CORRUPTION, CRIME AND MISCONDUCT AMENDMENT BILL 2017

Second Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [5.07 pm] — in reply: I begin my second reading reply on the Corruption, Crime and Misconduct Amendment Bill by commending the Standing Committee on Procedure and Privileges for its report, which each member who has spoken in the debate has referred to. As members have noted, the committee's report is a very useful summary and history of parliamentary privilege. As some members have commented on in their remarks, privilege is not a concept that is easily understood by those outside this place, and sometimes even by those inside this place. It is not simply defined. It is a principle that, at its simplest, seeks to protect one of the key and cornerstone elements of our democracy—the right and, indeed, the obligation of elected members to speak up on behalf of their constituents. It also seeks to protect the independence of the Parliament from the executive and the judiciary. This bill goes to part of the tension that occurs between privilege in its most simple form and privilege in its most complicated form. I am pleased to note that the report found that the proposed amendment in the bill before us will not result in any diminution in the scope and operation of parliamentary privilege.

I turn now to the comments made by each of the respective members and I thank them all for their contribution to the debate. A number of references were made to matters canvassed in an earlier report by the Standing Committee on Procedure and Privileges titled "A Matter of Privilege raised by Hon Sue Ellery MLC" and dated November 2016. Members would be aware that that included a recommendation for a memorandum of understanding between the houses of Parliament and the Corruption and Crime Commission that such a thing be developed. Information that I have already provided to the house via a parliamentary question confirms that that is yet to be finalised.

Questions were raised about the exclusivity and the operation of section 3(2), including: How will this be determined? Will it be by the Parliament, the court, a parliamentary committee or by the Presiding Officers? Will this be justiciable? Questions were also raised about the workability of the original provisions around sections 27A and 27B. I might note, by way of assistance to the house, that there have been discussions and negotiations behind the Chair and agreement has been reached on how we might handle section 27A in particular, by way of a response to the issue as it was raised during the course of the second reading debate. If conduct involves a breach of section 8 of the Parliamentary Privileges Act and a criminal offence, the matter is not exclusively determinable by Parliament. In that case, the Corruption and Crime Commission will have jurisdiction to investigate, provided that the conduct involves an allegation of serious misconduct. If conduct involves a breach of section 8 of the Parliamentary Privileges Act but is not a criminal offence, the matter is exclusively determinable by Parliament. In that case, the Corruption and Crime Commission will not have jurisdiction to investigate. In any particular case, the Corruption and Crime Commission will need to determine whether it has jurisdiction to investigate, having regard to the provision of its act. In some cases, the commission may need to seek advice on this issue. It remains open to the commission to refer a matter or to consult the relevant Presiding Officer and the Standing Committee on Procedure and Privileges when appropriate. In respect of whether this clause is justiciable, it would be up to a person who challenges the jurisdiction of the Corruption and Crime Commission to seek a declaration from the Supreme Court that the commission did not have jurisdiction to investigate on the basis that the matter was determinable exclusively by a house of Parliament.

Sections 27A and 27B are no longer in existence and were repealed because they were no longer required. I understand the intent is that the proposed memorandum of understanding will address some of the practical issues when the commission is investigating an allegation of serious misconduct, which the Parliament itself may be dealing with as a contempt of Parliament.

A question was raised about the laying of charges and filing on indictment and the potential to trespass on the privileges of Parliament, and whether the amendment that was on the supplementary notice paper at that point—there is a new supplementary notice paper now—would solve the problem. I will deal with that when I get to the amendment that is on the supplementary notice paper before us.

In respect to the application of the amendment and the statutory interpretation of "backbench" and whether it is confined to non-ministers only, the Corruption and Crime Commission investigates serious misconduct; that is, certain misconduct by public officers. For the purposes of the Corruption, Crime and Misconduct Act, a public officer has the meaning given by section 1 of the Criminal Code. In section 1 of the Criminal Code, "public officer" means, relevant for the present purposes, a minister of the Crown, a parliamentary secretary and a member of either house of Parliament. Accordingly, both backbenchers and frontbenchers are included within the definition of a public officer.

I might touch on the question of the laying of charges and the filing on indictment. It is arguable that in enacting offences in chapter 8 of the Criminal Code, which relate to Parliament or proceedings in Parliament, that

Parliament has waived its privilege. In order to prosecute the offence, it would be necessary to lead evidence of the proceedings in Parliament. By way of contrast, section 3(2) of the Corruption, Crime and Misconduct Act makes it clear that Parliament intended to maintain privilege, as it states —

> 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 Corruption and Crime Commission does not have the power to lay criminal charges or file an indictment against a person who has been investigated by the commission. The Western Australia Police Force or the Director of Public Prosecutions may need to seek advice about the issue of parliamentary privilege when considering the laying of charges or the filing of an indictment. That advice could be obtained from the State Solicitor's Office or from lawyers employed by WA police and the DPP. The Corruption, Crime and Misconduct Act does not deal with the laying of charges or the filing of indictment against a person investigated by the Corruption and Crime Commission.

