

PUBLIC

THE JOINT STANDING COMMITTEE ON INTEGRITY MET IN COMMITTEE ROOM 1, PARLIAMENT HOUSE, HOBART ON MONDAY 27 OCTOBER 2025

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

The committee met at 10.02 a.m.

CHAIR (Ms Armitage) - We're very grateful that you've come along today. Welcome to our hearing of our Joint Standing Committee on Integrity.

If you could please state your name and the capacity in which you'll be appearing before the committee.

Prof APPLEBY - My name is Professor Gabrielle Appleby. I'm a professor at the University of New South Wales Faculty of Law and Justice, and I'm the Head of Research at the Centre for Public Integrity. I'm appearing in my personal capacity.

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

Prof APPLEBY - Yes.

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

I'd just like to introduce members of the committee. We have Cassy O'Connor, member for Hobart; Peter George, member for Franklin; Meg Webb, member for Nelson; me, Rosemary Armitage, member for Launceston; and Ella Haddad, member for Clark. On screen we have Roger Jaensch, member for Braddon; and our secretariat here we have Fiona and Mary. On Hansard we have Terry.

Thank you very much.

If you could make the statutory declaration in front of you, please.

Prof APPLEBY - Certainly.

Prof GABRIELLE APPLEBY, CENTRE FOR PUBLIC INTEGRITY, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - Thank you. Do you have a short statement you'd like to make before any questions?

Prof APPLEBY - Yes, sure, Chair, and very short. This submission was put together by myself and Associate Professor Will Partlett from the University of Melbourne. I'll speak to the matters in the submission and Associate Prof Partlett sends his apologies. He was not able to come today for personal reasons.

The general thrust of the submission, if you will, is that we really welcome the development of such a protocol in the state so it's really important to clarify how these matters might be executed in practice. History has shown when it comes to executing these types of warrants there can be confusion on both sides - both the anti-corruption commission and the parliamentary side as to how they operate.

We do in the submission make a number of small suggestions for consideration by the committee as how to strengthen and clarify the protocol. We emphasise that it's really important to make sure that the protocol gives responsibility to the right people within the constitutional system, particularly with respect to notification of a warrant making and determining claims of privilege.

In our submission, this needs to be informed by the purpose of the Integrity Commission and particularly by parliament's role in ensuring government integrity and the function of parliamentary privilege in facilitating parliament's constitutional purposes. We emphasise the importance of a protocol such as this being really clear. So, clarity in how it will operate in practice, as I said in my opening remarks, when there is confusion, that will inevitably cause problems in practice, and history shows in other jurisdictions that that is the case.

For instance, one area that we have identified in the submission that is not clear in the protocol is in relation to the executions of covert warrants. There are exceptions made in the protocol, but it's not clear what the alternative process will be to still ensure parliamentary privilege is respected in those circumstances.

Finally, we do emphasise the importance of - once the protocol is put in place - the need for education and training in relation to the protocol. Again, history has shown that having the protocol is a good first step, but you need to make sure the relevant officers are aware of the processes and the procedures. When these things happen in practice, it's usually urgent and people need to know their roles and how to execute the protocol; and so there needs to be something put in place to ensure that can happen as the next step once the protocol is agreed. Thank you.

Ms O'CONNOR - Thank you for coming along, Professor Appleby. In your submission, when you're talking about the kind of protocol we might put in place, you point to the New South Wales model where the ICAC has had a protocol of some form or another with the parliament since 2009, and perhaps it does need updating. What is it about the New South Wales protocol that you think is potentially superior, if you like, to what the Commonwealth National Anti-Corruption Commission has in place with the federal parliament? The MOU, as I understand it, was only agreed to last year.

Prof APPLEBY - Yeah, sure. We drew upon both the Commonwealth and the New South Wales protocol, in particular, when we were writing our submission to try to assist the committee in determining the best agreement for Tasmania. In our view, the Commonwealth memorandum of understanding, which is equivalent to the protocol, has a couple of processes

that we think don't quite get the balance right between the role of the Anti-Corruption Commission and the role of parliament.

I will take you to a couple of instances: so under the Commonwealth MOU, in determining disputes over parliamentary privilege, the presiding officer puts the matter before the relevant House, so the question of parliamentary privilege can be determined. Ultimately, it is the House and the House's responsibility to determine privilege, but there are concerns when matters such as these are put before an entire House that they can be caught by party politics. Generally speaking, these types of issues are referred to committee to determine on behalf of the House.

We think that is an issue, and our recommendation is that in Tasmania, questions of determining disputes over parliamentary privilege are determined by an independent arbiter appointed by the committee representing the House. That picks up part, but not full, of the New South Wales protocol.

The New South Wales protocol has an independent arbiter determining the privilege, but that independent arbiter is determined by a presiding officer. Once again, we look at that and we think, well, the presiding officer is an individual, doesn't represent the House, and the better institution/body to appoint the independent legal arbiter would be the committee. Again, we can see the benefits and the disadvantages of both, and we're trying to find a best-fit solution for Tasmania.

In relation to the importance of education, again we drew on both the protocols, and we see that in the federal protocol, the NACC is given the responsibility for setting up education to determine - to make sure that the different officers are aware of their responsibilities. Now, the Tasmanian protocol doesn't deal with this question of training and education at all. We have concerns that it would be one party to the agreement, and particularly the party who has the power to execute the warrants. Our recommendation is not to follow that example, but to look more at that principal level, and we've made the recommendation that it should be the independent adviser to the Houses, the Clerks, that undertake that responsibility.

I'm not sure I've directly answered the question as to which is the better protocol, but we've tried to draw on the different protocols, see the strengths of them, but then also take a principled sort of reflective analysis to provide our advice for your consideration.

Ms O'CONNOR - Thank you. If we could just go back to basics, there's been some delay with the establishment of a Tasmanian parliamentary protocol. Why, in your view, is it important that we do have a protocol in place with the Integrity Commission on matters of privilege?

Prof APPLEBY - Sure. When warrants may be issued in relation to documents where there are questions of privilege that need to be determined, there have been historical instances, particularly, for example, at the Commonwealth level, where it's unclear as to how those warrants need to be executed on parliamentary premises, who is allowed to be notified, who is allowed to be present and how privilege is going to be claimed and then determined.

All of this should be determined in advance so that documents aren't inadvertently provided where privilege should have been claimed, which would undermine the parliament's

role and ability to claim privilege. These things should be determined in advance so there can be clarity and those important questions can be worked through.

Ms WEBB - I will follow up on a few of those. One of the things I am interested in is just how this looks in practice, if it was all playing out, especially if, as per your recommendation, the Integrity Committee were to have a role, for example, in setting an independent arbiter to make determination about privilege; where does that then sit in the process of what's going to happen?

You've got the integrity entity wanting to execute a search warrant. If it's on parliamentary premises, presumably they also then have to go through a process that's also in the protocol, which is about notifying relevant people, which may be the other presiding officers or the Clerks; and then at what point does the claim of privilege come in? Is that claim then made to the integrity committee to then appoint the arbiter, or what are the mechanics of how it would actually work? Who calls who?

Prof APPLEBY - In terms of the sequencing? Is that sort of what you're asking?

Ms WEBB - Yes, the sequencing, exactly. That's exactly what I'm asking.

Prof APPLEBY - It's really important to get it right. There is some ambiguity in the current protocol in terms of sequencing, but also within the protocol there's ambiguity about what happens when there's a covert warrant. There's a carve-out in relation to the current protocol with covert warrants, but there's nothing that explains what happens with them.

But taking the instance where it's not a covert warrant, under the current protocol, as I recall it correctly, the privilege determinator is either the presiding officer or any other person, entity or committee authorised by the relevant House of parliament. It's not clear when that person is authorised or when that might kick in. It might be the presiding officer if nobody else is authorised. It's not clear when that authorisation has to happen.

In our view, that person should not be the presiding officer or someone appointed by the House, but someone appointed by the committee. In terms of sequencing, it would seem to be better that there is a standing appointment or even a standing sort of set of appointments, rather than something that needs to be done after, during the execution of a warrant where things may be political. There may be an urgency, there may be a timing issue about getting the committee together, for instance; and so it would seem as a matter of prudence, but also good practice, to have a person or a number of persons pre-appointed that could fill that role if needed and called upon.

Ms WEBB - In that case, would that also potentially provide for circumstances in which parliament is prorogued, the committee is actually not formed? Could an independent arbiter who's been agreed and appointed by the committee also cover a period of prorogation of parliament for those matters?

Prof APPLEBY - I think the protocol could provide for that, and by agreement could provide for that. As a matter of both prudence and good practice, it would seem that pre-appointment would be preferable.

Ms WEBB - The question I had about sequence is still there: how is that person brought into play, even if they are pre-approved and ready to go? Who makes the call that there's a claim of privilege here and we need to get in touch with the independent arbiter? I'm just interested in the mechanics of it. Does it happen before the execution of the search warrant? After the execution of the search warrant? When a claim of privilege is made after the fact, or does it have to happen before the fact?

Sorry, these are very basic questions but I'm just trying to understand, because I'm not familiar with it having happened here and exactly what it's looked like in other jurisdictions. I'm trying to figure out, okay, a search warrant is wanting to be executed, certain notifications have to happen about that. Does the claim of privilege get made prior to the actual execution of the warrant and materials being collected, or does it have to happen after that?

Prof APPLEBY - I think it's a really good question because, in my mind, it could potentially rise at any point. It may be that once knowledge of the warrant - notification is given to the presiding officer or the Clerk, but also the person whose premises is being searched - because they are able to attend - they may know that there is privilege involved, so it may be that they assert privilege early, before the warrant is actually executed. It may be whilst they're in the premises, and documents and material are being collected, that they're able to make that claim.

It would also seem to be prudent to allow, once documents have been identified, for there to be a period of time for potential claims to be made, because it may not be apparent immediately to the presiding officer or the Clerk, or the person who's there - the member, presumably - that privilege needs to be claimed. So there might be a period of time during which documents are held that a claim can be made, at which point that needs to be determined or they're released to the commission. Does that make sense?

Ms WEBB - Yes, it does.

Prof APPLEBY - I imagine that all three points that you've identified are relevant: prior, during, and then also - almost like a period that allows people to consider whether there's a privilege claim that needs to be made before the documents are fully made available to the commission.

Ms WEBB - In terms of bringing the independent arbiter into play, the committee having pre-appointed, as you've just suggested would be prudent, an independent arbiter, does the request for them to actually undertake their activity have to come via the committee or does that go in a more direct sense, a request to them? On a practical side of it, how do the mechanics of this work? Who calls who?

Prof APPLEBY - I would imagine that if a claim for privilege had been asserted, then the protocol would allow for the claim to be directed to the independent arbiter to be determined. That doesn't need to go through a further process. Then the claim can be determined. We recommend that in the agreement, both the Houses agree and the commission agrees to abide by the determination of the arbiter. Then it follows if the arbiter determines there is privilege, it's not released, or if they determine there's none, it is immediately released - so there's not a further process after that. That's our recommendation.

Ms WEBB - Is that achieved by - when the protocol is agreed by each House, that part of that agreement is to abide by? That's what's in the protocol, that you're going to abide by what the independent arbiter agrees. That's just taken as a given that the Houses have agreed to that, if it's in the protocol, and they have passed the protocol?

Prof APPLEBY - I would say that it ought to also be reflected in Standing Orders within the Houses, if that's what the Houses have agreed to. There's the element of the agreement, yes, but then Standing Orders should allow for that process to occur.

Mr GEORGE - Can I just follow that up, please? With the independent arbiter, I wonder why it is that you recommend that there is an agreement by the House that the recommendations of the independent arbiter will be accepted? Surely, I would have thought that the arbiter would then, quite potentially, go through a sort of quizzing by a committee to find out why he or she has made those recommendations? I also wonder, is there a role for a court process - which, of course, may well delay matters - but is there a role for a court process in which a claimant of privilege might challenge the role of the arbiter, or challenge the decision of the arbiter?

Prof APPLEBY - Sure. Parliamentary privilege and the determination of parliamentary privilege constitutionally sits with the Houses, rather than the courts, and whether the privilege exists is a determination for the Houses themselves. That immunity, if you will, from judicial review over such an important legal question is part of the way the system works, and that parliament is able to determine its own proceedings free from interference by the court. It's sort of an exception, if you will, to our generally understood rule-of-law situation where the courts can come in and have the final word.

Determining privilege sits with the Houses. There are some exceptions when the courts will get involved, but they usually involve alternative challenges in which privilege arises. So, if we take that sort of first principle approach where it's the Houses' responsibility for determining privilege - but the Houses can put in place processes by which privilege can be determined. That's where this recommendation comes from, in terms of a process being put in place where there is clarity and certainty as to how a privilege claim may be determined in any given instance, particularly when it's going to be an urgent and possibly politically charged situation, such as the execution of a warrant. Hence the need for a protocol and the recommendation about having a process which is clear and has kind of, like, a finality to it.

We do recommend in our submission that when the committee is appointing the independent legal arbiter, there are criteria about standing in the legal profession, and of course they need to have the confidence of the committee, which is a non-government-dominated committee as it's currently set up. The appointment is really important and, as I said, the pre-appointment is preferable, because it means it's not charged by the circumstances of any particular search warrant. They're pre-appointed.

As to whether the arbiter should be then simply providing advice to the committee - and the committee can quiz them, as you indicated - that is an option. Our recommendation is, though, that there be priority given for the process and finality and for a privilege claim to be determined - noting, too, that it then takes it out of any politics of the day as well.

In jurisdictions such as New South Wales, where the independent arbiter determines matters such as this relatively regularly, the arbiter does provide a full set of reasons as to why they have or have not determined a claim of privilege, so there is a transparency and openness.

It's not simply a 'yes' or 'no'. There is a set of reasons that's provided, and they're available on the internet. They're fascinating reading, in fact, the independent legal arbiters' precedents about privilege. So, there is a transparency, there's the importance of the appointment, but in our view, as I said, it's important that it stays within the parliament, but there is also a finality that's given to the process.

