



**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

STANDING COMMITTEE ON PUBLIC ACCOUNTS

(Reference: [Inquiry into Work Health and Safety Amendment Bill 2022](#))

Members:

**MRS E KIKKERT (Chair)
MR M PETERSSON (Deputy Chair)
MR A BRADDOCK**

TRANSCRIPT OF EVIDENCE

CANBERRA

THURSDAY, 2 FEBRUARY 2023

**Secretary to the committee:
Ms S Milne (Ph: 620 50435)**

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents, including requests for clarification of the transcript of evidence, relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Legislative Assembly website.

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Privilege statement

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Witnesses must tell the truth: giving false or misleading evidence will be treated as a serious matter, and may be considered a contempt of the Assembly.

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Amended 20 May 2013

The committee met at 12.30 pm.

AGIUS, MS JACQUELINE, Work Health and Safety Commissioner, WorkSafe ACT

THE CHAIR: Good afternoon, everyone, and welcome. I declare open the public hearing of the Standing Committee on Public Accounts inquiry into the Work Health and Safety Amendment Bill 2022. Before we begin, on behalf of the committee, I would like to acknowledge that we meet today on the land of the Ngunnawal people. We respect their continuing culture and the contribution they make to the life of this city and its region.

The Assembly referred this inquiry on 22 November 2022. The committee has received three submissions, which are available on the committee website. Today the committee will hear from three groups: the Work Health and Safety Commissioner, the Office of the Legislative Assembly and the ACT government.

Please be aware that the proceedings today are being recorded and transcribed by Hansard and will be published. The proceedings are also being broadcast and webstreamed live.

We will now move to the first witness appearing today, Ms Jacqueline Agius, the Work Health and Safety Commissioner. On behalf of the committee, thank you for appearing today and for your written submission to the inquiry. I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement before you on the table. Could you confirm for the record that you understand the privilege implications of the statement.

Ms Agius: Yes, I confirm that I have read and understand the privilege statement.

THE CHAIR: Thank you. Before we proceed to questions from the committee, Commissioner, would you like to make a brief opening statement?

Ms Agius: No; I am happy to move directly to questions.

THE CHAIR: Okay, then we shall. In your submission you mention that WorkSafe ACT “believes all workers and all workplaces are entitled to be safe and healthy”; right?

Ms Agius: Correct.

THE CHAIR: Do you believe that WorkSafe should uphold the highest standards for ensuring safe and healthy workplaces?

Ms Agius: Yes, I do.

THE CHAIR: And based on this reasoning you felt that the Legislative Assembly needed a prohibition notice because you felt it was not ensuring a safe and healthy workplace for its workers, so then the work was stopped due to health concerns?

Ms Agius: The prohibition notice was issued by an inspector. The inspector formed a reasonable belief, and I have delegated powers to that inspector to carry out the duties under our act until that notice is before a court. Only a court can determine whether or not the notice was valid. In this case, that was the inspector's belief.

THE CHAIR: According to your website:

Prohibition notices are designed to stop a workplace activity that involves a serious risk to a person's health or safety emanating from an immediate or imminent exposure to a hazard.

Ms Agius: That is correct.

THE CHAIR: You also have an improvement notice.

Ms Agius: Yes.

THE CHAIR: So:

Improvement notices aim to remedy minor contraventions of the WHS Act or to prevent a likely contravention from occurring. They are issued when the matter does not involve a serious risk to the health and safety of a person emanating from an immediate or imminent exposure to a hazard. An improvement notice may include directions concerning the measures to be taken to remedy the contravention or prevent the likely breach.

Is that correct?

Ms Agius: That is correct.

THE CHAIR: Last year a WorkSafe ACT improvement notice was issued to AMC, based on the second-hand smoking that was happening in AMC. Do you know how second-hand smoking affects non-smokers?

Ms Agius: Do I know?

THE CHAIR: Yes.

Ms Agius: Yes.

THE CHAIR: I just want to clarify that second-hand smoke damages the body in many different ways. Adults exposed to second-hand smoke may experience cardiovascular disease like high blood pressure, heart attack and/or stroke; lung problems and asthma; increased risk of lung cancer and cancers in the brain, bladder, stomach, breast and more; frequent coughing, sneezing, shortness of breath or other breathing problems; frequent ear infections, frequent and more severe asthma attacks; respiratory infections such as bronchitis or pneumonia; damage to eyes and teeth; and learning and behaviour problems.

Studies have shown that damage from second-hand smoke occurs in as little as five minutes. So after five minutes arteries become less flexible, just like they do in a

person who is smoking a cigarette. After 20 or 30 minutes, blood starts clotting and fat deposits in blood vessels increase the risk of heart attack and stroke. And after two hours an irregular heartbeat can develop and trigger a heart attack or other serious cardiac problems. Sounds pretty severe; right?

