



Imposition of a WHS 'prohibition notice' on the ACT Legislative Assembly

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Introduction

On 12 August 2022, inspectors from WorkSafe ACT¹ attended the precincts of the Legislative Assembly for the ACT to investigate a complaint that had been made about the Select Committee on Estimates 2022-2023. Concerns had been raised that the committee's planned in-person hearings (rather than remote video hearings) were possibly in breach of the *Work Health and Safety Act 2011* (the WHS Act) due to the lack of consultation with 'affected workers' (i.e., senior government officials who were to be witnesses at the hearings) and the purported lack of a risk assessment in relation to potential Covid exposure.

Subsequently, a Work Health and Safety (WHS) inspector served a notice on the Speaker purporting to prohibit committee hearings or meetings being conducted at the Assembly precincts. The notice led to delays in the work of the committee and a select committee on privileges was established to inquire into and report on the issuing of the prohibition notice. The committee ultimately found that the prohibition notice issued by WorkSafe ACT improperly interfered with the free exercise of the Assembly's and its committees' functions and was a breach of privilege.

The episode gave rise to concerns about the use of statutory powers by an executive government agency to prohibit the accountability and scrutiny functions of a parliamentary committee and that such incursions could undermine the effective separation between the legislative and executive branches of government.

These matters are the subject of this paper.

Events at the centre of the exercise of the WorkSafe powers

Following the introduction of the appropriation bills for the year, it is the practice of the Assembly to establish a select committee on estimates to inquire into and report on the bills. The estimates process is the preeminent accountability moment for the ACT Executive and its agencies, with public hearings being conducted to review all facets of public administration in the ACT. Consistent with that practice, the Assembly established the Select Committee on Estimates 2022-2023 to, among other things:

... examine the expenditure proposals contained in the Appropriation Bill 2022 2023, the Appropriation (Office of the Legislative Assembly) Bill 2022 2023 and any revenue estimates proposed by the Government in the 2022 2023 Budget and prepare a report to the Assembly.

In arranging its public hearings, the Opposition chair of the committee,² wrote to the Manager of Government Business³ advising of its intention to conduct its hearings in-person, rather than via remote video conferencing as had been used earlier in the Covid-19 pandemic.

¹ Inspectors from WorkSafe ACT (Australian Capital Territory) are appointed by the Work Health and Safety Commissioner who is the work health and safety regulator in the ACT.

² The committee was made up of a member of the Canberra Liberals (Chair), a member of ACT Labor, and a member of the ACT Greens.

³ The Manager of Government Business also being the Minister for Industrial Relations and Workplace Safety with responsibility for WorkSafe ACT.

The chair advised of the precautions that would be taken to manage health and safety risks through social distancing, cleaning seats and desks between witnesses, the use of hand sanitiser, and the availability of masks for use while participating in proceedings. Witnesses would also be given the opportunity to appear remotely in the event that they had a health condition that would make them especially vulnerable.⁴

In response, the minister wrote back to the committee seeking to implement what was described as a 'hybrid model' by which witnesses could, of their own choice, appear either remotely or in-person. This, the minister said, would assist in meeting relevant obligations under the WHS Act to protect witnesses from the risk of Covid transmission.

On behalf of the committee, the chair responded to the minister by advising of the room limits⁵ that would be applied to ensure social distancing and reiterated the committee's position that 'the Committee decided that hearings will be face to face where possible to provide effective scrutiny of the budget'.⁶

After additional back and forth, on Friday 12 August 2022, and prior to the hearings that were to be conducted with government officials on Monday, 15 August 2022, the minister requested that the committee acknowledge the Covid-related risks and consult about the committee's risk assessment and that witnesses be permitted to choose the 'safest method of appearance [i.e. in-person or remotely] without having to disclose private health information to the committee'.⁷

The committee advised the minister that it would further consider the request.

Before a formal response to the minister's request was able to be considered by the committee, on the afternoon of 12 August 2022, inspectors from WorkSafe ACT were despatched to the Assembly precincts to investigate a complaint (which, it was later revealed, had been generated following a contact by the minister's office) about the conduct of the proposed public hearings. The inspectors met with the Clerk of the Assembly and, later, a member of the estimates committee and a staff member of the Office of the Legislative Assembly. According to the Office's submission to the subsequent privileges committee, the following was then said to have transpired:

The inspectors proceeded to demand the production of certain documents from the Clerk.

