

# PUBLIC

## THE JOINT STANDING COMMITTEE ON INTEGRITY MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART ON FRIDAY 14 NOVEMBER 2025

### INQUIRY INTO THE ESTABLISHMENT OF A PARLIAMENTARY PRIVILEGE PROTOCOL BETWEEN THE PARLIAMENT OF TASMANIA AND THE INTEGRITY COMMISSION TASMANIA

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**The committee met at 11 a.m.**

**CHAIR** (Ms Armitage) - Thank you very much for appearing at today's hearing of the Joint Standing Committee on Integrity. If you could please state your name and the capacity in which you're appearing before the committee.

**Ms McKENZIE** - Yes, my name is Ellen Marie McKenzie and I am the Chief Executive Officer of the Integrity Commission.

**CHAIR** - Thank you. Can I confirm that you received and read the guide sent to you by the committee secretary?

**Ms McKENZIE** - I have.

**CHAIR** - Thank you. This hearing is covered by parliamentary privilege, allowing individuals to speak with freedom without fear of being sued or questioned in any court or place out of parliament. This protection is not accorded to you if statements that may be defamatory that are repeated or referred to by you outside the parliamentary proceedings. This hearing is public. The public and media may be present. Should you wish aspects of your evidence to be heard in private, please make this request to the committee at the time.

To introduce the members of our committee from the Legislative Council - myself, Rosemary Armitage, member for Launceston; Ms Meg Webb, the member for Nelson; Ms Cassy O'Connor, the member for Hobart. From the House of Assembly are Ms Ella Haddad, member for Clark; Mr Peter George, member for Franklin, and Mr Roger Jaensch, who is an apology at the moment travelling but may join us online during the interview.

Could I please ask you to read the statutory declaration in front of you?

**Ms ELLEN McKENZIE**, CEO, INTEGRITY COMMISSION TASMANIA, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

**CHAIR** - Thank you. I also advise for the record that we have Mary and Fiona from our secretariat and we have Henry from Hansard.

Would you like to make a short opening statement before we ask some questions?

**Ms McKENZIE** - Thank you, Chair, I would.

You all have the Integrity Commission's submission that we've made. Obviously, if you have any questions about that, I'm here to answer any of those that you might have today.

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As you'd all be aware, parliamentary privilege is preserved by section 100 of the Integrity Commission Act. Further, any misconduct in terms of the definition under the Act, does not include conduct in connection with a proceeding before parliament. The Integrity Commission respects the rights, powers and protections that are afforded by parliamentary privilege to members of parliament, and we take it very seriously. Our interest in the establishment of a protocol is really threefold.

First, we want to avoid breaching parliamentary privilege and inadvertently coming into possession of privileged material. We want to reduce any confusion that might come up and assist members of parliament to comply with any notices or warrants that might be issued. We also want to avoid delay in our investigations and improve the efficiency of our investigations.

**CHAIR** - Thank you.

**Ms O'CONNOR** - Thank you. Just on that third point, has the lack of a protocol for parliamentary privilege delayed investigations?

**Ms McKENZIE** - There has been one matter that has been affected by the absence of a protocol as there were quite significant delays in obtaining access to material. That's the matter, I think, that the former chief commissioner was referencing; also in the letter - the submission that we made to this Inquiry - that's the matter, I believe, we had in mind when we -

**Mr GEORGE** - And that's ongoing?

**Ms McKENZIE** - No, the evidence - well, the investigation is not complete, but the evidence collection process is.

**Ms O'CONNOR** - Is the evidence collection process as complete to the extent that it can be for want of being able to potentially access other records and documents?

**Ms McKENZIE** - Well, the evidence that was able to be provided was provided. I can't really speak, probably, at any more detail than that.

**Ms O'CONNOR** - Of course. That's right.

**Ms HADDAD** - Can I seek the call, Chair? I don't expect you to share anything that you can't.

**Ms McKENZIE** - Sure.

**Ms HADDAD** - We've heard from other commissions and those working with them - the ones that have protocols in place, they're a very important thing to have, but they haven't actually had many instances where privilege has been asserted. Without disclosing anything that you can't about the delayed investigation, is that basically what we're trying to come up with - the protocol to deal with when privilege is asserted?

It goes to your comment in your opening statement, but also in your written submission, about inadvertently coming into possession of privileged material. I wondered at what point is that able to be assessed or would be able to be assessed if - when - we develop a protocol. Is it the case that someone could assert privilege and then refuse to provide information to you at

all, or would the information be looked at first and an assessment of privilege and an assertion of privilege be assessed to determine then whether or not you should or could have access to that information?

**Ms McKENZIE** - Could I just clarify? Would this be if there were, in fact, a protocol in place, or are you talking in -

**Ms HADDAD** - I suppose at the moment you can't. - At the moment, if somebody says right now, 'I assert privilege,' it's just a full stop, it ends there. You can't get what you need.

**Ms McKENZIE** - I could probably speak to the couple of examples that I've been made aware of by my staff. One of the examples was that there was an assertion of privilege when we, as I recall it, served a notice to produce material. We withdrew two of the questions, I believe, in the notice and we redrafted the notice. In another matter, in fact it was the matter I referred to earlier, there was someone on, I believe, the parliamentary staff who actually reviewed the material and then material was provided.

**Ms O'CONNOR** - That's not ideal, is it? Given that questions of privilege, really, are to be determined by each House. It's not ideal that you'd have a parliamentary staff member carrying the responsibility of determining whether something was privileged material or not, given that it is the responsibility of each House to determine questions of privilege.

**Ms McKENZIE** - I can't speak to the process that may have occurred in the background when that parliamentary staffer reviewed that material. What I can indicate is that there was no claim of privilege made following that person's review of the material.

**Ms WEBB** - We have a draft protocol, and your submission outlines the process that's been tracking over the last couple of years, trying to resolve this. Our Inquiry's looking at this draft protocol and we've had some submissions made that make some comments and raise some matters about it. I want to touch through a couple of things in the draft that have been brought to our attention and test the Integrity Commission's view on them, if that's okay?

**Ms McKENZIE** - Yes.

**Ms WEBB** - One of those is around the treatment - or the gap of treatment - of covert warrants and notices in the draft protocol that we have, and that's a bit of a gap because then it's an uncertainty as to how claims of privilege would be asserted in relation to covert warrants and searches, I suppose. Surveillance as well, potentially, I don't know. Can you talk about the treatment of covert activities in the protocol and whether that should be dealt with more explicitly?

**Ms McKENZIE** - I don't think there'd be an issue with dealing with it more explicitly, but it might help the members of the committee to know that we've never actually had any covert search warrants.

**Ms WEBB** - I understand that we might never have had, but we have to set up a system in anticipation of all eventualities, potentially. Especially, in the instance that - there will often be some potential urgency about this and maybe some political potency about it. We don't want to be solving things in the midst of that sort of context. I imagine we want our protocol and the

way we establish it to be as complete as possible. At the moment, covert matters are outside of the protocol, essentially. Is that the way you read it currently?

**Ms McKENZIE** - I think that's the position, yes.

**Ms WEBB** - Do you see that there's the opportunity to include how matters would be dealt with - a process - for dealing with a situation where there might be covert warrants or claiming of documents that needed to occur? If so, where might we sit that within the protocol?

**Ms McKENZIE** - I think if it would assist the process we'd be amenable to looking at the inclusion of provision relating to covert warrants. But, I wonder if I could just foreground that question by this comment, which is, that if we were dealing with a matter involving a member of parliament or a member of the parliamentary staff, we'd be taking very great care to ensure that we draft the notice or the warrant narrowly to avoid requesting material that might be privileged.

Now, in saying that, I acknowledge immediately that we can't always foretell -

**Ms WEBB** - What might be.

**Ms McKENZIE** - what might be there. I suppose an example might be emails. I mean, we might be interested in alleged conduct that went from, say, 1 January to 30 June because we are investigating a particular aspect of the person's alleged conduct, but a number of the emails within that period might be relevant, not affected by privilege. But there might be others that potentially are affected by privilege and relevant, but clearly, if the ultimate finding is that they're privileged, then we don't get that material, and rightly so.

**Ms WEBB** - Fair enough. In your work that the Integrity Commission has done towards drafting the protocol and in the back-and-forth that's occurred, was there ever an inclusion of a particular process or aspect of the protocol that would deal with that covert situation?

**Ms McKENZIE** - I can't immediately speak to that. I may need to take that under notice, because it predated my time with the Commission as well. I've been briefed and I've done a fair bit of reading, but I can't speak to the ins and outs of the process that led to the production of this draft protocol.

**Ms WEBB** - It might be as follow-up that the committee would need to discuss it, but the committee might even seek the Commission's views on what an inclusion of that sort of clause in the protocol might look like, to help our assessments of it. Thank you.

Can I check another thing? Chair, feel free to interrupt me and move on.

There's probably a list of things that have come up already from submissions and in the hearings we have had that I wanted to check back in on. The protocol at the moment has - in terms of the definitions, and throughout the document, around the privilege determinant - has it as 'the Presiding Officer or any other person, entity or Committee authorised by the relevant House of Parliament'. It has been raised that the presiding officer is not the appropriate person for that.

We've had various suggestions about, and including from Professor Gabrielle Appleby, in submissions and at hearings, that it could be deemed appropriate because it's the House that would need to be the ultimate determinant of that - that this committee, the Integrity Joint Standing Committee on Integrity, on behalf of the two Chambers, could be the ones who appoint an independent determinant of privilege.

Does the Integrity Commission have a view on that sort of model, or any concerns about a model, where there is an independent determinant that's appointed and at the ready, available to undertake that role?

**Ms McKENZIE** - Not at all.

**Ms WEBB** - Okay, so there's no barriers to that from your point of view, or an issue about that sort of model?

**Ms McKENZIE** - Definitely not.

**Ms WEBB** - Okay. Thank you.

**Ms O'CONNOR** - It's been a couple of years, at least, since the draft protocol was prepared and presented by the Integrity Commission. In that time there have been Memorandums of Understanding (MOUs) around parliamentary privilege, either agreed or tweaked in other jurisdictions. As I understand it, I think the New South Wales parliament is currently going through a process of reviewing its MOU for privilege. Has the Integrity Commission had the opportunity to speak to other integrity bodies about the most consistent and up-to-date approach to questions of privilege in investigations?

**Ms McKENZIE** - If you're talking about the period between when this draft was presented to parliament and now, I can't answer that, because I don't know. Speaking for my part, I've not spoken to any of the other commissions about it. Clearly I've read the submissions that have been made by other agencies working in the anti-corruption and integrity space, and I see that there are various iterations out there of the protocols that govern material that might be affected by parliamentary privilege.

**Ms O'CONNOR** - In reading that, have you identified areas where the draft protocol that's been presented to us could be improved?

**Ms McKENZIE** - I suppose the main thing that has struck me is probably two of the things that I've already been asked about this morning: one is the identity of the privilege determinant, and I suppose the other issue about covert searches.

**Ms O'CONNOR** - In your submission, which is dated April this year [2025], you said:

In the absence of a protocol, it would be necessary to rely on the process set out in section 92 of the IC Act for determining claims of privilege which entails an application being made to the Supreme Court. To date it has not been necessary to do so.

As of now, since April [2025], has it been necessary to use section 92?

**Ms McKENZIE** - It hasn't.

**Ms O'CONNOR** - Okay. Thank you.

**Ms WEBB** - A couple more things to check on around the draft protocol so we can get an Integrity Commission view on some things raised.

One is around that there doesn't seem to be a really clear timeline in there within which privilege can be asserted, necessarily. When we think about, blow-by-blow, how this might work in practice, at what point and within which timelines is it allowable for there to be the assertion of privilege, and does that need to be specified more clearly in here? I think in some other protocols or MOUs there's a particular timeframe specified within which, say, the relevant member can have the opportunity to be reviewing materials, I suppose, or understanding that they have the opportunity to assert privilege over material that's being collected or seized. Do you think there would be an issue, or value in, having a clearer timeline described?

**Ms McKENZIE** - I wonder if I could draw the member's attention, Chair, to 2.2 paragraph 14 in the draft protocol. Does that assist?

**Ms WEBB** - 'The person who has received the Notice has 7 days from date of the Notice to notify the Commission either that the claim has been abandoned, or that they have informed the Clerk that a ruling is sought on the claim.'

Yes, I guess that does. Can privilege be asserted before it's even occurred, necessarily? I'm just wondering.

**Ms McKENZIE** - There's probably one issue, Chair, which I might assist the committee to be aware of, which members may not be aware of. Under our Act, when we issue a notice, it has to be complied with within 14 days. So, if this process of determining whether or not there is a parliamentary privilege issue, what we can do, in terms of a practical solution, is withdraw that notice and issue a new notice. So it's not the end of the world if it can't be resolved within that 14-day period?

**Ms WEBB** - That's good to know. I will move onto another aspect that I was wondering about regarding consistency. In the draft, in 2 Notices, 2.1 A procedure for giving notices, at paragraph 10 it says, 'The Commission will inform the Presiding Officer as soon as it's reasonably practicable on a confidential basis', and then outlines what needs to be informed. The notification, then, goes from the Commission to the Presiding Officer in relation to notices.

Then over in 3.1 The procedure prior to executing a search, the Commission informs the Clerk, on a confidential basis, of the intention to conduct the search. It's then the Clerk who has to apparently inform the Presiding Officer in paragraph 21.

I wondered, in one instance, notices are informed to the Presiding Officer, but searches are informed to the Clerk. Can you explain those differences there, or should they be consistent?

**Ms McKENZIE** - I think the difference might be explicable on the basis of the fact that the search warrant pertains to a search of parliamentary premises, which is probably where the Clerk's significance comes to the fore. Whereas the other one is relating to notices that are

served on members or parliamentary staff, which is altogether a different thing to actually entering into premises that might fall under the authority of parliament.

**Ms WEBB** - In terms of the draft then, referring to the Presiding Officer there in 2.1 paragraph 10 -

**Mr GEORGE** - 2.1, did you say?

**Ms WEBB** - Yes. Then in 3.1 paragraph 21, where the Clerk must then inform the Presiding Officer, the Presiding Officer role in either of those paragraphs, is that because of the fact that the Presiding Officer has been defined as the privilege determinator in this protocol? Are those requirements there because of that role of privilege determinator? I'm asking that because if we were to change the privilege determinator definition and it didn't relate to Presiding Officer, would that change the presiding officer role and reference in these two paragraphs here?

**Ms O'CONNOR** - Well, 4.1 gives the Presiding Officer significant influence over determining questions of privilege.

**Ms WEBB** - Yes. Because we've had it raised with us as a committee that it may be inappropriate to have the Presiding Officer defined in that role as privilege determinator. I'm just trying to anticipate if we were, as a committee, to be contemplating changing that in our recommendation, does that then change the role of the Presiding Officer here at 2.1 paragraph 10 or 3.1 paragraph 21?