Ms Agius: Well, it depends on the circumstance.

THE CHAIR: Second-hand smoking?

Ms Agius: Yes. It depends on how close a person is to that second-hand smoke, and it depends on the exposure. The only way that we can determine that exposure is based on the reasonable belief of an inspector at the time. I can see where you are going, Mrs Kikkert. What you are trying to imply is that either there should have been a prohibition notice on the AMC or there should not have been on the Legislative Assembly. I must say, with the greatest respect, that I disagree with your assertions and that they are unfair assertions. The only person that can determine whether a prohibition notice or an improvement notice is placed on a workplace is an inspector who is trained and has delegations to carry out those duties.

THE CHAIR: So you are saying that the second-hand smoking that is currently happening at AMC, where staff are inhaling smoke, while we are sitting here in this clean environment—

Ms Agius: No. You are making assertions. You—

THE CHAIR: Excuse me please; I am speaking.

Ms Agius: You are making assertions as to what the inspector saw.

THE CHAIR: Excuse me; I am speaking, as chair of this committee. I am speaking, so I need you to listen, please. You are saying that the second-hand smoking that is currently in place at AMC, where staff are smoking it and inhaling it, is not severe enough, while we are sitting here—

Ms Agius: Could you provide me the evidence? Could you provide me the evidence?

THE CHAIR: The evidence is that you have placed an improvement notice at AMC which has been extended.

Ms Agius: Yes.

THE CHAIR: Extended to June 2023—

Ms Agius: But there is no evidence that staff—

THE CHAIR: to make sure that they actually are not doing it.

Ms Agius: Let me finish now. Let me finish now. There is no evidence that staff were inhaling the smoke. If you have that evidence, then I suggest you make a complaint to WorkSafe ACT so that the inspector can go out and visit.

THE CHAIR: If there is no evidence, based on that assertion, why was there an improvement notice given?

Ms Agius: The improvement notice in that case was to ensure that they complied with their own controls that were in place, which included separating smokers from the rest of the detainees.

THE CHAIR: But that is not the case. They are in one room, smoking and inhaling it.

Ms Agius: No, they are not. They are outside.

THE CHAIR: They are outside and indoors as well.

Ms Agius: Have you been to the AMC?

THE CHAIR: I have been into the AMC. Yes, I have.

Ms Agius: Then I suggest you provide that evidence to WorkSafe ACT.

MR PETTERSSON: Mrs Kikkert.

THE CHAIR: Would you say—

MR PETTERSSON: Mrs Kikkert. Mrs Kikkert!

THE CHAIR: I am sorry; I am asking one last question and then you can have a turn, Mr Pettersson.

MR PETTERSSON: If you do not let me speak, I will move that we suspend. Please let me speak.

THE CHAIR: Okay; speak.

MR PETTERSSON: I have a range of questions about the bill. I would like to ask them.

THE CHAIR: Yes.

MR PETTERSSON: You have had 10 minutes. I suggest that we continue through the committee members.

THE CHAIR: Yes. There is still time for you, Mr Pettersson. Ten minutes each. Thank you. Just one last question: would you say that the notice you gave to AMC and the Assembly is out of convenience, rather than relating to the health of its staff?

Ms Agius: Absolutely not, and I reject that assertion.

THE CHAIR: Okay. Thank you.

MR PETTERSSON: In your submission you suggest that a further amendment would be beneficial: that the role of an officer be clarified. Could you please explain to the committee why you have made that?

Ms Agius: Yes; absolutely. Section 10 of the Work Health and Safety Act binds the Crown, insofar as the powers in the Legislative Assembly. It is really clear that the Crown is bound by the Work Health and Safety Act. Subsection (2) of section 10 says that the territory is liable for an offence under the act.

The model laws, however, at 247, initially excluded a minister of a state or the commonwealth. It did not, and nor did our act, exclude ministers of the territory. If there was any intention to exclude either MLAs or ministers of the territory, it would have been explicitly referred to in section 247 of the Work Health and Safety Act, and it never was. One can only interpret that as them being included.

The federal government amended it, as per the recommendations—and I refer to it in my submission—in the Australian Human Rights Commission report, which was the *Set the Standard* report. They said that it would perhaps assist to amend the act to avoid doubt that a parliamentarian is an officer. Because that has happened at the commonwealth level, I suggest that this is a wonderful opportunity to ensure that we make that very clear.

MR PETTERSSON: You have already formed the view that MLAs are officers?

Ms Agius: I have.

MR PETTERSSON: Why have you formed that view, and why is it important to formalise it?