Mr GEORGE - Has the arbiter ever been challenged in NSW?

Prof APPLEBY - By convention and by practice, you'd have to check with the Clerks - I think that would be the best point of call. Based on my observation of the New South Wales experience, the independent legal arbiter's position is treated as a final statement on privilege, even though under the Standing Orders it does go to the committee to endorse, in practice that does happen.

Mr GEORGE - On a slightly different subject, it seems to me that when privilege is claimed, particularly over something like emails, that's going to take a lot of effort and time from parliamentary staff to work through what may be subject to parliamentary privilege and what may not be. I'm wondering about the need for resources to be able to resource something like this. If we're going to take it seriously, obviously it has to be well resourced.

Prof APPLEBY - Absolutely. It will depend on the scope of the warrant, of course. This, I think, also ties into the earlier question about timing and process, and how long might be given between knowledge of a warrant and a claim for privilege being made and the need to allow appropriate timing for claims to be made. In terms of staffing and resource implications, yes, there will be staffing and resources implications if you want these to operate well. I think that's all I can add to the conversation.

Ms O'CONNOR - Can I ask a quick follow-up question to that, Chair?

CHAIR - Yes.

Ms O'CONNOR - In your recommendations, when you talk about the kind of criteria that you might apply to the person you appoint to the independent arbiter's role, the person with a legal history, but also not someone who's had experience as a member of parliament, and given the question that they will be examining, that is, whether a matter should be protected by privilege, I wonder why you would exclude someone potentially who had parliamentary experience - and the person who comes to mind for me, for example, is Duncan Kerr, who, for 20-odd-years, was the member for Denison, but also a minister of the Crown and then later head of the Administrative Appeals Tribunal, a judge on the Federal Court.

Why would we exclude, for example, someone with that breadth of experience of both the legal profession but also the operation of parliament?

Prof APPLEBY - Thanks for the question. Duncan Kerr's experience is, in many respects, unique given that it is very rare now for a parliamentarian to be appointed to the bench - not unheard of, but very rare. The reason why we exclude those who have been a member or former member of parliament is because of the need for absolute confidence in the non-partisan nature of this independent arbiter, I think.

Whilst there may be individuals who have parliamentary experience who you could say still have confidence, I think, as a general rule, the reason we have said they should be excluded is because of the need for that confidence in non-partisanship. That's not to say they would not have parliamentary experience. So in different ways, former clerks of the parliament would be people who might be able to be appointed and, of course, New South Wales, which has a long history of using independent arbiters for determining matters of privilege, there are individuals who have performed that role who both have judicial, legal and quite extensive parliamentary experience in the procedural sense of determining matters such as privilege.

So there is a pool of people who have both legal and parliamentary experience without having to dip into members and former members which raise questions about partisanship and politics getting involved, which are really best avoided. Not passing any judgment on the individual that you raised because I think that is possibly an exception to the general position.

Ms HADDAD - Hi, thanks for coming down to Tassie for this. I just wanted to ask you a bit more about the New South Wales process of appointing the independent arbiter, it is the presiding officers, as you said in your submission. Was there any discussion at the time of that decision around it being someone other than the presiding officers? That also goes to what you just said in response to Cassy's question about potential partisanship. Has there ever been any kind of unease, I suppose, in the New South Wales system around it being the presiding officers who make that appointment, and was there any discussion of it being their equivalent of this committee, for example, who makes that appointment?

Prof APPLEBY - Yes. So, in New South Wales it is the presiding officer, but then it is subject to approval by the relevant committee. So it does engage the relevant committee and there is the need for approval for exactly this reason, I think, because otherwise there would be unease if it was resting just with the presiding officer. Our recommendation is that it is just a committee appointment because that would just be a more direct way of doing it, but in New South Wales it does still involve the committee for exactly these reasons, yes.

Ms HADDAD - And is there a panel there or is it just one person who's appointed or do they have a pool to draw on?

Prof APPLEBY - So, I have recently read some of the independent legal arbiter's decisions, and it has been the one individual, the Honourable Keith Mason, who's the former president of the Court of Appeal, but also former Solicitor-General for New South Wales and has spent time as the electoral commissioner in that state as well, so a very impressive CV and he seems to be the person who's regularly appointed to the position, but in the past it has been others.

Generally, in that state, it is former judicial officers who they seem to refer to, the pool seems to be that group, yes.

Ms HADDAD - And is it a set-term appointment or is it an ongoing appointment, do you know?

Prof APPLEBY - I would have to take that question on notice. I do not know the answer.

Ms HADDAD - If you'd be happy to, that would be great.

Prof APPLEBY - Yes, I can have a look.

Ms HADDAD - Thank you, and I just had another question about covert warrants. For the jurisdictions that - well, first of all, do all the jurisdictions with a protocol of this type allow for the use of covert warrants, and do you know from your experience how frequently they are used? If they are a bit of an exception to the rule? If there is a practice of not using covert warrants as a preferred option for the jurisdictions that have covert warrants?

Prof APPLEBY - I don't know the answer to the second part of your question. Again, I could have a bit of a look around and see if I can answer the question on notice, to the extent that we can. I mean covert warrants, by their very nature, are often hard to know whether they've been executed. Sometimes they're reported after the fact.

Often when it's very serious conduct of this nature, you can imagine why a covert warrant would be desired. The challenge with the Tasmanian protocol is that there's just an exception carved out in the protocol and then there's no procedure provided for what will be probably the most highly charged type of warrant and it's just not included in the protocol. And that's what we've identified as a real need in the Tasmanian protocol. There needs to be a way in which such a warrant, officers involved on all sides, know how such a warrant is executed.

Yes, it may not be appropriate that the parliamentarian's whose office may be being searched is there, but there needs to be a relevant officer there so that a claims of privilege can be made - and again, coming back to earlier questions, it might be a situation where that time period between the execution of the warrant and making a claim for privilege that becomes the most important period.

Again, the protocol needs to make it very clear what that process and timeline is.

Mr JAENSCH - I am probably the newest member of this committee, so I am catching up on the history of this and learning as I go. So, thank you very much for your submission and evidence.

Just reading through it and listening to the discussion, if the starting point for determining the best approach to determining privilege is to acknowledge that it is the relevant House of parliament that has the constitutional responsibility, which is in your submission, so it's the parliament itself that has that power. As you said before, we can't refer this through the courts; it's the parliament that decides.

Within that then, we are talking about a mechanism by which the parliament can appoint an arbiter and agree that the arbiter's decision will be respected.

We are not, though, in that giving the arbiter parliament's powers, are we?

Are we just agreeing that the convention will be that we will accept their advice and decide accordingly as a parliament with those powers?

Sorry if that sounds murky, but I'm trying to work out here if the parliament is giving its power to another person or if it is agreeing in advance that they will accept that person's recommendation when making a decision that only parliament can make.

Prof APPLEBY - Yes, I think you've actually very clearly stated what the proposal would be, and sort of coming back to those first principles constitutional foundations, the Houses of parliament, sort of in recognising that these situations are often politically charged, they often have to happen with urgency, and there needs to be a way in which they can be resolved so that investigations can move forward as needed. And so, in recognising those things, parliament in advance decides this will be a process by which we will have matters of privilege determined. They are not delegating to the arbiter the determination of privilege. They are simply saying: we will appoint through the committee an arbiter. They will make a determination; it will be transparent and then we will abide by that determination in our claims or not claims of privilege.

It is not a delegation, but a process by which the Houses have agreed privilege will be determined in that particular instance.

Mr JAENSCH - That's why we call it a protocol because it is a convention, but it does not replace parliament's responsibility for making the final decision.

Prof APPLEBY - No, it doesn't replace parliament's responsibility, and really it is a mechanism through which parliament is exercising its responsibility.

Mr JAENSCH - That's right. And so, to go back to an earlier question, and the matter of the extent to which this process can proceed when parliament is prorogued. If the decision ultimately will be made by the parliament, through whatever process, there needs to be a parliament sitting to make that decision, doesn't it?

Prof APPLEBY - Hmm.

Mr JAENSCH - I would think so. Otherwise, what happens is that you've got a prorogued parliament, a suspended parliament, and you would need to have a delegation of the constitutional responsibility to your independent arbiter to fully resolve that matter, but I think we've also said that you can't give that power away.

Prof APPLEBY - It could be that the protocol simply makes provision for the process to continue, and then to conclude, if you will, in terms of the determination of privilege once parliament is recalled.

Mr JAENSCH - So you don't lose time, and you don't lose the other aspects of currency that might assist that determination; but you can't resolve it finally until you've got a parliament to make that decision, I would have thought.

Prof APPLEBY - Yes. And the protocol could make the process - and another advantage of the protocol, it allows for the process to continue in terms of claims, arbiters' determination of claims and then the finalisation of that when parliament is recalled.

Mr JAENSCH - Yes.

Ms WEBB - I will just follow on from that one, if I may, and then jump to my final one. In terms of that then, I would assume that as a new parliament begins after an election, there would be a refresh of the protocol each time, like a re-confirmation -

Prof APPLEBY - Yes.

Ms WEBB - That the new parliament is entering into that protocol, and will abide by it, because you've got a fresh parliament, even if in fact all the members were the same, it's still a fresh parliament. So, would that be the case?

Prof APPLEBY - Yes. I think that would be the case, and then that would be in a sense reaffirming the process that might have been undertaken during the prorogation if, for example, a legal arbiter was determining a claim during that period.

Ms WEBB - Across that time.

Prof APPLEBY - Yes.

Ms WEBB - That makes sense. I just wanted to ask some questions, following up from Mr George's questions about resourcing, and the matter of scope came up. In these circumstances, as far as you're aware, is there any expectation that the integrity entity that is seeking to execute search warrants and go about their investigations, that there's some expectation that they will have as narrow a scope as possible in terms of impinging on privilege, on parliamentary privilege?

Has that come up in other jurisdictions where this is being dealt with more regularly than here, that there's some sort of requirement, or expectation even, that the scope of these things should be mindful of being as narrow as possible for capturing - to avoid, as best as possible, capturing matters or materials that might be covered by parliamentary privilege? I'm just thinking about the questions that were asked about having to go through masses of material and whether there's an expectation that's minimised.

Prof APPLEBY - No, I don't think so. The legislation would allow for privilege to be claimed and that where privilege is claimed, the commission can't access the material, but that, as far as I'm aware, doesn't have a flow-on interpretive effect or practical effect that the commission or the agency narrowly draws the warrant; it's just more the execution of the warrant might be narrowed because of claims of privilege.

It might be that in practice officers within these agencies are doing that because they think, well, if we make it too broad, there will just be claims of privilege which will then, you know, hold the investigation up, but that's not for me to say. I don't know whether that's the case in practice, but just in terms of the legislation, no. There's no indication in the legislation that that should inform the drawing of a warrant and there wouldn't be any interpretive consequence. Privilege will -

Ms O'CONNOR - Sorry, which legislation are you talking about?

Prof APPLEBY - The Integrity Commission legislation that allows for the warrant.

Ms O'CONNOR - The act for the Integrity Commission?

Prof APPLEBY - Yes, that allows for the warrant.

Ms O'CONNOR - Thank you. Sorry. Yes.

Prof APPLEBY - Yes, so just interpreting the powers and the drawing of the scope of the warrants.

Ms WEBB - I'm looking at your submission, the part of the submission that addresses the covert warrant issue and the fact that there's a bit of a gap in the proposed draft protocol here, and you say that the Integrity Commission would need to notify someone in parliament when a covert warrant is executed and there's a question over who that person should be that is notified. You've suggested there that that could also most appropriately potentially be the independent Chair of the Joint Standing Committee on Integrity, and I want to understand why you would recommend that rather than, say, the Clerk or a presiding officer, which I think is probably the case in other jurisdictions, that that notification of this sort of thing is given to either the Clerks or the presiding officer?

Prof APPLEBY - Yes, in the Commonwealth, it's given to the Clerk as we indicate in the paragraph prior. We have concerns about notification to the presiding officer, as the presiding officer can bring in concerns and implications around partisanship. Our recommendation is that it is notified to the Chair of the Joint Standing Committee on Integrity, because they are representative of the committee, which is a broader representation of the parliament, but also because they have responsibility for this issue.

It's not without its own issues. As we've indicated, if the chair is possibly the subject of the warrant, there's a question about who it goes to then. It needs to be someone who has the most confidence, and is able to garner the most public confidence that this is the right person who's not going to be affected by partisan interests, and will be able to facilitate the making of a claim for privilege if it needs to be made.

It could be the Clerk, and I haven't had the opportunity to read the Clerks' submissions, but it might be that that's a suggestion that's made there. Again, you just need to start from that principle that you need to get the right officer who is appropriately representative of the parliament's interests. The Clerk raises concerns. They're not a member of the parliament. It could be the Clerk and the Chair, the two sort of - the staff plus representative. That's an alternative way of doing it, and might be able to facilitate the claim of privilege in that way.

Ms WEBB - Presumably though, that also covers any practical matters that need to be engaged with if there's a covert warrant to be executed. The Chair of the Joint Standing Committee on Integrity is not necessarily going to be able to facilitate the practical matters of that in the parliamentary setting in the way that the Clerk would be able to, so I did wonder whether there would be a natural need potentially to interact into the structure of the parliament via the Clerk instead of just a parliamentarian.

Prof APPLEBY - Just a parliamentary officer, yes. I can see that. You would potentially have the representative then, plus the Clerk as the officer to facilitate.

CHAIR - Cassy, do you have another question? We are almost out of time.

Ms O'CONNOR - Yes. Parliamentary privilege is quite a, for want of a better word, a sacred thing. How do we protect against, or avoid a situation where an integrity body may be able to go on a fishing expedition into materials that are held by a person who's the subject of a warrant? Sure, they might be able to claim privilege, but there is a risk here, isn't there? This goes to Meg's question. If there's not some scope, restraint, if you like, that an investigative

body can go into privileged materials and go fishing, effectively, how do you protect against that?