The Clerk provided the inspectors with a copy of a draft revision of the Assembly's COVID Safe Plan... that the Speaker had provided to the Standing Committee on Administration and Procedure at its meeting of 1 August 2022 for its consideration.

The plan contains a series of detailed risk assessments and associated controls relating to a wide range of activities that take place in the Assembly precincts.

The inspectors were particularly interested in the proceedings of the Select Committee on Estimates 2022-2023 and how it intended to undertake its public hearings program. The Clerk explained that he did not have any authority over the proceedings of the committee and nor was

⁴ Select Committee on Privileges 2022, [Imposition of a prohibition notice by WorkSafe ACT](#), 10th Assembly, April 2023, p 6.

⁵ That is, to ensure that 1.5m was maintained between people in committee rooms in line the then public health advice.

⁶ Select Committee on Privileges 2022, p 7.

⁷ Select Committee on Privileges 2022, p 7.

he authorised to speak with any third-party about what the committee's internal deliberations might have entailed.

During the inspection, the inspectors purported to require that the Clerk make members of the estimates committee available to the inspectors in order to question them.

It is understood that being finished with their meetings for the day, two of the MLAs on the estimates committee had left the precincts already and that only one of its members remained.

On being advised of this, the inspectors reprimanded the Clerk for 'permitting' the other two MLAs to leave the precincts....

Throughout the course of the Clerk's interactions with the inspectors, he had emphasised on several occasions that parliamentary privilege was potentially enlivened by the sorts of demands that were being made and the prospect that had been conveyed by the inspectors that they could shut down the work of the committee if they were not satisfied that certain risk assessments and consultations with 'affected workers' had been performed. The matters raised by the Clerk did not appear to be of concern to the inspectors.

On a number of occasions, and in response to queries about consultations with 'affected workers' and risk assessments, the Clerk attempted to draw the inspectors' attention to the Assembly's COVID Safe Plan and the risk assessments contained in it. It was unclear whether the inspectors did, in fact, examine the plan in any detail.⁸

It was following this series of events that later that day a written prohibition notice was issued to the Speaker purporting to prohibit:

... any hearings or committee meetings at [the] Legislative Assembly of the Australian Capital Territory until a risk assessment has been undertaken, adequate control measures are implemented in line with the Hierarchy of Control, and consultation has been undertaken with all affected workers.⁹

The notice purported to require that a range of remedial measures were to be implemented before committees would be permitted to perform their functions in the precincts. These included undertaking a risk assessment, implementing 'adequate control measures', consulting with workers and providing evidence to WorkSafe ACT that these things had been done.¹⁰

Upon receiving the notice, we were immediately concerned about:

- the interference with the work of the estimates committee by an executive government agency and the possibility that a contempt had been committed against the Assembly;
- the broad sweep of the prohibition notice, which purported to prohibit *any* hearings or committee meetings in the Assembly precincts;
- what we regarded as factual inaccuracies concerning certain claims in the prohibition notice; e.g., the purported lack of a risk assessment, contentions that workers had been 'directed to attend' the hearings; and

⁸ Submission of the Office of the Legislative Assembly as quoted by the Select Committee on Privileges 2022, p 8.

⁹ Select Committee on Privileges 2022, p 10.

¹⁰ Select Committee on Privileges 2022, p 10.

- the apparent lack of awareness, by WorkSafe ACT, about parliamentary privilege or the nature of parliamentary processes and practices more generally (including the lack of understanding about different functions performed by MLAs,¹¹ the Speaker, the Clerk, and individual committees in the context of parliamentary proceedings).

Early on the morning of Monday 15 August 2022, to avoid the prospect of non-compliance with the prohibition notice and in an abundance of caution, the estimates committee met at a venue outside of the Assembly precincts to consider the implications of the notice. The Speaker had also written to the WHS Commissioner requesting that she withdraw the prohibition notice by 10am on Monday. The Commissioner did not respond to that request by the stated deadline, and the Speaker made the following statement to the Assembly:

Members would have seen a copy of the letter that I sent this morning to the Work Health and Safety Commissioner explaining the fundamental constitutional issues that arise in connection with the issuing of the notice, which purports to prevent all committees in this place from conducting meetings or hearings. On these grounds, I have respectfully asked the commissioner to rescind the notice.