A question was raised about Mr Barry Urban; it was used as an example. I am advised that he has been charged by the WA Police Force with a number of criminal offences including giving false evidence before Parliament. These matters are still before the courts and it would not be appropriate to comment any further on that. Members are aware that Mr Urban was the subject of a report of the Procedure and Privileges Committee of the Legislative Assembly. The bill before us does not prevent investigations by WA police into criminal offences that may also constitute a contempt of Parliament.

The respective abilities of the CCC and WA police to enforce, charge, prosecute and punish any matters was raised, as well as their impact on parliamentary privilege. The Corruption and Crime Commission has powers related to the investigation of misconduct as outlined in the Corruption, Crime and Misconduct Act. The commission does not have the power to lay criminal charges against a person who has been investigated by the commission—there is a reference to A v Maughan (2016) WA Supreme Court of Appeal—nor does it have the power to prosecute and punish matters. The decision of the Supreme Court in that matter was also the subject of an inquiry by the Joint Standing Committee on the Corruption and Crime Commission of the thirty-ninth Parliament. That report was tabled on 17 November 2016 and subsequently re-tabled by the committee of the fortieth Parliament in September 2017. The Attorney General has responded to the committee and intends to update Parliament in due course on the outcome of recommendation 2. WA police have powers to investigate criminal offences. They may also charge offenders with criminal offences. WA police may prosecute certain offences in the Magistrates Court; the DPP may prosecute offences in the Magistrates Court and in the superior courts. The courts punish offenders, not WA police. The powers of WA police to investigate and prosecute criminal offences is separate from the powers of the Western Australian Parliament to deal with a person for contempt of Parliament; however, issues of parliamentary privilege may arise in relation to the admissibility of evidence in a criminal prosecution.

The supplementary notice paper reflects agreements reached regarding negotiations around the original amendment that was on the supplementary notice paper in the name of Hon Alison Xamon.

Another issue raised was the question of concurrent jurisdiction. It is not correct to speak of a concurrent jurisdiction between the Parliamentary Privileges Act and the Criminal Code; rather, it is the concurrent jurisdiction of the courts and Parliament. As set out in paragraph 12 of appendix 1 of the forty-eighth report of the Standing Committee on Procedure and Privileges, the opinion of the Solicitor-General was —

> 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.

There was an issue about the Solicitor-General's and Bret Walker's opinions being silent on how the CCC should investigate. The investigative powers of the Corruption and Crime Commission are set out in the Corruption, Crime and Misconduct Act. The commission is required to adhere to the requirements of its act in its conduct of investigation and the use of its powers.

There was a question about a lack of clarity on the extent to which evidence arising from parliamentary proceedings may be used in prosecutions. The bill does not deal with the extent to which evidence arising from parliamentary proceedings may be used in prosecutions because the Corruption and Crime Commission does not have the power to commence a prosecution by laying criminal charges against a person who is being investigated by the commission, or to prosecute the matter in a relevant court. As I pointed out earlier, issues concerning the admissibility of evidence are a matter for the WA Police Force and the Director of Public Prosecutions. However, for completeness, I refer to debate in the other place on 9 May. The Attorney General referred to the case of

R v Smith and was quoting from the forty-fourth report of the Standing Committee on Procedure and Privileges when he said —

> … the Legislative Council resolved that the Attorney General be directed to prosecute an apparent instance of giving false testimony to a parliamentary committee …
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> …
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> 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.

In that instance, the Legislative Council gave specific leave for members and the Chief Hansard Reporter to attend. Parliamentary privilege was maintained and, as many members have noted, not abrogated by the then Legislative Council.

One of the functions of the Corruption and Crime Commission is to assemble evidence obtained in the course of investigating serious misconduct, and to provide evidence that may be admissible in the prosecution of a person for a criminal offence against a written law. A question was raised about double jeopardy—whether a person can be tried and punished by both a Parliament for contempt and a court for an offence. A person cannot be tried twice for the same offence. In WA, a previous conviction or acquittal is a defence under section 17 of the Criminal Code, subject to section 46M(4) of the Criminal Appeals Act 2004. That means that as a general rule a person cannot be tried again for an offence for which they have previously been convicted or acquitted. However, there is no issue of double jeopardy because Parliament punishes for contempt and the courts punish for an offence.

Section 11 of the Sentencing Act 1995 provides —

> If the evidence necessary to establish the commission by a person of an offence under a law of this State is also the evidence necessary to establish the commission by that same person of another such offence, the person may be charged and convicted of each offence but is not to be sentenced for more than one of the offences.

