLICITOR GENERAL BRIEFING NOTE

BRIEFING NOTE

Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017

Introduction

1. My advice is sought in relation to the effect of the proposed amendment to section 3(2) of the Corruption, Crime and Misconduct Act 2003 in clause 5 of the Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017.

2. In that context I am asked to provide advice as to:

(a) The history of section 3(2) of the Corruption, Crime and Misconduct Act 2003 ("the CCM Act"), including any amendments made to it;

(b) Whether the proposed amendment affects Parliamentary Privilege, including the respective roles of the Corruption and Crime Commission ("the CCC") and the Privileges Committees of Parliament in relation to the matters affected by the amendment.

The Proposed Amendment Briefly Described

3. Section 3(2) of the CCM Act was originally inserted into the Corruption and Crime Commission Act 2003, as it was then known, by the Corruption and Crime Commission Amendment and Repeal Act 2003.

4. The subsection, in its original form, provided:

(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.
5. The subsection remained in that form until the passage of the Corruption and Crime Commission Amendment (Misconduct) Act 2014, which (by s 6(5)), deleted the word "exclusively", and the words ", unless that House so resolves". The form of the subsection after that amendment was:

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

6. The amendment proposed by clause 5 of the Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017 would re-insert the word "exclusively", such that the subsection would then read:

(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.

Effect of the Amendment — Significance of the Word Exclusively

7. The effect of the proposed amendment rests on the significance of the word "exclusively".

8. Prior to the removal of the word "exclusively", s 3(2) did not prevent the CCC from exercising powers in relation to a range of misconduct by members of Parliament. This was because there was a range of conduct which constituted both a breach of the Parliamentary Privileges Act 1891 and a criminal offence.

9. For example, certain misconduct by Members of Parliament under s 8 of the Parliamentary Privileges Act 1891 could also amount to an offence under the Criminal Code. This is particularly so with respect to sections 55 to 61 of the Criminal Code, which are offences involving interference with the proper operation of Parliament, including corruption offences such as members of Parliament receiving bribes.
10. There are also offences contained in Chapter XIII of the *Criminal Code* which provide a series of offences in relation to corruption and abuse of office. Given the definition of "public officer" in the *Criminal Code*, it is clear that many of those offences would relate to offences of corruption committed by members of Parliament in that capacity.

11. Many of these *Criminal Code* offences comprise elements which are substantially identical to some of the offences set out in s 8 of the *Parliamentary Privileges Act* 1891, or breaches of Parliamentary Privilege generally. Bribery of a Member of Parliament is probably the clearest example of conduct which would comprise both an offence against s 61 of the *Criminal Code* and an offence punishable by Parliament under s 8 of the *Parliamentary Privileges Act* 1891.

12. In creating the *Criminal Code* offences referred to, Parliament has ceded its previously exclusive authority to deal with conduct of the character referred to in s 8 of the *Parliamentary Privileges Act* 1891. Offences under these provisions of the *Criminal Code* may properly be investigated by the police and prosecuted in the Courts. Insofar as conduct by a Member of Parliament or another person constitutes both an offence against the *Criminal Code* and s 8 of the *Parliamentary Privileges Act* 1891, the Courts and the relevant Houses of Parliament may have been said to have had concurrent jurisdiction.

13. Given the concurrent jurisdiction of the Courts and Parliament in relation to that "conduct", it cannot be said that punishment in respect of the conduct which gives rise to an offence against s 8 of the *Parliamentary Privileges Act* 1891 was, following the introduction of the relevant *Criminal Code* offences, determinable exclusively by Parliament. That conduct may well amount to an offence against the *Criminal Code* and, indeed, "misconduct" for the purposes of the *CCM Act*.

14. The removal of the word "exclusively" in *Corruption and Crime Commission Amendment (Misconduct) Act* 2014, had the potential effect that - even though suspected conduct may well amount to an offence against the *Criminal Code*
and, indeed, "misconduct" for the purposes of the *CCM Act* - if that conduct would also amount to a breach of Parliamentary Privilege, it could not be the subject of a CCC investigation. This is because the matter would be determinable by a House of Parliament.

15. Reinsertion of the word "exclusively", would remove that potential effect, so that the CCC would be able to investigate conduct over which there was concurrent jurisdiction of the Courts and Parliament.