**Ms McKENZIE** - I don't think I can answer that right now, but I think it's a valid point.

**Ms WEBB** - That's okay. Can we get your thought on it later? Can we come back to you with that on notice?

**Ms McKENZIE** - Absolutely. Definitely, yes.

**Ms O'CONNOR** - Is it possible, then, to remove the Presiding Officers from the process?

**Ms WEBB** - What we're trying to just decide is where -

**Ms O'CONNOR** - Where you would involve -

**Ms WEBB** - In this protocol, where the Presiding Officer is referred to, where is it of relevance that it's because of their role as Presiding Officers that they should stay in the protocol, but if we were to change them and take them out of the privilege determinator space, would we need to also remove them from other aspects of the protocol? That's probably something to come back to us about.

**Ms McKENZIE** - One issue that occurs to me in relation to that issue is - and I'm not sure if this is the case - but it strikes me as a possible explanation for why the Presiding Officer is there. Putting aside the issue of whether the Presiding Officer is there because of being the privilege determinator, is that ultimately the question of parliamentary privilege is a matter for parliament. That could well be why the Presiding Officer is given a stake, if you like, in this process.

**Mr GEORGE** - Must have a role.

**Ms WEBB** - But the Presiding Officer isn't the representative of the Chamber in that sense. The Presiding Officer can't make a decision on behalf of the Chamber in that role.

**Ms McKENZIE** - I understand that, but nonetheless it, I suppose, puts the potential issue on the radar of parliament, for want of a better way of describing it.

**Ms O'CONNOR** - I guess the concern is, in part, and it's come through to us in hearings, is that the Presiding Officer of any House is, first and foremost, a politician and may well be a politician from a political party. When we're dealing with investigations, potentially of a member of another party, there's a question of procedural fairness. I wonder if the Integrity Commission has reflected on that since the draft, or would reflect on that as we move through this process.

**Ms McKENZIE** - I'm more than happy to take that back to the office and consider that issue.

**Ms O'CONNOR** - The New South Wales MOU, in their Legislative Council privileges committee, developed a three-step test for determining whether records form part of proceedings in parliament and are therefore covered by privilege. Has the Integrity Commission had a look at this three-step test? I will just very briefly detail it:

- (1) were the documents brought into existence for the purposes of, or incidental to, the transacting of business in a House or committee? If yes, it falls within the proceedings of parliament; if no, move to question two in the test;
- (2) have the documents been subsequently used for the purposes of, or incidental to, the transacting of business in a House or committee? If yes, it falls within the proceedings in parliament; if no, move to the third and final question, which is:
- (3) have the documents been retained for the purposes of, or incidental to, the transacting of business in a House or committee? If yes, it falls within the proceedings of parliament; if no, it does not fall within the proceedings of parliament.

Do you think it might be helpful to include a three-step test in any protocol we develop?

**Ms McKENZIE** - I think it's a very useful test.

**Ms O'CONNOR** - It's really clear, isn't it?

**Ms McKENZIE** - Yes.

**Ms WEBB** - It seems to be well used.

**Ms McKENZIE** - Yes. It's practical and it's easy to follow.



**Ms O'CONNOR** - Yes, and everyone who was interested in these matters or affected by them would have some clarity. Thank you.

**Ms WEBB** - Some of the other things that have come up in discussion in submissions and the hearings thus far are around education and training and the fact that of course, when this protocol comes into effect, everyone who might have a role to play in it will need to understand that role well and be ready to undertake it.

Clearly, within the Integrity Commission, the training of the people within your staff would need to be your responsibility. Then there's a question about training for the people on the parliamentary side of things and where that might be located. There's been some different views about whether that training and education could be provided - is it rightly to be provided from the Integrity Commission itself, perhaps, into the parliamentary space? Or is it a responsibility, in fact, of the parliament and the Clerks as the advisers of the parliament - would they be responsible for that education and training? Do you have a view on an appropriate model for where we would expect that education and training to be sourced and delivered?

**Ms McKENZIE** - The two points I would make in relation to that are: we already have a role under our Act, actually, to provide training to members of parliament. Training or education in relation to a protocol, if one were to come into existence, could be placed within that umbrella of the training that we already provide.

Having said that, though, I acknowledge the comments that have been made in some of the submissions about the importance of the Clerk, perhaps, taking on that role for the obvious reason that there's an interest, I suppose, that we have in obtaining material, but also not obtaining material - though I might quickly say that if it's privileged we do not want to get that material. But I do see some force in the argument that's been made in some of the submissions, of the Clerk take on that role as, I suppose, a disinterested person in the sense that the Clerk's primary role and function is to take care of -

**Ms O'CONNOR** - Protect the parliament.

**Ms McKENZIE** - Exactly right.

**CHAIR** - Sorry, just to acknowledge we have Roger Jaensch, the member for Braddon, who has now joined us. Just put your hand up, Roger, or yell out when you want to ask a question.

**Mr JAENSCH** - Thank you, I will. My apologies, colleagues and others, for late arrival.

**Ms WEBB** - To continue on that, around the education and training that would be required when the protocol comes into effect, or prior to it coming into effect even, thinking that the Integrity Commission may be the entity to do the training into the parliamentary space, have there already been thoughts or plans put into place to think about what that might look like, or how that might be delivered, or what would be required resource-wise from the Integrity Commission in order to do that? Is that something that can slot in, or does it need a new piece of work done?

**Ms McKENZIE** - That could probably be fitted into what we already do, and we could make it part of our ongoing provision of education to members of the parliament, and

parliamentary staff too for that matter, because that's the next tranche of the work that we're going to be doing in the education space.

**Ms WEBB** - Is it something the Integrity Commission has already looked at in terms of content, or even just a jurisdictional scan to see what other jurisdictions do in that education space around their MOUs or protocols?

**Ms McKENZIE** - I'm not aware, unfortunately.

**Ms WEBB** - That's fine. Just checking.

**Ms O'CONNOR** - In the submission that we've received from Dr Gabrielle Appleby and Dr Will Partlett - and Dr Appleby gave evidence to us - in relation to covert warrants they say:

In our submission, the most appropriate person to be notified is the independent Chair of the Joint Standing Committee on Integrity. In the event that the Chair is the subject of the warrant, it should be the Deputy Chair. In our view, this person is best able to represent the collective interests of Parliament in the privilege relating to the precinct, and potentially the documents/materials, given that privilege is not an individual MP's right, but an institutional one

Has the Integrity Commission considered whether that might be an appropriate pathway for the notification of covert warrants?

**Ms McKENZIE** - I'm not aware as to whether we have or not, but it's certainly something that we'd be happy to look at, if the committee be minded Madam Chair, to seek further information from us in respect of this.

**CHAIR** - No, that would be good. It's always good to get further information. If we could perhaps provide you with the letter.

**Ms McKENZIE** - Yes, thank you.

**CHAIR** - That would be great.

**Ms McKENZIE** - Now that we have our new Chief Commissioner on board, certainly I will be consulting him as part of that process.

**Ms O'CONNOR** - Just to finish. As we talked about earlier, it's been some time since the draft protocol was developed. Perhaps you could convey to this committee, and I'm sure people in the Integrity Commission are frustrated by it, how important it is that we do have an agreed protocol in place - and when I say agreed, agreed by all concerned, but most importantly, agreed by each House.

**Ms McKENZIE** - I completely accept that. In fact, my view about this whole process is that it needs to be a cooperative, reasoned approach as well, in the sense that we aren't interested in trammelling parliamentary privilege.

**Ms O'CONNOR** - That's clear and it's clear in the draft protocol. Absolutely oxygen clear, but it is an issue that the Integrity Commission would like to see resolved without too much delay.

**Ms McKENZIE** - I won't disagree with that.

**Mr GEORGE** - I have two basic questions. I'm going back almost to the start. First of all, I know that Robert Hay has only just been appointed as the Chief Commissioner. I wonder if there has been any opportunity to discuss with him whether this draft protocol and whether you think that there will be an impact - his coming on as Chief Commissioner will impact this draft protocol.

**Ms McKENZIE** - I can't really speak to that because I haven't even met my new Chief Commissioner yet. I've only spoken to him and I'm meeting him today. He's in Hobart today. I'm happy to mention this to him and, as part of the briefing that I'll be giving him, I will be telling him about the parliamentary privilege protocol.

**Mr GEORGE** - The only other question I have to ask, again, it's very basic, is have there been any issues in the past that you know of which you would have investigated, or you would have pursued had a draft protocol being in place?

**Ms McKENZIE** - I don't think I can answer that question.

**CHAIR** - Any other members have a question? Roger, do you have a question?

**Mr JAENSCH** - None at this stage. Thank you.

**Ms O'CONNOR** - Just a quick one. Ellen, you said earlier that only one matter had been held up by the lack of a privilege protocol. It's a matter of public knowledge that there are two long running investigations which obviously we don't expect you to go into any details of, so you can reconfirm and you don't even need to necessarily connect the two, but that being held up by a lack of a protocol - of those matters, was privilege in any instance asserted?

**Ms McKENZIE** - I'd have to check on that.

**Ms O'CONNOR** - Okay. All right.

**CHAIR** - We're happy for you to take any questions on notice.

**Ms McKENZIE** - I have to be a bit careful.

**Ms O'CONNOR** - I know you do and we're trying to be careful as well. I am trying to understand how much the lack of a protocol - and this goes back to earlier questions - has inhibited the work of the commission.

**Ms McKENZIE** - What I can say at least in response to that question is I have been briefed that there have only been the two matters I referenced, one where there was a delay in the matter progressing due to us attempting to obtain material where issues were raised about privilege and it was a very elongated process. Had there been a protocol, perhaps it might not have been so elongated, and we may have been able to deal with the matter in a different way

to the way that we ultimately dealt with it because it definitely did impact the way that we were able to deal with that matter. That's not even going to the issue of were the matters privileged or not. I can't say, but there are any number of reasons why an investigation is delayed.

**Ms O'CONNOR** - Yes, of course.

**Ms McKENZIE** - That is probably all I can say, but the delayed matter, no, I don't think I can go there, I need to be really careful.

**Ms O'CONNOR** - I know there are any number of reasons, but you know as we all know, these investigations have been going on for some three years now and there's delays and then there's delays. I'm definitely not pointing any finger at the Integrity Commission, just noting the length of the delays.

**Ms McKENZIE** - Unfortunately, I can't go into any detail about why those matters are delayed.

**CHAIR** - We still have 10 minutes left if members have any further questions.

**Ms WEBB** - This is really brass tacks. I'm still trying to get my head around, with this, how it would play out in practice. If you've given a notice that, let's say you want to access the emails from 1 January to 1 July from a particular member because you're investigating something that you're aware likely had communications during that period. If you had a protocol in place and the member was going to assert parliamentary privilege, do they have to specify the specific emails or specific topics?

Is that assertion of privilege - because most likely if there is genuine privilege to be asserted, it will cover some matters in their full email inbox between that time, but not necessarily all matters - do you have to specify that in a very narrow way yourself in the notice about what you're seeking in that time period? Do they have to also similarly make an assertion of privilege in a very narrow targeted way over particular elements in there? I'm trying to get my head around the brass tacks.

**Ms O'CONNOR** - It does potentially identify.

**Ms WEBB** - How would this play out? It's theoretical. I'm putting a hypothetical to you, to help us understand what it would look like.

**Ms McKENZIE** - The difficulty with emails is we won't necessarily know what emails might exist, or if they did exist, whether they're able to be produced or not. We might though, be aware of an email that we've been told about by somebody else, say, which we will definitely want to obtain.

**Ms WEBB** - Would you issue a notice in that case then specifically for that email or email chain?

**Ms McKENZIE** - Certainly anything that had been identified to us, we would. Although there is the preliminary step, at our end, of considering whether it might be protected by parliamentary privilege and if there is a realistic prospect that it is or could be, we will not seek that material. It would not be appropriate for us to do so. That's what I was referencing earlier

when I was talking about narrowly drafting notices or warrants to ensure that we are not potentially capturing material that's privileged.

**Ms WEBB** - I guess that's where I'm asking the question from. It's like, how does this in practice work out? I'm thinking about it, I guess from the parliamentary side of things. You know, if I got a notice to produce particular materials from my records and needed to consider whether parliamentary privilege should be asserted over any of those materials, if it's a vast array of things that's quite a task for me if I have to narrowly assert privilege over particular parts of it. How do you see that practically working?

**Ms McKENZIE** - I don't think there's any way around there being a process that would need to be gone through if there was a large volume of material because the fact of the matter is it has to be reviewed with the intention of identifying whether there is a privilege issue. It can't be avoided.

**Ms WEBB** - In that case it might be that the MP makes the assertion of privilege over the entirety. The Commission could then challenge that and, at that point, that's when, say, an independent arbiter comes into it, the independent privilege determinator to do the actual review of that material. Is that how you see that process playing out?

**Ms McKENZIE** - There is, I suppose, an intermediate step which is that the person on whom the notice has been served or on whom the warrants have been executed, they are required to indicate a reasonable basis for the assertion of the privilege. That might be enough to satisfy the Integrity Commission. But if it's not, then it becomes a disputed issue and that's where the role of the privilege determinator comes live.

**CHAIR** - Thank you. Any other questions? Mr Jaensch, do you have any questions? No?

Thank you very much for your appearance today. What you've said to us today is protected, as we know, by parliamentary privilege. Once you leave the table, you need to be aware that privilege is not attached to comments you may make to anyone, including the media, even if you're just repeating what you've said to us. Do you understand that?

**Ms McKENZIE** - I do.

**CHAIR** - Thank you very much. Stop the broadcast, please.

**The witness withdrew.**

**The Committee suspended at 11.43 a.m.**

## PUBLIC

**The Committee resumed at 12.00 p.m.**

**CHAIR** - Thank you very much for appearing at today's hearing of the Joint Standing Committee on Integrity. If you could please state your names and the capacity in which you are appearing before the committee.

**Ms LAURA ROSS**, CLERK, HOUSE OF ASSEMBLY, AND **Ms CATHERINE VICKERS**, CLERK, LEGISLATIVE COUNCIL, WERE CALLED, MADE THE STATUTORY DECLARATION AND WERE EXAMINED.

**CHAIR** - Can I confirm you received and read the guide sent to you by the committee secretary?

**WITNESSES** - Yes, thank you.

**CHAIR** - This hearing is covered by parliamentary privilege, allowing individuals to speak with freedom without fear of being sued or questioned in any court or plays out of parliament. This protection is not accorded to you. If statements that may be defamatory are repeated or referred to by you outside the parliamentary proceedings. This hearing is public. The public and media may be present. Should you wish aspects of your evidence to be heard in private, you must make this request to the committee at the time.