On its face, the notice effectively prevents the exercise [by] the legislative arm of government of its powers of inquiry and substantially and materially inhibits the scrutiny, accountability and representative roles associated with the form of parliamentary democracy that operates in the territory. That this should occur while the Select Committee on Estimates 2022-23 was in the process of inquiring into the annual budget estimates and appropri[ation] bills is very concerning.

As members, you will have seen that the notice purports to prevent all Assembly committees from conducting meetings and hearings in the Assembly precincts. And, while there are legal questions as to the efficacy of the commission's powers in this matter, it was in an abundance of caution that the Select Committee on Estimates this morning met at premises outside of the Assembly precincts to conduct a meeting. This is unprecedented.

As members would be aware, the Assembly has inherent powers of inquiry. This power [inheres in] the constitutional design of our system of government and can be traced back through section 24 of the Self-Government Act, which establishes general equivalence between powers, privileges and immunities of the Assembly, its committees and its members with those of the Australian House of Representatives, and also section 49 of the Australian Constitution, which gives the House of Representatives the same powers, privileges and immunities as the UK House of Commons at the time of the establishment of Federation.

These powers, privileges, and immunities were amplified by the Commonwealth *Parliamentary Privileges Act 1987*. The parliament's power of inquiry is essential to the operation of responsible government and resides ... [untrammelled] in this place. It is a power that has traditionally been delegated to a parliamentary committee and has recognised that our standing orders provide that a committee has the power to call for papers, persons or records. That an agency of the executive would seek to interfere with the exercise of [these] powers is indeed concerning.

To be clear: it is the ACT executive that is accountable to this place and to the Assembly committees it establishes in order to exercise the inquiry power. It is unlikely that, absent

¹¹ The Office had previously received legal advice that, under the WHS Act, each of the Assembly's 25 MLAs and the Clerk could each properly be regarded as being 'persons conducting a business or undertaking' (PCBUs) who have a primary duty of care for workers and specific compliance obligations under that Act and associated regulations.

expressed statutory provisions, enactments such as the WHS Act are capable of interfering with the Assembly's inquiry powers, its jurisdiction over the conduct of its own proceedings or its power to make findings of contempt when improper interference in the work of the Assembly or its committees has been found to occur.

I can advise the Assembly that the Work Health and Safety Commissioner has, this morning, not responded to my letter and has not lifted the prohibition notice. As a result, I am in the process of seeking legal advice on the matter and will keep members up to date as the situation unfolds.

Very shortly after the Speaker issued her statement to the Assembly, three WHS inspectors presented at the Assembly and met with the Clerk, the Speaker's chief of staff and senior members of the Office of the Legislative Assembly. In its submission to the privileges inquiry, the Office described the encounter as follows:

At the meeting, the Clerk and parliamentary officials reiterated that issues of parliamentary privilege and possible contempt of the Assembly were enlivened by the serving of the prohibition notice in terms that purported to prevent all of the Assembly's committees from meeting or conducting hearings.

The Clerk sought to draw the attention of the inspectors to the wording in the notice that was regarded as being particularly problematic. However, the inspectors indicated that they had not brought a copy of the notice with them.

The inspectors indicated that all of these considerations were not pertinent to their function in attending the Assembly precincts and that such matters would need to be dealt with elsewhere.

The inspectors indicated that there had been 'some confusion' as to the scope of the prohibition notice in that it was claimed that the notice was not intended to prevent all meetings and hearings of Assembly committees, only those that took place in-person. Assembly officials pointed out that the terms of the notice were clear and did not make any such distinction. It was also pointed out to the inspectors that, in any event, a notice that purported only to restrict in-person meetings would still engage the Assembly's privileges. The inspectors said words to the effect that this was not a matter for them to consider...

The Clerk asked whether, given the issues associated with parliamentary privilege, the inspectors had sought legal advice prior to the issuing of the prohibition notice. The inspectors indicated that they had not sought legal advice but had consulted with their supervisor.