However, section 3(3)(c) of the Sentencing Act makes it clear that the Sentencing Act does not apply to, or in respect of, a person being punished for contempt of a house of Parliament. An offence against section 8 of the Parliamentary Privileges Act is not the same offence as an offence contrary to the Criminal Code, albeit that certain misconduct may comprise both an offence against the Criminal Code and an offence punishable by Parliament under the relevant section of the Parliamentary Privileges Act. The clearest example of that is an offence against section 61 of the Criminal Code, which covers bribery of a member of Parliament.

There was a request to clarify the circumstances in which the bill will permit the CCC to exercise its powers, rights and functions in matters that are not criminal offences but are misconduct matters, as defined under the Corruption, Crime and Misconduct Act, that correspond to the contempt powers of Parliament. For present purposes, serious misconduct occurs if a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment; a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself or herself, or for another person, or to cause a detriment to any person; or a public officer, while acting or purporting to act in his or her official capacity, commits an offence punishable by two or more years' imprisonment. The conduct referred to in the first two examples may also constitute a criminal offence—for example, a member of Parliament receiving a bribe, contrary to section 60 of the Criminal Code; bribery of a public officer, contrary to section 82 of the Criminal Code; or corruption by a public officer, contrary to section 83 of the Criminal Code.

The effect of the bill is that a power, right or function conferred under the Corruption, Crime and Misconduct Act is not to be exercised if, or to the extent that, the exercise would relate to a matter exclusively determinable by a house of Parliament. The proposed amendment ensures that the Corruption and Crime Commission can investigate misconduct that is capable of being prosecuted in a court of law as well as being dealt with by a house of Parliament.

A question was raised around possible evidence sharing between the Corruption and Crime Commission and Parliament. That is a matter for the commission and the Parliament to resolve, possibly in the memorandum of understanding or, until that is sorted, on a case-by-case basis.

A question was raised about resourcing and whether there would be any impact on the CCC's core business of investigating police. The Corruption and Crime Commission has a number of functions, which are set out in part 2, division 2, of the Corruption, Crime and Misconduct Act. Those functions include the "serious misconduct function" relating to public officers, which is defined to include police officers; the police royal commission functions; the Anti-Corruption Commission functions; the organised crime function; the reviewable police

action function; the prevention and education function: police misconduct; the capacity development function: public authorities; and the unexplained wealth functions.

Prior to the amendment in 2014, the Corruption and Crime Commission had jurisdiction to investigate a matter that was determinable by Parliament, but not exclusively determinable by Parliament. The issue of resourcing is a matter for the Corruption and Crime Commission. Should the commission advise the Attorney General that it is not appropriately resourced to carry out its functions under its act, consideration will be given to additional funding. Additionally, with the conferral of unexplained wealth powers to the commission in 2018, it was agreed that the commission's resourcing would be reviewed following the first three years of operation of that particular function.

A question was raised about the inadvertent impact on disclosures by whistleblowers. There was a request seeking confirmation of whether a public interest disclosure made to a member of Parliament or a relevant Presiding Officer would fall outside the Public Interest Disclosure Act. Under section 5 of the Public Interest Disclosure Act 2003, any person may make an appropriate disclosure of public interest information to a proper authority. A disclosure of public interest information is made to a proper authority if, in situations in which the information relates to a member of either house of Parliament, it is made to the Presiding Officer of the house of Parliament to which the member belongs. Any other disclosures on other matters must be made to the proper authority specified in section 5. Disclosures to members of Parliament, excluding the circumstance above, are not covered by the Public Interest Disclosure Act or subject to any protections. A person who makes an appropriate disclosure of public interest information to a proper authority under section 5 is provided with certain protections in respect of the disclosure, in accordance with section 13 of the Public Interest Disclosure Act 2003. In respect of disclosures made to the Corruption and Crime Commission, persons who make allegations or disclose or give information under the Corruption, Crime and Misconduct Act are also protected from civil or criminal liability as set out in section 220 of that act.

A question was raised about minor misconduct and the transfer in 2014 to the Public Sector Commissioner specifically excluding Clerks and members of Parliament—not that the Clerk would do anything like that! I was asked whether minor misconduct by MPs was a concern for the commission and government. The jurisdiction of the Corruption and Crime Commission in respect of misconduct is confined to serious misconduct, as that term is defined in the act. Serious misconduct does not include minor misconduct. It is always open to the commission to refer a matter involving minor misconduct to the relevant Presiding Officer in circumstances when a matter has been brought to the commission's attention but the commission has no jurisdiction. To the extent that minor misconduct by a member of Parliament constitutes an offence contrary to section 8 of the Parliamentary Privileges Act, it would be open to the house of Parliament to deal with that matter.