While I'm aware you know the members of the committee, I will introduce the member for Launceston, myself, Rosemary Armitage; member for Franklin, Mr Peter George; and we have Mr Roger Jaensch, member for Braddon online. We have Ms Ella Haddad, a member for Clark from the House of Assembly. We have Ms Cassy O'Connor, the member for Hobart. We have Ms Webb, the member for Nelson. We have Mary and Fiona, our secretariat, and we have Henry from Hansard.

Would you like to make a short opening statement?

**Ms ROSS** - Yes, if that's okay.

**CHAIR** - Certainly.

**Ms ROSS** - Thanks to the committee for the opportunity to make a submission and to provide evidence. We would like to make a bit of an opening statement to highlight some of the aspects of our submission and, of course, we are in the committee's hands as to any questions you might have for us.

By way of summary at the outset, I guess we'd like to say that we're supportive of the adoption of a protocol to deal with parliamentary privilege in Integrity Commission investigations as it's an important means of ensuring the parliamentary privilege is protected in these processes. The terms of such a protocol and the adoption of that is something that would have to be done by the Houses themselves. That's an important thing to note because privilege belongs to each House, so it's for those Houses to adopt what a protocol would look like.

We think this Inquiry is really important in terms of members being able to consider some of the issues. In our submission, we draw out some of the issues that need to be considered in

developing a protocol. We'd like to outline a few basic principles today, which we hope might assist in the committee's deliberations.

We're happy to take questions, but we're going to talk a little bit about the role of Clerks and Presiding Officers because that becomes relevant as to who has particular roles under a protocol; some basic comments about the Act insofar as it's relevant to these types of matters; the basics of parliamentary privilege and why it's important; and some of the key considerations that need to be looked at in developing a protocol or MOU of this nature. If that sounds okay, I might hand over to Catherine to talk about the role of the Clerks.

**Ms VICKERS** - The role of the Clerk is steeped in a lot of ancient history and tradition. It's been around since the 14th century, just for the history lesson.

The Clerk of each House is perhaps the most, well, we are the most senior parliamentary official in our respective Houses. We're not appointed by the government. We're appointed by Letters Patent. I want to read to you a bit of the introduction about how we are appointed. The King basically allows the Governor to make our appointments:

Know ye that we having taken into our royal consideration the loyalty, integrity and ability of our trusted and well-beloved Catherine Louise Vickers and Laura Elizabeth Ross do constitute and appoint us to be the Clerks of each House.

The reason we start with that is it's a nice reminder that we are here as the senior officials who are here to provide authoritative advice on all matters parliamentary law, practice and procedure, and the constitution. We're also the keepers of the records of parliament and we're here to support members in a very impartial and confidential way in the discharge of their parliamentary duties.

In some ways we see ourselves as custodians both of the institution of parliament and a whole lot of Westminster traditions.

**Ms O'CONNOR** - We're all very thankful for that. Just to be clear.

**Ms VICKERS** - We ummed and ahed about whether we'd say that and put the thing in about the Letters Patent, but it is important to explain what we do and why we do it, and why we think we have a role in any protocol or process that may be developed with any law enforcement agency, whether it be an integrity commission, a police service or the like.

We are entrusted with a significant degree of public trust and expected to act, as I said, impartially, with integrity, in the public interest and the interests of justice to protect and preserve the parliamentary institution.

The role of Presiding Officers: as you're aware, we have two as we're a bicameral parliament. We have the President of the Legislative Council and the Speaker of the House of Assembly. The Presiding Officers role is multifaceted. Basically, they're sort of elected as senior members in their respective Houses to serve the House and maintain order during debates, enforce the Standing and Sessional Orders, deal with points of order and conduct in the Chamber, and basically look at things through the conventions of the House. Their role also includes a lot of ceremonial duties and they are a representative of each House.

It should be noted that not only are they maintaining order in the Chamber, they also have key roles in the security and management of the parliamentary precinct. That includes members' offices. To that end, we submit that they do have a role - some role - in any legal process as well that may emanate from a protocol or under the legislation. An example of that is that, currently we have an MOU with police, and Presiding Officers are notified if there are warrants to be served on members to go to their offices. That's just a bit of information to take into account.

The Integrity Commission itself - we don't intend to comment on their operations, we just want to make some general comments about their role. As you know, they're established by statute and they perform a number of important functions in our system of government and our system of democracy. The main ones are set out in their objectives. They raise standards, they educate, they investigate and report on and prevent misconduct. I think we just want to acknowledge that there is an inherent tension, I suppose, between the aims of what they're trying to achieve by looking at alleged misconduct and the rule of law - principles of the rule of law - that every person, including members of parliament, are subject to the rule of law and must abide by the laws of the state. However, we also have this parliamentary privilege aspect and sometimes they're not congruent. Parliamentary privilege is not intended to shield members from the law, but it is an important part of our Westminster traditions of parliamentary democracy. There is this tension and I think we'd like to see a protocol developed that manages both aspects of that.

We note that our Integrity Commission, unlike some other similar bodies in other jurisdictions, doesn't have the power to prosecute or sanction individuals, but it can make reports as to their conduct or misconduct and make adverse findings about behaviour. In supporting those functions, the *Integrity Commission Act 2009* gives the Integrity Commission the power to receive complaints, and assess and investigate complaints about alleged misconduct. They can require members and us as principal officers of public authorities to attend and give evidence and provide information and produce documents. They also have the power to search premises, seize information and take possession of records. In matters involving serious misconduct, the Integrity Commission may apply for a warrant to use a surveillance device, which is a listening device.

The Act does recognise privileges generally. The definition section at section 4 recognises the privileges in the *Evidence Act 2001* like legal, professional privilege, medical, religious confession, privilege against self-incrimination, spousal privileges and it recognises the privileges of parliament. It quotes proceedings of parliament or defines proceedings of parliament, which is similar to definitions in the common law and other legislation. That's in section .

Section 100 of the Act also provides that 'nothing in this Act is taken or held or construed directly or indirectly by implication or otherwise, to affect in any manner any power or privilege possessed by either House of parliament before the passing of the Act.' It takes into account all our privileges.

Section 92 provides a mechanism for where anyone wants to raise an issue of privilege and they want a claim privilege. It includes a mechanism to apply to the Supreme Court to determine whether material is privileged. These provisions all combined, we submit, recognise



and preserve parliamentary privilege which is a fundamental element of our democracy and Westminster traditions. Laura will talk more about that.

**Ms ROSS** - Yes. Just to take a step back, as members, you're all aware of parliamentary privilege, but it might be beneficial to put some of that on the record, where it comes from.

Parliamentary privilege refers to the special rights and immunities which belong to the Houses and its committees and its members, and those are considered essential for the House to conduct its business unobstructed, essentially. It's absolutely fundamental, and the most important privilege is that of freedom of speech, which derives from Article 9 of the Bill of Rights, and states:

Freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.

That is relevant for these purposes, and it's recognised that that forms part of the law in Tasmania. For completeness, parliamentary privilege also encompasses the power of the House to deal with its own proceedings and control its own proceedings and its power to deal with contempt. There's a number of aspects of parliamentary privilege derived from case law that are relevant to this area, so I will quickly summarise some of those.

As I noted, parliamentary privilege is concerned with the freedom of speech and prevents proceedings of parliament being questioned in court or other places. For the current purposes, we're not just talking about courts, we're also talking about other processes, so tribunals and administrative inquiries such as ones conducted by integrity agencies. That's why it becomes relevant here.

Proceedings in parliament include not just the actual proceedings, so not just proceedings in the House or a committee, but also incidental documentation and things that are incidental to the proceedings themselves and have that necessary degree of connection. That's why records held by MPs and others may be subject to parliamentary privilege and immune from production in Integrity Commission investigations.

Parliamentary privilege is a privilege against use, not against disclosure, so it doesn't matter whether something's already in the public domain. The privilege is about whether or not it can be used in another process. A lot of what happens in parliament is in the public domain, but it's about whether that can be used in another process.

Case law confirms that the use of the information occurs at the time when the information is obtained. That's obviously relevant in terms of integrity agency investigations, because the obtaining by that agency of material that's subject to parliamentary privilege constitutes a use, and that is because an integrity agency is not merely an investigative body, but it's also a determinative one so it can do its investigations and make determinations. Once the information is provided, that constitutes the point of use.

The question of whether privilege applies to a document or thing is legally for a House or a court to determine, and if it exists in relation to a particular document or thing, it's not capable of waiver by a member. A member can't unilaterally waive parliamentary privilege.

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That's some of the basics in terms of what's relevant in terms of parliamentary privilege to this area, but we thought we might just talk now briefly about what some of the things, MOUs of this nature cover and then what they should cover. The basic purpose of a protocol -

**Mr JAENSCH** - Excuse me. Can I ask, on this point of definition, is it okay for me to ask a question at this point before going into the issue of the protocol itself?

**CHAIR** - Yes.

**Mr JAENSCH** - In relation to these definitions of parliamentary privilege, and thank you for the preamble on it, what I am trying to get clear in my head is that I understand if I am in parliament and, as part of parliamentary proceedings, I can say things that I might be subject to legal challenge on in that environment, if I am doing that in the course of my work and for good purposes, I am putting information on the public record, but I am immune from prosecution that might arise from that. Is that right?

**Ms ROSS** - That's right.

**Ms VICKERS** - Correct.

**Mr JAENSCH** - Then there's the matter of producing immunity from production where - on the grounds of parliamentary privilege, where it is not that that information is being made public and I have immunity; it is immunity from having to produce it in the first place. Can you please help me with that?

**Ms ROSS** - Yes. You are quite right. Anything that you say in the course of parliamentary proceedings is protected by absolute privilege. It's not just the actual proceedings, it's also if documents are so connected to parliamentary proceedings that they are deemed to form part of that proceeding, they are protected by absolute privilege as well. With integrity agencies, the use of that occurs at the time they obtain it. It's immune from production because it can't be used in that way.

**Ms VICKERS** - It can't be forgotten. Once they see it, they've seen it. It might be things like you're preparing for a debate, and you have a whistleblower, or someone comes to your office, and you want to get information from them to talk about in the House. That would have a sufficient nexus, but it's all a question of fact at the time. It's all about whether -

**Mr JAENSCH** - In that case, you would - is there a need to establish that that is associated with a parliamentary process?

**Ms VICKERS** - Yes. That's why you'd make the claim that the material is privileged, or you'd want that determined before it was handed over to the investigator.

**Mr GEORGE** - Just to follow that up, if I may, to be clear about this. A whistleblower comes in with documents; those documents then become subject to privilege once they're handed to the MP.

**Ms ROSS** - It depends on what you're going to do with them. There are tests for whether something's privileged or not -

**Ms O'CONNOR** - The three-step test.

**Mr GEORGE** - That three-step test.

**Ms ROSS** - It depends on the purposes for which you've obtained it, the purposes for which you've used it or retained it.

**Ms VICKERS** - It all depends on the facts of each case.

**Mr GEORGE** - Sure.

**Ms VICKERS** - These things can play out in other forums. We've had other court processes where people have asked for all the records in an electorate office. They can't have all of those, but we want to maintain the privilege. They've got to look at the records and decide whether those records were going to be used for a parliamentary purpose or whether it was just a constituent inquiry following up on another matter.

There are live issues that will always depend on the facts of each case. We always say, if there's any legal process, whether it's the Integrity Commission, a Family Court matter, a Supreme Court matter or criminal matter, we're here to provide that advice to make sure that you're not handing over things that you are using for a legal proceeding.

**Mr JAENSCH** - Thank you, and look, the extension of that, just for my head, is that what are the limitations of protections of parliamentary privilege? For example, if I'm on my feet in parliament and I'm making statements or accusations, or I am relaying allegations about a third party who may have done something illegal, now, I understand that there is an assumption of parliamentary privilege that would apply to that, in terms of I can't be sued for that the way I could if I was standing outside -

**Ms VICKERS** - That's correct.

**Mr JAENSCH** - Do I have some obligations - I could go in and destroy someone's life and career.

**Ms O'CONNOR** - It's happened before. It's happened many a time under privilege.

**Mr JAENSCH** - What's the repercussion for - is there any repercussion or obligation or test on whether there has been a gratuitous abuse of that privilege?

**Ms O'CONNOR** - That's for the Privileges Committee of parliament, isn't it?

**Ms ROSS** - Yes, it's for the House. Really, the House is the only one that can take action. You can't be questioned or impeached in a place out of parliament, but can by the House itself. The House might say, well, that was egregious, and we will refer you to the Privileges Committee. That's how that would work, that process.

**Mr JAENSCH** - Do we have a Standing Order to use in that case?

**Ms ROSS** - There are a couple of things, yes. There's a code of conduct for members, and there's also probably just generally-accepted principles in terms of there's not -

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**Ms VICKERS** - The House regulates its own conduct and its own members.

**Ms ROSS** - Yes, its own conduct and affairs.

**Ms VICKERS** - A motion can be put that a member be referred to the Privileges Committee for, as the honourable member for Hobart has said, an egregious breach.

**CHAIR** - Are you fine with that?

**Ms O'CONNOR** - Well, maybe let Laura just finish the introduction because there's lots of questions.

**Ms WEBB** - There are a lot of questions. If this is factual information, is it possible you could give it to us as tabled information?

**Ms ROSS** - Yes, sure.

**Ms WEBB** - That would be great and we would just add it to your submission as - and then we can ask questions about the submission, if that's all right. Is that all right, Chair?

**Ms VICKERS** - Can we have a week to polish it up a bit?

**Ms ROSS** - Yes, happy to take questions.

**Ms O'CONNOR** - Yes, absolutely.

**CHAIR** - Did you want to continue?

**Ms ROSS** - No, that's all right. We're happy to take questions if the committee prefers.

**CHAIR** - Are you happy to wait until after the Clerk finishes speaking -

**Mr JAENSCH** - No.

**CHAIR** - Ms O'Connor, to ask your question? Or is it relevant now?

**Ms O'CONNOR** - Well, I think that - look, the Clerk is quite happy to provide that further information to us.

**CHAIR** - There's nothing more you wanted to say?

**Ms O'CONNOR** - You can go to questions. Thank you, Chair.

I'm interested to go back to something that the Clerk of the Council said, that we'd like to see a protocol that manages the tensions, and noting that in your excellent comprehensive submission, there's a table at the back that examines the draft protocol put to us by the Integrity Commission. I wonder if, you know, not necessarily going through this step-by-step, because it is a matter of record, but I wonder if you could give, and from each House's perspective that

would be quite interesting too, a broad assessment of the draft that we have and some of the issues in it that we might, as a committee, explore improving, in order to resolve those tensions?

**Ms VICKERS** - We didn't really want to get stuck into choosing one model over another. There are different models in different jurisdictions. The model that we originally started to look at would do the work, but there are different models, and we are agnostic as to which you choose. That's probably one point to say.