Prof APPLEBY - It's a question about whether the exercise of the warrant is done in accordance with the legislation; now, that is a separate question from parliamentary privilege and could be the subject of judicial review proceedings if a member believed that a warrant had been executed outside of its statutory scope and authorisation, so that could be the subject of judicial review.

The ability to place a claim of privilege and then have it determined by an independent arbiter is, I think, the best safety mechanism and, in practice, the one that's most likely to be exercised. Judicial review of warrants is very difficult, so that sort of reinforces the importance of this. It reinforces the need to have the time between notification and possibly even execution of warrant and ability to claim privilege.

They are the best safeguards that can be put in place. Of course, it is very important to have these powers to exercise these warrants and to be able to search the premises of parliamentarians and that's, of course, one of the important dimensions of integrity commissions, of anti-corruption commissions and their jurisdiction, including parliamentarians.

It's intersection with parliamentary privilege is challenging, hence the need for a protocol like this. It's always going to be a balance and there will need to be safeguards. There's always the possibility for abuse, of course.

CHAIR - Thank you. Do we have any other quick burning questions as we are just about out of time?

Ms WEBB - Thank you. Just another quick one. In New South Wales, the Legislative Council Privileges Committee has developed its three-step test for determining whether records form part of proceedings of parliament and, therefore, can attract parliamentary privilege. Do you think, in this jurisdiction, we need to formally adopt something like that so there's an agreed test that would be applied that we would all understand would be applied in each instance?

Prof APPLEBY - My view is that the greater clarity that you can get around what will fall within and outside of privilege, the better situation you are going to be in and the more confidence there will be in a process such as in the protocol. So, if there can be agreement as to what amounts to proceedings of parliament, then that would facilitate that.

Ms WEBB - On that, what's your personal or academic view of the three-step tests that New South Wales has developed and that applies there and can you point us to any other variations that may be better for us to consider?

Prof APPLEBY - I will have to take that on notice.

CHAIR - Thank you very much for taking questions. I really appreciate you coming in and thank you very much for your appearance, and for your submission and taking the time to provide us with evidence. Obviously, what you have said today is protected by parliamentary privilege. Once you leave the table, you need to be aware that privilege does not attach to the

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comments that you make to anyone, including the media, even if you are just repeating what you have said to us. Do you understand that?

Prof APPLEBY - Yes, I do.

CHAIR - Thank you very much and we really appreciate your time.

Prof APPLEBY - Thank you, Chair. Thank you, committee.

The witness withdrew.

The committee suspended at 10.48 a.m.

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The committee resumed at 11.00 a.m.

CHAIR - Thank you very much for appearing even remotely today at today's hearing. If you could please state your name and the capacity in which you're appearing before our committee.

Mr BRERETON - I'm Paul Le Gay Brereton - National Anti-Corruption Commissioner.

Ms O'MEAGHER - Rebekah O'Meagher, General Manager, Legal Branch of the National Anti-Corruption Commission.

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

Mr BRERETON - I don't know that we have.

CHAIR - Okay. 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 this time.

I will introduce our members of the committee. The honourable member for Braddon - Roger Jaensch, on screen. The honourable Cassy O'Connor, member for Hobart, the honourable Peter George, member for Franklin, the honourable Meg Webb, member for Nelson, the honourable Ella Haddad, member for Clark, and me, Rosemary Armitage, member for Launceston. Assisting us, we have Fiona, Mary, and Luke from our secretariat. On Hansard we have Terry.

Hon Mr PAUL LE GAY BRERETON AM, NATIONAL ANTI-CORRUPTION COMMISSIONER, and **Ms REBEKAH O'MEAGHER**, GENERAL MANAGER, LEGAL BRANCH, NATIONAL ANTI-CORRUPTION COMMISSION, WERE CALLED, MADE THE STATUTORY DECLARATION AND WERE EXAMINED.

Thank you. To start, would either or both of you like to make a short opening statement?

Mr BRERETON - Thanks, Chair. I think most of what we want to say was contained in the written submission we provided some months ago.

In short, we negotiated an MOU with the Commonwealth parliament. I am sure you have a copy of that. We certainly provided a link to it.

We think that that MOU provides a pretty good balance between preserving parliamentary privilege, which our legislation does, whereas it does not preserve legal professional privilege or the privilege against self-incrimination, and on the other hand not unduly inhibiting our ability to investigate conduct of parliamentarians and parliamentary staffers.

The MOU has now been invoked on quite a number of occasions over the last 12 months since it was negotiated. I believe we have a good relationship with the Clerks of both Houses,

and they are pretty central to making it work sensibly. They have a pretty good sense that sometimes operational imperatives will necessitate a departure from the general provisions of the MOU and we have emphasised in our written submission that many of those provisions are expressed to apply normally so as to permit us to depart from those provisions in exceptional circumstances.

Those circumstances are typically those in which forewarning of action might warn or alert someone in a way that would enable the destruction or manipulation or concoction of evidence. A very important concept in the MOU is that of potentially privileged information, which is described in the MOU and it is essentially the trigger for many of the protections or many of the provisions in the MOU to be engaged.

If it does not appear that there is going to be potentially privileged information caught by a warrant or a notice, then generally speaking the provisions won't be engaged, except that there is a provision that covers privileged material that comes to light unexpectedly in the course of an investigation. There are fairly complex dispute-resolution provisions which have not been engaged up to this point, although they may well be.

It is fair to say that, where a large amount of information is gathered from a current or former parliamentarian there can be a lengthy impediment to an investigation while that is sorted through and we have come across that in a couple of cases, but we don't really see a way around that while balancing the interests of privilege against the interests of investigations.

I think that's all I need to say by way of opening statement. Rebekah, anything to add?

Ms O'MEAGHER - No thank you.

Ms O'CONNOR - Thank you, Chair, and thank you, Commissioner and Ms O'Meagher. It's Cassy O'Connor here, the Greens member for Hobart. We have just heard from the Professor for Public Law at the University of New South Wales, Prof Gabrielle Appleby, about the difference, for example, in protocols and the difference between the Commonwealth MOU and, for example, what the ICAC has in place in New South Wales, and one of the things she pointed to was that in the Commonwealth system, ultimately the House or MPs determine matters of privilege, whereas what we are looking at here in Tasmania is that there be an independent arbiter in place.

Can you see that there are potential issues in having a partisan group of MPs potentially determining matters of privilege?

Mr BRERETON - The reason we adopted the course we did is we considered it was in accordance with law and in particular with the decision of Justice Hall in the case in Western Australia, the name of which I temporarily forget, but that decision made pretty clear that, ultimately, the person who was legally entitled to judge questions of privilege was the relevant House of parliament and that that could not be delegated, or it could not abrogate itself of that right. So, we stuck with what we understood the legal position, as espoused in that case, to be.

Ms O'CONNOR - Thank you for that answer. I think it's reasonable to say the NACC has come under some criticism for being ineffectual, and I wonder if this arrangement is some part of that. Has there been a vote of the parliament where a matter of privilege has arisen where a vote has prevented access to materials during an investigation?

Mr BRERETON - The dispute resolution provisions have not been invoked since this MOU was established.

Ms O'CONNOR - Has the NACC had no cause to seek access to potentially privileged material, or has it chosen not to?

Mr BRERETON - We have sought access to a great deal of potentially privileged material, but where privileged material has been identified we've excluded that and quarantined it, and no dispute has arisen for any of the material that we have sought access to.

Ms O'CONNOR - Just to be clear, the NACC has been able to, and indeed has, accessed communications and other materials from members of parliament without a claim of privilege being invoked and without there being a vote of the House yet?

Mr BRERETON - Yes.

Ms O'CONNOR - Thank you.

Ms HADDAD - It's Ella Haddad here, I'm the Labor member for Clark. You've probably covered it in answering Cassy's questions, but just so we're really clear as a committee, it's been the case that the NACC has sought access to information that privilege has been asserted and therefore you've excluded that from your investigations?

Mr BRERETON - Correct me if I'm wrong on this, but I do not believe that we have ever encountered a claim for privilege.

Ms HADDAD - Right, thank you. In that case, my question is probably a hypothetical one. If that did occur, and under your protocol the House or the relevant Chamber is to determine privilege, how would that work in a practical sense? Would it be a committee of the House that would make that determination, or would it be a debate for the entire Chamber to consider?

Mr BRERETON - That would be a matter for the House, not for the commission, but my understanding, from discussions with the Clerks, is that ultimately it would be the House. Presumably the House could have the privileges committee conduct an inquiry into the matter and report to the House, but the ultimate decision would be that of the House.

Ms WEBB - I'm Meg Webb, I'm the independent member for a seat called Nelson. My question was in relation to the MOU which came into play, I believe, last year in 2024. We had a federal election earlier this year. Can you explain what the arrangements were across the time of a prorogation of parliament? Then what, if anything, needed to occur to reaffirm the MOU under a new parliament? Were the arrangements in place during periods of prorogation, and then was any form of reaffirmation of the MOU required?

Mr BRERETON - Well, the view we've taken is that the MOU remains in place, and no form of reaffirmation was required.

Ms WEBB - So a new parliament doesn't have to re-sign up to the MOU, then? It's taken as being a permanent fixture until it's otherwise actively disengaged from?

Mr BRERETON - Until it is amended, varied or terminated in accordance with its terms.

Ms WEBB - Interesting.

Mr BRERETON - I think the same approach has been taken with the other MOUs that have similarly been entered into by the Commonwealth parliament, for example, or in particular the Australian Federal Police (AFP). For the AFP, there have been a couple of iterations of MOUs, but I'm sure the view has been taken that the last one negotiated remains in force.

Mr GEORGE - Peter George, Independent Member for Franklin. Having read through the MOU, I'm still not very clear about the timing of various events, particularly the timing of claims of privilege, timing perhaps of a NACC response. It talks a lot about what is 'reasonable', and I wonder why 'reasonable time' has never been locked down to a particular number of working days, or to a particular period. I gather you haven't actually had to face this yet, but nevertheless I'm quite interested to know why there seems to be no particularity here.

Mr BRERETON - First of all, the idea of 'reasonable time', 'reasonable notice' and the like is a concept very well known to law that all lawyers would understand. It takes into account all the surrounding circumstances. Secondly, what is reasonable for an MP for an electorate in the Australian Capital Territory or Sydney might be very different from what is reasonable for an MP in the Northern Territory or Broome. 'Reasonable' was adopted in the negotiations particularly in response to some members of the committees with which we were negotiating, pointing out that those circumstances would be different, depending who the MP was and what electorate they represented.

Mr GEORGE - I think in another jurisdiction it's tied down to three working days, isn't it? I appreciate that lawyers may well understand what 'reasonable time' is, but this is not something that's going through a court process; this is something that goes through a parliamentary process. What were the discussions that led to a decision to not put a particular time in place?

Mr BRERETON - I don't think anyone has ever proposed that there be a particular time, and it will very much depend on the exigencies of the particular investigation and the type of process in question. I think there are time frames, particularly in the resolution process, from memory. So if you look at clause 30(b), it provides a period of 10 business days for a claim to be made before other things happen.

Mr GEORGE - Alright, I stand corrected. Yes, 30(b).

Ms O'MEAGHER - Then, in terms of 30(c), if there is some contest in relation to the material, it says 'the presiding officer shall, at the first practical opportunity, put the matter before the relevant House'.

Mr GEORGE - Just one other question, if I may. In earlier evidence today, there was some discussion about who is best, within the parliamentary system, to make judgments on the question of parliamentary privilege, and to take part in - at least, to assist in - an investigation. The question is whether it's the presiding officers, the Clerks or the Chair of a committee. Do you have a view on that?

Mr BRERETON - We think the Clerks are a really valuable and important point of contact in the process, because we can perhaps provide a bit more information to them than could be provided to a presiding officer who might be politically aligned with a person under investigation. So, we find it very useful to work through the Clerks, from that perspective, as a point of contact. They're not the judge or determinant of everything; the parliament has to remain the ultimate determinator under the law as we understand it, but as a point of contact and source of advice for parliamentarians and point of contact for us, we find the Clerks very valuable.

Mr GEORGE - Thank you.

CHAIR - Roger, do you have any questions?

Mr JAENSCH - No, not at this stage, thank you.

Ms WEBB - A couple of things I wanted to follow up on. I'm trying to clarify because in your submission, I read at paragraph 2.8 that you say that 'to date, the MOU has been invoked on several occasions and the agreed procedures appear to be efficient'. Then today, in our discussion with you, you mentioned that there haven't yet been claims of privilege made during investigations. I'm trying to understand, when you said that it's been invoked on several occasions, what were you referring to in your submission? What part of the processes have been invoked?

Mr BRERETON - So, if we seek, as we have, telephone intercept warrants on a former or present parliamentarian, that may capture, or has the potential to capture, privileged information, and before we do that, we - in accordance with the MOU - consult with the Clerks about what we propose to do, including often to say given the scope of what we are seeking, we do not believe this will capture privileged information, but we consult and give the Clerks an opportunity to speak about that.

If we issue, as we have, a notice to produce to a parliamentarian, we have, again - well, the notice doesn't require prior consultation, but in some cases we have, I think, abridged the time for that notice beyond that which the MOU would normally provide, and we've informed the Clerks in advance we propose to do that. We have issued hearing summonses to parliamentarians and consulted with the Clerks about the return dates of those summonses to ensure that they will not interfere with parliamentary business.

Can you think of some other examples?

Ms O'MEAGHER - I think that pretty much covers it, Commissioner. It's very much involved in that consultation phase that we've had to engage the MOU. As the Commissioner said, you haven't had reason - when we then put in place what has been agreed with the Clerks as the appropriate way to ensure that privilege is maintained - to actually go to them yet with material that we think is relevant to our investigation and to have a decision made on that. But definitely a number of times, in terms of the consultation process.

