Standing Committee on Procedure and Privileges — Sixty-first Report — Progress report: Supreme Court proceedings and matters of privilege raised in the 40th Parliament — Motion

Resumed from 2 June on the following motion moved by Hon Sue Ellery (Leader of the House) —

That the report be noted.

Hon SUE ELLERY: I thank the President for her advice to the house. The motions that arise out of the sixty-first report, *Progress report: Supreme Court proceedings and matters of privilege raised in the 40th Parliament*, are orders of the day and are to be dealt with in due course. I want to take a couple of minutes to make some comments about what is in the report and what is not in the report.

To the extent that the report provides a chronology of certain events, I think it is a useful document. To the extent that there is some pejorative language in the report about whether a member of the executive, in this case the Attorney General, directly intervened—that is the language that is used and there is a bit of other language—I could find no evidence of that in this report. Members may be aware that subsequently there has been some media coverage of whether an exchange happened in a court proceeding. I do not know the background to that. All I know is what I read in the media. But in the report that is before us, I could not see the sort of silver bullet that categorically demonstrates intervention by the executive. However, what is absolutely clear—abundantly clear—is that the two parties to this dispute, if you like, did not have an agreement about how to deal with matters in dispute.

It is clear that the committee was firmly of the view that it had progressed pretty well and it was of the view—it expresses that at various points—it had reached agreement, but at other points in the report, its language is less definitive and it says it understood it had reached agreement. The bit that makes it starkest is on page 287 of the report, which contains the transcript of Commissioner McKechnie's evidence to the Standing Committee on Procedure and Privileges. The commissioner is asked about the procedure the committee had agreed to and asked to provide an explanation, and his response in the transcript is —

> … I do not think there was ever any agreement reached. I think, as sometimes happened, each side thought there was a particular position and there was not a meeting of minds on it.

If nothing else is clear from this, it is clear that an agreement was not reached in the minds of both parties at the same time, which is a fairly fundamental problem. It may well have been that the committee was genuinely of the view at various points that they had agreement. I think elements of that are laid out in the report, but also laid out in the report is a degree of uncertainty about whether that had been confirmed by the commissioner of the CCC. The significant takeout is that element of the first recommendation in the report that there needs to be a memorandum of understanding reached between the two. It is that element of the first recommendation that I think will be the most useful way to go forward.

I am not on the Standing Committee on Procedure and Privileges, so I do not know whether that committee is considering this report at all. I do not know whether it has it before it and is pursuing a particular line of action or progress. I think court cases aside—that is taxpayers' money being used—and principles of the Parliament's right to assert itself aside, what needs to be resolved is that an agreement be made between the two, because this kind of thing will happen again. It might take another 10 years or whatever, but, in my mind, that probably should have been pursued earlier than when the particulars of this matter first blew up. Members who have been around for a while will remember that a memorandum of such between the Parliament and the Corruption and Crime Commission was a recommendation from several years ago. It was obviously unfortunate that it had not been progressed by the time the particular circumstances here blew up.

I might leave my comments there. People will read this and draw their own conclusions. I went looking for the categorical evidence that there had been intervention by the executive and I could not find it. If somebody wants to point it to me they can, but I could not find it in this report. I am interested to hear what other members have to say. Even though I will leave the chamber on urgent parliamentary business, I will be astutely listening in my office.

The CHAIR: Members, before I give the call to any further members, I remind members that standing order 21 now applies without the application of the temporary order; that is, each member is entitled to one period of 10 minutes per report. At the discretion of the Chair of Committees and when no other member wishes to speak, a member may be allocated a second period of five minutes per report. Just be aware of those time restrictions that apply to consideration of committee reports.

Hon NICK GOIRAN: We are finally here; it has taken several weeks while the Leader of the House decided each week to try to hide this report from our consideration but here we are finally with an opportunity to consider it. It is no wonder the government did not want to consider this report given its staggering revelations. I am somewhat amused and perplexed that the Leader of the House has indicated that she was unable to find what she was looking

for in the report. It might be helpful to read the report in its entirety and then she might be able to find the information she was looking for. It does not take too much to read the then President's tabling statement, which reads —

> facts have come to light that this was the result of the direct intervention of the Attorney General in the CCC's investigation.

The Leader of the House said that that assertion was made but she could not find anything in the report to back it up. In the limited time we have let us take a look at this matter, particularly for those who will not have had the opportunity to know its full history. At the outset, I encourage members to familiarise themselves with the various findings and recommendations in this report. Finding 1 states —

> The PPC finds that:
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> a) a total of 499,174 records relating to five CCC notices to produce records were the subject of the PPC's parliamentary privilege review;
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> b) a total of 10,079 records were determined by the PPC to be subject to parliamentary privilege; and
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> c) a total of 489,095 records were determined by the PPC to be not subject to parliamentary privilege.