**Ms O'CONNOR** - Yes, I get that. I'm really looking for an overview because there are issues that you've identified in the submission, for example, notifying the Presiding Officer at that first point. That's been raised with us as a potential issue because the Presiding Officer is by nature a potential party-political figure. In broad terms, if we want to put forward the best possible draft protocol, what are the elements that we need in it? How can we improve the draft that's before us?

**Ms ROSS** - I might perhaps go through -

**Ms WEBB** - They've got that there; we can just dig into it.

**Ms O'CONNOR** - I know, but you can ask your questions on the basis of the detail that you want. I'm interested in an overview.

**CHAIR** - That's fine.

**Ms VICKERS** - Do you want to go through the key elements?

**Ms ROSS** - There are a few key elements we think should be covered. The protocol should define the legal basis of parliamentary privilege: who is notified prior to certain activities being conducted, so searches and issuing of notices and surveillance; how a member can make a claim; how the material will be handled; and who makes the determination.

I suppose in terms of what we've attempted to do in that table is to pull out the issues that you might want to consider. Now we had some input into that draft. A lot of issues that we raised were dealt with at the time, but we've sort of pulled out issues that you might want to give consideration to.

One of them, as Ms O'Connor has said, is about who is notified. It has in various parts that that would be the Presiding Officer. So, we've made some suggestions about potentially that being the Clerk.

**Ms WEBB** - Is that in addition or to substitute?

**Ms ROSS** - Well, you could have either way.

**Ms WEBB** - I wanted to clarify that. It could be both?

**Ms ROSS** - Yes, it could be both or either/or.

**Ms O'CONNOR** - But it loses nothing by excising the Presiding Officer from the pathway, does it? I mean, maybe the Clerks would advise the Presiding Officer?

**Ms VICKERS** - Remember, sometimes when these things are brought to attention, there are confidentiality notices.

**Ms O'CONNOR** - That's right.

**Ms VICKERS** - One of the comments I was going to make is that in a general sense, it's better to look at these things generally. You can spend a lot of time worrying about - we've sort of taken a high-principled approach about roles of Clerk, roles of Presiding Officers. Now, clearly politics play out, but good law is not made by trying to look at every potential issue or conflict. You could have mechanisms in there that might deal with conflicts, but it's probably not ideal to try to start with that from the starting point. So, it could be Presiding Officers or Clerks that are both or separately notified.

**Ms ROSS** - The whole point of that is so that people have the opportunity to raise a claim of privilege at the time before the information is handed out - so somebody needs to know about it, is the point.

**Ms HADDAD** - To be able to make that assertion of privilege? Right.

**Ms O'CONNOR** - Clearly you would like to see a three-step test put into the MOU?

**Ms ROSS** - That's what we would adopt because it's been really accepted as that would be how you determine whether something was privileged. We would accept that as -

**Ms VICKERS** - the test. And whether we do that determination, and the other option is the House approved a mechanism to appoint someone else to do it. There's probably some role still there for the Clerk to be involved.

**Ms O'CONNOR** - In the event of a covert warrant being issued, in your paper you talk about notification to the independent chair of the Integrity Committee.

**Ms ROSS** - I think that's someone else's submission.

**Ms O'CONNOR** - Is that Professor Appleby's, is it?

**Ms VICKERS** - Covert warrants or surveillance devices, it is difficult, and there are papers. I know the Clerk of the Senate a few years ago wrote a paper, or did provide us some evidence around the difficulties if you're putting a listening device, say, in my office, it's going to capture all your conversations with me.

**Ms O'CONNOR** - They'd be quite bored listening to them possibly, but anyway, matters of procedure.

**Ms VICKERS** - Well, maybe not, because they could be quite controversial notices of motion or questions on notice or tactics that you want to do, so there is an issue.

We had some notes about covert surveillance. It is difficult and should someone be notified, should there be mechanisms put in place to actually try to gather that evidence in a different way before you proceed down that path, but as the *Integrity Commission Act 2009*

says that's really in cases of serious misconduct and you've got to go to a court to get those. But whether a Clerk would like to be an *amicus curiae* in that sort of proceeding, should we be notified, this is where the tension starts to emerge that bugging a member's office and what you do with that material -

**Ms WEBB** - Presumably because that doesn't provide for the opportunity for there to be an assertion of privilege because they've already collected it, which is therefore the use.

**Ms ROSS** - If you have a look at the protocol with the NACC [National Anti-Corruption Commission], this 2023 version of our draft protocol predates that one. That one does deal with the covert powers -

**Ms WEBB** - What do you think about the way that deals with it?

**Ms ROSS** - Well, I think that it seems to be acceptable in terms of -

**Ms WEBB** - So you'd point us to the NACC protocol on the covert side of things.

**Ms ROSS** - They have dealt with that issue. They have to essentially advise the Clerk. The Clerk can give some input into how that's conducted in a way to try to minimise any potential impact on privilege and there's quarantining of material too with a view to working out whether there is privileged information before it's handed over.

**Ms VICKERS** - Sometimes with quarantining it, it might be that the Integrity Commission recognises that the investigator has no role in the quarantining of material that might come into the possession of - it sort of goes and sits somewhere - and a forensic officer will pull out what they think. Then a Clerk might determine it and there's a whole lot of access logs about who's looked at that material. Emails are the other thing, if they just sort of [conduct a] metadata capture, you don't know what you might get out of an email.

**Ms WEBB** - Mostly we've heard from witnesses about trying to be very narrow witnesses from integrity entities, describing they be very narrow in what they're seeking through notices to try to prevent that sort of just big broad sweep of gathering everything from an email inbox and having to figure then what's privileged and what isn't.

**Ms ROSS** - I was going to say just one more point on your question, Ms O'Connor, about our table. I suppose the other issue we pulled out is one for the committee to look at and consider is about the concept of the privilege determinator -

**Ms WEBB** - That's where I was going to go with my question. That idea that there may be a role then for, say, an independent privilege determinator to be established or identified. It seems to be fairly commonly utilised and then the question becomes how that person or people are appointed. So there are different options for that and included in that it could be obviously the House, or the Houses, do it, but for that to be a more wieldy process rather than unwieldy process. This committee, for example, has been put as an option. This committee could do that appointing of the independent privilege determinator. I think the suggestion is that probably the Presiding Officers appointing that person is not necessarily the preferred option because of the potential for that to be seen as political. I'd be interested in your view. If we were to go down the track of doing that independent separate entity as the privilege determinator, what do you think is the most appropriate way?

**Ms ROSS** - The draft protocol - the issue we've pulled out, I guess, for the committee to consider is it's defined, at the moment, as the Presiding Officer. So they would be one alternative to be a privilege determinator; so someone who would actually make the determination.

**Ms WEBB** - I think we're being steered away from that.

**Ms ROSS** - Yes, right. We've made some comments about that: 'Any other person, entity or committee authorised by the relevant House of Parliament' - I mean the House could delegate it to a committee - a privileges committee or this committee. It probably doesn't -

**Ms VICKERS** - The main point is that the House has to set up the way they want it to be delegated. Whether, as Laura says, they delegate the Presiding Officer makes the appointment, or this committee, or the Privileges Committee make the appointment -

**Ms ROSS** - It's whatever you have confidence in, I suppose.

**Ms VICKERS** - It's always difficult in a political environment. The next question is the skills - what kind of skill set are you going to do that? A protocol could at least indicate some basic - do you want a lawyer with seven years standing, not someone who's never been a member - that kind of thing. Just flesh out the details of the qualifications.

**Ms O'CONNOR** - That's in some MOUs in New South Wales.

**Ms WEBB** - We've had that suggested to us by some other witnesses as well - that you could just have those basic criteria.

You're not necessarily pointing us towards - other than the House deciding who's going to do the appointing, and that's therefore the official decision of that House of parliament.

**Ms VICKERS** - We did think - just in our preparation for today - if you were to come to some sort of model and you wanted to hear from us again in some capacity, we'd be happy to come back, either on or off the public record, to go through what your thoughts might be. It's hard to -

**CHAIR** - To give your opinion on anything that the committee came up with.

**Ms WEBB** - Do you have a view on whether it's - because presumably, this person or people who are appointed need to be pre-appointed before they're needed and be there ready to be tapped on the shoulder to undertake the role when needed because it could be a matter of urgency that it crops up. Again, depending on the appointment process -

**Ms ROSS** - Depends on who appoints them as to how it could be done, I suppose, yes.

**Ms WEBB** - That's right. In the same way that we have other roles that are sort of appointed to be potentially on-call when needed - I'm thinking about things like our Parliamentary Standards Commissioner and things through the Act. This is the sort of role you see as - an appointment is made and then that person is therefore able to be contacted to be brought in to do the role when necessary.



**Ms VICKERS** - Or the alternative is doing it at the time that you need it. I think if you appoint a particular - say someone from the Tasmanian Bar, a legal practitioner - and you put them on some retainer, then they're completely - they're not able to take any other cases in those sorts of matters. It's hard if you want a standing appointment or appointment as the need arises - I don't know the answer to that.

**Ms HADDAD** - It would also influence who makes the appointment, because if it was determined, for example, that it's this committee, if the appointment needed to be made during a period of prorogation, the committee doesn't exist; it couldn't make the appointment.

**Ms WEBB** - Having a standing appointment, in that sense, at least provides for that. If, in fact, a committee of some sort is the appointing body on behalf of the parliament.

**Mr JAENSCH** - Is there any precedent for a person/s in this role to be appointed by way of an ex officio arrangement whereby the default is that the person who is, at the time, in 'X' role somewhere else in the system is the person who's called in to do this job - which alleviates appointing an actual human - but it's attached to another existing role, which is deemed to be sufficiently separate and qualified?

**Ms VICKERS** - We'd probably have to take that on notice.

**Ms WEBB** - It's potentially problematic.

**Ms ROSS** - I haven't seen that anywhere else but I'm not sure whether you've heard some evidence from other parliaments, whether you've talked to them about how their processes work, because we haven't had a protocol before so this is new territory for us.

**Ms WEBB** - Lots of them have one but haven't used it, interestingly enough. There's that. The other thing about that is, if there is somebody appointed in a standing capacity, do they have to be on a retainer? Is it an arrangement you can have where you basically just stand them up when they're identified and specified as the person that will be called on, that's brought in to do the role and paid appropriately to do that role, at any time it's needed?

**Ms VICKERS** - We'd probably want to think further about that. I was thinking in terms of legal practitioners. The difficulty is, once they're on retainer, they then can't -

**Ms WEBB** - Do you mean they're being paid regularly?

**Ms O'CONNOR** - Whether they're paid or not, then they have conflicts -

**Ms VICKERS** - Whether they're paid or not, then they have conflicts. As it is, often when we have matters, we have a pool of people we use, but they're all different, because sometimes we need to get advice on a matter and they're conflicted out because they're advising the other party. That's the nature of the Tasmanian profession - it is small, and even using ex judges - and the shadow attorney-general might remind me: we have seven judges, or we might have increased that - but we don't have a lot of ex judges in a small state. We don't have a County Court or a District Court. We only have a Supreme Court and a limited number of magistrates. The pool into making those sorts of appointments, I think, is something that requires some further assessment of.

**Ms WEBB** - However, it wouldn't need to be somebody who's Tasmanian, would it? It can be an out-of-jurisdictions person.

**Ms VICKERS** - I think that's why you might want to think about the qualification requirements for that person. Sometimes we do go to the mainland for those sorts of appointments, because of the size and scale of our jurisdiction.

**Mr GEORGE** - In practice, in many ways, going outside the state would be an advantage in terms of arm's length, too, wouldn't it?

**Ms VICKERS** - It is probably more cost and -

**Mr GEORGE** - More cost but arm's length.

**Ms VICKERS** - That's where they need to understand our privilege laws, and not all states and territories are the same. We're probably much more aligned with New South Wales, so you would want someone who was able to understand the foundations of our privilege, which might be different to, say, Western Australia or Victoria, which have statute-based foundations.

**CHAIR** - Thank you. Do we have any further questions?

**Ms O'CONNOR** - There was quite a lot of interaction between Clerks and the Integrity Commission during the development of the draft protocol. Have there been any approaches or conversations, given there were obviously issues with the draft? That's part of the reason we're holding this Inquiry. We've talked to the CEO this morning about what work may have been done since then. Has there been any further conversation?

**Ms VICKERS** - Probably not since this committee was established. I had thought about that, and I think since this has been established, we haven't had any further. They've had a change in CEO and change in personnel, so that may explain that.

**Ms O'CONNOR** - Then there have been two elections since the draft protocol was drafted, which clags everything up.

**Ms VICKERS** - Yes, I forgot.

**Ms ROSS** - The difficulty in negotiating a protocol - because we had input, and a lot of the issues we had were able to be resolved, but some of them are really high-level things that the House is going to have to grapple with and make decisions on. It's not really for us to say whether the House should be delegating to a privilege determinator or whether the House should retain that power. We can advise, but you need to get to the point where the House is the one grappling with those issues. So, it was a draft that had taken into account a lot of our feedback, but there are some issues that the Houses need to come to terms with, in terms of actually adopting them.

**Ms O'CONNOR** - Ideally, obviously there would be a whole lot of conversations before a protocol's finalised, and advice from this committee, but ideally the protocol would go through parliament.

**Ms ROSS** - It needs to.

**Mr GEORGE** - Rather basic questions, I suspect - one is that I think you do not have a preferred model for determining privilege. Is that right?

**Ms ROSS** - That's right. That's a really high-level policy decision. Some protocols, as you've probably seen, retain the House's ability to make that decision, and some provide for somebody more independent to make that determination. Different parliaments have gone in different ways

**Mr GEORGE** - Sure have been, yes. In the event that we actually ended up with an independent determinator wherever that person may come from, do you think between the Integrity Commission, the independent determinator, the parliament and the Clerks, where would the Clerks fit in that sort of jigsaw puzzle?

**Ms ROSS** - It depends on the exact terms of the protocol, I suppose.

**Mr GEORGE** - Yes, I know. I'm just wondering if you have a view.

**Ms ROSS** - It depends on what it says, but we could be the person receiving the notice in the first place, in which case, we would be identifying that there may be an issue of privilege in the first instance. Then it's more a process that's put in place by the protocol to resolve that.

**Mr GEORGE** - You would be the doorkeeper, the facilitator, or whatever - first point of contact.

**Ms ROSS** - Potentially, yes, depending on if we were the receiving recipient of the notice.

**Ms VICKERS** - You also have to think about, if a member receives a notice to produce -

**Ms HADDAD** - Where would they go for advice?

**Ms O'CONNOR** - They'd need some advice.

**Ms VICKERS** - Yes. So, taking into account the confidentiality provisions in the act, I would assume that - people who receive notices are able to go and seek legal advice. So sometimes there would need to be some way of carving out that the member or person can come and talk to the Clerks about the privilege and the legalities, I suppose.

**Ms WEBB** - That should be in the protocol?

**Ms VICKERS** - It wouldn't hurt to put something like that in there, but just to carve out what our roles are, whatever they may be.