Ms Agius: I have formed the view because there is no exclusion in 247. Clearly, in 247 they have listed the exclusions, and those exclusions at that time applied to ministers of states and the commonwealth. There was no exclusion of territories. When I speak of territories, I refer to the Australian Capital Territory and the Northern Territory. Had there been an intention to exclude parliamentarians of territories, it would have been included in 247.

The matter has, however, never been tested in a court, so WorkSafe have formed a view. Some of those views have been based on legal advice, privileged legal advice. However, it is our view, because there is no exclusion, that they were intended to be included. I suggest that, to avoid doubt, given the events of last year, it is made very clear.

MR PETTERSSON: Wonderful. Just one other question before I let Mr Braddock take over. Have you seen the Speaker's proposed amendment?

Ms Agius: I have not had time to look at anything in relation to this hearing because I have been absolutely flat out. So, no, I have not.

MR PETTERSSON: All right. Thank you.

MR BRADDOCK: I have a supplementary on that. We would appreciate your views on that particular amendment, because when it comes up for debate we would like to know whether you are supportive of that. Is that something we can arrange? As a committee, could we write to you and obtain your views before the completion of this report?

Ms Agius: I am happy to take anything on notice.

MR PETTERSSON: Could you take on notice whether you believe that amendment would affect your ability to uphold WHS laws?

Ms Agius: Okay.

THE CHAIR: The amendment is literally just one page. Would you like to read it now and then get back to us in a couple of minutes?

Ms Agius: No, I would prefer to take it on notice.

THE CHAIR: Right. It is quite long. Okay.

MR PETTERSSON: I feel like it would take quite a considered legal mind to consider the effects of it, so I think taking it on notice is reasonable. Recommendation 1 of the Select Committee on Privileges was that WorkSafe ACT develop a memorandum of understanding with the Assembly on how it will exercise its regulatory functions within the Assembly precincts. Has there been any progress on this recommendation, and does this bill progress or hinder an MOU?

Ms Agius: I do not think it either progresses or hinders. At this stage we are waiting for some advice in relation to an MOU, but there is no barrier to an MOU from my agency. We certainly have MOUs with lots of other agencies. They propose them to us because we are independent.

MR PETTERSSON: Okay, so you are waiting for the Assembly.

Ms Agius: Yes.

MR PETTERSSON: Thank you.

THE CHAIR: This act is taken to have commenced on the day the bill for this act was presented to the Legislative Assembly?

Ms Agius: Yes.

THE CHAIR: Did you have any feedback on that? Did the government consult with you on this amendment of the bill?

Ms Agius: We saw the amendment of the bill and were consulted, like everyone else.

THE CHAIR: Like everyone else. Okay. Did you have any feedback on when the act would commence?

Ms Agius: No.

THE CHAIR: You did not have any feedback on that. Great. Thank you. I have no further questions.

MR PETTERSSON: All good.

THE CHAIR: Amazing. Thank you.

Ms Agius: Can I make a clarifying statement in relation to the improvement notice that you mentioned, Mrs Kikkert? A reasonable belief can only be informed by an inspector. The reason that I am tired of explaining this is because, for some reason, people seem to assume that I am the person that goes out and puts notices on workplaces. I do not. I delegate that, and it is done on the circumstances of a particular workplace at that time.

There are no like-like situations. You cannot possibly compare one workplace with another workplace risk, because it is dependent on a number of things: all of the controls that the workplace has in place at the time, whether or not those controls are current, and whether or not those controls have been implemented and adequately implemented as is required.

It is also extremely disappointing to me, as the Work Health and Safety Commissioner, that there are people in our community who think they do not have to abide by work health and safety laws. In fact, I sit on the Work Safety Council, and both industry groups and union representatives were outraged that the Legislative Assembly refused to do the simple task of a risk assessment in relation to the prohibition notice that was issued upon them.

In fact, if a risk assessment had been conducted over the weekend, the hearings would have gone ahead on the Monday morning. That did not occur because somebody decided that the Work Health and Safety Act did not apply to them. Every single workplace and PCBU in the ACT must comply with the Work Health and Safety Act, and I suggest the Legislative Assembly must comply as well. Thank you.

THE CHAIR: Thank you. You also asked, Ms Agius, for evidence on smoking in AMC. I refer you to the 2022 *Healthy Prison Review*. It says:

Despite smoking being restricted to designated outdoor areas, smoking inside cells and units is considered a common occurrence. Most staff and prisoners feel exposed to second-hand smoke daily, and staff told us they feel unsupported by various levels of management when seeking to enforce restrictions.

That is from the Office of the Inspector of Custodial Services.

Also, in a question taken on notice, I asked the minister:

Have you been given an evaluation report about the pilot of the smoking cessation?