There were some specific questions about which information has been sought from the Corruption and Crime Commission. The first of those was on how many occasions since the 2014 reforms to the Corruption, Crime and Misconduct Act has the commission received an allegation against a public officer but been prevented from commencing an investigation due to the removal of the word "exclusively". I think an answer was provided in parliamentary questions, but since 2014, the commission has received allegations against public officers in one matter it was prevented from dealing with in accordance with the act due to the removal of the word "exclusively". In that matter, without assessing the allegations received, the commission formed the preliminary view that they may be related to proceedings in Parliament, being subject matter to which parliamentary privilege attaches, and referred the matter to the Speaker of the Legislative Assembly.

A question was raised about the commission's procedures or guidelines on the notification of persons with respect to the conduct of a search when exercising the commission's power to enter and search a premises, with or without a warrant, when it is likely to encounter material that is subject to parliamentary privilege. When exercising the commission's powers to enter and search premises, with or without a warrant, when it is likely to encounter materials subject to parliamentary privilege, the commission's practice is to notify and consult with parliamentary staff before and during the search, as possible and appropriate. The commission concurs with the statement in the forty-eighth report of the Standing Committee on Procedure and Privileges that a memorandum of understanding may go some way to addressing the issue of early notification by the Corruption and Crime Commission of investigations that may involve a claim of parliamentary privilege.

A question was asked about a claim of parliamentary privilege being made in the course of a lawful search undertaken by the commission, and the procedures or guidelines that are relevant in determining such claims so as to avoid a contempt. When a claim of parliamentary privilege is made in the course of a lawful search undertaken by the commission, the commission's practice is to consult with parliamentary staff to enable claims to be made and appropriately determined. I do not think I have anything to add there, but I will make some comments. A copy of this has been circulated to members; I am going to place it on the record now in respect to the amendment on the supplementary notice paper. Electronic copies have been provided, and I hope I will have hard copies available to table when we go into committee.

The proposed amendments on the supplementary notice paper are designed to provide for a greater degree of parliamentary oversight of investigations by the commission and members of each house of Parliament. The proposed amendments correspond with the checks and balances that apply to the commission when investigating judicial officers. Those checks and balances are set out in section 27 of the existing act. The proposed amendments also incorporate the substance of the matters in supplementary notice paper 41, issue 1, raised by Hon Alison Xamon. The change in wording is to ensure uniformity of language with section 27. There are three major parts to proposed section 27A.

First, proposed subsection (1) provides for the commission to give notice to the parliamentary inspector if it receives or initiates an allegation against a member of Parliament. That provides the same level of oversight that every other person investigated by the commission receives, but it ensures that the fact of an investigation concerning a member is particularly drawn to the parliamentary inspector's attention. The parliamentary inspector is therefore able to audit and report upon the investigation, if warranted. Of course, that mode of parliamentary oversight operates in hindsight; however, it does not mean that it is unimportant. It is the same type of check or balance that applies to all other public officers.

Second, proposed subsection (2) contains the fundamental obligation for the commission to have proper regard to the importance of preserving parliamentary privilege. That provision must be read in conjunction with section 3(2), which expressly provides that nothing in the acts affects or is intended to affect the operation of parliamentary privilege. In other words, the commission is bound to give effect to the privilege and cannot override it. The commission is expressly obliged to have proper regard to the privilege in performing its functions. Given these express legislative directions to the commission, it should be assumed that the commission will not knowingly infringe upon parliamentary privilege. The most likely area of difficulty will arise when the commission takes one view about the scope of parliamentary privilege and a member of Parliament takes a different view. That situation calls for a practical method of resolution.

The third part of proposed section 27A is designed to provide a practical mechanism to assist in resolving differences of view between the commission and a member of the house. Proposed subsection (3) requires the commission to act in accordance with any conditions and procedures formulated in consultation with each house of Parliament. In other words, what is contemplated is that the commission and each house will formulate agreed conditions and procedures relating to the practical issues that will inevitably arise in advance of specific questions of parliamentary privilege needing to be resolved in particular cases. Those conditions and procedures will need to be worked out separately with each house. Until they are developed, and even after they have been agreed, the commission still has the basic obligation not to override parliamentary privilege and to consider it in performing its functions. The formulation of conditions and procedures in advance of particular issues arising gives each house of Parliament the opportunity to regulate the commission's conduct in advance of specific cases. That is another form of parliamentary oversight. It should be observed that the obligation contained in proposed subsection (2) is designed to ensure that the commission proceeds having proper regard to the importance of parliamentary privilege. If the commission has complied with the agreed conditions and procedures formulated under proposed subsection (3) and these agreed conditions and procedures cover a particular case, it would be expected that the commission would have satisfied the obligation in proposed subsection (2). It is always open for a member of a house of Parliament who is subject to a commission investigation, either during the investigation or subsequently, to disclose the fact of the investigation and the circumstances of it to the house and to seek a determination by the house about matters of parliamentary privilege, assuming that this disclosure is itself within the scope of the parliamentary privilege.