Those numbers are staggering and I, indeed, congratulate the members of the then Standing Committee on Procedure and Privileges and any staff involved on the sheer magnitude of the work that was undertaken. If nothing else, it demonstrates the sheer quantum of the Corruption and Crime Commission's self-inflicted frustration of its own investigation. It can avail itself of thousands and thousands of documents. If members read the report, they will see that at first, the CCC took advantage of the offer from the PPC but since then has said, "No, we won't do that; we'll wait for the outcome of the court hearing." Indeed, I am sure that we are all waiting for the outcome of that court hearing. I will speak more about that when other matters come before the house in due course.

I draw to members' attention that the executive summary in the report indicates that the PPC has subsequently carried out its own audit of the produced documents and determined that 1 120 privileged documents were handed over at that time by the Department of the Premier and Cabinet–State Solicitor's Office to the CCC—1 120 privileged documents. That means that the law of Western Australia has been breached 1 120 times under the auspices of the McGowan government. It is no wonder the Leader of the House did not want us to debate this report over the last few weeks—1 120 breaches of the law. These documents were handed over to the CCC subject to parliamentary privilege. It was noted that, of the 1 120 records determined by the PPC to be privileged yet were produced by the DPC to the CCC, they included—the committee helpfully sets them out in its executive summary—six categories. We have just had a discussion about the importance of the confidentiality of deliberations. We know what the government's view is. Let me tell members that the sixth dot point of item 10 in the executive summary reads —

> confidential parliamentary committee material, including committee deliberations and draft report recommendations.

Perhaps it is no wonder the government does not want to support the motion we were just considering and it has been trying to hide this report from Parliament for the last few weeks and prevent us from debating it. It has been revealed that, under the auspices of the McGowan government, the member for Rockingham and the member for Butler, the law of Western Australia has been breached more than 1 000 times.

People who are interested in the passage of this matter and the obsession with certain peripheral matters, might take the opportunity to read this report and see that the only material that ought never to have been provided were those subject to parliamentary privilege; for example, confidential parliamentary committee material. To put that into some context for members, as the chair of the oversight committee of the CCC for eight years, there were times when we received information, as members can imagine in our oversight capacity, about the operations of the CCC. The oversight committee has a job to oversee the CCC and its extraordinary powers. People communicate to it and have complaints about that body from time to time and now, under the McGowan government's dictatorial rule, these types of committee deliberations can be provided. It has been done; it has been found to occur 1 120 times.

The other matters indicated were draft parliamentary speeches, draft parliamentary motions, draft parliamentary questions, submissions from members of the public requesting a member to vote a certain way, documents indicating how a member intended to vote on a bill or another measure and, as I say, confidential committee deliberations. When a constituent of Western Australia comes to see us and seeks our assistance effectively as a last resort because they have been unable to go somewhere else, particularly if they are a whistleblower, they should have the confidence and the trust that that confidence will not be broken. We have just heard from Hon Dr Brian Walker, who, quite helpfully, reminded us about patient–doctor confidentiality. The same principles apply to solicitor–client privilege for my fellow learned friends in the legal fraternity. Under the dictatorial regime of the McGowan government, there is no respect for the rule of law. In this situation facts have come to light that the Attorney General has directly intervened in the Corruption and Crime Commission's investigation. It is most regrettable—although it no doubt suits

the Leader of the House—that we are now operating in circumstances in which a member has a mere 10 minutes to speak to a report of more than 300 pages. It contains significant matters that have not been addressed and, as the Leader of the House has already indicated, will come up again. I draw members' attention to paragraph 5.49 on page 106, which says —

> Finally, in an sms message sent by the Commissioner of the CCC to the Attorney General dated Monday, 22 July 2019, the Commissioner wrote:
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> > The DPC has delivered a USB in accordance with the requirements under the CCM Act. Any privileged material was identified —

Garbage! That is my interjection into the quotation, for the benefit of *Hansard*. That is absolute garbage. It says privileged material was identified—clearly not, as we had 1 120 breaches. Nevertheless, the quote continues —

> and removed prior to delivery. I have ordered that the USB remain in the secure exhibit room. In the absence of any indication to the contrary I will release it to the investigators later this week. Enjoy your last night in Bali.