Ms Davidson gave me an answer. This is part of her answer:

The detainees reported the main barriers to reducing tobacco consumption as being bored, lack of programs, stress and exposure to second-hand smoke, which made it difficult to quit.

So that is the evidence you were asking for.

Ms Agius: Thank you.

THE CHAIR: You can look it up in the *Healthy Prison Review*.

Ms Agius: Thank you. I am sure that the inspector took that into account when they determined, along the lines of our compliance policy, that an improvement notice was adequate, for whatever reason. I do not know what the inspector's reasons were. Indeed, we never had a review sought in relation to that improvement notice.

In fact, I think it was actually an investigator that went out to AMC and determined that because they were looking into whether or not they were going to investigate the matter. It was determined that it was appropriate to put an improvement notice in place, just as the inspector in relation to the Legislative Assembly determined that a prohibition notice was appropriate, given their powers.

THE CHAIR: Thank you very much.

Hearing suspended from 12.51 pm to 1.15 pm.

BURCH, MS JOY, Speaker, Legislative Assembly for the ACT

DUNCAN, MR TOM, Clerk of the Legislative Assembly for the ACT, Office of the Legislative Assembly

SKINNER, MR DAVID, Senior Director, Office of the Clerk, Office of the Legislative Assembly for the ACT

THE CHAIR: Welcome back to the public hearing of the Standing Committee on Public Accounts in its inquiry into the Work Health and Safety Amendment Bill 2022.

Please be aware that the proceedings today are being recorded and transcribed by Hansard and will be published. The proceedings are also being broadcast and webstreamed live.

The next witnesses appearing today are Ms Joy Burch, Mr Tom Duncan and Mr David Skinner from the Office of the Legislative Assembly. On behalf of the committee, thank you for appearing today and for your written submission to the inquiry.

I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement that is before you on the table. Could you confirm for the record that you understand the privilege implications of the statement?

Ms Burch: Yes.

Mr Skinner: Yes.

Mr Duncan: Yes.

THE CHAIR: Thank you. Before we proceed to questions from the committee, Madam Speaker, would you like to make a brief opening statement?

Ms Burch: I had not planned to, but I will provide a very quick response to some of the commentary from Jacqui Agius, the Work Health and Safety Commissioner. She ended her remarks by implying that the Assembly considers itself above the law. Can I say from the outset that that is totally and absolutely wrong. I will read from my submission to the privileges committee, and I have repeated it a number of times:

To place the matter beyond doubt, it has never been my position or that of the Office of the Legislative Assembly that the WHS Act does not apply to the Assembly, to MLAs or staff working within the precincts. In fact, there has never been any suggestion that we do not have duties under the WHS Act to ensure the health and safety of workers.

The issues that were the subject of the committee's inquiry relate to improper interference in the functions of the Assembly—and that goes to the heart of my proposed amendment. Also, one of the attachments to the submission, No 4.3, was advice by the Solicitor-General with respect to consideration internally within the Assembly about members being a PCBU. He was very clear, from 2019, that we are, always have been and always will be considered to be relevant and to recognise the

WHS Act under the law.

I want to put that on the record. It is disappointing that the Office of the Work Health and Safety Commissioner continues to misrepresent my views and those of the Assembly.

THE CHAIR: Thank you very much, Madam Speaker, for providing that clarity. I have read your amendment. Thank you for including that in your submission. With the Work Health and Safety Act, you are not included in it; you understand the principle. I am concerned about whether, if your amendment is accepted, it will still have a penalty attached to it, because it says nothing there about not being included, if the Legislative Assembly finds that it is in breach of the Work Health and Safety Act. Your amendment does not actually suggest that it is safeguarded from penalties such as a fine.

I understand where your amendment is coming from, regarding being exempt from the amendment itself; we are asking the government to make sure that the Legislative Assembly is not prohibited from doing any of its work. My concern is that they cannot do that if your amendment is passed; but they can still impose a fine on the Legislative Assembly, because that is not included in the amendment. Could you give some clarity on that?

Ms Burch: I can. For clarity, there are two things. The recommendation that I provided to PAC and to the privileges committee was adopted by the privileges committee as a recommendation, and adopted by the Assembly. Given that that is adopted by the Assembly, one would assume that the Assembly has accepted that it is a sensible recommendation going forward.

With respect to what the Chief Minister did recently, it is almost like having a pigeon pair. The incident last year raised questions; there was ambiguity, misrepresentation and a number of questions. For the purpose of both the executive's amendment and my amendment, it is putting beyond doubt that the Assembly recognises WHS. The commissioner this morning used language such as "officers" and "members", and their obligations under WHS. We are sympathetic to that; we do not have a problem with that. It is how we have functioned and behaved.