Nothing in part 9 of the act affects a disclosure permitted by the act, and the act expressly preserves parliamentary privilege, and I refer members to sections 3(2) and 151(4)(h). If that disclosure occurs, the house will have a further opportunity of parliamentary oversight in respect of the commission. It is true that there is no particular obligation that requires the commission to notify a house of Parliament about the existence of an ongoing investigation so that the house may monitor the progress of that investigation. That is intentionally so. It is a matter of policy whether a house of Parliament should be entitled to know and monitor an existing investigation as it happens. There are obvious dangers to the integrity of an investigation being disclosed while it is occurring.

One further matter should be mentioned. There is potentially a risk that the commission may take a different view from a member of the house about the scope of parliamentary privilege on an issue that is not dealt with by the conditions and procedures that have been formulated between the commission and the house of Parliament. Depending upon the scope of the agreed conditions and procedures, that may well be a narrow class of case. The risk just mentioned needs to be weighed against the risk to the integrity of an investigation if the circumstances of the investigation are disclosed to Parliament in every case.

If the commission obtains information that a member considers to be the subject of privilege, in respect of an issue that is not dealt with by conditions and procedures that have been formulated between the commission and the house of Parliament, at least three options are available to a member. First, the member may disclose the matter to

Parliament and seek to have the relevant house determine any question of privilege, assuming that this disclosure is itself within the scope of parliamentary privilege. As explained, nothing in part 9 of the act affects a disclosure permitted by the act, and the act expressly preserves parliamentary privilege. Practically speaking, this course is available only when Parliament is sitting, but it could still be effectively utilised at any stage before the commission provides a report with findings to Parliament. A house of Parliament could inform itself of the circumstances, and determine whether certain information was, or was not, privileged. That means that the existence of privilege is not simply something that relates to a dispute between executive government and Parliament. The existence of privilege defines the lawfulness of the actions of a statutory body that are expressed by reference to the existence of the privilege

The decision of the Supreme Court of Western Australia in Halden v Marks (1995) 17 WAR 447 also states that there are generally only two types of case in which a court will involve itself in decisions concerning parliamentary privilege. The first category of case is where a question of parliamentary privilege is raised in a case already before the courts. The second category is where a court has been asked to review action by Parliament to enforce its proceedings, most commonly where Parliament has, by warrant, sought to subject a citizen to restraint by arrest. Apart from these categories of cases, the Supreme Court indicated that, either as a matter of jurisdiction or propriety, a court will not consider questions of parliamentary privilege as these questions are exclusively for Parliament.

Again, the categories of case referred to in Halden v Marks did not relate to a situation in which the lawfulness of the conduct of a statutory body depended upon express statutory obligations related to having proper regard to the scope of parliamentary privilege. While it is not possible to say whether a court would choose to intervene in each potential case that may arise, or how a court would exercise its discretion to give a remedy in each case, the existence of the statutory obligations in the proposed amendments would assist in confining the actions of the commission, and would also provide the basis for a possible judicial remedy to an aggrieved member.

The third option for a member would be to wait and see whether any charges were laid as a result of an investigation. If and when that occurred, the member could test the scope of privilege in a court, in defending the charges. The court would need to rule upon the extent of the privilege in determining the admissibility of evidence that the member claimed to be privileged. While these three options are not altogether failsafe, the risks of compromising the integrity of an investigation, as it happens, seem to be greater than the risks of the privilege being wrongly infringed by the commission, given the type of checks and balances contained in the proposed amendments.

It was agreed between all the parties that that material would be read in and that copies would be made available to members, and I will table hard copies when we go into committee. I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Chair of Committees (Hon Simon O'Brien) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Hon SUE ELLERY: I want to formally table the notes that have been prepared with respect to the amendment that appears in my name on supplementary notice paper 41, issue 4. These have been circulated electronically, but I now table hard copies for interested members.

[See paper 2424.]

Hon MICHAEL MISCHIN: I appreciate the tabling of the notes prepared by the Solicitor-General, in accordance with the request made yesterday for some advance notice of what was going to be suggested by the Solicitor-General. That was to satisfy certain concerns that were aired behind the Chair. I can give some summary of what has happened since the last debate: there has been some discussion between the Attorney General and members of several parties in this chamber, in particular Hon Martin Aldridge as the spokesperson on behalf of the Nationals WA and Hon Alison Xamon as spokesperson for the Greens WA and, at one point, Hon Aaron Stonehouse has been discussing matters with us as well. There had been some discussion last week about how this bill might progress, and a much more full discussion yesterday, involving not only the Attorney General but also the Solicitor-General and advisers from the Attorney General's office and the State Solicitor's Office, including Ms Connolly. The purpose of those discussions was to satisfy, as much as possible, the concerns expressed by several members of this place about the scope of the operation of the bill, and how we might properly ensure that the most important privileges of this place, developed over many generations and many centuries, ought to be preserved, while not

interfering with the ability of the Corruption and Crime Commission to do its job, to ferret out and investigate allegations of corruption, in particular allegations of serious misconduct within the meaning of the act.