**Ms HADDAD** - Can I ask a question, Chair? Oh, you keep going, Peter.

**Mr GEORGE** - Mine is a slightly different subject.

**CHAIR** - We have four minutes left.

**Mr GEORGE** - A really quick question. What happens if there's an investigation of the Clerks or of a member of staff in the parliament? Just briefly, or is that an entirely different subject?

**Ms ROSS** - Even if it's a member, we might be receiving the notice because we're custodian of some of the records, as well. I mean, issues of conflict need to be dealt with in some way, obviously, but you don't want that to be the starting point of developing the protocol, because this will apply to all investigations about members and everything. So, you don't start from that - but it's something to consider in terms of when would it apply and what other avenues do you have if there is potential conflict.

**Ms VICKERS** - That's why you would probably try to set out principle-based things, but it's probably not a question we can answer.

**Ms HADDAD** - I know we only have a few minutes, and I feel like my question is messy, so maybe I will wait and we'll talk about it next time.

It feels like, from the other bodies we've heard from, and also the Integrity Commission this morning, there's two points at which privilege might crop up as a potential. One is the member might try to assert privilege and then the protocol should put in place processes to determine that. Then there's another potential, where perhaps, like you said about metadata before, Catherine - if a whole lot of information has been given to an investigative body and they stumble across something that they suspect privilege might be an issue around, how would they be expected to determine that?

We heard from the NACC that they said they'd get a different staff member who's not involved with that investigation to look at that information and then take whatever processes are in their protocol. I wonder, however, how, initially, if you're an investigative person at one of these commissions, you're reading through reams and reams of information, at what point would they potentially say, 'Whoops, this could be -'? Because the commission was very firm in their wording this morning in explaining that they don't want to inadvertently come across privileged material and they're certainly not trying to find any way to seek privileged material. But, when there's a grey area about whether privilege might or might not attach, I wonder how protocol will deal with that.

**Ms ROSS** - I think that was what we were talking about a bit earlier, about who needs to be notified.

**Ms VICKERS** - There's an education aspect to all of this as well. But I think, as Laura said, if we are notified early and you see some of these protocols have the possibility of setting aside, quarantining this stuff, then taking advice and having the Clerk present while that happens - even at the point where they're doing the keyword search on the email account, and information's tagged and you can kind of tell it's not about the - I don't know - Melbourne Cup sweep. It's actually about, 'I have a question', or 'I want to ask', or 'An amendment I want to do', or 'This has happened', or 'Can I set up a committee?', well, that's totally privileged. Someone can do that at a very preliminary stage.

## **PUBLIC**

You can train people to at least have these things flagged in their mind, but they can be very nuanced. Particularly, as you would all know, constituents come to your offices with very difficult things that might just be a series of - I will try to pick something that's anodyne - but a series of cat issues. Then it becomes something of a cat management issue that you want to bring before the parliament, or there's a bill coming in and their stories impact the way you want to conduct the debate or inquire into something. It might have just started off as one or two things, but it's all very nuanced. It's all about what is the nexus to the parliamentary proceeding or matter you want to bring before the House.

**Ms HADDAD** - That's interesting, thank you.

**CHAIR** - If there are no further burning questions from anyone -

**Ms VICKERS** - There's probably a lot of burning questions, Chair.

**CHAIR** - Bearing in mind, we do have our next online at 1.15 p.m. Thank you very much for your appearance. What you have said to us here today is protected by a parliamentary privilege. Once you leave the table, you need to be aware that privilege does not attach to comments you may make to anyone, including the media, even if you're just repeating what you said to us. Do you understand that?

**Ms VICKERS and Ms ROSS** - Yes.

**CHAIR** - Thank you very much.

**The witnesses withdrew.**

**The Committee suspended from 12.46 p.m.**

## PUBLIC

**The Committee resumed at 1.15 p.m.**

**CHAIR** - Thank you very much for appearing at today's hearing of the Joint Standing Committee on Integrity. If you could please state your names and the capacity in which you're appearing before the committee.

**Mr BANSON** - Peter Banson, Deputy Clerk of the House [of Representatives].

**Ms MORRIS** - Jackie Morris, Deputy Clerk of the Senate.

**CHAIR** - Can I confirm that you've received and read the guide sent to you by the committee secretary?

**Ms MORRIS** - Yes.

**Mr BANSON** - Yes.

**CHAIR** - This hearing is covered by parliamentary privilege, allowing individuals to speak with freedom without fear of being sued or questioned in any court or place out of parliament. This protection is not accorded to you if statements that may be defamatory are repeated or referred to by you outside the parliamentary proceedings. This hearing is public. The public and media may be present. Should you wish aspects of your evidence to be heard in private, you must make this request to the committee at the time.

Just to introduce the members of our committee: myself, Rosemary Armitage, I'm the honourable member for Launceston; we have Ms Meg Webb, the honourable member for Nelson; we have Ms Cassy O'Connor, the honourable member for Hobart, all from the Legislative Council. We have from the House of Assembly Ms Ella Haddad, the member for Clark; Mr Peter George, the member for Franklin; and also online we have Mr Roger Jaensch, the member for Braddon.

**Ms JACKIE MORRIS**, DEPUTY CLERK OF THE SENATE, AND **Mr PETER BANSON**, DEPUTY CLERK OF THE HOUSE OF REPRESENTATIVES, WERE CALLED, MADE THE STATUTORY DECLARATION AND WERE EXAMINED (via Teams).

**CHAIR** - If you'd like to make a short opening statement and then we can open up to questions.

**Ms MORRIS** - We thought maybe we would just go straight to questions. We're probably both happy to hold forth at length, but maybe you'd rather use the time, just since you've got a submission from the clerks which we helped to prepare, so -

**Ms O'CONNOR** - Thanks for joining us and for your submission. The MOU between the National Anti-Corruption Commission, the Attorney-General, President of the Senate and Speaker of the House of Representatives has been in place for about a year now. I was wondering if you had any reflections on its workability and whether or not it's been tested at any point. We don't need to go into the details, but has it just sat there, or has it been operationalised, and if you have any thoughts one year on.

**Ms MORRIS** - Yes, obviously we're a bit constrained about details on things. We had the benefit of reading the evidence that the NACC Commissioner gave you, and I think he was pointing to the fact that nothing has run through the whole process that's envisaged in the MOU, but it has certainly been used in terms of the NACC seeking advice, as we're seeing under the agreement, to try and avoid actions that might cause privilege issues down the track.

**Mr BANSON** - In our perspective, really that aspect of the MOU is working really quite well, and we haven't heard any complaints and, in a sense, the process appears to have been put together in such a way that so far the NACC has been able to use it without needing to go any further than they have.

**Ms O'CONNOR** - In the MOU, the Presiding Officer of a particular House plays a reasonably significant role in terms of being notified when there's a search warrant issued, for example. It's been raised with us that the Presiding Officer by their nature is a political position, and they may well be a person who's a representative of a political party. Was there any discussion that you know of in the development of the MOU about whether it's desirable to have the Presiding Officer in a - not a determinative role, necessarily, but in those key roles, being notified?

**Mr BANSON** - Certainly in respect of covert investigations, there was some concern about the Presiding Officers being the points of contact or notification points. This, we'd have to say, arose initially in the renegotiation of the MOU that our parliament has with the AFP [Australian Federal Police]. There appeared to be a lot more comfort with the Clerks fulfilling those roles. Then when we got around to doing the MOU with the NACC, that was the initial proposition put forward by the NACC, and we - I don't think there was really any difficulty with that.

**Ms MORRIS** - I'd probably say - I think there's an idea of the function of the Pos [Presiding Officer's] is twofold under all the MOUs that we have. First of all, they're a mechanism for bringing something before the House. They have an ability to table things and then to allow people to move motions about them, or even to propose their own motions in relation to things, but also they have that function that relates to the precincts.

We have a statutory regime that gives them roles in relation to the precincts. When these things started to be developed - and search warrants were probably the major way of gathering information - the Presiding Officers are front and centre because things might happen in the precincts. We had that history, perhaps, going into these new negotiations and some comfort about them performing that role.

**Ms O'CONNOR** - Okay. Just for clarity: was, to your knowledge, the MOU with the AFP - does it have a different threshold around the role of Presiding Officers? I haven't seen the AFP one.

**Ms MORRIS** - Not really. The language is very different but actually the models are pretty similar.

**Ms O'CONNOR** - Okay.

**Ms WEBB** - Actually that was an area I was going to go to because I'm interested in part 6, the covert powers part. The draft that we're contemplating at the moment here doesn't

provide for the situation around covert powers. We would be interested to consider whether that's something to include. We've been pointed to this one here that you have with the NACC as being useful to look at. You just have the Clerk there as the point of contact. That does seem to be, in this circumstance of covert powers, more appropriate than the Presiding Officer in that sense.

It might be difficult for you to answer this, but is that something that you've had tested in this last year over the time you've had this in place? We're interested because sometimes we've talked to witnesses who haven't yet utilised their protocols and so it's hard to then gauge whether they're ones we can look to as tested and proven or not. I'm interested in this. Are you able to comment on whether this has been utilised? If so, has it functioned as it intended?

**Ms MORRIS** - Perhaps what we can say is that the NACC is putting out public material in its annual report - and in fairly regular - probably their quarterly reports about investigations. That shows that they do have live investigations involving parliamentarians and parliamentary staff.

**Ms WEBB** - Okay, fair enough.

**Ms MORRIS** - But can I perhaps make a comment on those provisions that - hopefully I won't go further than my colleague is happy with. These are a real compromise. It's not everything that the working group that we were secretariat to would have wanted. But obviously it's in the nature of these things that you're trying to square away what's workable for investigators, in terms of the practicalities of the tools that they're using and their obligation to chase down wrongdoing, against the concerns of parliamentarians about how it might impede their functioning if they are worried about their metadata being grabbed or their emails being searched, or a surveillance device, or a telephone intercept. So I wouldn't say they're a perfect model. They're just the model that was able to be reached. There's probably a process of, as you say, things being used to then inform - we have regular reviews built in - if we do a second version of this, what do we learn about how it might be improved?

**Mr GEORGE** - Hi, it's Peter speaking. I'm the newest member on this committee, so my questions are pretty basic. First of all, do I understand that the MOU with the NACC has not yet been stress-tested?

**Mr BANSON** - Yes, I think that would be a fair enough comment to make in terms of the entirety of the MOU. Yes. The processes in it are being followed to the extent that they've needed to be so far.

**Ms MORRIS** - We probably have the advantage of having had the AFP MOUs for longer. We have had things that have gone through the whole process of claims for privilege being raised and being referred to the Privileges Committee and then determinations by the Houses in that space, even though we haven't had them in relation to the NACC one.

**Mr GEORGE** - I'm not entirely familiar with the way it works with the federal parliament. As I understand it - tell me where I'm wrong - NACC does the investigating and as I would understand it, it passes on the results of its investigation, should it be deemed necessary, to the AFP. Is that correct?



## PUBLIC

**Ms MORRIS** - No. I think they would have a direct line to the Director of Public Prosecutions.

**Mr GEORGE** - Okay. That is why, is it, that you need separate MOUs for the AFP and the NACC?

**Mr BANSON** - It's about the investigative process itself, I suppose. Before it reaches that point, they have their own investigative processes. We would need separate ones, yes.

**Mr GEORGE** - Okay. All right. That's it, just for the moment. The only other quick question is that three steps - from everything that we've heard, I think, from anyone - the three steps for determining parliamentary privilege seems to have satisfied most jurisdictions. Would you feel the same thing? The three steps work for you?

**Ms MORRIS** - It's certainly been used and endorsed by the Senate Privileges Committee, so yes, we're comfortable.

**Mr BANSON** - Yes, and I think we are too.

**Mr GEORGE** - Therefore, you are, in the same way the NACC is, comfortable but it has educated its people. You feel the same way, do you, in terms of educating members of parliament and members of parliamentary staff?

**Ms MORRIS** - One thing I would say is that I did hear some of the evidence the Integrity Commissioner gave this morning. I think one of the lessons of the experience with the AFP has been that it is good for parliamentary Clerks to be injected into the education process because the grasp of privilege might be high in an organisation at one point and over time drift, and then people can get themselves into situations where they're really completely misunderstanding what the point of these agreements is.

**Mr BANSON** - The Commissioner [of the NACC], I think, probably said to you in his evidence that he was involved in speaking to both party rooms at the start of the parliament. Also, he came and spoke to both of our privileges committees before we had the MOU in place, and we've had NACC give presentations to all our parliamentary staff. The Commissioner came along to our new members seminar to talk to our new members about the NACC. I'm not sure to what extent we've captured members' staff yet. That's the only thing I'm not sure about.

**Mr GEORGE** - Thank you.

**CHAIR** - Thank you. Ms O'Connor had a question.

**Ms O'CONNOR** - Was that a follow up to that?

**Ms WEBB** - I was going to go to training and things, some of which has been answered. Can I have a tiny follow up on that training stuff?

**Ms O'CONNOR** - Sure, because I have a question about how the House controls privilege.

**CHAIR** - Ms Webb.

**Ms WEBB** - Thank you. Here in the agreement it talks about developing training resources to ensure that staff who may in the course of their duties be exposed to parliamentary privilege issues receive training about parliamentary privilege. Is that staff of the NACC, staff of the parliament, or both?

**Ms MORRIS** - Staff of the NACC, yes, which, for us, since we've been captured on video, we have periodically gone to deliver training directly, but they also have videos for new entrants that they can roll out.

**Mr BANSON** - I should add also that when NACC was developing their own training that they're sort of more preliminary training that they provide to all their staff and new people, they did run that by us before they delivered it.

**Ms WEBB** - That's what this agreement seems to require anyway because it says the commission will provide Clerks with the opportunity to review and comment on the training resources that they're developing for their staff. Is that enough of a requirement there to ensure, because you mentioned the Clerks needing to be injected into the process - does that function effectively to ensure that occurs?

**Mr BANSON** - Yes, it's worked well from our perspective, but not only did we look at their material, Jackie and I - as Jackie just mentioned - did go along to NACC and give quite an extensive presentation to all their investigators and staff as well. There were two parts to it.

**Ms WEBB** - Okay, thank you.

**Ms O'CONNOR** - Noting that questions of privilege are to be determined by the Houses, the draft protocol that we have been presented with and, in fact, a number of other MOUs that are in place, establish a privilege determinator, if you like, that's delegated that authority by the Houses. How does it work mechanically at a Commonwealth level when that question of privilege is put before a House to be determined, given that someone might be the subject of an investigation and there will be all sorts of sensitivities there? How would that work?

**Ms MORRIS** - The general process in relation to matters that have gone through the Privileges Committee is that the House has referred it to a committee rather than trying to deal with it in the entire House. The Privileges Committee has, in a couple of cases, appointed someone to do the actual sifting through material. In a way there's not that much difference in a sense, between the model of having a determinator and having a committee supervising a specialist to run through material and do the practical work of sifting and giving some advice to the committee to then report back to the House.