To balance that off, because one of the core questions was around parliamentary privilege, if you have one, in order to have an abundance of caution and clarity, my amendment should also be adopted. It is like having a perfect pigeon pair—or bookends—in order to have absolute clarity, so that we do not have the confusion which occurred last year. WHS applies, but the matter of parliamentary privilege also needs to be recognised, understood and not interfered with. They are almost two parts of the same whole, for the purpose of clarity.

THE CHAIR: That is correct. I completely understand that. However, my concern is that it does not cover the fact that, if the act identifies that the Assembly is in breach of that act, it does not stop them giving the Assembly a fine.

Ms Burch: No. I might go to Tom or David for clarity. We recognise that WHS applies. If there is inappropriate behaviour within the building or unsafe elements

within the building, that applies, but the point of parliamentary privilege is to not interfere with parliamentary processes. Each member—all of you—is a PCBU; you have responsibilities within your office to provide a safe workplace. I doubt that this would ever happen, but if that were not the case, with respect to staffers, people involved or even OLA—I will put it back on OLA, to take it away from members—if a complaint is made and the commission gets involved, they are indeed able to come within the building and do something about that. It is around the matter of privilege; that is the other half of this question.

Mr Duncan: Madam Speaker, I echo what you have said. The WHS Act definitely applies to the Assembly, as the Speaker has outlined, but we also recognise that parliamentary privilege and the ability of committees and the Assembly to function are important points in this whole situation. As Madam Speaker said, to avoid the confusion of last year, we think that having both the Chief Minister's bill and the Speaker's amendment will add clarity to the law.

The proposed wording of Madam Speaker's amendment is not dissimilar to a provision in the Integrity Commission Act which provides that nothing that the Integrity Commission Act can do affects the privileges of the Assembly. The PAC will be very familiar with the work of the Integrity Commission and how it could infringe on parliamentary privilege. The Assembly has already legislated words to the effect of Madam Speaker's amendment, and we are asking that such an approach continue.

THE CHAIR: Thank you.

MR PETTERSSON: Madam Speaker, if you, WorkSafe and the ACT government are all of the belief that this is a workplace, do we need the bill at all?

Ms Burch: One would argue that no, you do not, but I would also argue that what has played out this morning is consistent with the need for absolute clarity and understanding, and I welcome that clarity and understanding. The Chief Minister has put through an amendment to provide that clarity. There are questions within the scrutiny report about that. Putting those aside, I fully support the intent of having clarity. The mirror, or the other half of that, for clarity, is the amendment that was adopted in the parliamentary privileges report and that was adopted by the Assembly, which makes reference to privilege.

MR PETTERSSON: I am a bit of a bush lawyer when it comes to parliamentary privilege, so bear with me if I get this wrong. The privileges of the Assembly derive from the privileges of the commonwealth parliament?

Ms Burch: Yes, and through our self-government act; in fact, you can go back to the House of Commons, the commonwealth and our self-government act. That is absolutely the case. But, as the Clerk said, given the confusion about this last year, the fact is that these words have already been put into the acts of other offices that are independent of the executive. These words have been used before. It has been done before. If clarity comes on one hand, it seems fair and reasonable that clarity comes on the other hand.

MR PETTERSSON: Forgive me for my sins, but I have not read the entirety of the Integrity Commission Act.

Ms Burch: That is your weekend task, Mr Pettersson!

MR PETTERSSON: I am assuming that it does not include reference to “nothing in this act gives the regulator or anyone else exercising a function under this act the power to prohibit or otherwise interrupt a proceeding of the Legislative Assembly or its committees”. That would be unique to this. Is your amendment establishing new parliamentary powers or privileges that are different from those of the commonwealth parliament?

Ms Burch: No.

Mr Skinner: No, Mr Pettersson. If you take the provision on its own, it is actually circumscribing the ambit of the regulator’s powers in respect of the Assembly, if I can put it that way, rather than giving, in positive terms, an immunity or a power to the Assembly. If you read it standing alone, without the words “parliamentary privilege” being anywhere near it, it just stands on its own.

The point to make here is that we are talking about a very narrow range of activity in this space. We are not talking about members in their offices, hazards, asbestos or things like that. We are talking about the actual proceedings of parliament, which has a meaning at law. I think that is where some of the confusion in these tensions between WHS provisions and privilege has emerged. Privilege is there to ensure that parliaments can continue doing their work. WHS laws and regulations are there to make sure we are all safe at work. Both objectives are legitimate and need to be supported and protected.

I suppose it is the contention of the Speaker that they can operate harmoniously. They have been drafted in such a way as to be as narrow as possible; not to provide some broad basis—a get-out-of-jail-free card, essentially. We are talking about not stopping, say, this hearing right now. That is the sort of activity that is envisaged by the amendment.