It is unfortunate that, before this bill arrived in this chamber, there had been a tendency to trivialise the concerns of members of this Parliament by suggesting that this "loophole" in the legislation, as it was termed, had been created by the previous government to protect miscreant members of Parliament, and was now being fixed simply by the insertion of a word, and no-one should inquire any further into it.

I think that what has been exposed by the debate and the discussions that have been had behind the Chair is that more generally there are some legitimate concerns. It is very simple for members of the public, who may be cynical about the parliamentary process and politics generally, to suggest that members have a desire to protect themselves from their own misconduct and that matters such as parliamentary privilege and the like—such as legal professional privilege—are there to protect the bad guys, rather than to get to the real nub of the problem.

Of course, through trial and error and bitter experience in Westminster, the mother of Parliaments in the United Kingdom, these sorts of things have been developed for a purpose—that is, to ensure that members can do their public duty, which they have been elected to do, and not be intimidated or persecuted by an executive that has the power to wield the weapons that are available to government. That is no less important with independent statutory authorities than it is with those that are directly under the control of ministers. The Corruption and Crime Commission is one of those bodies that wields enormous power. The original form of section 3(2), from my understanding of the history of it, evolved from a very legitimate concern by the Parliament of the day in 2003, when this act was first crafted by the then government, to ensure that parliamentary privileges would be protected and that the powers of that commission, which at that stage were unexplored and latent rather than exercised, and without any experience of how the power would be exercised, would be properly controlled and reined in. I do not for a moment suggest that corruption and crime commissions, with their broad-ranging powers—the powers of royal commissions in one form or another—are not a worthy addition to the protections people have against corruption in society. However, the fact remains that, with the best will in the world, independent agencies sometimes exceed their power. They exceed their authority and can be dominated by overzealousness. It is not so much that they can be corrupted, but that their activities can be moulded by the ethos of that agency. With the best will in the world, they can encroach on areas that they should not. It is likewise with the police. The police are not affected by this amendment or by this act. The minister has quite properly pointed out that the CCC, as a result of recent case law, cannot itself lay charges, present an indictment or prosecute. Again, it is a policy matter as to whether its powers ought to be extended to that, but, as presently advised, it is not a bad thing that it does not. Vesting too much authority into one body may be efficient and effective and may solve a lot of problems, but it also may give rise to problems down the track. It is always a balancing exercise. The police will not be affected by this legislation. An independent statutory authority, which is under the control of a commissioner who wields enormous powers, will be affected.

Without any criticism of this commissioner or any previous commissioner by suggesting ill will or a lack of due attention to their function, there have been occasions when the commission has not done things that the Parliament that created it thought that it should have done, but also has done things that the Parliament that created it thought that it should not have done. We had the case more recently of the matter that involved Hon Sue Ellery and the report about the Turnseck and Home incident. The current commissioner had exceeded the remit available and was admonished by this house. There is no reason to suppose that that sort of thing will not happen again. The start of this exercise was in the speech delivered by the current commissioner in which he pointed out that he has been far more circumspect in investigating members of Parliament because of his experience at that time and the amendments that were made to the act back in 2014. He suggested a legislative solution was needed if Parliament thought fit to enable him to investigate members. The solution that seems to have been struck was not to restore all of the formula that had been created as a result of the committee back in 2003 that crafted section 3(2), but only a bit or bits of it.

The CHAIR: Hon Michael Mischin.

Hon MICHAEL MISCHIN: I will draw to a close shortly, but I need to set where we are going with this debate. It was decided to restore a piece of that formula. In the course of making the amendments in 2014, we also removed certain processes that may have affected some of the commission's operations under sections 27A and 27B. Those involved things that were not serious misconduct according to the meaning in the act. Nothing like that was planned to be restored in this legislation.

In our view and the view of members who are concerned about these issues in a broad sense, beyond the current commissioner of the CCC, the current Parliament, the current Attorney General and the current government and into the future, there are legitimate concerns about how this provision will operate. That was the reason for the discussions. I am pleased to say that, for a change, the Attorney General—I think it is a first for this Parliament—engaged by telephone link with members last Thursday and here yesterday to see whether the concerns could be

properly met in a way consistent with government policy, but also with due respect and regard to the privileges of this place and the other place. As I understand it, the original formula of section 3(2) was inserted out of the fear that the CCC might encroach on parliamentary privileges. It stated —

> 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.

In a sense, that provided more latitude to the CCC, because, if the house resolved, the CCC could look at all matters. The words "exclusively" and "unless that House so resolves" were removed in 2014, along with then sections 27A and 27B. This bill now seeks to reintroduce "exclusively". I might just set the background. I wonder whether in fact that section says more than it needs to anyway. If we had deleted the words after "Parliamentary Papers Act 1891", would it make much of a difference to the operation of the legislation? I would also like the assurance that in the government's view there is no need to reinsert the words "unless that House so resolves" in order to give the Corruption and Crime Commission adequate scope to investigate matters of serious misconduct.