Ms WEBB - Sure. Thank you for clarifying that. I understand better now that you've utilised the mechanisms described in the MOU up to the point of then not actually having to go through the process of determining privilege, and how that works under your MOU. That has yet to be tested, that side of it.

Mr BRERETON - Yes.

Ms WEBB - Can I ask a question too about training? You do mention training in your submission, briefly, and clearly you're referencing the fact that training has to occur for members of your staff and your investigations teams on the MOU and the matters covered by it. There's also been training provided by, from your description, deputy Clerks of the House and the Senate. What has been the extent of that training? I'm interested to get an understanding of the scope and if there's, I presume, mirrored training, in a sense, for MPs and people in the parliamentary setting as well as for your staff in the commission. Would that be correct?

Mr BRERETON - On the second part, we have made presentations to incoming parliamentarians after the recent election, and we also presented to all the party rooms shortly after our establishment in 2023.

It's fair to say that those presentations have not covered in much detail parliamentary privilege, but I do understand that some of the induction training provided by the Department of the House and the Department of the Senate for their incoming parliamentarians does touch on parliamentary privilege.

We have engaged a couple of times with the privileges committees for both Houses. Our internal training, there's essentially been two sessions, each, I think, of about 90 minutes. One was delivered in-house by our legal branch for our staff. The other, as you note, was delivered by the deputy Clerks who came across here and presented to our staff in a session that I think was widely appreciated.

Ms O'CONNOR - Thank you, Chair. It's Cassy O'Connor here again. Just to be really clear, has the NACC been able to access federal members of parliament's communication in the course of an investigation -

Mr BRERETON - Yes -

Ms O'CONNOR - Without those MPs invoking privilege?

Mr BRERETON - No claim for privilege that I can think of has been made by a federal parliamentarian. I am pretty confident of that.

Ms O'CONNOR - You talked earlier about summonses to MPs. Does that mean in order to access information held by a person who's under investigation, the NACC has issued a summons and that MP who's the subject of an investigation has willingly, on the basis of that summons, provided the material requested?

Mr BRERETON - I don't think I should go into that detail.

Ms O'CONNOR - I ask you why you wouldn't go into that detail? Because we're not identifying anyone. What I think we need to establish here is how effective the NACC'S MOU with the federal parliament is in assisting in investigations, because in the two or three years of the NACC's existence, as I understand it, the MOU which only came into place last year, but it hasn't been tested.

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Can you simply confirm that if the NACC has sought information from an MP that that information has been provided willingly to the NACC?

Mr BRERETON - Information that is potentially privileged is not necessarily sourced directly from an MP.

Ms O'CONNOR - Thank you. But we're talking here about an MOU between the Commonwealth Parliament and the Commonwealth's Anti-Corruption Agency.

So we're talking here about how the NACC accesses information, if it has tried, and how successful it has been without an MP ever invoking privilege.

Mr BRERETON - And the question is?

Ms O'CONNOR - The question is, again, is it the case that when the NACC has requested material from an MP who may be the subject of an investigation, and presumably requested the material either nicely or by summons, then that MP who's the subject of an investigation or an inquiry has willingly provided that material to the NACC?

Mr BRERETON - The information that we have obtained from MPs has not been privileged information.

Ms O'CONNOR - Right, because the MP themselves determined when you asked that what you are asking for wasn't privileged information?

Mr BRERETON - Because we endeavour to exclude privileged information from the scope of what we seek.

Ms O'CONNOR - How would you know whether information is privileged or not if, ultimately, it is a matter for parliament, not the NACC?

Mr BRERETON - Because we can make a judgment according to the time frame of what we are looking for and the nature and subject matter of what we request.

Ms O'CONNOR - Okay.

Ms HADDAD - We heard from Prof Appleby earlier today about the different protocols across different jurisdictions and the use of covert warrants. Does the federal protocol allow for the use of covert warrants and, if so, are the majority of warrants used covert warrants or otherwise?

Mr BRERETON - I am not going to talk about the majority or minority, but if you were to read part 6 clauses 21, 25 of the MOU, you would see that it does cover covert powers.

Ms HADDAD - Thank you, I will go to that section. In a practical sense, when you are doing your day-to-day work, say, for example, you do seek and receive access to a parliamentarian's emails, for example, how do you narrow that scope or how do you make sure that you are being able to have access to the emails relevant to the investigation underway or is it a much broader power to be given, for example, access to their entire email system, past and present messages.

That is the first part of my question, I suppose, is it a narrow request for emails relevant to the investigation? And if so, who determines what material is relevant to the investigation underway?

Mr BRERETON - We are responsible for drafting our own notices and we determine what is to be sought for an investigation. In the case of parliamentarians, we typically make the request, even if it is a request to a third party that might produce a parliamentarian's communications, we make it as narrow as we can, consistent with the purposes of the investigation, in order to limit the prospect of capturing privileged information.

If potentially privileged information is captured, it is then quarantined and a NACC officer not associated with the investigation is then responsible for examining the material, quarantining all potentially privileged information before anything is released to the investigator and then if we decide we want to take the question of potentially privileged material further, we would engage the MOU, but that has not at this stage arisen.

Ms HADDAD - Okay, thank you.

Ms WEBB - That answered my question also.

Mr GEORGE - Me too.

Ms O'CONNOR - I am very happy to ask another question. Commissioner, given that we are inquiring into various jurisdiction's protocols, what would your advice be to this committee in what we might avoid in establishing a protocol between the parliament and the Integrity Commission.

Mr BRERETON - Look, from an Integrity Commission's perspective, I guess the major frustration is, at least if you embark on it from the perspective which we did, which was that parliamentary privilege is to be respected, and we don't want to trammelling on it in any way. The major frustration, if you like, from an integrity commission's perspective is the time that it can take to sift through material to see if there is potentially privileged material in it, and that because of the extent of information that some of these powers can gather involves, that can be a very time-consuming process. But I really don't know that there's advice that I can give on how you avoid that, because any other mechanism would risk trammel on the privilege, which is the last thing we want to do.

Ms O'CONNOR - Thank you.

Mr BRERETON - I think the balance that we've got in this MOU is a pretty good one that seems to be working to general satisfaction at the moment.

Ms O'CONNOR - Thank you. Well, I guess that's a -

Mr BRERETON - Sorry. Ms O'Meagher wishes to add something.

Ms O'MEAGHER - Apologies, Commissioner. I was just going to add, I think another important consideration is to be aware that the document will need to be used practically by a variety of people and we worked really hard, collaboratively with the parliament, to ensure that

it was as simple as possible and that it was going to be comprehensible for those who would then have to invoke it.

So that was an important part of the process that we went through to ensure that, yes, it didn't have unnecessary complexity. And in addition to that, that it did enable you to go outside of it to reach other arrangements, if necessary, because as we know in documents, you rarely can foresee every single circumstance that may arise.

Ms O'CONNOR - Okay. Thank you for that. But when the Commissioner said earlier that the model that's in place at the Commonwealth level seems to strike the balance and is generally working, isn't it the case that it's never really been tested?

Mr BRERETON - There's never been a claim for privilege, so yes, that part of it has not yet been tested and that remains to be seen.

Ms O'CONNOR - Okay. So the MOU hasn't been invoked, it's -

Mr BRERETON - No, that is a misrepresentation of what I said.

Ms O'CONNOR - Okay. I'm very happy to be corrected.

Mr BRERETON - A claim for privilege has not been made; many clauses of the MOU have been used.

Ms O'CONNOR - Okay. So just one final question: has the NACC, in the course of any of its inquiries or investigations, ever had access to an MP's emails, for example?

Mr BRERETON - I don't propose to answer that.

Ms O'CONNOR - Well, I don't think it's an unreasonable question. We're trying to understand operationally how different jurisdictions' MOUs might work. It doesn't sound like the NACC has ever had cause to or felt the need to access an MP's emails, and I don't think that's a controversial or difficult question.

Mr BRERETON - Well, that question has nothing to do about the memorandum of understanding. It has everything to do about what we are doing operationally.

Ms O'CONNOR - What we're trying to understand here is how effective the MOU between the NACC and the Commonwealth Parliament is. To be honest, it doesn't sound like it's particularly effective - but again, I stand to be corrected on that - because it's never been tested.

Mr BRERETON - I don't understand on what basis you make that remark. You've not pointed to a single way in which we have been frustrated.

Ms O'CONNOR - Well, that's why I'm asking you the questions. Because it doesn't sound like that MOU has yet been tested, so it's hard to know whether it's generally working.

Mr BRERETON - Well, as I've said several times now: no-one has made a claim of parliamentary privilege, and we have not, and would not seek to access a privileged

communication, because by law the privilege prevails over our powers, so far as providing a means ahead for us to be able to obtain communications of parliamentarians without trammelling on the privilege. The MOU has, in our view, been very effective.

Ms O'CONNOR - Thank you.

Ms WEBB - Just on that, under your MOU, I am sorry, I probably should have been able to tell as I read through it myself, but I cannot find the relevant section potentially.

Is it only the MP in question and whose materials you're accessing that has the ability to raise a claim of privilege? Or are there other avenues that a claim of privilege could be raised beyond the MP themselves?

Mr BRERETON - The privilege is the parliament. So ultimately, it is the MP who has to raise it. But the MOU does cover communications of the former parliamentarians and staff members as well.

Ms WEBB - I am just trying to think my way through a scenario where the commission may have sought material from an MP, the MP themselves may not have invoked a claim of privilege on that to be determined, but the parliament more broadly, other MPs, committee of the Parliament that that MP may be part of, are there avenues where those other parliamentary actors are able to make a claim of parliamentary privilege over that material that should then be investigated, adjudicated or assessed?

Mr BRERETON - For example, clause 20 provides circumstances in which a staff member could state a claim for privilege.

Ms WEBB - Is that only over their material, though, that has been in their custody, or could they do that over material that you were collecting from the MP or former MP?

Mr BRERETON - A staff member's claims wouldn't almost necessarily be about communications of the MP rather than of the staff member. The staff member has no privilege in their own right, so they would be stating a claim that the MP had.

Part 7, which is entitled 'Third Parties', deals with circumstances in which information is obtained or to be obtained from a third party that might attract privilege and how that is dealt with.

Ms WEBB - In that instance, who makes the claim of privilege that then would be assessed or determined? Say if you were seeking information from a third party, is it only the third party that can raise a claim of privilege or is it in some sense the parliament itself or an entity of the parliament like a committee or another MP or how does that work?

Ms O'MEAGHER - It is really for the parliamentarian to raise it, and they are well placed to know if it does relate to potentially privileged material involved in transacting with the House, or that could be if we're seeking information from the parliamentarian, or it may be from the staffer that they would raise that. But obviously, in-built within the MOU is that they then seek advice from the Clerks who are very skilled in terms of issues of parliamentary privilege.

I guess that overall sort of concern, you're talking about generally, of the privilege belonging to the parliament is taken care of through that consultation process, and that's certainly what we've been finding is that the Clerks are able to give that advice in terms of how we need to approach it to ensure that the privilege is respected.

Ms HADDAD - Thanks both of you. My question goes back to something you described in response to my earlier question about when you have access to communications from a member under investigation, you described a process where if privileged information is stumbled across, for one of a better word, then somebody else in the NACC will make a determination about whether that should be quarantined. I can't quite remember the wording you used, but that process that you have in place to make a determination about potentially privileged information that you come across in the course of investigation, are there guidelines or is there a set of information available to NACC officers to make that determination when they come across information?

I understand that no MP or senator has made a claim of privilege, but could it be the case that information is being excluded from investigations because it's been quarantined at the NACC level, and how that determination is made I guess is the thrust of my question?

Mr BRERETON - We don't decide whether something is or is not privileged. The furthest we go is for an officer of the commission to decide whether it is potentially privileged. If it is potentially privileged, it's quarantined and then if we wanted to pursue the matter, the resolution procedures in part 8 would be invoked, but essentially the guidance they get is that provided in clause 30 which sets out a cascading sequence of events, but all our officer would decide is, is it potentially privileged? Is it something that could conceivably attract parliamentary privilege? If it does, it's quarantined and then the resolution procedures would, if necessary, be invoked. Sorry, Ms O'Meagher wishes to add.

Ms O'MEAGHER - If I can just add to that, that gets back to the importance of the training that takes place. As soon as the MOU was executed, we then had a training session that stepped everyone through the various provisions and, as the Commissioner said, also training by the Clerks as well. It would be fair to say that in the commission that the investigators have parliamentary privilege on their radar at all times when they're carrying out their operational work.

Mr GEORGE - Commissioner, recognising the fact that there are obvious sensitivities in this, I'm still trying to work out just how, if we're going to put an MOU into practice, it's useful to know whether what you're suggesting is that NACC has established something of a workaround so that your investigations actually avoid potentially privileged material so that perhaps the NACC, apparently, has never been denied access to information that it's sought from an MP because it may be subject to privilege. Is that how it works? Do you have a workaround to avoid that apparent conflict?

Mr BRERETON - I don't think we have a workaround. Our starting position, and it's stated in the recitals to the MOU, is that we recognise that parliamentary privilege prevails over our powers and that we are not entitled to use privileged material in our investigations.

We, therefore, endeavour to avoid seeking information that we know is going to be privileged. We recognise that some of the information and communications we seek might, or the description of what we are seeking, might potentially capture some privileged information

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and we take steps if that's the case to avoid accessing that information through the quarantine procedures we've described.

It's not a workaround; it's just respecting parliamentary privilege.

Mr GEORGE - I'm trying to be clear about this, does that mean that part 8, clause 30 and onwards - that sort of cascade - that you haven't had to employ from that part 8 for the resolution - that's not arisen? Is that right?

Mr BRERETON - Exactly. Clause 30, the resolution of issues, has not arisen.

Mr GEORGE - Okay. Good, thank you.