Ms Burch: It is not about giving individual members absolute immunity for poor conduct. Let us be very clear. That is not what this is about.

MR PETTERSSON: The privileges committee found that the first prohibition notice breached the privilege of this Assembly; in essence, a notice that prohibited the Assembly from meeting or having a committee meeting went too far. If we already have the precedent that WorkSafe cannot prohibit the proceedings of the Assembly, why do we need this in statute law?

Ms Burch: There are two things. Looking at the recommendations of the privileges committee, recommendation 3 is that the committee recommends that the Work Health and Safety Act is amended to provide clarity that the Assembly is a workplace. That is fine. It provides that nothing in the act abrogates or takes away from the powers, privileges and immunities of the Assembly and its committees and gives the inspector or other person the power to prohibit the proceedings. This has already been

put to the Assembly, and it has been adopted by all three parties. The amendment is an action of that recommendation.

Given that we also have understood and accepted that we are a workplace covered by WHS—disappointingly, this morning, the commissioner herself misrepresented that fact—I believe all parts, the Chief Minister’s, the executive’s amendment and this amendment that has already been adopted by the Assembly, should progress.

MR PETTERSSON: One of the other recommendations of the privileges committee was that an MOU be established between the Assembly and WorkSafe.

Ms Burch: Yes.

MR PETTERSSON: Is that progressing? Can you give us an update?

Ms Burch: No. If you recall, this was back in November-December. The Clerk was absent from the Assembly for a lot of December. I had always marked it as, “Let’s get past December, Christmas, Australia Day.” We discussed it this morning; it is unclear from the recommendation who makes the first approach about it. We will write to the commissioner and say, “Our recommendation is this; how do we progress it?” and take it from there. I have no problem whatsoever—unless you know something that I do not, Clerk.

Mr Duncan: I am reading recommendation 1 of the privileges committee. The committee recommended that WorkSafe ACT develop an MOU. From my perspective, I think I heard the commissioner talking about the development of an MOU. My reading of the committee’s recommendation is that they asked WorkSafe ACT to develop an MOU. In fact, that makes sense because, as the commissioner says, she has a lot of MOUs with a whole heap of other agencies, so she would be best placed to know what is in a good MOU, and I would expect in due course the commissioner to write to the Speaker proposing an MOU and we would then interact to come up with a final MOU.

Ms Burch: Without having a public fight, Clerk, I would suggest that I would be more than comfortable with approaching the commissioner and saying, “How do we start this process? Is there a model MOU that you have that you can show us, in order to progress this matter?”

Mr Duncan: I have just followed the recommendation of the Assembly.

Ms Burch: Yes.

MR PETTERSSON: I am sure we will find a way through.

Ms Burch: Yes. We will find a way through. The principle of it is absolutely fine. Also, there is a recommendation there about further clarity, in one of the continuing resolutions; so we will progress the matter.

Mr Skinner: I think it is worth noting that there is an MOU already in place, for instance, between the Speaker and the Australian Federal Police. Again it recognises

some of the principles that we have been talking about. There are objectives to community policing. There are objectives to the Crimes Act. There are objectives to all sorts of things in acts.

The questions that get really difficult to pull apart are with respect to the general law, of which parliamentary law is a part, and when the WHS purposes and objects of that act interface with the privileges of the parliament. That can happen in lots of different contexts. It is not just with WHS; it is with all sorts of things. We would all acknowledge that they can be complex and they are not necessarily things where the answers are really clear.

The best spirit in which to work through these things is a cooperative approach where we understand how we can meet both objectives, and everyone feels that we are having health and safety workplaces and that parliaments can continue to do the work that they do. I think that is where we want to get to.

THE CHAIR: Thank you, Mr Skinner. Hear, hear.

MR PETTERSSON: I have one last question. In the privileges committee, you provided a copy of legal advice that you had sought. Have you sought legal advice in drafting your amendment? If so, would you be willing to provide it to the committee?

Ms Burch: No.

Mr Skinner: We have not sought any legal advice.

Ms Burch: It is not that I am not going to show you anything, Mr Pettersson. In essence, from the very get-go, we have said we recognise WHS. We are covered. Our workplace is a safe workplace. But the question of parliamentary privilege is, for a parliament, critical and absolute. Therefore, for clarity, and for no other purpose, we have provided this amendment to the privileges committee and through this process. The amendments were drafted through PCO; these were the principles that we wanted to achieve, recognising the self-government act, and the reference to the commonwealth on privilege. This does not abrogate, slice through or give us extra powers. It is just saying, "Let's all be very clear: we are a WHS workplace, and parliamentary privilege is absolute."