Hon MARTIN ALDRIDGE: I rise to commence my remarks in the consideration of the bill before us. I thank the government for the way it has, in good faith, engaged with the members of this house who have taken an interest in this bill, going back to when this bill was discharged and referred to the Standing Committee on Procedure and Privileges for report. Interestingly, this is the second occasion that the Leader of the House has been the minister responsible for this bill. On this matter, the government has made available legal advice from the State Solicitor's Office in Western Australia. The advice certainly has been helpful in our consideration of this matter. It would be helpful if perhaps on other occasions the state were to make that legal advice available.

I want to foreshadow the amendments that will be dealt with later. I do not want to go into those in any great detail because we will obviously consider the amendments at a later stage of this consideration of the bill. I want to put on the record that my concern throughout the consideration of this bill, which I reiterated during my contribution to the second reading debate, boils down to how and who will determine claims of parliamentary privilege. At this point, that has not been adequately dealt with by the amendments standing in the Leader of the House's name on the supplementary notice paper. Indeed, I want to point out that there may well be a further amendment to proposed section 27A. That will be based on the responses I receive during the committee stage of the bill with respect to how the government perceives that claims of parliamentary privilege will be handled during the course of a CCC investigation. That is notwithstanding there is some mention of that in the proposed amendment on the supplementary notice paper. I want to set out from the beginning that my concern in this respect is certainly not about protecting members of Parliament. When an allegation is made and an investigation commences in relation to a member of Parliament, I think it is in the best interests of this house that that investigation is undertaken, whether it is an investigation of the Standing Committee on Procedure and Privileges or of some executive body, including the CCC.

Equally, I want to ensure that in that course the privileges of this house are not diminished. In its only finding, the Standing Committee on Procedure and Privileges formed the view that the passage of this bill will not diminish the application of parliamentary privilege. Because the purpose of this bill is to reinstate the Corruption and Crime Commission's power with respect to certain offences in the Criminal Code, I want to ensure we have fully thought through how that may operate, particularly with the intersection of claims of parliamentary privilege. I want to make sure that when a member of Parliament becomes aware of an investigation, which could be in many different ways, that member of Parliament is not unreasonably protected by claiming parliamentary privilege for the purpose of concealing criminality. I think that is equally important when we consider how we move forward with this legislation.

I thank the government for the advice that it tabled. I note that it provided some advance notice of that advice electronically. I do appreciate that, but we have not had a lot of time to fully consider the five-page document tabled by the Leader of the House. The document largely relates to the application of the government's proposed new clause 5. The advice references cases, including Crane v Gething, which is widely recognised, quoted and relied upon by other Parliaments throughout Australia. I intend to consider that further as the debate progresses. In my view, the advice does not make entirely clear how a matter would be ultimately determined if a member of Parliament were to claim parliamentary privilege during the course of a CCC investigation. I am not talking about any potential memorandum of understanding, or agreement, procedure or code that might exist between the commission and the Parliament or anybody else. If all those procedures are followed and a dispute remains, who, in the government's view, would be the final arbiter of claims of parliamentary privilege? I think the references to the three remedies outlined in the Solicitor-General's advice relate to proposed section 27A standing in the Leader of the House's name on the supplementary notice paper. Certainly, the third remedy, if I am not mistaken, would not be satisfactory from my perspective; that is, an MP should wait and see whether they are charged before making a claim for parliamentary privilege in the court.

I might start by seeking some advice from the minister on the government's view around the determination of claims of parliamentary privilege by members of Parliament and see where we go from there.

Hon SUE ELLERY: If I can start with the first matter that the honourable member raised in his comments, it was around the words that had been removed—"unless that House so resolves". That was previously in section 3(2) and that allowed the house to approve the commission investigating matters that were exclusively to be determined by the house. The commission cannot be permitted to do so if this bill passes. That means the commission's role is slightly more restricted. In respect of the question the member just put, I am not sure we are able to give him a clean, neat, narrow, precise answer because it is going to depend somewhat on the circumstances. I am not saying that to be cute, but beyond the three circumstances I referred to in the advice from the Solicitor-General and the second option, it is going to depend on the circumstances. I am not sure whether that gives the member the degree of comfort he is seeking—I suspect it does not—but I am not sure I can give him anything more precise than that.

Hon MICHAEL MISCHIN: I thank the Leader of the House. In respect of the words "unless that House so resolves", was consideration given to restoring that ability for the CCC with the approval of the relevant house of Parliament to investigate misconduct that would otherwise exclusively have been within Parliament's prerogatives; and if so, why was that option rejected?