**Effect on Parliamentary Privilege of the Amendment**

16. The amendment would leave the powers and privileges of Parliament unaffected. Indeed, the broader purpose of s 3(2) of the *CCM Act* is to ensure that the privileges of Parliament are not affected by the *CCM Act*.

17. For example, the Parliament, and its Privileges Committees, would retain their full authority in relation to the investigation and determination of breaches of the privileges of Parliament, including all of the offences under s 8 of the *Parliamentary Privileges Act 1891*. The amendment does not affect those powers at all.

18. Similarly, Parliamentary Privilege would still have a role to play in the investigation and prosecution of these *Code* offences, whether by the CCC, as part of a misconduct investigation, or an investigation by the police, as part of a criminal investigation. For example, Parliamentary Privilege may preclude the obtaining and adducing of various types of evidence.

19. In this regard a distinction needs to be drawn between the powers of Parliament under the *Parliamentary Privileges Act 1891* (which exclusivity the *Code* provisions affect) and the immunities enjoyed by the House, their members and committees (under s 1). The *immunity* of a House of Parliament and of a member of a House are not affected by the existence of these *Code* offences.
20. For example, Article 9 of the Bill of Rights 1689, which provides “that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”, may, in a particular case have an impact on the extent of an investigation by the CCC or a prosecution in a Court for an offence against the Criminal Code. It is settled that Article 9 of the Bill of Rights is made applicable in Western Australia by the Parliamentary Privileges Act 1891, s1: Haddon v Marks (1995) 17 WAR 447 at 461.

21. There have, at various times been issues raised as to whether the privileges of Parliament in this respect should be altered or different provision made for the manner in which investigations may be conducted (See, e.g., the Report of the Select Committee of Privilege on a Matter Arising In the Standing Committee on Estimates and Financial Operations, November 2007; Review of the Corruption & Crime Commission Act 2003, by Gail Archer SC, February 2008).

22. These issues concern the manner of exercise of the CCC’s powers. They were raised, for example, in Report 44, Standing Committee on Procedure and Privileges. A Matter of Privilege Raised by Hon Sue Ellery MLC, November 2016, which recommended that a Memorandum of Understanding be developed between the CCC and the Houses of Parliament in that regard.

23. Those are issues that are ongoing, and in relation to which differing views have been taken by the CCC and Committees of Parliament (as reflected in Report 44, Standing Committee on Procedure and Privileges. A Matter of Privilege Raised by Hon Sue Ellery MLC).

24. While important, those issues are separate from the one dealt with by the amendment, which is whether the CCC (as with the police) can investigate certain conduct at all.

[Signature]

P D Quinlan SC
Solicitor General for Western Australia
Solicitor General’s Chambers
25 August 2017
APPENDIX 2

Opinion of Mr Bret Walker SC

Memorandum of Advice

TO: Nigel Pratt.
    Clerk of the Legislative Council, Parliament of Western Australia

FROM: Bret Walker SC


Advice in Conference

1. This memorandum summarises the advice that I provided by way of telephone conference on Wednesday, 6 September 2017.

The Question

2. I have been asked to provide advice in response to the following question:

   What effect, if any, would the proposed amendment contained in clause 5(3) of the Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017 have on parliamentary privilege?

Background

3. The Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017 (Bill) was introduced into the Legislative Assembly of the Parliament of Western Australia by the Attorney General on Wednesday, 16 August 2017. It proposes amendments to both the Criminal Property Confiscation Act 2000 and the Corruption, Crime and Misconduct Act 2003 (CCC Act).

4. The main stated function of the Bill is to confer upon the Corruption and Crime Commission (CCC) powers to confiscate unexplained wealth and the proceeds of crime under the Criminal Property Confiscation Act 2000. A secondary function is to ‘restore’ the CCC’s ability to investigate Members of Parliament for various offences. This ability was apparently inadvertently lost due to amendments made in December 2014 to the CCC Act. The Attorney General stated in his Second Reading Speech on the Bill:

   The second purpose of this bill is to restore the power and jurisdiction of other authorities, particularly the Corruption and Crime Commission, into misconduct by members of Parliament, which could constitute a breach of section 8 of the Parliamentary Privileges Act 1891 and a breach of the Criminal Code. The jurisdiction of the Corruption and Crime Commission to investigate members of Parliament for such breaches was removed by the Corruption and Crime Commission Amendment (Misconduct) Act 2014. The restoration of this power will be achieved by a minor amendment to the Corruption, Crime and Misconduct Act. The proposed amendment leaves the powers and privileges of Parliament unaffected.
5. The relevant amendment is at Clause 5 (3) of the Bill, which proposes the following insertion in to the CCC Act:

    In section 3(2) after “determinable” insert:

    exclusively

6. Section 3(2) of the CCC Act, as proposed to be amended, will therefore read as follows:

    (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.