CHAIR - Thank you. Any further questions, members? Roger, do you have a question? Does anyone here have any further questions? Would you like to make any further comment online, Mr Brereton.

Mr BRERETON - No, thank you very much. We wish you well with your work.

CHAIR - Thank you very much for your appearance. What you have said to us today, as you're aware, is protected by parliamentary privilege but once you leave the hearing, you need to be aware that privilege does not attach to comments you may make to anyone, including the media, even if you are just repeating what you've said to us. I'm quite sure you are aware, but do you understand that?

Mr. BRERETON - Yes.

Ms. O'MEAGHER - Yes, I do.

CHAIR - Thank you very much, we appreciate you appearing today.

The witnesses withdrew.

The committee suspended at 11.50 a.m.

The committee resumed at 1.00 p.m.

CHAIR - Thank you for appearing at today's hearing. If you could please state your name and the capacity in which you're appearing before the committee.

Mr HATZISTERGOS - My name is John Hatzistergos. I am the Chief Commissioner of the New South Wales Independent Commission Against Corruption.

CHAIR - Thank you. Can I confirm that you have received and read the guide sent to you by the Committee Secretary?

Mr HATZISTERGOS - I have.

CHAIR - Thank you. This hearing's 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.

May I introduce the members of my committee: the honourable Cassy O'Connor, member for Hobart, Peter George, member for Franklin, me, Rosemary Armitage, member for Launceston, the honourable Meg Webb, member for Nelson, Ella Haddad, member for Clark. The honourable Roger Jaensch is an apology today and the member for Braddon, who is normally part of our committee.

We also have with us our parliamentary secretaries assisting us, Fiona, Mary and Luke. We have Terry and Lilith on Hansard.

Hon JOHN HATZISTERGOS AM, CHIEF COMMISSIONER, NSW INDEPENDENT COMMISSION AGAINST CORRUPTION, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - Would you like to make an opening statement before members ask some questions?

Mr HATZISTERGOS - Yes, thank you very much for the opportunity to be able to speak to you. You would have received our submission, and I assume that you have read it. You may not be familiar with the detailed provisions of our legislation to which the submission makes reference. I'm not across the details of your own legislation, so I can't comment on aspects which might be parallel to those that we have, but I can take you through the individual provisions if you wish.

I indicated in the submission that you've received that we are in the process of revising the protocol that's been in place since 2009. We did think we had come to a position as far as that was concerned, at least that was the indication that we received when I appeared before the Legislative Assembly Privileges Committee in 2024.

However, it still is the position that we haven't resolved the final terms of the revised protocol. I did arrange - and I apologise for doing this relatively late - I did arrange to have forwarded to you the Legislative Assembly's report of March 2024, that does annex - yes, you've got a copy of it there - that does annex the interim or the proposed protocol which is yet to be adopted by that House, at the back of it so we may make reference to that during the course of your deliberations.

At this stage, we haven't been advised when it's likely to be adopted, or whether it's going to be amended from the form that's expressed there. The Legislative Council at this stage, I think, is waiting to see how the Assembly approaches the issue before it comes to alerting us to its position.

I'll leave it at that, unless you wish me to take you through the submission to explain to you where we are.

CHAIR - I think most members have read it. We can go to questions and then maybe relate to some of the areas.

Mr HATZISTERGOS - Sure.

Ms O'CONNOR - Thank you, Chief Commissioner, for coming along and talking to us today. The state of NSW has had a protocol or an MOU in place, as you said, since 2009, and to some degree it's obviously stood the test of time, notwithstanding that there's some revision work happening. Can you explain to us, just in simple mechanical terms, how it operates and why it's been effective to the extent that it has to date? We had Prof Gabrielle Appleby in from the Public Interest Law Centre this morning who pointed to the New South Wales MOU as a model that we might take some lessons from, but I'm interested to hear how it has withstood the test of the last 16 years.

Mr HATZISTERGOS - Well, it hasn't. I beg to differ. It hasn't actually stood the test, because it was something which evolved from a very narrow set of circumstances. In 2003 there was an execution of a search warrant of the parliamentary office of a member of the Legislative Council, and it was following that that it was seen necessary to develop a protocol. It was a reactive response to the circumstances which arose in that particular case.

The protocol that developed was really quite narrow. It didn't embrace all the circumstances where there could be an interaction between the commission and members of parliament requiring particularly the issue of privilege to be resolved. If you read our submission, you'll see that the protocol didn't relate to a number of the other notices that we issued. It was a search warrant at a Parliament House office. It didn't relate to various other notices. We issued notices which can require production of documents, under section 22 of our act. We can also require a public official to make a statement. Again, both of those matters can raise questions of privilege which are not really covered by the protocol the way it stands.

Then you have the requirement to come into the commission to give evidence, and that may also require documents to be produced, so there may be a call made for documents. Again, the issues of privilege may arise as far as that is concerned. Then you have circumstances where the search warrant may be executed at an electorate office as opposed to a parliamentary office, and the member may not be there at the time that the search warrant is being executed. So there may be a claim for privilege made at a time subsequent to the time that the search warrant is executed.

These are all the different circumstances that we felt needed to be addressed. There's potentially more that are going to come forward in due course. I don't know if you're aware, but there's a proposal - not a proposal, there's been legislation which has been enacted at the Commonwealth level relating to international production orders which will enable us, in due course, to be able to go to places other than politicians' offices to get access to emails and other materials, mainly through the big tech companies like Meta and so on - that's down the track, so this is an evolving set of circumstances that we're trying to come up to date with in terms of the circumstances where there are interactions. I can tell you what the practice is, if that can help?

Ms O'CONNOR - Yes, that would be good, thanks, and to be clear, I wasn't saying that it withstood the test of time, because it's great, it's just that it's been in place for 16 years and that is a long period of time to have one MOU.

Mr HATZISTERGOS - Well, it is, but what we've been doing is - I mean, our act is quite clear in section 122. Nothing that we do overrides parliamentary privilege; we have to respect parliamentary privilege.

On page 10 of our submission, you'll see the practice that we follow in terms of how we determine questions of parliamentary privilege, which is essentially following the Senate practice. The Legislative Council, in fact, has adopted that as the test to be adopted in relation to any determination which attracts privilege. So the question, really, is a mechanical one: how does that arise in the circumstances that we may have a claim of parliamentary privilege arise? If it falls within the notices under section 22, or if it involves having to give us a statement pursuant to section 21, that's relatively straightforward. The person can make the claim for privilege. They'll know, they'll have direct notice of the issue of the documents they have to produce, they'll know the information that they're required to give, and they can make that claim for parliamentary privilege.

The more complex situation arises in the context of a hearing, either compulsory examination or a public inquiry. In those circumstances, it may be necessary to adjourn the proceedings in order to have the claim resolved, and there are complications about that because there are secrecy provisions, particularly in relation to a compulsory examination.

I have to remind you that this is the privilege of the parliament; it's not a privilege which attaches to you as a member, and it's not waivable. The person just can't waive and say, 'Look, it doesn't matter, I'm going to nonetheless provide you with the information.' So there's a potential complication.

With a lot of the electronic materials that are available, when we execute a search warrant, as the commission has done, under our legislation we can arrange a seizure or, in some circumstances, we're allowed to take a particular device - not seize it, but examine it. The question is: what do we do with the material and how does the member get to make the claim for privilege, particularly if they're not there at the time that the search warrant is being executed?

So, the proposal that we had come up with is that there would be a relatively short time where a claim for privilege could be made of about three days, bearing in mind if the device is taken we can only keep it for seven days before we must return it, or determine that we're going

to seize it. There are some time constraints around that aspect of it. Then if we do decide to take it, how do we manage the claim, particularly with devices which have a very large amount of information? The protocol that has been adopted, well it hasn't been adopted but the informal protocol that we've been taking is basically that we would image the material. The material would be kept with our property section. It wouldn't, in other words, be provided to the investigators. So, it would be kept here at the commission - it would be imaged - and the copy - and the subject matters that we would want to look at we would extract the relevant documents, and before they could go off to the investigators, the parliament would be given an opportunity to look at the materials that are proposed to be examined with a view to making a relevant claim for privilege.

Now that, I think, is a sensible way forward, because the alternative is that the parliament has to go through all the material, the parliamentary officers have to go through all the material and look at it and determine whether to make a claim, and that can be quite laborious and intensive.

In those cases where that arises, the member may not be aware that the relevant communications have been the subject of - if it's a subject of a section 22 notice, which is the notice which we serve on the parliament asking for all the emails of a particular member relevant to certain matters, the member may not be aware of the fact that we have that material, so the parliament has to make that judgment, but the parliament obviously has resource constraints, and to be able to go through a whole range of material and make that determination can be quite problematic.

What we do here is we try - in the very rare circumstances that it arises, I'm not suggesting this is common at all - we try to keep the request down as narrow as possible. If we get the material in, we will image it, and whatever material we're going to seek to rely upon, we will provide the parliament with that material so that any claims for privilege can be made before it's accessed by investigators.

Ms WEBB - Can I ask a question about that? In terms of the parliament having to decide whether to make claims of privilege on some of that material, or all that material, who is making that decision?

Mr HATZISTERGOS - Well, it depends at what stage the investigation is up. If you have a look at the protocol at the back of the March 2024 document, if there's a dispute - and there may not be a dispute, it may be perfectly obvious that there's a claim for privilege. If there's a dispute, it's referred to an independent arbiter. This is in circumstances where the member is not aware that their material is being looked at. So, the independent arbiter would give advice to the Clerk, effectively.

Ms WEBB - Yes, but I think I'm at the stage before that, so before there's a dispute. That sounds like a claim has already been made and perhaps the commission has a different view of it and therefore a dispute occurs and that goes to the independent arbiter. What about just that initial making of a claim of privilege over the material?

Mr HATZISTERGOS - Well, that would be made by the parliament.

Ms WEBB - When you say that, is it something that has to be considered by each Chamber? Is it something that is determined by the Clerk, who is responsible, perhaps by trawling through it or -

Mr HATZISTERGOS - Well, ultimately, it is determined by the Chamber that the member comes from if necessary; but if it is at a stage where the material should not be provided to the member, it would be done by the Clerk and if there's a dispute, it would go to the independent arbiter who is referred to.

Ms WEBB - Right.

Mr HATZISTERGOS - Now, if the stage is reached where it's overt, that is, that the member is aware, then the House would make the relevant decision.

Ms WEBB - So, that is quite possibly a significant impost on the Clerk then, to have to go through that material and decide whether it is appropriate to make claims of privilege over elements of it; is that your experience?

Mr HATZISTERGOS - Well, it does - well, it can have some resource implications. We're very mindful of that, when we make the request for information, that we keep it as tight as we can so that it addresses our needs.

Ms WEBB - Have there ever been cases where you have interacted with the Clerk to narrow the scope of what's being asked for? Has that been something that has been a -

Mr HATZISTERGOS - Look, I don't want to detail -

Ms WEBB - Okay.

Mr HATZISTERGOS - Any circumstances in my term where that situation has or has not arisen for obvious reasons.

Ms WEBB - Sure. Just theoretically, then.

Mr HATZISTERGOS - But all I can say to you is, we're very mindful of it.

Ms WEBB - Yes, I am just wondering about a circumstance - not asking you to reflect on anything in particular, but -

Mr HATZISTERGOS - There was a previous circumstance, and there's a published report on it, where there was an investigation of a member. That's concluded, so I can mention that, and this was done whilst these things were still being developed, where there was a very large request made, and it was very resource-intensive for the Clerk to arrange people to make the relevant analysis of the material to determine whether there should have made a claim for privilege, and it's in those circumstances that we reflected on that experience and took the course that we have. We have to be mindful of the people we are dealing with, and their capacity, and the resources that are available to them.

Ms WEBB - Yes, and you would appreciate in a small jurisdiction like Tasmania and our parliament that these are matters for us to turn our mind to quite distinctly when we are looking at the arrangements we have put in place.

Mr HATZISTERGOS - Look, the circumstances where this arises is not frequent, but having said that, they are matters of significance. I mean, parliamentary privilege is important. As I said, it's not the privilege of the member, it's the privilege of the parliament, and we're required to respect it and we do. If we're told that something's covered by privilege, then to us that will be readily apparent from the description of the relevant documents. We would certainly not try to interfere with that claim unless we don't believe it's got any substance, but -

Ms WEBB - Can I ask you another question, sorry.

Mr HATZISTERGOS - Yes.

Ms WEBB - Apologies if I cut you off there when you were finishing your thought.

Mr HATZISTERGOS - That's okay. It's Ms Haddad, isn't it?

Ms WEBB - No. It's Ms Webb.

Mr HATZISTERGOS - Ms Webb, sorry.

Ms WEBB - Meg Webb.

Mr HATZISTERGOS - Okay.

Ms WEBB - Can I move to another aspect that we've already touched on, but I'd like a little bit more understanding about the independent arbiter role and how that role is appointed in your jurisdiction, because it is something we would turn our mind to here if we were to contemplate having that sort of mechanism in our protocol, and we have heard different views on that.

Mr HATZISTERGOS - You'll see that referred to in the interim report which has been forwarded to you. It says:

10.4 Any appointments proposed by the Speaker to the role of the independent arbiter must have the support of the committee, which will consult with the Chief Commissioner before making its recommendation.

10.5 Any person appointed as the independent arbiter must be an Australian lawyer of at least seven years standing and secondly, must not be a member or a former member of an Australian parliament, as defined by the *Evidence Act 1995*.

Ms WEBB -Yes.

Mr HATZISTERGOS - So those are the prerequisites. They normally get a retired Supreme Court judge.

Ms WEBB - And is there one person who's appointed into that role, or do you have a panel, perhaps, of available people that -

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Mr HATZISTERGOS - Look, this hasn't been implemented yet and I am not- I am aware that they have used independent arbiters for other purposes, and it's usually the same person.

Ms WEBB - Okay. Thank you. But the appointment process there incorporates the presiding officer, but also the relevant committee by the sound of it.