Mr Skinner: Mr Pettersson, in your question before about whether we are creating new privileges, you noted the source about privileges, going back through section 24 and so on. I note in the government's submission there are some allusions to the idea that this might be a duplication or essentially a redundant exercise. I understand that position; indeed people might try to argue that it has some effect on how section 24 operates and links us to the House of Representatives and their practices and so on.

What I would say, as the Clerk pointed out, is that there are already a number of provisions. Section 35 of the Public Interest Disclosure Act basically limits the contempt power of the Assembly in relation to people making public interest disclosures. There are also provisions in the Integrity Commission Act which reaffirm privilege and say that nothing in the act affects the privileges of the Assembly, any state or territory parliament or the commonwealth parliament.

We have precedent here that has not unravelled our entire system of privilege. When you make some provision that essentially says, “This act does not affect privilege,” it is an unlikely leap to then suggest that you cut off your nexus with the commonwealth’s privileges and the House of Representatives’ privileges. It does not seem to make logical sense. That is not a legal view; that is just a matter of the plain reading of the text. I just wanted to explore that; I detected that that may have been an area of concern for you.

MR PETTERSSON: The Work Health and Safety Commissioner, in her submission and again this morning, made reference to the fact that she would like to see a further amendment to clarify who is an “officer”. Is that something that you could be supportive of?

Ms Burch: I saw that in her submission and heard her this morning. She also referred to the clarity regarding members and some area that excluded ministers—members, ministers and officers. The principle of getting as much clarity as we can in this regard is supported by me.

MR BRADDOCK: The government considered that this clarification was so important that it applied it retrospectively, to the date when it was introduced. At this point your proposed amendment has not been passed. What is the risk from that in terms of this period of time whilst we have one half of the act essentially in operation and not the other half?

Ms Burch: I have not put my mind to that test. I know that that was applied to be retrospective. The amendment does not include retrospectivity. The Assembly may want to change that, or this committee may have a view on that. I remain agnostic on it.

Mr Skinner: To be honest with you, I think that, with respect to both amendments—the Speaker’s and the amendment around the work—those issues probably already exist at law.

Ms Burch: In many ways they even pre-date the tabling of the amendment. Again, I go back—I cannot be any clearer—to legal advice attached to the privileges submission that I put in. It was advice that Ian Duckworth sought. Yes, it does apply, and this was how we structured all of our internal WHS committees, with reps from different parts of the building. Yes, in many ways it is retrospective.

Mr Skinner: I believe the scrutiny committee is looking at, or has looked at, the bill. I believe the government would be in discussions with the scrutiny committee about their proposal to have retrospectivity. I know that the scrutiny committee has never liked retrospective legislation.

I think that both sets of amendments are about the avoidance of doubt. They may forestall potential litigation, too, potentially, by saying that we do not need to litigate. Where there may have been a bigger question, perhaps it is now a narrower question.

Ms Burch: I have a level of confidence that there is not a black hole between

December and this amendment being presented to the Assembly and passing—that any mischievousness can happen.

MR BRADDOCK: Following on, Mr Skinner, from your point in terms of reducing the area of doubt, Speaker, you have previously advised that you may seek to take Supreme Court action regarding some of the events happening. If both of these amendments were passed, would there still be a requirement to seek legal clarification on the status, or would this fully resolve that question?

Ms Burch: I would not have thought so. I think these two amendments put beyond doubt our view that we recognise WHS but we also recognise parliamentary privilege. I would not see anyone challenging either of those to the extent that we would need to go to court.

Mr Skinner: This is not legal advice or a legal view, but I guess there is always potential for litigation under any statute. That is always a possibility where there is a matter that is contentious.

Remember that all of the regulator and work safety commission powers are preserved under both of these things. If there are conflicts, they are typically resolved, under the act, through the courts—through the Supreme Court. I do not know that it wipes out every prospect of litigation, but it lessens the likelihood. With these two entities, when there are conflicts, at least they have a sense of the boundaries of how that relationship works, or the limitations. There is a certain sensibility that needs to be applied to it that may not exist in other workplaces. That may be sufficient in itself to prevent there being litigation.

Ms Burch: In addition, the MOU would provide that clarity of process. If there is “conflict”, there is an articulate way regarding how you would go through it.

THE CHAIR: Why was it necessary to have the bill commence prior to the enactment? That is unique. I have never seen that before.

Ms Burch: The Chief Minister’s amendment?

THE CHAIR: That is correct.

Ms Burch: That is a matter for him.

THE CHAIR: What are your thoughts on that?

Ms Burch: I have not made my own retrospective; that is all I will say.

THE CHAIR: I have no further questions. Thank you.