The Clerk indicated that he had provided a copy of the Assembly's COVID Safe Plan to the inspectors on the afternoon of Friday 12 August 2022 and that a number of specific risk assessments were contained in that document, including those relating to the conduct of committee proceedings and the way in which consultations were conducted. The inspectors advised that they did not bring a copy of [the] COVID Safe Plan with them.

The Clerk, staff of the Office and the Speaker's senior staff member observed that the COVID Safe Plan and the risk assessments in the plan had been endorsed by the Office, the Speaker, the Standing Committee on Administration and Procedure and the Assembly's Health and Safety Committee, all of which had been consulted. Inspectors were queried as to whether those arrangements were not considered as being adequate in satisfying various duties under the Act and/or the matters alluded to in the prohibition notice.

Inspectors indicated that assessing the adequacy of controls was a matter for individual 'businesses' but that they had formed the view that a number of steps had not been taken to

properly assess possible hazards and that there was a requirement to consult with ‘affected workers’ [i.e. the witnesses / senior public officials appearing at the hearings].

On several occasions, it was put directly to the inspectors whether they had read through the assessments within the COVID Safe Plan. On each occasion, the inspectors declined to answer that question, instead stating words to the effect that they had ‘read through the COVID Safe Plan’—they would not be drawn on whether they had specifically examined the risk assessments, or the consultation arrangements contemplated in the document and whether or not they were considered adequate.

The inspectors took issue with the plan being in a draft form (with March 2022 being the last time that the plan had been formally endorsed). It was pointed out to inspectors that the plan remained with draft revisions in place from July as it had been presented to the Standing Committee on Administration and Procedure on 1 August 2022, party whips (who sit on the committee) had been asked by the Speaker at that meeting to consult with their party room colleagues and that that process had not concluded.¹²

At the same time as the inspectors had been meeting with Assembly officials, the Speaker had received notice from the chair of the estimates committee alleging that a breach of privilege, arising from the issuing of the notice, had occurred. The Speaker gave the matter precedence pursuant to standing order 276. The chair of the estimates committee then moved a motion establishing a privileges inquiry ‘to examine whether there has been a breach of privilege relating to the actions of the Work Health and Safety Commissioner and any other person, and whether they have improperly interfered with the free exercise of the authority of the Select Committee on Estimates 2022-2023 or breached any other privileges of the Assembly’.¹³ The motion, with minor amendments, was passed.

Later that day, the original prohibition notice was rescinded by WorkSafe ACT but a new notice was issued stating that:

You [that is, the Speaker] are prohibited from carrying on the following activity, or the carrying on of the activity in a specified way:

Conducting committee hearings at the Legislative Assembly of the Australian Capital Territory, at which participants attend in person, until a risk assessment has been undertaken, adequate control measures are implemented in line with the Hierarchy of Control, and consultation has been undertaken with all affected works and others [i.e. witnesses appearing before the committee].

The only substantive difference between the first notice and the second notice was that the prohibition was directed towards ‘in person’ hearings (rather than all hearings) and did nothing to alleviate concerns that an improper interference with the proceedings of the Assembly may have occurred.

Later in the week (Thursday 19 August 2022), a new group of WorkSafe ACT inspectors met with senior officials of the Office and the Speaker’s office. Being satisfied that certain consultation and risk assessments had been conducted, the second prohibition notice was lifted by WorkSafe ACT.

¹² Office of the Legislative Assembly submission to the Select Committee on Privileges, pp 12-13.

¹³ Minutes of Proceedings, No 57, 15 August 2022, p 793.

Privileges committee

The Speaker had initially been disposed towards initiating action, through the courts, to set aside the notice issued by the WHS Commissioner. After additional consideration, the Speaker formed the view that the Assembly itself already had the necessary tools to address the relevant matters. The Speaker considered that the privileges committee, through its inquiry power, was able to ‘apply the principles of parliamentary law to get to the bottom of the circumstances leading to the issuing of the notices and whether any contempt was committed in the course of those events ...’.¹⁴

In conducting its inquiry, the privileges committee sought submissions from all key players—the Speaker, the Clerk and the Office of the Legislative Assembly, the WHS Commissioner and staff of the Commission, the relevant minister, and members of the estimates committee. All appeared before the committee to give evidence.

