

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

Fifty-fifth Report — “A Refusal to Comply with a Summons to Produce Documents” — Tabling

THE PRESIDENT (Hon Kate Doust) [1.04 pm]: I am directed to present the fifty-fifth report of the Standing Committee on Procedure and Privileges titled “A Refusal to Comply with a Summons to Produce Documents”, and I have a statement that I wish to make.

[See paper 2929.]

The PRESIDENT: Members, I bring this matter to the attention of the house because I am required to do so by law. Ms Emily Roper, acting director general of the Department of the Premier and Cabinet, has refused to comply with the committee’s order to produce documents. That order was conveyed to her by a summons authorised by me. Ms Roper has refused to comply with that summons.

The documents demanded from Ms Roper are required so that the committee can discharge the functions the house delegated to it on 12 June 2019. These functions were to ensure that any documents or data created or received by a current or former member of the Legislative Council are released to an investigative agency only when: (a) its description falls within the lawful scope of any warrant, notice to produce, or other similar power granted to an investigative agency under a written law; and (b) the documents or data are not proceedings in Parliament within the meaning of article 9 of the Bill of Rights 1688, or does not otherwise fall within the scope of parliamentary privilege.

The committee advised Ms Roper that a failure to comply with its summons would result in a legal requirement for me to report that refusal to this house. The need for me to report arises from section 7 of the Parliamentary Privileges Act 1891. That section mandates this course of action. It leaves me with no discretion to do otherwise. Ms Roper’s response to the committee’s order has shocked and appalled all members of the committee for its cavalier disregard of the committee’s lawful right to those documents. This house will only know the full reasons as to why Ms Roper has acted this way after a thorough investigation.

The committee has done everything in its power to maintain the integrity of a Corruption and Crime Commission investigation to which the committee’s summons relates. The need to maintain confidentiality of that investigation was the reason behind the resolution of the house made on 12 June 2019, empowering the committee to act on its behalf. The committee has fully cooperated with the CCC in conformity with the functions delegated to it by the house. In providing a full account of the refusal by Ms Roper to comply with its summons and the actions that led to this point, the committee has redacted certain information in its report in an effort to preserve, as far as possible, the integrity of the CCC investigation and the identity of its targets.

The committee also advises the house of a matter of privilege arising from the conduct of Mr Darren Foster, director general of the Department of the Premier and Cabinet. That conduct sowed the seed for Ms Roper’s refusal to comply with the committee’s summons. The matter of privilege arises from Mr Foster’s decision to devise and execute a procedure to review the private and confidential emails and documents of former members and their staff sought by the commission. The Department of the Premier and Cabinet manages that sensitive data on the Parliament’s behalf. Mr Foster put his procedure in place to determine which of those documents, if any, were subject to parliamentary privilege. In doing so, Mr Foster authorised public servants and other agents of the executive government to read the emails of former members and their staff. Undoubtedly, some of those documents are subject to parliamentary privilege.

The question of what documents are subject to parliamentary privilege is one for this house or its authorised delegate to determine and not Mr Foster or employees of the executive government acting under Mr Foster’s direction. Mr Foster’s procedure was not authorised by the committee or this house and he was expressly advised of that fact when the committee first became aware of his intentions. How the agents of Mr Foster decided whether a document was or was not subject to parliamentary privilege is unknown. Whether documents subject to parliamentary privilege were released by Mr Foster to the commission is unknown. The committee issued its summons to determine through the application of its own procedure whether privileged documents had been released to the commission. It cannot fulfil its obligations to the house without those documents.

Mr Foster undertook his unauthorised procedure in preference to a procedure determined by the committee to deal with the documents. The committee’s procedure required an appropriately qualified, independent external party appointed by it to undertake the review task and to determine the question of parliamentary privilege in respect to each document. Under the committee’s procedure, none of the committee’s members had access to or could view those confidential documents. The committee developed its procedure following a personal approach to me by, and with the assistance of, Hon John McKechnie, QC, Commissioner of the Corruption and Crime Commission. Mr Foster chose not to follow the committee’s procedure.

These two related matters of privilege and their effect on the sources of information to Parliament and its members strike at the heart of our democratic institutions. How will a house of Parliament or its committees have the

information required if its orders to produce documents are refused? How will elected members bring the government to account without sources of information from their constituents, whistleblowers and other informers? Will those informers speak to a member of Parliament about their concerns if they believe those working for the executive government or an investigative agency will read their privileged documents or other communications? I think not. The chilling effect on parliamentary activities would be palpable and immediate.

The committee's procedure was carefully developed to preserve members' privileged information and other privileges of the house and its members whilst permitting the CCC to obtain non-privileged documents relevant to its investigation. The decision made by Mr Foster to refuse to follow the procedures stipulated by the committee and Ms Roper's refusal to comply with the committee's summons have raised significant issues of parliamentary privilege that are now required to be addressed by the house.

Made Order of the Day — Motion

On motion without notice by **Hon Simon O'Brien**, resolved —

That consideration of recommendations 1 to 4 contained in the fifty-fifth report of the Standing Committee on Procedure and Privileges, "A Refusal to Comply with a Summons to Produce Documents", be made an order of the day for consideration in the Committee of the Whole House.