This is John McKechnie communicating with John Quigley on 22 July 2019. This is a staggering, staggering revelation that a person who is supposed to be entirely independent and who is the corruption watchdog is colluding with the first law officer of Western Australia, the Attorney General, and seeking direction from him as to whether this material is going to be released to investigators! As if it is up to the honourable Attorney General to dictate whether this material goes to the investigators or not. There is so much more to be said about this particular matter, and I regret that we do not have time to deal with it today.

Hon TJORN SIBMA: In the 10 minutes I have been gifted, for the benefit of newer members I want to provide the circumstances surrounding this sixty-first report of the Standing Committee on Procedure and Privileges. I suggest that members make their way first to the then President's tabling statement and to the executive summary of this report. That is not all members need to know, but it is a very good starting point, because it is fair to say that this matter has been misrepresented both by members of the government and the media. To apply the most charitable interpretation to that misrepresentation in respect of the media's reportage, one might observe that the issues at stake are actually complex and that the material germane to the subject matter contained in this report—essentially, two Supreme Court actions—are extensively detailed. Nevertheless, it is worthwhile that this discussion about committee reports comes on the back end of the motion that we debated recently, because it goes to the integrity of the committee's deliberative processes. It might come as some surprise to newer members that this report was largely authored by five members who represented different political parties; obviously the ex-President Hon Kate Doust, ex-Labor member Hon Adele Farina, Hon Martin Aldridge, and Hon Simon O'Brien, who was the father of this house, which is to say to newer members that he had the longest term of service, some 24 years, so he knew what he was doing, and for a brief period of time, yours truly.

The circumstances upon which I was appointed to this committee have been discussed elsewhere, but I only draw attention to it for the fact that I came into this process with an open mind because the debate that I had heard inside and outside of this chamber, frankly, was a little confusing and a little opaque. Again, that is a function of some of the complexity involved. I was compelled to come to grips pretty quickly with over two years' worth of deliberations, some 80 meetings of the Standing Committee on Procedure and Privileges. What did I learn in the course of that experience? Well, I learnt some things, frankly, I would prefer never to have known about, because it did undermine something of my residual trust in the capacity of executive government and ministers of that government to conduct themselves properly. On that score, I refer to references made in the tabling statement, in the executive summary and in the body of the report, because once again I am compelled by the Leader of the House, through her politically clever and artful contribution, to correct some matters of fact. The Leader of the House put it to us that, effectively, the statements contained within the tabling statement and the executive summary were pejorative statements that reflected ill on the Attorney General. Members, they can be absolutely substantiated in pages 101 through to 106 of the report.

I cite additional evidence to the text message exchange just read in by Hon Nick Goiran—that is, another piece of evidence appears on page 101 of that report which refers directly to the outcomes of the Attorney General's direct intervention and involvement in this matter in a way that I would categorise, as an ordinary member of this chamber, to be absolutely inappropriate, and more properly I would say that a conscientious and conservative Attorney—not in a political or partisan way—would be minded not to do. I will read this reference to a letter from Mr Nicholas Egan, the State Solicitor to Mr John McKechnie, SC, dated 4 July 2019. This is footnoted at the bottom of page 100 and that footnote is interesting because it reveals that this evidence was obtained by the PPC only in December 2020. I refer members to paragraph 5.45, which reads —

> On 4 July 2019, Mr Nicholas Egan, State Solicitor, wrote to the Commissioner of the CCC in the following detailed terms confirming "the agreement" that had been reached between the Commissioner of the CCC and the Attorney General:

That is a reflection of a defined action that was recognised by the State Solicitor's Office. It is not a flippant accusation put in there without due regard or with scant regard to the facts of the matter; there was direct evidence that was confirmed in a letter from the State Solicitor, Mr Nicholas Egan, which confirmed the Attorney's direct involvement.

As reflected in the report, paragraph 2 of that letter relates —

> 'I understand that you —

That is, Justice McKechnie —

> have agreed with the Hon Attorney General a process under which:
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> (a) officers of the [CCC] will assist officers of the DPC to identify those electronic documents which fall within the terms of the notices and then apply search terms to identify which of those documents —

That is, relevant documents —

> … are of interest to the CCC, but without any of those documents ever leaving the possession of the DPC, or being read, copied or retained by the CCC;

Independent members are allowed to take a view of whether that was a pragmatic or practical process, but what they cannot dispute is that this is direct evidence of the Attorney General's intervention. I put it to members that that is inappropriate and, in the context of the broader debate and the defence of a fundamental parliamentary principle—the principle of privilege—it was absolutely untoward and unwarranted. It should not have occurred. Why it sticks out and why it is so salient is because of a disputation over the process of an agreement being formulated by this house with the Corruption and Crime Commission, which would effectively manifest itself in a memorandum of understanding. In essence, it would provide scope for Parliament to facilitate lawful inquiries by the CCC but in a way that did not imperil parliamentary privilege. It seems to be the view, again, unfortunately put by the Leader of the House, that the burden of failure to strike an agreement rests completely with this Parliament and this house, and that is absolutely not true. In the 10 seconds available, I will say that this issue is not a partisan matter. It is not a trivial matter. It is a vitally important matter and it gets to the heart of the fundamentals of governance in this state.