Our primary contention was that, notwithstanding the ordinary application of statute law—including the WHS Act—to the Assembly, its committees, and its members, nothing in the WHS empowered an inspector or the Commissioner to ‘prohibit’ the Assembly’s proceedings. That is, while the Assembly must comply with WHS laws, it nonetheless retains an exclusive jurisdiction to determine the conduct of its proceedings. The Speaker observed that the contempt power was available to the Assembly to determine and punish any improper interference with the performance of the Assembly, its committees, and its members of their parliamentary functions.

In their advice to the Speaker, which was provided to the privileges committee, Brett Walker SC and Jackson Werhertt concluded that:

... in our view, an inspector does not have power under s 195 of the Work Health and Safety Act to issue a prohibition notice to the Legislative Assembly prohibiting either parliamentary debates in the Assembly or the conduct of parliamentary committee meetings. It would be open to the Select Committee to conclude that the issuing of the prohibition notices amounted to a breach of parliamentary privilege. More particularly, it would be open to the Committee to find that the notices amounted to an improper interference with the free exercise by the Assembly or committee of its authority or functions, which is a privilege enjoyed by the Assembly by reason of s 24 of the Self-Government Act.¹⁵

Drawing on practice of the Australian Senate and previous advice issued by former Clerk of the Senate, Harry Evans, the Speaker submitted to the committee that a contempt may be committed, even where a person has acted in accordance with other aspects of the law. For instance, a person may be found to be in contempt of the Assembly notwithstanding that a statutory or regulatory basis for the person’s conduct may exist.¹⁶ As an example, threatening to exercise, or exercising, a coercive power in a way that is intended or likely to amount to an improper interference with the free exercise by the Assembly or an Assembly committee of its authority or functions, or with the free performance by a member of the member’s duties as a member, may be considered a contempt of the Assembly.

¹⁴ Speaker’s Submission to Select Committee on Privileges 2022, p 3.

https://www.parliament.act.gov.au/_data/assets/pdf_file/0003/2091612/Submission-4.3-Speaker,-Legislative-Assembly-for-the-ACT.pdf

¹⁵ https://www.parliament.act.gov.au/_data/assets/pdf_file/0015/2107023/Submission-04.5-Legal-advice-ACT-Legislative-Assembly-Validity-of-prohibition-notices.pdf, p 13.

¹⁶ Speaker’s submission, p 6.

The WHS Commissioner also sought external legal advice. Prepared by Saul Holt KC and Katharine Brown, the advice concluded that:

On balance, we consider that the second notice did not breach privilege,^[17] but the matter cannot be said to be clear.

Based on the advice to this point, it will be clear that, in our view, there is doubt attending the question of whether the notices were validly issued. In particular, the question is significantly underpinned by the existence (or not) of a presumption against interference with parliamentary privilege. That position is far from settled.

Longstanding authority indicates that it is for the courts to determine the existence of a privilege, and for Parliament to determine the manner of its exercise. Although a House of Parliament can try a contempt, it cannot determine for itself the existence of a privilege; no resolution of a House can change the law. Parliamentary privilege in the ACT is a creature of statute. In circumstances where a later statute has, at the very least arguably, empowered an inspector to issue the notice, it is far from clear that the privilege the Legislative Assembly claims continues in force. A question of law is raised about whether the Legislative Assembly, in empowering the inspectors to issue the notices, altered its own privileges.¹⁸

The advice suggested that it was appropriate for the matters to be brought before the courts to determine whether the WHS Act had in anyway abrogated parliamentary privilege.

The Office's position, like that of the Australian Senate, was that express statutory declaration is required to abrogate privilege. In its submission to the privileges inquiry, the Office advised that:

The 'privileges' that are enjoyed by parliaments in the Westminster tradition, are the powers and immunities that attach to legislative chambers, their committees, and their members to ensure that they are able to carry out their functions unhindered.

As the most direct embodiment of the will of electors and the body from which executive government is formed (and to which government is responsible), parliaments represent electors (and air their grievances), consider and make laws, and scrutinise and hold executive government to account. The powers, privileges and immunities of parliament recognise the singular and central nature of these functions in our democratic scheme and have evolved over centuries of dispute between the legislature, the Crown/executive government and, on occasion, the courts.