Mr HATZISTERGOS - Correct. And consultation with the Chief Commissioner.

Ms WEBB - Uh-huh. So it's like a three-point process.

Mr HATZISTERGOS - Well, that's what it says at the moment, but it hasn't been finalised.

Ms WEBB - Okay. Is it a matter that that position would be appointed for a period of time, to be reviewed after a period of time, or for the term of a parliament?

Mr HATZISTERGOS - I think it's a case by case - so every time the issue arises. I am not sure. It doesn't say in here in the actual clause, how long the person is necessarily appointed.

Ms WEBB - Can also I ask about the MOU? Either the one that's been in place which we know needs to be superseded with the more up-to-date one that you've been working on.

But either way, from your experience, does the MOU need to be reaffirmed at the beginning of each new term of parliament after an election? Is it something that once it's in place and agreed by that parliament at that time, it stays in place until it's otherwise amended or brought to an end?

And is it still in effect across periods of prorogation of parliament?

Mr HATZISTERGOS - That's the way the 2009 one has, but it is quite narrow. The MOU of 2009 continues.

Ms WEBB - What is anticipated for the updated one?

Mr HATZISTERGOS - Well, it doesn't say. Either party may revoke the agreement to the protocol, just writing to the other notifying them of their decision. So it's opened at any time to the Speaker, if he's asked to by the parliament or that particular House, to write back saying they're revoking the protocol. The commission can do the same.

Ms WEBB - Just to clarify, then it would still be in place across periods of prorogation and into new parliaments.

Mr HATZISTERGOS - Correct. But it can be revoked at any time.

Mr GEORGE - Thank you, Chief Commissioner. Peter George, Independent.

Mr HATZISTERGOS - Yes, Mr George, thank you.

Mr GEORGE - Just a couple of questions. One is the three steps that you use to judge whether something would be subject to parliamentary privilege or not. Have you found that's worked satisfactorily? Is that a good guide?

Mr HATZISTERGOS - I think it does. I don't have any issue with it. To be clear, this came from the Australian Senate. This is the approach that the Senate uses. It has been adopted by the Legislative Council formally as a test and I think it addresses the issue appropriately.

Documents are brought into existence in the course of or for the purposes of incidental to transacting with the business of a House of Committee.

The documents have subsequently been used in the course of or for the purposes of, or incidental to transacting the business of a House of a committee.

If there's contemporary or contextual reference evidence that the documents were retained or intended for use in the course or for the purposes of or incidental to the transacting of the business of a House or Committee.

I have no issue with any of those matters. Those matters, in my view, quite properly fall within the province of parliamentary privilege.

Mr GEORGE - May I ask about the timing of some of these things? I think it's right to say that an MP or their staff have three days to claim privilege.

Mr HATZISTERGOS - That's in circumstances where - that is not at this stage the position because it hasn't been formally resolved, but it is in the draft protocol, I think.

This is a situation where we haven't seized something, we've actually taken it away for examination and they want to make a claim for privilege.

If there has been a seizure there'll be a claim for privilege. I mean you can't waive it. It has to exist.

If you're seizing some particular device and you wish to make a claim for privilege and you're not there at the time, then you need to be in a position to be able to do that. It may require some time to make that decision. We suggested 'one day', and parliament came back suggesting 'five days'. The difficulty for us is that we can only keep the device for seven days. I think the compromise was three days, but where that lands, ultimately, I can't tell you.

Mr GEORGE - Right. That's something that's been proposed, that's not something that has yet been implemented. Obviously, that puts a lot of constraint on the investigation -

Mr HATZISTERGOS - Well, it can. We have had situations - not so much with circumstances arising out of politicians - but we have had circumstances where people have made late claims for privilege in other settings; legal professional privilege, for example. Where that's arisen, we've still respected it, in the sense that we put those documents aside and we don't further progress them.

I should also indicate to you, now that your question has prompted it, when we do image devices or image material and keep copies and submit to the parliament the documents that

we're proposing to hand over to investigators, subject to the claim for privilege, we have very strict access arrangements as to who can access that material whilst the claim is being determined.

Mr GEORGE - Great. That was going to be my next question, because I assume that you might seize, say for instance, a hard drive from a computer, and then, having seized that, what's the chain of custody and what is the usage? Who ends up making a decision about what is going to be put to the parliament as potential privilege and what won't be used? How does that actually work?

Mr HATZISTERGOS - With devices, what will happen is there will be an image created of it, and that will be stored with the commission. Because of the volume of this material - our property section, just so that you understand, has downloaded something like 37 terabytes of material in the last quarter, which is a huge volume of material, so we need to manage our resources appropriately. What happens is that we identify subject matters that we want to look at, and this occurs right throughout the board. This is not just with parliament. We look at the subject matters and we identify the subject matters. But with parliament, because there is the parliamentary privilege issue, we would identify the documents which would fall within those subject matters. We would provide those to the parliament. This is before any of it goes to the investigators. The parliament would make any claim. Once that issue is resolved, the remaining documents would then be provided to the investigators. We would not have access to the privileged material.

Ms HADDAD - Thank you, Chief Commissioner. This is Ella Haddad, member for Clark.

Mr HATZISTERGOS - Sorry, I mistook you for your colleague earlier.

Ms HADDAD - That's okay, we've got similar haircuts and our electorates overlap, too, so it's totally fine. My question is a procedural one as well. I'm looking at page nine of the written submission: the four steps that are outlined in the protocol when you've imaged information, to describe it how you described it earlier.

Mr HATZISTERGOS - Is this the test you're talking about?

Ms HADDAD - The test, yes.

Mr HATZISTERGOS - It's three steps.

Ms HADDAD - Sorry, maybe I'm looking at the wrong thing.

Ms O'CONNOR - This is in the protocol, the four steps.

Ms HADDAD - That's right, thank you. So that outlines the four steps -

Mr HATZISTERGOS - Well, this is part of the negotiation that was going on. That was actually one of the proposals, but it has moved on since then, so we've given you an historic -

Ms HADDAD - Snapshot.

Mr HATZISTERGOS - An historic snapshot of how we got to the position that we have in the draft protocol. Draft protocols are different, obviously, and that's why, after I was looking at this yesterday in preparation for this discussion, I thought it was important that you read the interim report of March of 2024 because the situation has progressed somewhat.

Ms HADDAD - Yes, has changed.

Mr HATZISTERGOS - And you can see there from that report where it's at. I don't know what the issues are which are holding up the final adoption of the report. I suspect that the Legislative Council is waiting to see how the Legislative Assembly approaches the issue before it comes to a landing. I was of the impression that the Legislative Assembly was going to formally adopt it, but that hasn't occurred and we're now six months down the track, so -

Ms HADDAD - That kind of leads to my other question that I had for you as well, about the protocol with each Chamber. The existing one, is it held with the entire parliament? Are both chambers signatories to the same protocol?

Mr HATZISTERGOS - Yes. That's my understanding of it, 2009. I haven't looked at the formal process that led to its adoption, but -

Ms HADDAD - Yes. So the new draft protocols - you've outlined that the two chambers have to adopt it separately, which makes sense of course, but is there a chance that they could adopt slightly different protocols? Would that be problematic for the work?

Mr HATZISTERGOS - Well, it hasn't happened previously. They - generally, there's a lot of comity between the two Houses. I mean, they do safeguard their independence obviously.

Ms HADDAD - Of course.

Mr HATZISTERGOS - And there's robust disagreements from time to time, but generally speaking in areas like this they try to work together on a joint position. I think that's the reason why the Legislative Assembly has, in the process of dealing with this, forwarded its thoughts to the Legislative Council so that it can engage in its own analysis. And maybe that's one of the reasons for the delay, waiting to see how the Legislative Council approaches it, but at this stage we don't have a final position, although we're both sort of operating as though this protocol is the way -

Ms HADDAD - In place.

Mr HATZISTERGOS - In place, yes.

Ms HADDAD - Okay. Thank you. And just back to the previous discussion we had about the - I understand it might change under the draft protocol - but in the event that you - your officers look at a whole lot of information, determine that some of it may attract privilege, or that a claim of privilege could be made; does all of that information then go to the parliament to consider, or just the items that your officers have identified might be potentially subject to a claim of privilege?

Mr HATZISTERGOS - No. we give all - we identify the documents that we're proposing to hand over to the investigators, so they make the claim.

Ms HADDAD - Right. I see.

Mr HATZISTERGOS - It's not us second-guessing the claim -

Ms HADDAD - Great. Okay.

Mr HATZISTERGOS - And asking them, well, do you get a claim, because remember, they've got to make the claim and privilege is the privilege of the Parliament, and it's not waivable. They can't waive it.

Ms HADDAD - Yes, not the member. Yes. So they see everything that's proposed to be handed to the investigator.

Mr HATZISTERGOS - Yes.

Ms HADDAD - Yes. Got it. Thank you. That makes sense.

Mr HATZISTERGOS - They make that assessment.

Ms O'CONNOR - Thank you. Chief Commissioner, in evidence this morning, we've heard this is now the third potential model. We heard from the Commissioner of the National Anti-Corruption Commission, and there was some discussion about how a matter of privilege is determined by the House, and so in the Commonwealth, questions of privilege go to that House. What is proposed here in our draft protocol, and in the New South Wales protocol, is an independent arbiter who is chosen by, or selected by, a body of the House to certain criteria. Do you have any observations on why a model which has an independent arbiter might be less political and potentially contentious than sending a question of privilege to be resolved by a House that could have any mix of numbers in it?

Mr HATZISTERGOS - Look, I indicated earlier under this draft protocol, as I understand it, that the issue of going to the independent arbiter is really dealing with a circumstance where the House is not in a position to be able to resolve the issue of privilege, because it may be that the stage at which the investigation is being undertaken precludes it from being able to be ventilated publicly.

Ms O'CONNOR - Yes.

Mr HATZISTERGOS - So that's the purpose of the independent arbiter. It doesn't detract from the House's ability to - in other circumstances, to be able to make that decision. Now, there may be benefits in having independent arbiters more broadly used, but at the moment it still would be the House's responsibility, except in those circumstances - the circumstances are such where that shouldn't arise because of the covert nature of the investigation.

Ms O'CONNOR - So, can I ask when, then, a question of privilege is to be determined by the House, how does that work mechanically? Is there a debate on the floor of the whole House? Is there a vote?

Mr HATZISTERGOS - As you'd probably be aware, I used to be a member myself, but that was a long time ago, so in terms of the ICAC, I'm not aware of there having been a recent circumstance where the House had to resolve that issue. I am aware of other circumstances where there were issues, where there were calls for papers and matters of executive privilege were raised, and there were debates on the floor of the parliament relating to that, but that's a very different circumstance to what we're talking about here. So I imagine there would have to be some form of debate. I haven't looked at it in our context; it just hasn't arisen.

Ms WEBB - That's interesting.

Mr HATZISTERGOS - All the - as far as I'm aware, the recent claims for parliamentary privilege, whenever they have arisen, have all been resolved relatively amicably.

Ms WEBB - Resolved and respected, and - that's interesting. One of the things I wondered about in the protocol, in the MOU that you're looking to put in place, the updated version, is there then going to be something in that explicitly - and forgive me if I just have not seen it when I read it quickly - something in that that says that the Houses agree to abide by the decision of the independent arbiter, given, as you've just described, that that role comes into play when matters are covert and can't be discussed openly by the Houses and decisions made by the Houses overtly; is there then an explicit agreement?

Mr HATZISTERGOS - Look, that's my understanding of how it's proposed to work. If you look at 10.6, it says:

Where confidentiality applies to a section 22 notice and the ICAC disputes a claim of parliamentary privilege, the Speaker will refer the matter to the independent arbiter and advise the Chief Commissioner of the referral. The clerk will provide the independent arbiter with copies of any materials. The independent arbiter may take the same requests as the clerk under the clause and then the independent arbiter will assess and determine the claim within 14 days of receiving the relevant documents or things from the clerk.

Then it says:

The independent arbiter is not required to give the reasons for their decision. The independent arbiter's decision is binding until such time as confidentiality ceases to apply to the ICAC's investigation and questions of parliamentary privilege can therefore, if required, be determined by the House.

Ms WEBB - So that's clear there. It explicitly says the decision is binding, so therefore, in agreeing to this MOU -

Mr HATZISTERGOS - Yes.

Ms WEBB - The two Houses are agreeing that that will be the case.

Mr HATZISTERGOS - That's the case.

Mr GEORGE - But they're agreeing - am I right in thinking - sorry, through you, Chair -

CHAIR - No, that's fine.

Mr GEORGE - They're agreeing that it is binding -

Mr HATZISTERGOS - Sorry, I should emphasise: if the arbiter comes down in favour of parliamentary privilege, we will be required to return the documents, all the relevant materials, so we won't have copies of that material. That will be returned back to the relative House.

Mr GEORGE - So, it's binding until the matter is no longer confidential, which means that the House can then retrospectively review the arbiter's decision; is that right? That's what I marked up. That's what I was curious about.

Mr HATZISTERGOS - Well, the way the protocol is written:

The independent arbiter will assess and determine the claim within 14 days of the relevant documents and things from the Clerk. Alternatively, if required, the independent [arbiter] will consult with ICAC as to a time for compliance which is reasonable. The independent arbiter is not required to give reasons. The independent arbiter's decision is binding until such time as confidentiality ceases to apply to ICAC's investigation, and the question of parliamentary privilege therefore is required be determined by the House.

Mr GEORGE - Yes. 10.3, yes.

Mr HATZISTERGOS - So if the House makes an alternative decision, and wants to claim privilege, that's preserved.

Mr GEORGE - Yes, that's preserved. So, in other words, the arbiter's decision might be binding until confidentiality is no longer important, and then it can be reviewed if necessary. Yes, so that is the sort of backup as it were, is that right?

CHAIR - Seems to be.