7. On 25 August 2017, the Solicitor General of Western Australia provided the Attorney General with a briefing note on the Bill. The Solicitor General expressed the following opinion on the impact of the proposed amendment on parliamentary privilege:

    Effect of the Amendment - Significance of the Word Exclusively

    The effect of the proposed amendment rests on the significance of the word “exclusively”.

    Prior to the removal of the word “exclusively”, s 3(2) did not prevent the CCC from exercising powers in relation to a range of misconduct by members of Parliament. This was because there was a range of conduct which constituted both a breach of the Parliamentary Privileges Act 1891 and a criminal offence.

    For example, certain misconduct by Members of Parliament under s 8 of the Parliamentary Privileges Act 1891 could also amount to an offence under the Criminal Code. This is particularly so with respect to sections 35 to 61 of the Criminal Code, which are offences involving interference with the proper operation of Parliament, including corruption offences such as members of Parliament receiving bribes.

    There are also offences contained in Chapter XIII of the Criminal Code which provide a series of offences in relation to corruption and abuse of office. Given the definition of “public officer” in the Criminal Code, it is clear that many of those offences would relate to offences of corruption committed by members of Parliament in that capacity.

    Many of these Criminal Code offences comprise elements which are substantially identical to some of the offences set out in s 8 of the Parliamentary Privileges Act 1891, or breaches of Parliamentary Privilege generally. Bribery of a Member of Parliament is probably the clearest example of conduct which would comprise both an offence against s 61 of the Criminal Code and an offence punishable by Parliament under s 8 of the Parliamentary Privileges Act 1891.

    In creating the Criminal Code offences referred to, Parliament has ceded its previously exclusive authority to deal with conduct of the
character referred to in s 8 of the Parliamentary Privileges Act 1891. Offences under these provisions of the Criminal Code may properly be investigated by the police and prosecuted in the Courts. Insofar as conduct by a Member of Parliament or another person constitutes both an offence against the Criminal Code and s 8 of the Parliamentary Privileges Act 1891, the Courts and the relevant Houses of Parliament may have been said to have had concurrent jurisdiction.

Given the concurrent jurisdiction of the Courts and Parliament in relation to that "conduct", it cannot be said that punishment in respect of the conduct which gives rise to an offence against s 8 of the Parliamentary Privileges Act 1891 was, following the introduction of the relevant Criminal Code offences, determinable exclusively by Parliament. That conduct may well amount to an offence against the Criminal Code and, indeed, "misconduct" for the purposes of the [CCC] Act.

The removal of the word "exclusively" by the Corruption and Crime Commission Amendment (Misconduct) Act 2014, had the potential effect that - even though suspected conduct may well amount to an offence against the Criminal Code and, indeed, "misconduct" for the purposes of the [CCC] Act - if that conduct would also amount to a breach of Parliamentary Privilege, it could not be the subject of a CCC investigation. This is because the matter would be determinable by a House of Parliament.

Reinsertion of the word "exclusively", would remove that potential effect, so that the CCC would be able to investigate conduct over which there was concurrent jurisdiction of the Courts and Parliament.

Effect on Parliamentary Privilege of the Amendment

The amendment would leave the powers and privileges of Parliament unaffected. Indeed, the broader purpose of s 3(2) of the [CCC] Act is to ensure that the privileges of Parliament are not affected by the [CCC] Act.

For example, the Parliament, and its Privileges Committees, would retain their full authority in relation to the investigation and determination of breaches of the privileges of Parliament, including all of the offences under s 8 of the Parliamentary Privileges Act 1891. The amendment does not affect these powers at all.

Similarly, Parliamentary Privilege would still have a role to play in the investigation and prosecution of these Code offences, whether by the CCC, as part of a misconduct investigation, or an investigation by the police, as part of a criminal investigation. For example, Parliamentary Privilege may preclude the obtaining and adducing of various types of evidence.