With certain minor exceptions, the powers, privileges and immunities of the Assembly, its committees and its members are the same as those of the Australian House of Representatives [see s 24 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth)]. Through s 49 of the Australian Constitution, the House of Representatives itself is given the powers, privileges, and immunities of the UK House of Commons as they existed at the time of the establishment of the Commonwealth.

Among their privileges, parliaments have the protection of the freedom of speech, the power to investigate and punish contempts, the power to make rules and orders concerning the conduct of their business, and the power of inquiry (including the power to call for papers, persons, and

¹⁷ No mention is made of the legal status of the first prohibition notice.

¹⁸ https://www.parliament.act.gov.au/_data/assets/pdf_file/0003/2094564/Submission-3.6-a-WHS-Attachment-Parliamentary-privilege-advice-final.pdf

records), which is regarded as essential to the parliament's function of holding executive government to account.

While the privileges of parliaments are sometimes conceived as being exceptions to the normal operation of the law (for example, freedom of speech provides an absolute immunity for things said or done as part of 'proceedings in Parliament' from external impeachment that could, in other settings, give rise to civil or criminal action), they are not a wholesale immunity from the law.

On this, it is critical to state upfront that there has never been any suggestion that the ... WHS Act does not apply to MLAs, the Office or... staff. However, neither does the WHS Act operate in such a way as to cast aside the powers, privileges or immunities of the Assembly, its committees, or its members.

To abrogate the Assembly's privileges, express statutory provision is required; that is, plain words, in statute, clearly limiting or altering the powers, privileges and immunities, as they are known to exist at law, must be present. As noted in Odgers' Senate Practice:

It is ... a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words. Section 49 of the Constitution provides that the law of parliamentary privilege can be altered only by a statutory declaration by the Parliament.

This view is given support by a joint opinion, in 1985, of the Commonwealth Attorney-General and the Commonwealth Solicitor-General:

Whatever may be the constitutional position, it is clear that parliamentary privilege is considered to be so valuable and essential to the workings of responsible government that express words in a statute are necessary before it may be taken away In the case of the Parliament of the Commonwealth, s. 49 of the Constitution requires an express declaration...

... any attempt to adduce evidence before a court relating to a 'proceeding in Parliament' (for example, the conduct of a committee hearing) would be met with the absolute privilege that arises by reason of Article 9 of the *Bill of Rights 1688* (UK) and s 16 of the *Parliamentary Privileges Act 1988* (Cth).

There is no provision in the WHS Act that expressly alters or limits any of the powers, privileges or immunities of the Assembly, its committees, or its members in such a way as to give legal force, by administrative fiat, to a prohibition on Assembly committee proceedings.

Were it otherwise, a key aspect of responsible government—the obligation of accountability of the government to the parliament and the efficacy of the inquiry power—could be easily circumvented by the executive and administrators under all manner of pretexts...

Findings and recommendations of the privileges committee

Ultimately, the privileges committee made four findings, three of which were relevant to the matters the subject of this paper; namely that:

- The first WorkSafe ACT prohibition notice improperly interfered with the free exercise of the Assembly and its committees and therefore was a breach of the privileges of the Assembly by WorkSafe ACT. However, the committee recommended no further action against WorkSafe ACT.

- The second WorkSafe ACT prohibition notice may have improperly interfered with the free exercise of the Assembly or a committee of its authority but, as a breach of privilege has been found on the first prohibition notice, the committee did not consider it necessary to make a further finding.
- The phone call and email from the minister's office for advice, which WorkSafe ACT considered to be a complaint, was open to the perception of intentionally influencing WorkSafe ACT's actions. However, it did not, of itself, interfere with a committee and therefore is not a breach of privilege.

The committee made several recommendations, including, inter alia, that:

- WorkSafe ACT develop an MOU with the Assembly setting out how it will exercise its regulatory functions, including where privilege issues were engaged;
- there be amendments to the WHS Act to clarify that the Assembly is a workplace and covered by the Act and making explicit that nothing in the Act derogates from the powers, privileges and immunities of the Assembly, its committees or its members;
- the government draw the matters raised in the committee's report to other regulatory agencies;
- in reviewing compliance with the Latimer House Principles,¹⁹ the Executive's compliance with the principles vis-à-vis the relationship with the Assembly be assessed; and
- the code of conduct for members be amended to make clear that all members have a duty to 'not unreasonably place the health, safety and wellbeing of others at risk'.