Ms WEBB - The thing that still puzzles me, and it follows on from Ms O'Connor's question before, on a practical level, how is that done by either House? Who brings it to the House? What form does it take in terms of being brought to the House for consideration? What volume of material might be required to be presented to all members of the House for this to happen?

Mr HATZISTERGOS - I am not sure what processes they have. I mean, one option is to have the Chair of the Privileges Committee raise it in the parliament by formal resolution and have the matter debated in that way. Another option, maybe, is for the Speaker to report it to the House and then for debate to follow, but that's a matter for the House to determine, as to how it goes about its processes.

Ms WEBB - Could it also, though, risk being a complete dead end, something that just, in a murky sense, never gets resolved, if it got to that level of contention where that was having to be the resolution mechanism, the House considering it? Could it actually just get stuck there?

Mr HATZISTERGOS - Well, I mean the arbiter's decision is there until the House determines otherwise.

Ms WEBB - Well, even just stepping back, not in a situation where it's been an arbiter's decision but under normal circumstances, where there has been a dispute about their claim of privilege and then that needed to be resolved by the House in this same sort of way, at that point, unless it is brought forward by somebody, unless there is an actual mechanism for that to occur, it could just sit there unresolved, ad infinitum.

From your point of view, as the Chief Commissioner trying to pursue an investigation, do you see that there's a risk that there could just be a dead end there?

Mr HATZISTERGOS - Look, I could see potential pitfalls, but I don't want to judge this by extremes.

Ms WEBB - Sure, it's not likely.

Mr HATZISTERGOS - It's unlikely to arise and we're very sensitive to the question of parliamentary privilege ourselves, so if we do see something that falls into that category then we respect it ourselves. We don't want to be interfering with parliamentary privilege and the rights of the members and people who they speak to. That's a protection which is specifically preserved under our act and we're very mindful of it and respect that the circumstances where there are likely to be disputes, I would think, are not very common.

This protocol is a way of being able to resolve a large number of them and the circumstances where there may be disputes on disputes, I think, are even less common, if I can put it that way. So, I mean, experience will ultimately be the guide to determine these sorts of matters, but we've had, certainly in my time as commissioner, a fairly sensible approach to these issues and I've not had reason to be concerned about any overreach by anybody interfering with our work.

Ms O'CONNOR - Thanks, Chief Commissioner. For absolute clarity, the kind of materials that we'd be talking about here that would not be covered by parliamentary privilege are essentially personal communications that a member of parliament might do on their work device that may be of interest to an investigation, is that correct?

Mr HATZISTERGOS - Sorry?

Ms O'CONNOR - So, I'm trying to distinguish between the volume of material that a member of parliament may contain on their electronic devices and to apply the three-step Senate test. What we are essentially talking about here, aren't we, are personal communications that a member of parliament has made on a work device that may have nothing at all to do with their parliamentary work. Is that correct?

Mr HATZISTERGOS - I don't think it covers just that. That would certainly not be covered by parliamentary privilege. You need to focus on documents which are brought into existence in the course of, for the purposes of and incidental to transacting the business of a House or a Committee of the House. It has to relate to the House or a Committee of the House. Obviously, members of parliament have work which extends outside of the business of a House or of a committee, and particularly for members of the executive government, they have, there's

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executive privilege, obviously, but that is not parliamentary privilege; that's a different arrangement. It has got to relate to the business of the House or a Committee of the House.

Ms O'CONNOR - For example, if a member of parliament in the course of their work as an MP, receives a large volume of emails on a particular subject that has no direct relationship to the transacting of the business of the House or a committee, but is relevant to the work of a House or committee in terms of the issues that might be in those emails, would those emails from constituents and stakeholders -

Mr HATZISTERGOS - You are asking me for a whole range of nuanced sort of legal matters. If documents were subsequently used in the course of or for the purposes of incidental to the transacting of the business of the House, they would be covered.

If there is contextual evidence that the documents were retained or intended to be used in the course of or for the purposes or incidental to the transaction of the business House, they would be covered. If they have no relationship to the House or a Committee of the House, then they are not covered.

Ms O'CONNOR - Constituent emails would often potentially not be covered.

Mr HATZISTERGOS - Well, I don't know. Some of them might be, some of them may not be. Depends on what the subject matter is and what's going on in the House at the time.

Ms O'CONNOR - Interesting. Thank you.

CHAIR - Any other questions?

Thank you very much, Chief Commissioner, for your appearance.

Mr HATZISTERGOS - You're welcome.

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

Mr HATZISTERGOS - I do, but I won't be talking to anyone about that.

CHAIR - I did not think so and I am sure you understood it, but just something that I actually need to read.

Thank you very much for your appearance today and thank you very much for the submission as well.

Mr HATZISTERGOS - Thank you for your time. Best wishes, for your deliberations.

The witness withdrew.

The committee suspended at 1.53 p.m.

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The committee resumed at 3.00 p.m.

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

Mr DUNCAN - Thank you very much. My name is Tom Duncan. I am the Clerk of the Legislative Assembly of the Australian Capital Territory.

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

Mr DUNCAN - I have, Madam Chair.

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 the 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.

May I introduce the members of our committee: honourable member for Hobart Cassy O'Connor, Peter George, member for Franklin, me Rosemary Armitage, member for Launceston, the honourable Meg Webb, member for Nelson, Ella Haddad, member for Clark.

Also assisting us today we have Fiona, Mary and Luke from our secretariat. On Hansard we have Henry and Lilith.

Thank you very much. We very much appreciate you being here.

Mr TOM DUNCAN, CLERK OF THE AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - Would you like to commence with a short opening statement?

Mr DUNCAN - I don't really have an opening statement, apart from, I did lodge a submission back in April, and the submission pretty well speaks for itself. It just outlines how this Assembly has dealt with the Integrity Commission that was established in 2019, and the arrangements between the Assembly and the Integrity Commission. I'm more than happy to answer any questions on that submission or any other matter.

CHAIR - Thank you very much.

Ms O'CONNOR - Hello, Tom. Cassy here, member for Hobart. You've had an Integrity Commission in place for six years. Could you talk us through what you understand or what you've experienced operationally, and whether or not a question of privilege which the Assembly has had to determine has arisen yet?

Mr DUNCAN - Thank you for that question, that's a very good question. Luckily - and I think partly because we have quite a comprehensive continuing resolution at the back of our Standing Orders, which is explained in our submission - there have been no instances of interaction between the Integrity Commission and the Assembly on parliamentary privilege to date. But we think it's partly to do with the fact that we have very good procedures outlined in that continuing resolution, and in the Integrity Commission Act, that the Commissioner is well aware of parliamentary privilege. I know that I've had a number of conversations with the Commissioner and he is well aware of parliamentary privilege, so luckily we haven't had to deal with it. But we hope that if it does come to the point where an Integrity Commission seeks either documents from a member or evidence from a member, these procedures will enable parliamentary privilege to be determined in an appropriate way.

Ms O'CONNOR - Thank you. On page four of your submission, you say:
On one hand, refusal to provide information sought by the Commission may, in certain circumstances, be treated as a possible contempt against the Commission. On the other hand, the provision of information to the Commission relating to 'proceedings in Parliament' may enliven the Assembly's contempt power.

As you say, that hasn't been tested yet in the ACT.

When you say below that, 'a statutory remedy is needed to prevent such difficulties from arising', are you talking about amendments to your own Integrity Commission Act - and I note there are a number of amendments that went through in 2022 - or are you talking about a Commonwealth statutory provision, or codifying your Continuing Motion 4? What do you mean by 'a statutory remedy is needed'?

Mr DUNCAN - Look, I think under the Commonwealth self-government act - we are a territory parliament so we are created by a Commonwealth act, it's the *Australian Capital Territory (Self Government) Act 1988*. That act provides that we have the same powers, privileges and immunities as exists in the Commonwealth House of Representatives, and their powers and privileges are defined by the Commonwealth *Parliamentary Privileges Act 1987*. So, we have all the privileges of the federal parliament, except that we can't fine or imprison anyone who is in contempt in the Assembly, and we don't have that provision in our act.

So I think what that sentence that you've referred to is saying that if we did want to further enshrine our own privileges, we need to do that via a Territory enactment, but we've never done that. Currently we just rely on the Commonwealth *Parliamentary Privileges Act*, and we think that's sufficient to deal with our privilege issues. If we wanted to set our own path in terms of parliamentary privilege, we do have the ability to pass a law in the Territory, but I think it's generally recognised that we have all the precedents, all the case law that the Commonwealth Parliament has in relation to parliamentary privilege, and we apply that equally to the ACT.

Ms O'CONNOR - Okay. In the next part of your submission you talk about a really interesting case which was between the Western Australia (WA) Corruption and Crime Commission, the Legislative Council there and their Department of Premier and Cabinet (DPAC), and determinations that were made by their DPAC on what constituted privilege.

WA has a protocol in place, as I understand it. Is that correct?

Mr DUNCAN - It does now.

Ms O'CONNOR - So it does now - as a consequence of that case, is that right?

Mr DUNCAN - Correct. It didn't have one before that.

Ms O'CONNOR - Okay. If you were advising us, and we've taken on the job, for our sins, of trying to work through this protocol question, if you were advising us on what we might avoid and what we might be sure to include in any protocol or MOU between the parliament and the Integrity Commission, what would you advise us?

Mr DUNCAN - Well, in our situation, and I don't know if it's the same in Tasmania, but all members' data - emails, correspondence - is held by the government on a government server, along with the rest of the ACT public service. So when the Integrity Commission wants data, it will approach the government to provide that data, and that's what happened in Western Australia.

They were seeking information about, I think, three MLCs from the upper House, and the government provided that data without the ability of those MLCs to claim parliamentary privilege. I would suggest that - and they had no MOU as to about how parliamentary privilege was to be considered, so I would encourage you, if you don't have an MOU between - and I don't know where your data is held, whether the parliament independently holds all the data for members or whether it's held by the government.

Ms HADDAD - Well, it could be a mixture. If it's a minister, there's information held on different devices. It could be both.

Mr DUNCAN - Well, these were non-executive members that were looked at in the Council in Western Australia, and we would distinguish ministerial, you know, cabinet submissions and things like that in a separate category, because that's dealing with the executive arm of government. But certainly I would encourage you, if there is someone seeking data on members in any form, an integrity body seeking that information, that there needs to be an ability of a member to claim parliamentary privilege.

Now, in the case in Western Australia, it was about travel entitlements. That was the data that was being held, which I don't think was ever going to be subject to parliamentary privilege. But there was a principle in Western Australia - the principle was that it's the parliament that determines parliamentary privilege, not the executive, and not the courts, and not the corruption body. So I think they've now established that principle with that MOU that it's the parliament that determines parliamentary privilege and whether that information can go to the integrity body.

Ms O'CONNOR - A quick question and my last question: in the ACT - and rightly so - a question of privilege is determined by the Assembly, and you haven't had it tested yet.

Mr DUNCAN - Correct. Yes.

Ms O'CONNOR - But how would it work mechanically, and how would that work if there's a covert warrant? So that is, you can't sort of broadcast to the whole Assembly that there's an investigation into one of their colleagues; how would that work?

Mr DUNCAN - Well, I think even if there's a covert - the continuing resolution is worded in a way that if any Assembly information is sought by any means by the Integrity Commission, the member is entitled to claim parliamentary privilege, and the nuts and bolts - and as I said, we haven't been through it yet, so you kind of - but I think the way it's intended to operate is that the member would communicate to the integrity body that he or she is claiming parliamentary privilege, and then it's up to - if the commission disputes that claim, there is a process where a Speaker can appoint an independent legal arbiter to determine whether the claim by the integrity body is higher than the claim by the member. And then we would be bound by the determination of the independent legal arbiter who is, under the resolution, a retired King's Counsel, Senior Counsel, Supreme Court, Federal Court or High Court judge. There'll be a - sorry.

Ms WEBB - I have some follow-on questions about the arbiter, if I may, since you have gone there, and particularly because you have just said then about being bound by the determination of the arbiter. I am interested in that because when I read your MOU protocol here, there is a clear process mapped out where if privilege is claimed and the commission wants to dispute that claim of privilege, the member claiming privilege has to have provided some written reasons for their claim. The commission has to provide their argument against that.

All of that then flows through via the Speaker to the independent arbiter who makes a determination. The determination comes back to the Speaker and to your relevant committee, the Standing Committee on Administration and Procedure. What happens then? The arbiter's determination comes back, does that then have to be formally agreed and accepted by your Assembly in some sense, or is it just - or have you built that into this agreement as a given?

Mr DUNCAN - The Assembly has delegated its power to the arbiter.

Ms WEBB - That's an interesting use of term there, because we've had some discussion already today with different people appearing before us about the ability or not of the parliament to delegate that authority, or whether that in fact it's not about delegating it, but it's about creating a mechanism whereby an assessment is arrived at that the parliament agrees it then gives effect to. Do you think technically it's about delegating this power or is it actually just about creating a mechanism that you then agree you abide with?

Mr DUNCAN - Well, I - yes. You're probably more correct in saying it's a mechanism that the Assembly agrees to abide to. We have a similar system where we call for documents of the Assembly. In this Assembly, we are now regularly calling for documents from the executive.

Ms WEBB - That's music to my ears.

Mr DUNCAN - The executive is claiming executive privilege on those documents and refusing to provide them. We have a mechanism that if a member disputes that claim, an independent legal arbiter is appointed, and the independent legal arbiter will determine whether those documents are provided to the members or not provided. I can tell you that in the last

two - there's been five motions moved this year, and of five of them, two of them, the independent legal arbiter has resolved that the members see documents that the government has claimed executive privilege over.

Ms WEBB - Imagine our surprise. That's great. So similar to the New South Wales arrangement of having an independent arbiter -

Mr DUNCAN - Correct.

Ms WEBB - Which is great for production of documents.