Hon SUE ELLERY: I am referring to the explanatory memorandum that was provided to the house when the debate on the 2014 bill occurred. The part of the EM I am referring to is about clause 6. It says —

> 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* … and the *Parliamentary Papers Act* … 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.

Hon MARTIN ALDRIDGE: I want to turn to the references in the Solicitor-General's advice that has just been tabled. Paragraph 20 states —

> A Court generally has a discretion whether to grant relief such as an injunction to prevent, or rectify, a breach of a statutory function. However, a Court might be reluctant to do so, if this involves adjudicating upon a matter of Parliamentary privilege which is exclusively within the domain of Parliament or if it involves a fragmentation of an investigation, which would not necessarily result in charges. That was the basis of the decision of Justice French (as he then was) in *Crane v Gething* [2000] FCA 45, which was affirmed on appeal in *Crane v Gething* [2000] FCA 762.

Paragraph 21 went on to say —

> However, a substantial distinction between that case, and the proposed amendments here, is that *Crane v Gething* did not involve enforcing any express statutory obligations of the type in sections 3(2) and 27A(2) relating to the functions of a statutory body. That case involved magistrates administratively issuing search warrants to gather evidence from a Senator.

I now want to turn to the Crane v Gething case, which arose from the execution of three search warrants on then Senator Crane, who was a senator for Western Australia, on his home, his electorate office and his parliamentary office in Canberra on or about 17 to 18 December 1998. I am going to quote from the judgement of the Federal Court of Australia, Crane v Gething [2000] FCA 45. In the introduction it says —

> 1. Arthur Winston Crane is a member of the Senate of the Parliament of the Commonwealth. In December 1998, his Parliamentary and Electorate offices and his home were searched pursuant to search warrants issued under the *Crimes Act 1914* (Cth). The warrants were issued in aid of an investigation into payments made in respect of charter flights taken by Senator Crane between 1995 and 1998. Senator Crane brought to the Court what was initially a challenge to the validity of the warrants and a claim for parliamentary privilege in respect of documents seized. The challenge to the validity of the warrants was abandoned. However he now seeks a declaration as to his entitlement to the payments made in respect of charter services used. He also maintains his claim for parliamentary privilege in respect of certain of the documents seized from his Parliamentary and Electorate offices. The claim is not maintained in respect of the bulk of the documents seized which were released to the Australian Federal Police at the time of the hearing to enable them to continue their investigation.
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> 2. The case raises important issues concerning the proper role of the Court in dealing with allegations of criminal conduct in the context of civil proceedings and the proper role of the

Court in determining questions of parliamentary privilege which arise between the Executive and the Parliament and not in the course of judicial proceedings.

The judgement went on, and paragraph 43 said —

> 43. It may confidently be supposed that most, if not all of the documents seized from Senator Crane's Parliamentary and Electorate offices would be recognisable by parliamentarians as typical of the myriad of papers that are produced as an incident of work as a parliamentarian. But that work and the papers it generates extend well beyond what could be described as "in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee". I would not have regarded the itineraries as falling within the protected class. The fact that they may include names of constituents who have made representations or have had meetings with the Senator and which neither they nor the Senator would want to make public does not of itself raise an issue of parliamentary privilege. The documents do not otherwise answer the description in s 16.
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> 44. The documents on the disks, to a substantial degree, comprise internal office communications and standard documents which will have little, if any, relevance to the proper objects of the search warrants. On the other hand, some which might relate to the Senator's movements during the relevant period, may be of relevance. Like the itineraries, any such documents would seem unlikely to attract parliamentary privilege by reference to the criteria in s 16.
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> 45. In the end however while these observations may be of assistance to the parties in reviewing their respective positions, they are academic. That is because in my opinion it does not fall to this Court to determine the exercise of parliamentary privilege here. Indeed it does not seem to me that the relevant privilege, if it exists, arises under s 16 at all. The documents in question have been seized pursuant to a search warrant issued under s 3E of the *Crimes Act 1914*. The issue of the warrants, albeit done in each case by an issuing officer who was a magistrate, was an administrative and not a judicial act:
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> > *"The power to issue a warrant to enter, search and seize must be exercised judicially. But these indicia do not stamp the power to issue a search warrant with the character of the judicial power of the Commonwealth. The issuing of a warrant can be described as a judicial act but not in the sense of an adjudication to determine the rights of parties. Although judicial review is available to review an exercise of the power to issue a warrant, it is available whether the power be classified as judicial or as administrative in nature. And although the duty to exercise the power to issue a warrant must be exercised judicially, that means only that the power must be exercised without bias and fairly weighing the competing considerations of privacy and private property on the one hand and law enforcement on the other. In* Love v Attorney-General (NSW)*, this Court held that the power conferred by a State law on the Supreme Court of New South Wales to issue a warrant —*

Progress reported and leave granted to sit again, pursuant to standing orders.