Concluding thoughts

At its heart, this episode revealed a lack of understanding as to how the Assembly, its committees and its members operate, the roles that they perform and the importance of ensuring that none are interfered with or obstructed in carrying them out.

Never was there any suggestion that members or committees had placed themselves 'above' the operation of the law, only that—as a matter of law—there was no power to prohibit Assembly proceedings. Indeed, it would be a remarkable remarking of the separation of powers were executive agencies able to, with the administrative stroke of a pen on a clipboard, prevent a legislature from undertaking its constitutional functions.

All members of the Assembly owe a primary duty of care to workers within the Assembly precincts and must take all reasonable steps to ensure health and safety in the workplace. The Assembly takes this duty seriously as do individual members, each of whom are PCBU's under the Act. However, where regulatory action directly engages a legislature's privileges and threatens effective performance of its functions or the operation of its proceedings, it is important to meet those challenges head on and on the basis of principle and law.

¹⁹ The Assembly has adopted and endorsed, as a continuing resolution, *the Commonwealth (Latimer House) Principles on the Three Branches of Government*—<https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf> Compliance is periodically assessed by an external reviewer on behalf of the Standing Committee on Administration and Procedure.

We hope that a more constructive and consultative approach is to be adopted in the future and that there is a proper basis for understanding parliamentary law and privilege. We have both been drawn to the words expressed by former Senate President, Scott Ryan and then Senate Opposition Leader, Penny Wong, during the height of the pandemic made in the Senate at a time when the Commonwealth Executive and some state and territory governments had purported to restrict the movement of members and senators to attend parliament.

In a statement to the Senate, on 24 August 2020, President Ryan said:

The right of those elected to attend and participate in parliament is an ancient one. For good reason the ability of others, including the executive, to restrict this has always been limited.

The powers and immunities that enable and secure the work of the two Commonwealth houses belong to the houses themselves by constitutional design...

The ability to scrutinise the executive and participate in legislative activity is unarguably even more critical in times of crisis due to the extraordinary powers being delegated, granted and exercised by officials and the executive.

In the current pandemic, an important principle is at stake: notably, the ability of the executive or its officers, no matter the jurisdiction, to control attendance at parliament or constrain the work of members of parliament when it's directly related to parliamentary proceedings...

Unilateral action by executives—whether Commonwealth, state or territory—that impede the performance of Commonwealth parliamentary functions are problematic from a constitutional perspective.

This remains the case even where, as is the case with border restrictions and quarantine requirements imposed at a state and territory level, that action is founded on or in aid of genuine public health advice and goals. However, these problems may be largely avoided where the requisite action, in this case a response to the public health advice, is developed cooperatively by the institutions concerned.

The approach taken during this public health crisis will doubtless set precedents that will be looked to in the future...

In my view, simple acquiescence to these new assertions of control by officials of the executive of the Commonwealth, state or territories... poses a risk in that we cannot envisage how it may be used, or potentially even misused, at a future time in circumstances we cannot imagine. I doubt any of us imagined the current circumstances only a year ago.

Principles not defended in difficult times are in effect mere customs or conveniences.²⁰

Senator Wong, responding to Senator Ryan's remarks, said:

... we appreciate that you have taken your responsibilities in this office as encompassing some guardianship of this institution, and we respect and value that. We endorse, in particular, the point you make:

²⁰ Statement by President Ryan, [Australian Senate, 24 August 2020](#).

The ability to scrutinise the executive and participate in legislative activity is unarguably even more critical in times of crisis due to the extraordinary powers being delegated, granted and exercised by officials and the executive.

Put simply, parliamentary democracy needs a parliament. It's not an optional extra.

Ceding untrammelled power to the executive is not who we are, and it's also risky...

The parliament and the executive are separate institutions, and we each have a separate and unique responsibility within our system of government. The executive ought not and cannot interfere with the parliament.²¹

We could not agree with these two statements more.

²¹ Statement by Senator Wong, [Australian Senate, 24 August 2020](#).