Mr DUNCAN - But - sorry to interrupt, but I think they have delegated the power to decide what - is the parliament's interest higher than executive interest, and they have delegated that power to the independent legal arbiter, and both sides agree to abide by the decision of the independent legal arbiter.

Ms WEBB - Is that explicitly - forgive me if I am just not reading it here, because I may have just been too cursory in my reading; is it explicit in this agreement that the parliament agrees to abide by that determination?

Mr DUNCAN - Yes -

Ms WEBB - I probably just skipped through and missed it.

Mr DUNCAN - So if you look at paragraphs 18 and 19:

Where the Arbiter determines that an item of information does fall within the scope "proceedings in Parliament", it is protected by parliamentary privilege and it will be returned to the affected member and may not be inspected, accessed, examined, or copied by the Commission.

But 19 provides that if the arbiter's determines that it does not fall within the scope, then the Commissioner is then able to use that information in any investigation.

Ms WEBB - So that's fine, I understand the wording of those basically sets up the given that the parliament is agreeing with the arbiter.

Mr DUNCAN - Correct.

Ms WEBB - In terms of the appointment of the arbiter, the Speaker appoints the arbiter. Is there any requirement that there be some conferring with the relevant committee or any other point of reference in making that appointment? If not, was that something that was contemplated and then decided wasn't necessary?

Mr DUNCAN - Definitely in relation to - I'm just refreshing my memory - in relation to the claims of documents being sought, the Speaker has to consult with the Leader of the Government, the Leader of the Opposition, crossbench and, I think, Independent members. We have two Independent members here in our 25-member parliament. But I think -

Ms WEBB - I don't read it in here, but I just wondered -

Mr DUNCAN - No. I don't think there is a -

Ms WEBB - Has it been contemplated, and perhaps had there been contemplation of that, because just knowing that potentially the Speaker could have some political overtones to it as a position in that sense, so conferring with others helps to negate any -

Mr DUNCAN - Yes. I would agree that that is probably a gap in this continuing resolution that we didn't obviously think of while we did it, but certainly the Speaker is answerable to the Assembly. And if the Speaker does something that the Assembly doesn't like, the Assembly certainly has mechanisms to inform the Speaker that they're not happy with the proposed appointment.

Ms WEBB - Yes. I guess the political question there, though, is often the Assembly is going to be obviously dominated by the government most likely - perhaps not, but may well be and, therefore -

Mr DUNCAN - Not in the Territory.

Ms WEBB - True, and not necessarily here, either, but having said that, we have to contemplate all different scenarios, not just the current one. So it's still -

Mr DUNCAN - Sure. Well, just to add to that, the current Speaker is an opposition member, not unlike Michelle O'Byrne in the House.

Ms WEBB - Yes. Well, I was just hearing about that a short while ago. That's the case. But in terms of there being a negating of potential political overtones to the appointment, would you encourage us, or think that looking at some interaction with either a committee or some mix of political representation in the parliament is an advisable pathway to look at?

Mr DUNCAN - Look, I think that's a commendable point and I would encourage you to do that. I mean, I think in the end, though, someone has to appoint an independent legal arbiter, and you may find that the Premier agrees, but the Leader of Opposition and the crossbench don't. I guess you need to think about whether it's consult, or get the agreement, because we have a situation here where the Speaker appoints the integrity commissioner and the auditor-general, the electoral commissioner and the Clerk.

Some of those appointment mechanisms are with the agreement of the relevant committees or leaders and some of them are just consulting. I know there have been instances where, for instance, the Speaker did propose an integrity commissioner that the relevant committee did not agree with. So, the Speaker had to find another commissioner and similarly with an auditor-general. So yes, I think that those are useful arrangements to ensure that the appointment of any independent legal arbiter has the backing of the relevant House, or both Houses, as the case may be.

Ms WEBB - Yes. Can I just have one more question about the arbiter appointment: is it something that's just appointed on a case-by-case basis as necessary, or has there been contemplation of it and somebody appointed to be there and ready in case?

Mr DUNCAN - It's a case-by-case basis.

Ms WEBB - Is there anything that's problematic in terms of timeliness around that arrangement?

Mr DUNCAN - Well, independent legal arbiters are not sort of common on the ground. You've got to find someone who's got relevant expertise. We've been lucky. We haven't used it for this continuing resolution, but, as I indicated previously, we've used it for the calling of documents from the executive. and we've been very lucky in this Assembly to have the honourable Keith Mason from New South Wales who's also done a lot of work in the New South Wales upper House on this topic, so, yes, there are going to be times when that particular person is not going to be available and the Speaker needs to be able to appoint someone else. Trying to find a retired High Court, Supreme Court, Federal Court judge is not always easy.

Ms WEBB - No, that's why I was wondering about whether having someone up your sleeve and ready to go is important given - there are timelines on a lot of these other steps potentially in this process, so things don't get too held up.

It's so interesting to -

Mr DUNCAN - Just on that, we've had this continuing resolution in place since - if we'd gone down that path and appointed an independent legal arbiter to update on this particular continuing resolution, that person would have been sitting on the books for four years with not one bit of work.

Ms WEBB - Yes, that's true.

I wasn't contemplating necessarily that they're sitting there in a paid capacity the whole time waiting, but I guess any issue could arise. You'd have someone who was basically appointed, ready to be activated and brought onto the books when necessary. Even then, they may well be on leave, or they may well not be available due to other commitments, so you would still need a responsive process in the moment anyway, most likely.

Mr DUNCAN - Yes. I agree.

Ms HADDAD - Mr Duncan, it's Ella Haddad; I'm a member for Clark.

Mr DUNCAN - Hello.

Ms HADDAD - Hi, it is good to meet you.

We heard this morning from Prof Gabrielle Appleby from the University of New South Wales who talked about the importance of the educative function around protocols like these, and one of her recommendations to this committee is that that responsibility should sit with our Clerks of our two chambers. I wondered if you had any reflection on that, as a fellow Clerk, about whether or not that's a suitable kind of task to sit in the scope of the work of Clerks of various chambers?

Mr DUNCAN - Thank you for the question. Can I just ask whether Prof Appleby was talking about the educative role amongst members and counsellors or just members?

Ms HADDAD - Members and - it was the operation of the protocol specifically so I suppose it could also include people working at the Integrity Commission, but not general educative function around other things, but specifically the operation of any proposed protocol or any agreed-to protocol, I should say.

Mr DUNCAN - I think what Professor Appleby has said is quite correct. It probably does fall within the remit of the clerks. I certainly - we have an induction process for new members after every election, and then we run a series of seminars. We had an election in October last year, so we ran a series of seminars in November and December and then we ran a whole series of seminars on just parliamentary procedures from January and the last one was in about May or something like that, just lunchtime seminars and things like that.

We kind of made it available for members and their staff to come along and ask questions on any aspect of Standing Orders or continuing resolutions that they didn't know about. I don't think we covered this specifically, but we did talk about the role of the Integrity Commission. I know that they come along and address members about their role, and we did get the Integrity Commissioner himself to address new members, and so certainly this topic was covered amongst the new members.

How much of it sunk in, because we do realise that we give members a whole heap of information very early on in their term and it's information overload to be quite honest, but I certainly think that Clerks could certainly take a role in updating members and reminding them of the provisions.

What tends to happen is that when the Integrity Commissioner comes knocking is when people start to try to learn about this very quickly, which is far too late -

Ms HADDAD - Yes, understood.

Mr DUNCAN - But I agree that education is always good.

Ms HADDAD - Great. Thank you.

Mr GEORGE - Mr Duncan, it's Peter George, Independent for Franklin. My apologies for being a trifle late, and my apologies to the Chair as well. Twice in one day is not good.

I wanted to know if you have adopted the Senate test for privilege, which is the three-step cascade. You're aware of that, I assume?

Mr DUNCAN - If I can just draw your attention to my submission and paragraph 31 -

Mr GEORGE - It's there. Alright, good.

Mr DUNCAN - I've known it as being 'the Breen test', which I think came from the NSW Legislative Council, but I think it is very similar to the Senate test. So I can't guarantee that it's the Senate test, but there's definitely a three-stage process which, I think, will probably be very similar to the Senate.

Ms WEBB - And you've written it into your submission.

A MEMBER - Page 11.

Mr GEORGE - I'm sorry, I missed that. The other question I have for you is about how the whole system works. I noticed that a member has five days to make a claim of privilege, and then the commission has another five days in which to respond to that claim, and so on. So, can you briefly take me through how that would work if you were to seize some documents or a hard drive? What is the process that you then follow?

Mr DUNCAN - I'll just preface my response by saying this has never been used, so I'm talking in theory, but I think the way it's envisaged is if the integrity body was seeking documents or information from a member, and the member - we get a subpoena or get some communication, that's by way of paper documents, then the member has then got five calendar days - or five days, I'd have to check whether it's calendar or business - five days to make a claim of privilege, and then the integrity body has got five days to determine whether they want to dispute that claim.

Of course, it may well be that the member has been called before the Integrity Commission at a private or a public hearing, and in that case, while they're being cross-examined, they also have an opportunity to claim privilege, at which point, I guess, they would have to adjourn the proceedings to resolve the issue of parliamentary privilege, and the Integrity Commission couldn't ask any further questions on that line of questioning until the matter of parliamentary privilege was determined - which I'm sure the Integrity Commission probably doesn't like, but that's part of the process of allowing a member to claim parliamentary privilege.

I think that, in essence, it's either papers or documents being sought, or evidence being sought at a private or a public hearing. They're the two scenarios that, for the five days for both claiming privilege and the integrity body disputing the claim. On top of that, you've got a period of time for the Speaker to appoint an independent legal arbiter, and then the independent legal arbiter has to go away and determine the case as to whether parliamentary privilege applies.

I'm just trying to refresh my memory about whether there's a time frame for the independent legal arbiter. I think there is.

Mr GEORGE - Fourteen days, I think, isn't it?

Mr DUNCAN - Yes, I think that's right. That's the same as what we do for documents here as well. I hope that explains the process a little more.

Ms O'CONNOR - What was the process for developing Continuing Resolution No. 4? Presumably your committee started the work and then it went to the Assembly and was adopted by the Assembly. Is that right?

Mr DUNCAN - I think this one was one where a very proactive Clerk saw a problem, looking at the West Australian example, and put a submission to the then Speaker, and the Speaker agreed it was a problem. We have an Administration and Procedure Standing Committee, which is chaired by the Speaker and has the whips on it, and that's the committee that deals with changes to practice and procedure. It's effectively a procedure committee and a Standing Orders committee - and so that was the real impetus was that I thought there was a real gap. We did not want a Western Australian situation here in the ACT.

Ms O'CONNOR - Was that you who identified the problem and wrote to the Speaker? Are you being modest?

Mr DUNCAN - Yes.

Ms O'CONNOR - Just checking.

Mr DUNCAN - I did say the Clerk.

Ms O'CONNOR - Yeah, that's right. It could have been another Clerk in another time. Good on you for being modest.

In both the Commonwealth and the New South Wales MOUs, which we are looking at, the requirements for the independent arbiter are that they be an esteemed legal professional, which is here in Continuing Resolution No. 4. But also there is a requirement in those two and in our draft protocol that they not be a former member of parliament.

Was there a reason that you left out that provision even though it had been in the New South Wales MOU, I think, since 2009?

Mr DUNCAN - To be quite honest, I didn't think it was. Bear in mind it is a retired judge or judge of the Supreme Court. I guess if there's a King's Council or a senior council, there's been a member of parliament. If they're esteemed, you'd expect them to be in the profession for 10, 15, 20 years. But you know maybe it is a gap in our procedures that we need to address. I mean, had my attention drawn to it. It probably would be better to have that because I think you want the independent legal arbiter to be beyond reproach.

I note here that the Speaker must consult with the Standing Committee of Administration. But there is that consultation procedure, which I'd forgotten earlier.

But yes, ideally you want someone beyond reproach. I do know that the Speaker, in appointing the first Integrity Commissioner, that membership of the Labor Party was raised. This is on the public record. It was a former Chief Justice of the Australian Capital Territory Supreme Court. He had been made a life member of the Labor Party, but he had recused himself from any party ever since he went on the court. But that was deemed sufficient by the then opposition members to deem that he was probably unsuitable for the role of the Integrity Commissioner. So the point you raise is quite salient. And it does arise in these sorts of settings that where you are looking for someone you can approach, you want to get the best possible candidate that the whole parliament can feel comfortable with.

Ms O'CONNOR - Totally agree. But you know, looking over at the United States and seeing how flimsy the guardrails are.

Could, under your system, because I can't see anything - it says that the Speaker must consult, but the Speaker could consult and go, 'Oh yeah, well, whatever, I am going to appoint this person anyway'. There isn't actually anything preventing that in your system at all, is there? It's a goodwill and a convention keeping those guardrails up as much as we can.

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Mr DUNCAN - Correct. But, I just point out, that a presiding officer is responsible to the House for his or her actions, and this Speaker is an opposition Speaker, and the opposition has nine votes out of 25, and if there is a censure motion or no-confidence motion against the Speaker, then the Speaker needs to convince the majority of the Assembly that he has the confidence of a House. If the Speaker goes against the will of the Assembly, he has got to be accountable for that to the Assembly.

Ms O'CONNOR - Sure, thank you.

CHAIR - Any further questions from any members? No.

Thank you very much, Tom, for your appearance. Obviously, what you have said to us today is protected by parliamentary privilege. So once you leave the hearing, you need to be aware that 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 DUNCAN - Out of all the witnesses that appear before you, I think I am probably, without tickets on myself, best qualified to understand that advice. Thank you.

CHAIR - Well, we thought you would. Thank you very much. It's been really interesting and we really appreciate you taking the time to put in a submission and talk to us today. It's been very helpful.

Have a nice afternoon and thank you very much.

Mr DUNCAN - Thank you, and if you think of any further questions, I'm happy to answer any written questions or follow-ups.

CHAIR - Thank you.

The witness withdrew.

The committee adjourned at 3.35 p.m.