**Ms O'CONNOR** - Again, I'm interested in that though. In the event that a Privileges Committee reports back on a question of privilege, would it then under this model be put to the House or how does this work?

**Ms MORRIS** - Yes.

**Ms O'CONNOR** - Okay, is that a motion, a debate and potentially a vote?

**Ms MORRIS** - Usually it's done by way of a recommendation that the Chair moves for adoption and it can be debated, but often it's not. The reputation of the committees carries a fair bit of weight.

**Ms O'CONNOR** - The Privileges Committee could make a recommendation on whether or not, for example, a certain group or class of documents was covered by privilege and that's the recommendation, with some specificity presumably, that would go to a House for resolution?

**Ms MORRIS** - Yes, that's right.

**Ms WEBB** - One of the differences, I imagine, is there between there being a standing independent determinator appointed ready to do that work versus this arrangement where the House refers it to a committee and then it comes back to the House? One of the differences would seem to be timeliness in that process of being able to occur and, in the instances that we're talking about of these investigations, our *Integrity Commission Act 2009* has some timeframes in which things have to occur. I am not sure whether that's true also of the NACC. Have there been any issues about timeliness of that process if it is something that the House has to deal with in that way of referring to a committee and then having it come back?

**Ms MORRIS** - It's always going to cause delays in the eyes of investigators. It probably doesn't cause as much delay as the Western Australians experienced in relation to their matters where there was no protocol and then you're in Supreme Court actions, so it's relative isn't it. We, like your own Clerks, are agnostic and we don't know what the circumstances are in your Houses that might make you prefer one approach or the other.

I'll check with Peter's view, but I would say that the Presiding Officers and parliamentarians that were on the working groups that we supported were strongly of the view that they wanted to retain the control of the House over that question.

**Mr BANSON** - I don't recall the idea of an independent privilege determinator really being given any serious consideration during negotiations.

**Ms WEBB** - If it's something that's going to be determined by the House, whether by reference to a committee and then back to the House, are there any issues then about the fact of an investigation occurring, and any details relating to it that might have to be exposed in that, a problem? Doesn't that actually become very problematic? We have parts of our Act here relating to our Integrity Commission that are about the secrecy around investigations that are occurring and not being able to disclose them, but they are in fact occurring. How do you overcome that challenge?

**Ms MORRIS** - Two things. I think, first of all, you'd be relying on the protection you have through privilege to protect you from consequences under those provisions, if you're on a committee. I think the other thing is that's the source of the compromise in relation to covert powers that you see reflected in those agreements. The investigative agencies put to our Presiding Officers and the people who are working with them that they couldn't have things out through that public process. So, what was an acceptable alternative in those circumstances?

**Ms WEBB** - But even the reference to the committee from the House provides some exposure right there that there's an investigation occurring.

**Mr BANSON** - I think that's a question probably for the NACC to make. If it's currently in a covert investigation and someone has claimed privilege, it's a decision for the NACC as to whether, essentially, to some extent go overt, or to just not seek to use that information at all.

**Ms WEBB** - I'm thinking of it not just in terms of the covert side of things, even just for regular investigations that are using non-covert powers - they are still not things that can be discussed in the public domain or have come to light. I am a little bit puzzled as to how the House manages that without breaching other arrangements.

**Ms O'CONNOR** - Or compromising investigations to a really significant extent.

**Ms WEBB** - Can you give us an example of what - because there must be a motion to send it to the Privileges Committee, would that be via a motion in the House?

**Ms MORRIS** - That's right, and the examples we have there are where there were search warrants, so it's an overt process by its nature. The neighbours know because the police have pulled up.

**Ms WEBB** - The sound is a little bit muddy at our end. Could you just repeat the last bit you said?

**Ms MORRIS** - The examples that have been through Privileges Committees to date relate to search warrants whereby its nature it's an overt process. The person being investigated knows because people have come to search through their premises. The neighbours know because the police have pulled up.

I think what Peter was going through was that both of the agreements are set up in a way where they're creating some space for investigators to say, 'At this point we're not comfortable with things being overt, but we will quarantine material away until we get to a point where we're happy for it to be overt'. That's when you're triggered into the process of things that are inherently public referring things to a Privileges Committee.

**Ms HADDAD** - I am Ella Haddad, member for Clark. I think it was you, Peter, who said the NACC could decide to go overt. For example, if it's privilege being asserted over some material, the NACC could choose to either go overt and make it - sorry, let me start that again.

What I'm wondering is, at what point might the NACC decide to just continue an investigation without pushing to receive the potentially privileged information? I'm thinking back to Cassy's question. Just forgive me, sorry, I phrased that very badly. The question's around whether the whole House has to make any kind of determination, either determine if privilege exists or accept a recommendation and vote on a resolution from the Privileges Committee or an independent determinator.

If it's got to the point of the House needing to make a determination, at what point would that have to happen? I'm cognisant of what Meg said around our Act having certain provisions where it's actually not alright to even mention that an investigation is going on. They're not allowed to mention it as an organisation; the person being investigated can't mention it; and others can't mention that an investigation is on foot. Discussing a matter of whether privilege

applies to material in either Chamber would expose that very fact that an investigation is going on.

I have a question regarding somebody asserting privilege and then somebody making a determination around whether or not privilege applies. What do you anticipate the timeline is around receiving that information, receiving the assertion of privilege and making a determination under the protocol parliament has with the NACC - versus somebody saying, 'We're not even going to try to seek that information because privilege has been asserted and we'll just leave it at that.'?

I've phrased that really poorly but hopefully you can make some sense of what I've asked.

**Ms MORRIS** - Can I go back a step perhaps? We can't help you with timelines, probably, because I think it will entirely depend on the circumstances. If we're talking about, 'are these three emails protected', well, the committee might meet one afternoon and report the next day and off we go. If we're talking about a vast array of material, as some Clerks in other jurisdictions have had to wade through, you're talking about months, not days.

If you go back a step and put yourself in the shoes of the investigator, I'll use the leak examples, because they're the ones that we've had the most contact with, in examples that have played out. Investigators might want to look at material that has been provided to an MP for use in questioning and Estimates, or whatever it is. We would say, 'Well, cut and dried, you're in territory where that's privileged'. But it's not privileged if they've also given it to the journalist from the *Mercury*. They've got another pathway, potentially, to go down. It's not privileged if they've also sent it to their cousin. There might be other ways they can get to the same end point.

In the NBN case, where material was provided to a shadow and a senator, it might have been possible for them to look at the other end of the pipeline of, how did the person obtain the information in the organisation to begin with? They're not in proceedings at that point if they're rummaging around all the electronic files of the NBN to find interesting things. They're not protected because they're not doing anything. No parliamentarian has any knowledge at all of what they're up to. So there can be ways for investigators to reframe the investigation and what they might rely on to avoid the issue.

**Ms HADDAD** - That helps a lot. Thank you very much. Thanks for making sense of my garbled question.

**Ms O'CONNOR** - I'm interested in how the MOU works in relation to covert powers, which is a live question for us as we work to develop a protocol that's accepted by both Houses. In this process here, 'where the Commission intends to exercise a covert power, they need to notify the relevant Clerk, in confidence, of the nature of the investigation', and then, 'in consultation with the relevant Clerk, potentially appoint a reviewer'.

Who and what sort of person is that reviewer? They presumably provide some preliminary advice on how to identify and quarantine potentially privilege material, but who is that? What sort of position is that?

**Ms MORRIS** - You're talking about people who are internal to the NACC. I think they were even giving consideration to using barristers that they were taking on from outside.

**Ms O'CONNOR** - It may be a staff member of the NACC but it's not certain that they would be?

**Ms MORRIS** - That's right.

**Ms O'CONNOR** - Okay.

**Mr BANSON** - Ideally, at that point, the Clerk having had some discussions with the NACC about what they are looking to get, ideally they will have been able to pass on some advice about the sorts of categories of information that are more likely to attract privilege than others, and it might be a matter of that sort of reviewer then matching up what's actually taken with the categorisation that has been advised.

**Ms O'CONNOR** - So, the reviewer would assess feedback from the Clerk. So if the commission comes to the Clerks, and it says here:

The Commission has to give due consideration to any advice that the relevant Clerk may provide regarding mitigation strategies if the investigation may interfere with parliamentary proceedings.

So, does the reviewer test the advice given by the Clerk?

**Mr BANSON** - I think what I was meaning to say was that the reviewer, I imagine, would have access to the advice of the Clerk and would be testing the information captured against that advice. So, the Clerk might say, 'Look, if you come across this sort of information, you're in really risky territory, but this other information, you're okay'.

**Ms MORRIS** - Can I give a simple, practical - you know, if it's about parliamentary entitlements, we have a fair bit of certainty that it's not protected by privilege. So, if they limit the scope of electronic searches to things that mention entitlements, it might be all right. Maybe they would occasionally come across social security entitlements instead of parliamentary ones, you know, so you are giving that kind of steer.

**Ms O'CONNOR** - Yes. Okay.

**CHAIR** - Any other questions?

**Mr JAENSCH** - I have one.

**CHAIR** - Mr Jaensch.

**Mr JAENSCH** - Thank you. And thank you very much for the time you have spent with us and your submission. Just going back to the beginning, given that we are working through the process of contemplating a protocol, and it has some equivalence to the MOUs that we've been discussing that you are party to: what specific problems was your MOU set up to fix and did it fix those problems?

**Ms MORRIS** - Maybe we will answer that in relation to the AFP one, since there's a series of privilege reports that go to this in great detail. The reason for the first of the revisions

to the AFP MOUs was a dissatisfaction expressed by the Senate Privileges Committee, and the Senate and, I think, the House shared consternation about how the AFP had interpreted the original MOU. They had taken a fairly narrow view of its terms and perhaps not applied it in the way that parliamentarians would have intended. So it was a way of resetting the idea.

To give you one example, the AFP had a view that the protection of material connected to proceedings related to it not being able to be used in court, but we could still seize it. The view of the parliament was that it was immune from seizure, and there are court cases to support that position. So, we spent two or three years having that argument and saying no, seizure is, in itself, infringing parliamentary privilege.

**Ms O'CONNOR** - And you won that debate in the end, didn't you? I mean, not to be so crude about it but -

**Ms MORRIS** - I wouldn't say we did. I would say the Presiding Officers -

**Ms O'CONNOR** - The parliament won the debate.

**Ms HADDAD** - It was resolved.

**Ms MORRIS** - It was resolved.

**Mr JAENSCH** - And so, having made those revisions, has that resolved problems for the parliament, for the AFP? What's happened as a result of those changes?

**Mr BANSON** - It hasn't been tested really, but I think - well, I hope Jackie would agree, it was, as Jackie said, a long process. There was a lot of consultations and I think the position that we ended up with, with the senior AFP people at the end, compared to where we were at the start was a very, very different one. So I think the process itself was educative and, in the end, there's a far greater knowledge within the senior ranks of the AFP now about parliamentary privilege and what the parliament expects. By the time we got to the NACC one, a lot of that hard work had been done, I suppose, to some extent. I think the NACC MOU took us three or four months. It was very short.

**Mr JAENSCH** - Was it consequential to the other, or was the NACC MOU built on solving a different problem?

**Mr BANSON** - I think the commissioner even said himself, he very much did try to model the NACC MOU on the principles that were in the AFP one, to the extent that that was appropriate. So there are a lot of similarities.

**Ms MORRIS** - But it was a proactive step to prevent us getting into problems rather than a response to a problem.

**Mr JAENSCH** - Okay, that's important to know. Thank you.

**CHAIR** - Thank you. Any further questions?

**Mr GEORGE** - No, thank you very much.

## **PUBLIC**

**Ms HADDAD** - Thank you so much for giving us your time and expertise.

**Ms MORRIS** - It's our favorite thing.

**Mr BANSON** - You're very welcome.

**CHAIR** - What you've said to us today is protected by parliamentary privilege. Once you leave the table you need to be aware that privilege does not attach to comments you may make to anyone, including the media, even if you're just repeating what you've said to us. Do you understand that?

**Ms MORRIS** - We do.

**Mr BANSON** - Absolutely.

**The witnesses withdrew.**

**The committee suspended from 1.53 p.m.**



## PUBLIC

**The committee resumed at 3.15 p.m.**

**CHAIR** - Thank you very much for appearing at today's hearing of the Joint Standing Committee on Integrity. If you could please state your name and the capacity in which you're appearing before the committee.

**Mr KERR** - Duncan James Colquhoun Kerr, barrister, former member of parliament, minister and former justice of the Federal Court of Australia.

**CHAIR** - Thank you. Can I confirm that you received and read the guide sent to you by the committee secretary?

**Mr KERR** - I have.

**CHAIR** - Thank you. This hearing is covered by parliamentary privilege, allowing individuals to speak with freedom without fear of being sued or questioned in any court or place out of parliament. This protection is not accorded to you if statements that may be defamatory are repeated or referred to by you outside the parliamentary proceedings. This hearing is public. The public and media may be present. Should you wish aspects of your evidence to be heard in private, you must make this request to the committee at the time.

To introduce members of the committee. From the Legislative Council, we have myself, Ms Rosemary Armitage, the member for Launceston; Ms Meg Webb, the member for Nelson; and Ms Cassy O'Connor, the member for Hobart. From the House of Assembly, Ms Ella Haddad, member for Clark; Mr Peter George, member for Franklin; and, on screen, we have Mr Roger Jaensch, member for Braddon. Also assisting us today, we have Mary and Fiona from our secretariat, and we have Henry from Hansard.

Can I please ask you to read the statutory declaration in front of you?

**Hon. DUNCAN JAMES COLQUHOUN KERR AO, SC** WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

**CHAIR** - Thank you. Would you like to make a short opening statement before we have questions?

**Mr KERR** - I think it might be useful. Just a couple of general remarks. First, I would reinforce that it is a matter of some priority that this issue be addressed by the Tasmanian parliament, so that the work of the Integrity Commission can proceed effectively, or as effectively as it can. I am, however, somewhat sceptical of some of the approaches in the evidence that has been given to you. To the effect that you can anticipate every circumstance that may arise and so that you should provide, as far as possible, to anticipate every contingency. I only say that because the ambit of parliamentary privilege and the way it will intersect with the work of an integrity commission is inherently unforeseeable and the attempt to cover every possible contingency precisely, in advance, is an exercise in some futility.

My instinct, rather, is that the better approach mirrors that largely of the Commonwealth regime that applies to the NACC, but with this observation that much of the way in which that regime operates might be difficult to apply in Tasmania because of the different scale. The NACC provides for instances where there may be an issue of privilege arising to be, in a sense,

dealt with in a Chinese Walls type situation. That assumes a certain scale in the size of the organisation so that those who are charged with investigation don't know until it is decided that material should be released. They just don't become informed of it. Whether the Tasmanian Integrity Commission is at the scale that is capable of doing that, I'm not certain. I suspect it may present some difficulties.