Hon Dr STEVE THOMAS: Again, I will be very cautious about the comments I make today given the position that I currently hold. I suspect this is one of the most astounding reports that has ever been placed on the table in the Legislative Council. It is a most amazing document and it goes to the heart of a couple of key principles. The first of those has been mentioned; that is, the concept of privilege. For those members who perhaps have not looked into this, privilege in Parliament has been around for a very long time and it is considered to be a very important underpinning of Parliament. It is that we have to be able to have fearless, free and frank conversations with constituents and with each other. Those things need to be protected so that we are not at the whim of the law. Parliamentary privilege is very important. It is not universal and has never been so. Members cannot make a statement in this place and go outside and say, "I stand by the comments I made in that place" and assume that they are free and cannot be chased because parliamentary privilege in itself is limited, but it is critically important.

The report before us today goes to the key issue of privilege and whether privilege still exists. I would be very interested to know the government's position and whether it thinks that parliamentary privilege is still an important part of the Westminster system because I have not heard, in any of the debate from government members on these issues, whether they still believe in parliamentary privilege. I will make some comments next week on the motion about how some members of the government who believed very strongly in parliamentary privilege in their other lives perhaps do not so much today. I am very interested to hear what the government says about whether it still thinks that parliamentary privilege is important. We have not heard an indication from the government about its standing on parliamentary privilege and whether it thinks it still matters.

It might come as a surprise to government members that many people think parliamentary privilege is still essential in the same way that we heard before about doctor–patient confidentiality. We know that the legal profession also has obligations on what they can disclose. Surely members of the government consider that parliamentary privilege is still an important component of what we do. It was quite astounding to read it and I will jump to the executive summary of the incredible sixty-first report. This astounded me. I quote —

> Quite simply, it is the PPC's view that at the heart of this matter is an entirely inexplicable sudden cessation of good faith negotiations between the PPC and the Commissioner of the CCC. This coincided with the bald usurpation of the powers and privileges of the Legislative Council through the calculated intervention of the Attorney General and State Solicitor's Office (SSO), to the potentially unlawful benefit of the CCC.

I do not think I have heard a more important and potentially more damning statement in a committee report. We normally make rather bland statements in committee reports. Occasionally, they create a little bit of interest but this is one of the most important reports I think we have ever had. We have to take this at face value. This is an instance

in which the issue of privilege is under threat. I do not want to pre-empt the decisions that might be made at a later date, but I will jump to paragraph 9, which I think is also critical. I quote, in part —

> After a month of negotiations between the PPC and CCC via written correspondence, and adjustments made to a protocol to account for the issue by the CCC of its second notice, the PPC was under the impression that a workable protocol had, in fact, been reached.

That is a protocol in which the CCC could access documents that may or may not, at that point, have contained privileged information. It continues —

> Then, without clear explanation to this day, the Commissioner of the CCC reneged on his earlier indicated approval of the draft negotiated protocol and immediately began separate negotiations directly with the Attorney General to displace the Legislative Council's proposed protocol with their own device.

Under what authority does the Attorney General displace the negotiations between the Legislative Council, as represented by the privileges committee, and any other organisation? It is one of the most astounding usurpations of the power of the Legislative Council that I have ever seen, if the report before us is to be believed. It is a report from some outstanding members on both sides of politics, members who carry enormous respect around Parliament, including members of the Labor Party who have probably been pilloried for taking that principled position in a way that I suspect nobody else would put up with. It is astounding to think that we should not give some weight to these recommendations.

The executive summary goes on. I quote —

> Despite repeated requests and, ultimately, orders from the PPC not to produce the likely privileged evidence to the CCC … the Director General handed over to the CCC approximately 70,000 documents on 22 July 2019 that in the SSO's opinion were not subject to parliamentary privilege. The PPC subsequently carried out its own audit of the produced documents and determined that 1,120 privileged documents were handed over at this time by the DPC/SSO to the CCC.