...
Subsequent Activity in the Parliament

8. The Bill was subsequently amended in the Legislative Assembly with the aim of dividing the Bill into two separate bills. The existing Bill now deals only with the confiscation of property and a new Bill was introduced into the Legislative Assembly to deal with the parliamentary privilege issue.

9. The Corruption, Crime and Misconduct Amendment Bill 2017 (New Bill) was introduced into the Legislative Assembly on 18 October 2017. Section 4 of the New Bill proposes the same amendment to s 3(2) of the CCC Act as Clause 5(3) of the Bill previously did. The New Bill was passed by the Legislative Assembly on 23 November 2017 and is now before the Legislative Council.

The Proposed Amendment’s Potential Impact on Parliamentary Privilege

10. I agree with the opinion of the Solicitor General that, whether intended or not, whilst the word “exclusively” does not appear in s 3(2) of the CCC Act, the CCC is precluded from inquiring into those Criminal Code offences that are congruent with the ‘contempt’ offences listed in s 8 of the Parliamentary Privileges Act 1891. This is necessarily the case as the investigation of a Criminal Code offence that was similar to a Parliamentary Privileges Act 1891 offence would plainly relate to a matter “determinable by a house of Parliament”.

11. In my view clause 3(2) of the CCC Act preserves parliamentary privilege and the proposed amendment will not alter this position. The only likely impact on parliamentary privilege of the proposed amendment is that it will give rise to some incidental issues relating to the identification of parliamentary privilege and the proper use of evidence in the course of the CCC’s exercise of its investigative function.

Matters Exclusively Determinable by a House of Parliament


13. Section 8 of the Parliamentary Privileges Act 1891 lists certain offences over which each house of Parliament can exercise a summary jurisdiction. This jurisdiction is exclusive in the sense that no-one else can do it in that way – but that is not necessarily the only meaning of exclusivity in this context. Interestingly, however, ss 14 and 15 of the Parliamentary Privileges Act 1891 also contemplate an alternative route by way of a direction to the Attorney General to prosecute such a case in the Supreme Court. Accordingly, the s 8 offences are also plainly determinable by the Supreme Court. Even if the Supreme Court’s jurisdiction is viewed as being dependent upon first obtaining the fiat of a house of Parliament; that is no more significant a limitation than to say of any trial on indictment that it requires first the fiat or the act of a prosecutor. The section 8 offences under the Parliamentary Privileges Act 1891 also tend to reflect, in large part, the Criminal Code offences relating to Parliament. In my opinion, the amendment would have the beneficial result of permitting CCC investigation of them.

14. In terms of the criminal offending that is likely to draw the attention of the CCC, there are a few matters, but not a great many, that may fall within the definition of exclusively determinable by a house of Parliament. Matters exclusively determinable by a House of Parliament would, practically speaking, be only those interferences with parliamentary proceedings that amount to a contempt but that are not otherwise punishable by the courts. That is not an easily discernable class, at present.
15. Each of the houses of Parliament are empowered to establish and alter, from time to time, through the processes of their privileges committees and the adoption of their committees’ reports, standards and rules of conduct for their respective Members. These standards and rules may also extend to Member’s staff, witnesses and other persons that may find themselves involved in parliamentary proceedings. These are matters that, in my view, are definitely exclusively determinable by a house and should not as a general rule be the subject of an investigation under the CCC Act as it is proposed to be amended.

16. It is difficult, of course, to attempt to define with any specificity what such matters of exclusive jurisdiction are or may be, because in essence each of the houses can from time to time mould and adapt the norms of conduct enforceable as a matter of privilege to circumstances as they unfold. It is because of that potential to add new matters to this category, whilst at the same time more clearly defining the investigative jurisdiction of the CCC, that I am of the view that the proposed amendment to subsection 3(2) of the CCC Act should be supported.

17. It is also for this reason that I would not recommend the deletion of subsection 3(2) of the CCC Act to remove any reference to separate jurisdictions or to parliamentary privilege at all. As noted above, the potential for unanticipated matters to arise which may not be a crime but which may nevertheless constitute a contempt of the Parliament, means that it is important that the houses have the power to address such matters internally case-by-case. It would also be quite inappropriate to give the CCC the function of making determinations as to exactly what conduct of Members of Parliament not amounting to a crime falls within the CCC’s jurisdiction to investigate under the CCC Act.

Bret Walker
Fifth Floor, St James’ Hall
6th December 2017
Standing Committee on Procedure and Privileges

Date first appointed:
24 May 2001

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

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