But the overall approach of that memorandum seems to me to be preferable to an attempt to particularise everything in anticipation and through the process of education and training, and the way in which warrants and other mechanisms for compelling the production of evidence operate, there is a lot of forethought that goes into ensuring that the issue of parliamentary privilege is rarely going to arise. That doesn't mean it won't because there are going to be circumstances where warrants, for example, are issued to third parties where no-one would anticipate that an issue of parliamentary privilege would arise, then that Chinese Wall mechanism comes into effect.

I drew from the evidence that I read from Mr Brereton [Chief Commissioner of the NACC] that there was some suggestion that perhaps the system wasn't working well because there had never been a fully contested instance of parliamentary privilege. I drew a different conclusion, which is that the preliminary work and the Chinese Wall mechanisms are doing what they're supposed to do and that those who are responsible for the interface between the commission and the parliament are doing their work effectively. I suppose those are some introductory remarks, just by way of general observation.

**Ms O'CONNOR** - Thank you, Mr Kerr, for coming along and talking to us today. You have read the draft protocol that the Integrity Commission prepared for us. Can we take from what you have just said that on your assessment is that it's overly complicated?

**Mr KERR** - Well, rather, that some of the witnesses who appeared before you were urging a course that would be even further complicated than that and go to prescribing all sorts of circumstances to the best capacity of the committee. My own scepticism only arises that I think it is difficult to anticipate every circumstance in which an issue of parliamentary privilege may emerge and I think it perhaps gets away from some of the fundamental premises.

I'm personally not attracted to the idea of having an arbitrator, independently appointed. I understand the motivation and it's good motivation, but I'm old fashioned enough to believe that the Clerks and the chairs of the respective Houses have a responsibility that transcends their partisan, in the case of members, sometimes they're partisan officers, and in the case of the Clerks, hopefully, they don't have any because they've been selected through a process in which their own independence has been assessed. I don't have the scepticism that some of the witnesses have put about a system - I think that, again, scale is a difficult thing, but I don't think in this environment that scale would warrant such a system.

I'm also not sure that, as a matter of constitutional principle, the parliament should surrender its boundary riding of what is parliamentary privilege to any individual. It seems to me very close to a delegation of powers that can't be delegated. Perhaps it's been unproblematic in other circumstances, but that may be simply because the litigation that might arise has not had an occasion to emerge. One of the things that those who have submitted to you have all agreed upon is that parliamentary privilege cannot be waived by the parliament, in a sense. Therefore, in the end, I think it is for the parliament itself to enforce those boundaries. Sometimes perhaps inconvenient, but the way that the federal system is operating, there's a

certain preliminary attention to matters perhaps that wouldn't be given in circumstances where, if you are a bit more gung ho about it, you say, 'Well, that doesn't really matter, it'll be determined by an independent arbitrator.' So, there may be more willingness to move closer to the line than would be perhaps approved by parliament.

I still am old fashioned enough to believe that some confidence should be reposed in the Clerks and Presiding Officers. Particularly, the parliament Presiding Officers, if they get it wrong, are subject to the will of the various Houses.

Serious contests about privilege, I believe, should be resolved firstly by the relevant privileges committee and by a report to the parliament for disposition. That's old fashioned, but I think it is a better constitutional principle than saying 'such issues as arise from the exercise of these powers are to be determined by some person who will be selected for their independence but has no responsibility to the parliament.'

**CHAIR** - Thank you.

**Ms O'CONNOR** - How would that work mechanically here, if you've got a question - if privilege has been asserted and it needs to be tested -

**Mr KERR** - I don't think there's going to be much difficulty when privilege has been asserted. The real challenge, in any system, will be when the persons who are the subject of the search don't know about it. We now authorise the interception of telecommunications, we have various covert processes that we deliberately give to our integrity organisations, and they present, in my view, the more difficult instances. Where privilege has been asserted, it would be determined by the privileges committee in the first instance and then by the parliament. Obviously, it goes to the parliament, and normally it would be a rubber stamp that happens at that level - it's been the subject of consideration.

Rarely do privileges committees diverge, in my experience. I sat on the Commonwealth Privileges Committee for a short period of time, but it worked without any real regard to - without *any* regard, not any real regard - to partisanship. It's 'what goes around, comes around' - if you are a bit fast and loose about allowing some piece of mischief to blight your opponents, it's not a good principle, because it may well come to blight you also.

**Ms O'CONNOR** - That's right - political karma. So, we have a bit of a tension here, which is that under the *Integrity Commission Act 2009*, it is unlawful to confirm that an investigation is afoot, or that a referral has been accepted and an investigation is afoot. How do you protect the people who may be the subject of an investigation? I agree with you on the principles - but how do you protect them and not confirm an investigation when there's a relatively large audience there that would be examining the question of privilege, and they'll come from all parts of the parliament and the political spectrum?

**Mr KERR** - Look, it does present great difficulties; it presents them under any circumstance. I would think that the simple solution is to say that there is an exception in instances where parliamentary privilege is engaged, or may be engaged.

**Ms HADDAD** - An exception to disclosing that an investigation -

**Mr KERR** - It still doesn't answer the question of covert search, because a covert search - and if I can say, I read Mr Brereton's [Chief Commissioner of the NACC] submission with some care, and I think some members of the committee may have thought that his disinclination to answer a question about whether those powers have been exercised in respect of parliamentarians, that may have been suggesting they had not. I think given the number of referrals - it is improbable, if I can put it that way, that they have not been so exercised.

What his evidence was, and I think it's persuasive, in my view, was that they're very careful in the way they prescribe the materials in which they're searching. It's very rare for instance to arise where an issue is not dealt with simply by it not falling within the requirements of the search. Or secondly, if it potentially does and a potential issue arises then it goes, it's quarantined and the consultations occur between the House. Now, it's not a perfect situation. I don't think you'll ever get one.

I think the urgency you have is to put something in place that will work well most of the time. In that regard, the memorandum of understanding that the commission has put forward, it's not what I would adopt as a preferred model, but you wouldn't be doing anything horribly wrong if you were to adopt it, because I don't think there is any counsel of perfection in this area. I think the task is to get something on foot that will work well in the vast majority of instances. I also think that where it appears, perhaps, to give rise to a proper issue of parliamentary privilege that it's resolved by the parliamentary Chamber that is engaged.

Now, that may mean that certain things don't happen in an investigation whilst things are set aside. There may be a covert operation, it continues. Sometimes covert operations, in their nature, will discover nothing or the matter is not likely to be substantiated under any circumstance and there's no testing of the proposition. However, if it does seem there's some material that may be essential, that there's consideration, where a claim for privilege may legitimately arise, I think the point is then to determine it is in the Privileges Committee and by resolution of the House. I don't think that will happen very often; it's not happened in the lifetime of the NACC. I would not want to be thought to suggest that that's because they're not doing the job they've been asked to do. It's rather that they focus their inquiries very tightly. I'm not suggesting either that the New South Wales integrity bodies, or others that have an independent arbitrator, are wildcards going off on forays of their own without regard to the issue of parliamentary privilege and then leaving it to an independent umpire to sort of work it out.

But you can see the different approaches, and one is more likely to give rise to an issue, because you simply say, 'well, there's an independent arbitrator there, they'll sort it out'. The other is, 'let's sort it out initially, let's make sure we're narrow in what we're seeking and not give rise to an issue that's likely to ultimately require the resolution of the House'.

I think the latter course doesn't constrain a commission of inquiry to a degree that would get in the way of its work. It may have to delay things, but at some point, if an inquiry has progressed there will be a point at which time matters that were previously covert will become the subject of knowledge of the person of issue. Then such claims as are made, if any, can be heard and determined.

**CHAIR** - Thank you.

**Ms WEBB** - It's not like we don't have our challenges here with delays in investigations anyhow, although we do have a habit of proroguing our parliament fairly regularly. There's that, which also presents delays when it's the House that needs to make these determinations. Those were comments, not questions.

I wanted to ask about the covert side, because the draft that we are having as the basis of this Inquiry, and looking to progress, in some sense, doesn't deal explicitly with the covert powers.

**Mr KERR** - That's a criticism that's made of it, but not one I entirely share, because again, I think it's one of these circumstances that - it's difficult to anticipate every circumstance arising.

**Ms WEBB** - I wanted to ask you - it's been put to us by other witnesses that we could look to the NACC agreement with the federal parliament, which does have Part 6 explicitly dealing with covert powers, and we could replicate something along those lines. The difference, of course, is that it does bring the Clerk into a role to have some form of guidance, and almost as a determinator. Not quite, but almost. I'm wanting to test your thoughts on that.

**Mr KERR** - I fully agree with it. I don't know the process of appointing Clerks in Tasmania, but at the federal level, you don't get to become a Clerk of the parliament unless you're squeaky-clean.

**Ms O'CONNOR** - Same here. Appointed by the Governor.

**Mr KERR** - Neither side of politics, full independence. If you have somebody who genuinely thinks a person should not be appointed as Clerk, I'd be very surprised, wherever that objection came from, if the appointment proceeded. I actually think that's much more in tune with the constitution. The Clerk is responsible to the House that they serve.

**Ms WEBB** - To fully flesh that out if I may, the way that it's dealt with in the NACC agreement with the federal parliament, if there's a covert warrant, the Clerk is engaged in a discussion about that to help narrow it. But then if there is need for there to be a determination, the Clerk is consulted on an appropriate independent person who could be within the integrity entity but not in the investigation side of things, in a different side of things, who then would -

**Mr KERR** - That's the Chinese Walls issue that I -

**Ms WEBB** - I hear your concern that, because of our small jurisdiction and our small integrity entity, that's a more challenging proposition although that independent determinator - which sounds like a terrible role to have - could be external in fact, and probably here in this jurisdiction, would almost need to be.

**Mr KERR** - Would almost certainly have to be. I don't know, again, the numbers of people who are employed, but it just struck me that it's not in a practical way, it's not immediately replicable and you would probably have to have an anticipation that those things after consultation with the Clerk would go off to an independent person. Nobody wants corrupt conduct of the staff of parliamentarians or parliamentarians themselves to be incapable of being investigated. I just think the location of where the ultimate resolution would be, should involve

the engagement of the Officers of the parliament and, ultimately, if required, the committees of the parliament and the parliament itself.

It seems to me that there's this growing sort of scepticism that parliaments can operate in any way that engenders public trust to the extent it exists. Perhaps on some occasions it's been justified, but you don't solve that problem by being untrustworthy, by delegating things that should be decided by the parliament to third parties. In the end it really means that parliamentary privilege becomes a lawyer's forum, rather than the Houses themselves determining where those boundary lines are.

**Ms WEBB** - The other area that I see that the federal parliament and the NACC agreement MOU differs from the draft that we're contemplating here is around the inclusion of third parties and material that might be obtained as part of investigation from third parties but may in fact also be able to attract parliamentary privilege. Again, in that national agreement there is a role for the Clerk in that. Do you see that as also something we should contemplate including and similarly think about that appropriate role for the Clerk.

**Mr KERR** - Yes. In any instance where parliamentary privilege is likely to be an issue, you have to have some mechanism to address it. Whilst rare, I don't think it would be at all unusual for a circumstance to arise where an investigation into a third party commenced for reasons that don't appear to have any connection to the parliament initially, and give rise to some material that will need those sorts of consultations.

**Mr GEORGE** - I must say, I do like what you have to say is that I think we should be able to have confidence in our Clerks, or they shouldn't be in that position, and that in the end you can't delegate the final decision outside the parliament. The idea that it goes through a Privileges Committee and then goes to the House, that seems to me to be an ideal way of approaching these things. I also think that in some ways we're perhaps not a large enough state to have to start calling in outside arbiters to make decisions on our behalf.

However, I do note that, we are a small parliament, and we are a very small state and there's a very small legal profession. The history of this island doesn't necessarily give you enormous amounts of confidence in getting to the right decisions that are not politically or otherwise impacted. I'm wondering whether you would consider that we should build into an MOU the ability to call in and consult with an independent arbiter, which would probably have to be off-island, for circumstances where privilege actually becomes a far more complicated matter than we might otherwise expect.

**Mr KERR** - I just think building architecture for the sake of anticipating things is a wrong approach. I appreciate that there have been instances where a premier has been charged with corruption, there's been instances where bribes have been attempted on parliamentarians in Tasmania, and you have a relatively modestly resourced Integrity Commission in Tasmania. I think that's an issue that you might also -

**Ms WEBB** - We're turning our mind to that.

**Ms O'CONNOR** - We have, relentlessly.

**CHAIR** - Under-resourced, I think you'd say.

**Mr KERR** - I think the answer comes down the other way: if you have the Integrity Commission focusing its mind before it commences an inquiry as to how to narrow the terms in which it will seek a warrant, particularly a covert warrant or something of that kind, most of the issues that might give rise to contentious conflict between the doctrine of parliamentary privileges and the work of the commission will in practice not require anybody's attention.

My real focus then is what if something does and, notwithstanding the view of the Clerk, a member says for example: 'You have been a little cavalier in your dismissal of my concerns. I want this matter to be the subject of a referral to the Privileges Committee.' I still trouble myself that the systems that give those kinds of decisions to somebody who's appointed externally just doesn't fit with my understanding of what parliamentary privilege is or should be.

**Mr GEORGE** - I was thinking more in terms of advice rather than a final arbitrator or determinator.

**Mr KERR** - I still think the Clerks are in a very good position to do that.

**Ms O'CONNOR** - Just on that, is it the case though that questions of privilege - and there's a three-step test in the NSW MOU and we've been advised to examine that possibility - but determining whether something is captured by parliamentary privilege in itself shouldn't be that difficult.

**Mr KERR** - It shouldn't be. If there is going to be an examination of the conduct of a staff member, an electorate officer, a member, it's obvious that there is a possibility that a broadly-drawn warrant to search offices and all those sort of things might well give rise to issues of parliamentary privilege, so narrowing it down at the first stage is the most sensible thing that can be done.

Any protocol, I think, should build that in at the first expectation of the parliament and I think the logical person for them to consult in instances like that is the Clerk. That's old fashioned, I appreciate, and it is not the model that is now favoured in some other state. But I -

**Ms WEBB** - May I follow up on that because I think there's a distinction here though. I think at that early stage where there's a suggestion that things could be narrowed to avoid prompting an assertion, consultation with the Clerks is built into most of these MOUs or protocols. I think when it gets to the stage, and we're acknowledging it rarely needs to get there, but if it does get to the stage where there's the assertion of parliamentary privilege over something in particular, is then contested by the integrity entity that's seeking access to that, and you have that decision to be made, which rightly rests with the Houses of parliament, whatever the relevant House is, and let's say that, like the federal model, is then referred to the relevant privileges committee and it's for them to make a determination and to bring back as a recommendation to the Chamber.