I will come back to this fundamental principle of whether privilege exists. It still astounds me and we have yet to hear government members give us an indication of their position on it. Does privilege exist, Deputy Leader of the House?

Hon Stephen Dawson: Mate, you're the one who's got the floor. Keep going!

Hon Dr STEVE THOMAS: I am waiting for someone in the government to give us an answer. Does privilege exist? If privilege exists then members of the government should be amazed and, to some degree, outraged by the sixty-first report dropped in this Parliament last month, but they have still given no answer. Members of the government, particularly new members, will have to make an assessment of whether they believe privilege is important. We are at, in my view, one of those great junctures in the history of Parliament in Western Australia. Members might think that the election was a great juncture and a great turning point, but that was simply a win–loss situation. This is a genuine turning point.

Hon Stephen Dawson: Is that how you put it: a win–loss situation?

Hon Dr STEVE THOMAS: Yes, a win–loss situation. You cannot win them all, minister.

This is a great turning point in the Parliament of Western Australia, because we, as an opposition, have to ask that fundamental question, and we have to keep asking it until the government gives us an answer in one way, shape or form. It does not seem to want to give us a verbal answer across the floor and that is okay. It will probably give us an answer in some form of action or legislation that will demonstrate a complete contempt for parliamentary privilege, which we will look at. Honourable members should remember that when they display contempt for parliamentary privilege, they are actually displaying contempt for this chamber, because we cannot operate without it. If members are determined to make sure that there is no great reflection on parliamentary privilege—if it does not matter and if they cannot answer that question—they will be holding this chamber in contempt. They obviously hold us in contempt. More importantly, the next time they are in the caucus room and the issue of whether the Legislative Council is an evil place filled with people who are just trying to hide stuff comes up, they need to ask themselves whether they are holding themselves in contempt as well. Surely privilege matters to all members who are sitting in this chamber and wondering where we can go with this debate. Is it simply the case that executive government rules and the Legislative Council of Western Australia no longer plays a relevant role in holding governments, Parliaments and legislation to account? That is where we are headed at the moment. We are headed to a place where there is no accountability, where it does not matter and where the first law officer of the land apparently can do things like conflate arguments, interfere with the functions of a committee and hold us all in contempt.

Hon COLIN de GRUSSA: I, too, want to contribute to the discussion on the sixty-first report of the Standing Committee on Procedure and Privileges. It is a very interesting, weighty report. However, if we are to break it down, I think the honourable Leader of the Opposition touched on the most fundamentally important part of this report. It is not who did what, who gathered which piece of evidence, who requested what and who set up the procedures.

The most important aspect of this report is the concept of parliamentary privilege, which we operate under in the Westminster system. It is fundamental to our democracy. We cannot do what we do in this place or, indeed, in any Parliament without the sovereignty of parliamentary privilege.

I turn to Erskine May's *Parliamentary Practice*, the bible of the Westminster system and parliamentary privilege. Paragraph 12.1 outlines what constitutes parliamentary privilege. It states —

> Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Some privileges rest solely on the law and custom of Parliament, while others have been defined by statute.

I will not go on to read more of that, but the point is that when we are in this place and we are debating various issues or are dealing with constituent issues, they ought to be protected by privilege because some of the matters that we raise in this place could ordinarily find us dealing with legal action that would in fact prevent us from doing our job. When a constituent comes to a member with a most grave issue that they cannot talk about publicly for fear of litigation and the member must raise it in order that we make better laws for the land in which we live, the member must have the protection of the sovereignty of privilege in Parliament. Indeed, there is very interesting reading on page 49 in chapter 3 of the sixty-first report. Parliamentary privilege was established in ancient times, but the chapter heading says "Parliamentary Privilege in a Terabyte Age". That is the critical point here. In the past, handwritten documents were passed around and it was probably a heck of a lot easier to establish what constituted a privileged document and what constituted proceedings in Parliament because there were far fewer documents to sort through. When we consider the modern email and computer systems that we use and the literally thousands upon thousands of documents to consider, it makes it very difficult to quickly establish what is and is not a privileged document. Importantly, the role of establishing what is subject to parliamentary privilege is not for anyone but the Parliament, and that is one of the fundamental matters at the heart of this report. Yes, it is clear that we need to establish procedures to identify what is privileged, and those procedures need to work in circumstances in which there is a mountain of data to go through. However, who can determine that? The answer to that question is the Parliament. No-one else can determine that.

Debate interrupted, pursuant to standing orders.

[Continued on page 1501.]

Sitting suspended from 4.15 to 4.30 pm