That process and getting advice that they may wish to get at that point in time may not most appropriately be from the Clerk, because in some sense the Clerk would then be helping them make a judgment about one of their fellow parliamentarians. We did hear from the Deputy Clerks of the Senate and the House of Representatives this morning, that they mentioned that

their Privileges Committee at that point have at times sought external advice, not to make the decision but to advise them at that point of decision.

**Mr KERR** - That's constitutional.

**Ms WEBB** - Do you see that an external independent piece of advice at that time might be most relevant, rather than internally within?

**Mr KERR** - Yes. I think if there are difficult questions there's no disadvantage at all in the parliamentary committee seeking, from its own selected advisors, advice on the issues. I don't see that as a problem. It's that they're not - that's not disposition - that doesn't dispose of it and, in a curious way, I don't know whether it disposes of it in the New South Wales-type system either.

When a matter ultimately was the subject of further proceedings, let's say charges were laid or something like that, I'm not sure that that would withstand any great scrutiny as an immunity that would be - I mean, I don't think those things have been tested but whether they work or they don't work is, in a sense, a second order issue from my point of view. I think parliament should be wary of abandoning its responsibility of asserting its own privileges, defending its own privileges.

**Mr GEORGE** - It's a bit of a follow up and its sort of moving on to something -

May I ask you, Chair, who drew up the draft that we're looking at, at the moment? Is that the parliamentary drafting office?

**Ms WEBB** - No, the Integrity Commission.

**Mr GEORGE** - It was the Integrity [Commission]? Okay.

**Ms WEBB** - And they interacted with our Clerks, and it sort of came about through some back and forth.

**Mr GEORGE** - I'm new to this. First of all, I gather that you are in favour of a MOU and a protocol, right? Step one.

**Mr KERR** - I think it would irresponsible not to proceed as fast as possible.

**Mr GEORGE** - Great. Step two, I feel that you have a preference for the way that the NACC's memorandum of understanding is drawn up.

**Mr KERR** - Broadly, yes.

**Mr GEORGE** - And so No. 3 is that, with this draft from the Integrity Commission, do you see that as being overly complex? Or why would you have a preference for the NACC's MOU when you compare it to this one?

**Mr KERR** - I think because it locates responsibilities in the right places.

**Mr GEORGE** - Right.



**Ms HADDAD** - The NACC one?

**Mr KERR** - Yes.

**Ms O'CONNOR** - Solely with the parliament.

**Mr GEORGE** - Can you give specifics in the comparison?

**Mr KERR** - Well, I don't know - no. I can't really, at this stage. I mean, I could go into a point -

**Mr GEORGE** - You could if you did a - yes -

**Mr KERR** - I could, but not on my feet.

**Ms WEBB** - We might follow up with you.

**Mr GEORGE** - No, it's just your general sense of having read them both?

**Mr KERR** - Yes and, as I said, I'm not trying to suggest that there's any perfect solution.

**Mr GEORGE** - No.

**Mr KERR** - I don't think you would be doing the parliament a disservice if you chose the model that has been suggested by the Tasmanian body. It's just that I think it can be done better and more appropriately. So, I'm far from being critical of that. I mean, I don't know the means by which it evolved or anything of that kind, but it does strike me that it's been in the gestation for an awful long time. Much longer than an elephant.

**Ms WEBB** - For clarity for Mr George as well, the draft we're looking at here predates the NACC.

**Mr GEORGE** - I know it's incredibly old.

**Ms WEBB** - So it didn't have that to refer to. Now, we have a more up-to-date and more contemporary instrument to look at -

**Mr GEORGE** - If you have something better, why wouldn't you go for it? Yes.

**Ms WEBB** - which this Inquiry provides us with the opportunity to do that, which is happy.

**Mr KERR** - I think the NACC also comes after the Commonwealth had some experience with the memorandum that perhaps I had something to do with. I am trying to remember, but I think without -

**Ms O'CONNOR** - The AFP one.

**Mr KERR** - The AFP, yes.

**Ms O'CONNOR** - That came up this morning in our discussion with the Deputy Clerks.

**Mr KERR** - But I think, without traversing every possible way in which you do this, my own preference is that the NACC approach is broadly the right - the best. Not that anything is terribly wrong, but I just -

**Ms WEBB** - Just keep it simple and parliamentary, is what you're saying, I think.

**Mr KERR** - Yes. Again, it reflects a very old fashioned viewpoint of my own that parliament should not surrender to the idea that it cannot act with integrity, that its committees are not the right place to determine, ultimately, the boundary line of where privilege is to be asserted and maintained.

**Ms HADDAD** - I'm quite new to this committee as well, so forgive me because I can't remember which models - I might be muddling them up. There are some who, when they do go down a path of having an independent determinator, there's certain criteria set for what kind of person is appropriate to be appointed to that role - former judges, lawyers of X number of years standing -

**Mr KERR** - But not me.

**Ms HADDAD** - but not a member - not a former member.

**Mr KERR** - I don't take it as any slight.

**Ms O'CONNOR** - You have come up in dispatches as an example of someone who could be qualified but for your time as a politician.

**Ms HADDAD** - Yes, that's the only black mark against you individually in that list. I wonder about that because I agree with your - you described it as old fashioned; but maybe it's more accurately described as a traditional understanding – that we should be able to expect parliaments to act ethically and for committees to do the work that they are charged to make, regardless of political affiliation.

I wonder if you have any view on those models where they ruled out ex-members, because I feel like those of us who do work as members as well as senior parliamentary staff, Clerks specifically, actually have a very different understanding of how parliaments work and how privilege works compared to any other member of the community including ex-judges and qualified lawyers. I would argue that your experience as an MP would make you more suitable for a role like that than your experience as a judge or a lawyer of X number of years standing, but ex-members of parliament are excluded in those jurisdictions that do have an independent arbiter. Do you have any views about that?

**Mr KERR** - Well, it's a matter of great regret on my part, which I've articulated publicly on many occasions, the disinclination to use the talents and skills of people who served in state and federal parliaments as judges has increased. There's a lack of understanding increasingly between the different arms of government and, as a consequence, there's not a great sense of each other's constitutional roles necessarily, and it becomes a more abstract process.

But, look, I understand why those kinds of things are put there, because they seem to be belts and braces. Personally, I think you're never going to find a human who doesn't have some kind of bias, unless they've never voted in their life and lived in a padded cell. They're going to have some people who they think well of even when they start or less well of, or they will have some world view that will incline them more to a conservative side or more to a progressive side, or to the Greens or whatever. I don't think you remove it by some kind of application of label.

Where I would agree with Ms Webb is that there will be times if there is a genuinely difficult issue where a Privileges Committee should be resourced and capable of engaging an external consultant - or more than one - to assist in a resolution. It gives a reasoned platform that people can consider and say, 'Yes, that's persuasive,' or, 'No, I'm not persuaded by it.' In that situation, I think it should be entirely in the hands of the committees who to seek. I do get the sense in some of the submissions that there is this lack of trust in the parliamentary institutions -

**Ms HADDAD** - Real cynicism.

**Mr KERR** - and that by appointing a person externally who looks to have no history that would be disqualifying that can somehow substitute for ultimate constitutional responsibility for the assertion of the privilege. I just don't agree with that.

**Ms WEBB** - Can I put a slightly different viewpoint to you on that to test with you? I can understand why, in the case of, say, a matter referred to a privileges committee, that it's going to be their decision. They seek independent expert advice to inform their decision, but are entirely the decision makers. In that case I would think there wasn't a problem necessarily with a previous political affiliation or member of parliament potentially because they're not the decision maker.

In the jurisdictions referred to by Ms Haddad, however, who have basically outsourced the decision to the independent arbiter, the preclusion of someone with a political background isn't because of a doubt of their capacity to be unbiased. It's purely, almost solely, because of the perception that could be there then of a decision that they may make in that role and the idea of precluding political background is to ensure that there will never be a question over perception of a decision made by that person.

**Mr KERR** - If I was setting about a corrupted process, I could appoint somebody who looks really good but would reliably determine a matter in a way which was in accordance with the way in which I wished it to be determined.

**Ms WEBB** - Governments do that all the time.

**Mr KERR** - So, I really don't think that that's a persuasive objection. Nonetheless, it's a system that's operating. As I say, I don't think there's any perfect model. Those systems have yet to be rigorously tested as to the way in which the product of such determinations are ultimately determined if a matter is the subject of litigation. All kinds of arguments could be raised about whether or not it is capable for the parliaments to ineffectively delegate that responsibility.

I'm trying to stay away from all that stuff and just say, 'Well, how should it work?' My starting point is that the NACC's got it right. The starting point has to be in the training, the education and the approach of the integrity body. First, they work to narrow down any inquiry, then they put in place effective ways when something does hit the circumstance where there is an arguable case that it's quarantined and some mechanism is sought. In the NACC's case, ultimately, the determination would be for the Senate or the House of Representatives.

The fact it hasn't been used, I don't think is - the fact that that last step hasn't been required, I think is really an indication that if you do this thing sensibly, the number of instances where it's likely to give rise to problems will be quite small.

**Mr GEORGE** - I really like just the ideas of keeping it pretty simple and taking the rather traditional old fashioned view of it. The alternative view, I suppose, is that, first of all, the old sore - justice has to be seen to be done. Second, that the political parties are, let's face it, more siloed than they ever have been in the past and that in the modern context, faith in our MPs and in parliament have actually sunk to an unfortunately low ebb.

I want to put - within that context, do you believe - and sorry, also accepting the fact that you or I, we could choose an independent arbiter who's going to give us the right result. I know that that's possible.

**Mr KERR** - An independent looking arbiter, who's never been a member of the parliament.

**Mr GEORGE** - That's right. What I was wondering is, whether inserting a form of independence, which is what we've been discussing in some form or another - I'm not talking about as somebody who makes the final decision, but someone who actually plays the public role, should it be necessary. Does that not sort of give at least a sense of greater public confidence? After all, public confidence in parliament is what it's all about.

**Mr KERR** - I just think if parliament doesn't have confidence in itself, why should anyone else?

**Mr GEORGE** - Okay, that's a good answer.

**CHAIR** - Roger, do you have a question?

**Mr JAENSCH** - Yes, I do. Thank you very much, Mr Kerr. I haven't met you before, but I've really enjoyed listening to you. I find myself in agreement with a lot of the statements that you've made. I think that there's a trend.

Somewhere I read or saw that people tend to live down to your expectations of them. We find ourselves, I think, in a period of discourse and politics where we're demanding more of people's responsibilities and, at the same time, expecting less of them. Therefore, we feel the need to bring in someone who's not a politician a lot. I think that that progresses us down a spiral to the point where elected office has no value and I don't know what replaces it. So, I agree with you.

I won't rehearse that too much further. I do agree with the principle of ensuring that we're enabling our existing machinery to work as it was intended and as tradition has evolved it, I think that's very important. I think that's a good take out.

Particularly, outside this particular Inquiry, if we're also making comment as a committee and providing advice back to parliament as well, as to whether resourcing of this commission and its officers to conduct their work more effectively, is not a bad alternative to spending the same money on paying other people to come in and do parts of the job to make up for some of its shortfall.

A question I've asked a few other witnesses though, and given your comments on the draft protocol and your knowledge of some of the other things we've been comparing it to is, if what we're currently looking at is a bit too much - or overkill to some level - is there anything else in your reading of it or the work it addresses that you think we've missed? Is there a gap? Is there something else that we might usefully refocus around that would help us, rather than adding more complexity to something that is already possibly stretched?

**Mr KERR** - Look, I don't think so. I have had the occasion to read quite a bit of the background materials; not everything, of course. I don't think you missed anything. If I was to be critical, going back to Ms Webb's observation that the drafting of this proposed protocol predates the NACC protocol or the existence of the NACC, it really is a bit of a disgrace that the parliament hasn't put in place something to deal practically with the kind of issues that arise by giving powers to the body charged with investigating corruption and the parliament.

My strong hope is that whatever course you, as members, see fit to recommend progresses as quickly as possible, because it means that would give some rise to greater confidence, that people have looked with clear eyes, and had a look at what the possible models are and have selected one and are going ahead and I don't think any of the models is without its problems. Even the NACC model will potentially give rise to a circumstance that will have to go to the parliamentary committees and be determined, but I don't think that's, in a sense, a flaw. It just means that there may be an instance where a claim of privilege is in the grey, where it is not black and white.

My own view is, and I thank you for your observation, but my own is old fashioned and that, ultimately, if the parliament cedes its capacity to police the boundaries of its privileges, then it's changing the constitutional position. I'm not sure that, in the end, it preserves better public confidence in the institution. In fact, I think it really is an acceptance that the public is right to - and look, I understand why New South Wales, for example, has probably chosen the method it has. It is had Eddie Obeid and it's had a whole raft of villains and probably is under greater immediate pressure to sort of say, 'Look, we have to have an arm's length process'.

**Ms WEBB** - And it mirrors the production of documents process too, where there is an independent arbiter.

**Mr JAENSCH** - But does it also reflect a trade-off between independence and accountability? So that if you have people who are brought in solely on specialist knowledge, they are appointed through a process rather than an election and they, at the end of the day, are paid their fee and disappear. They are not there to answer to.

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**Mr KERR** - Well, they certainly don't have to think through the strategic position of the parliament and its members and its staff as they are engaged in what, I think, is, ultimately, a pragmatic assertion of power by the parliament, and it's a power that the parliament has been conferred with to enable its workings to be unimpeded. I think there is a real doubt about the constitutional probity of surrendering that or delegating it. I have always worked on the principle that, where parliament is given a constitutional responsibility, it can't do that. Perhaps it will be litigated in New South Wales or somewhere else and I will be proved to be incorrect, but there certainly could be no criticism of a policy choice to retain that power. It's not on the edge.

**Mr JAENSCH** - I agree.

**CHAIR** - Thank you. Any more burning questions from anyone?

**Mr KERR** - Can I just add one other thing? In an environment where you are anticipating that there is a potentiality for a matter of privilege to come before a privileges committee, then it is important that the selection of the privileges committee is attended by some care. That's all.

**CHAIR** - Thank you.

**Ms WEBB** - It is an important point. Thank you for that point.

**CHAIR** - Thank you very much for your appearance today. What you have said to us here today is protected by parliamentary privilege. Once you leave the table, you need to be aware the privilege does not attach to comments you may make to anyone, including the media, even if you are just repeating what you have said to us. Do you understand that?

**Mr KERR** - I don't propose to be making any comments to any media, but thank you.

**CHAIR** - And you do understand?

**Mr KERR** - I do understand.

**CHAIR** - Thank you very much.

**Mr KERR** - Thank you very much.

**The witness withdrew.**

**The committee adjourned at 4.08 p.m.**