Ms Burch: We did not take anything on notice. You do not need anything else from us?

THE CHAIR: No. On behalf of the committee, I would like to thank you, Ms Burch, Mr Duncan and Mr Skinner, for appearing today on behalf of the Office of the

Legislative Assembly. When available, a copy of the proof transcript will be forwarded to witnesses to provide an opportunity to check the transcript and identify any errors in transcription. If witnesses undertook to provide further information or took questions on notice during the course of the hearing, it would be appreciated if answers to these questions could be provided within one week from the date of this hearing.

GENTLEMAN, MR MICK, Minister for Corrections, Minister for Industrial Relations and Workplace Safety, Minister for Planning and Land Management and Minister for Police and Emergency Services

YOUNG, MR MICHAEL, Executive Group Manager, Workplace Safety and Industrial Relations, Chief Minister, Treasury and Economic Development Directorate

THE CHAIR: We move to the last witness appearing in this inquiry, Minister Mick Gentleman and officials from the ACT government. On behalf of the committee, thank you for appearing today and for your written submission to the inquiry.

I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the privilege statement before you on the table. Could you confirm for the record that you understand the privilege implications of the statement?

Mr Gentleman: Yes. Thanks, Chair. We do.

THE CHAIR: Thank you. Before we proceed to questions from the committee, Minister Gentleman, would you like to make a brief opening statement?

Mr Gentleman: Thank you, Chair. Yes: just to advise that the objective of this bill is to reinforce the longstanding policy view that the Work Health and Safety Act 2011 applies to the ACT Legislative Assembly. It is in place to apply to all workers in any workplace.

THE CHAIR: Thank you. I will shoot off the first question. In its report of 15 November 2022 the JACS committee states that it has considered the proposed amendments from the Speaker, which:

... will restrict the operation of the Act as amended to not limiting any power, privilege or immunity given under section 24 of the *Australian Capital Territory (Self-Government) Act 1988* ... to the Assembly, its committees, or members. This will extend to not allowing the regulator or anyone exercising a function under the *Work Health and Safety Act 2011* to interrupt a proceeding of the Assembly or its committees.

Does the government plan to support the Speaker's amendments, Minister?

Mr Gentleman: The Speaker has submitted amendments that seek to clarify, I think to protect the role of parliamentary privilege. The government is conscious of the importance of parliamentary privilege in protecting the independent functioning of the legislative branch of the government. The government is yet to agree to a position on those amendments proposed by the Speaker. This requires some consideration by cabinet.

THE CHAIR: Okay. Have you had any consultation with the Speaker with regard to her amendment?

Mr Gentleman: No; that would be between the Chief Minister's office and the

Speaker's office. But I understand that it is under consideration at the moment, for a cabinet position.

THE CHAIR: Okay. Thank you. Do other parliaments in other states, including the federal parliament, have similar provisions in their WHS acts that clarify that work undertaken in that parliament by its members, or people supporting a member, is covered under the relevant WHS acts?

Mr Gentleman: Yes. In this case, this bill highlights, I think, that the Assembly is still a workplace, as I mentioned. We are committed to a safe and secure workplace for all Canberrans, and we want to legislate to ensure that the foundational principles of the universal coverage of the WHS Act in the ACT are upheld across all workplaces.

THE CHAIR: Okay. Thank you. Just one final question, Minister. The bill is stated to commence on the day that the bill was presented to the Assembly, not the day that it will be enacted. I understand that the JACS scrutiny committee has also raised significant concerns around this retrospectivity. Why is it necessary to have the bill commence prior to enactment?

Mr Gentleman: We want to make sure that everybody is covered from the date that this discussion began, and we have received advice that we should backdate it to that time to ensure that everyone is covered.

THE CHAIR: To ensure that everybody is covered. Okay.

MR BRADDOCK: I understood that the purpose of the act was merely a clarification of what was a commonly understood state of affairs. So why does the retrospectivity have to apply to what is essentially a clarification?

Mr Gentleman: I will ask Mr Young to give you some more detail on that.

Mr Young: Certainly. Thank you, Minister. I have read and acknowledge the privilege statement. As the minister has indicated, and as you point out, the intent of the bill is to clarify the universal coverage of all workplaces and all workers. The government determined to bring forward that bill, in anticipation of some uncertainty that may arise from the published legal advice of October, published on the Assembly website, which does suggest or put forward an argument that the Assembly is not a workplace. So it was in response to uncertainty arising from that legal advice that the government sought to bring forward the clarifying amendment.

In the same spirit of removing uncertainty, it was seen to be important to introduce and make sure that the clarifying amendment was in effect from the date of the announcement, so as to avoid any period of time between when the uncertainty was identified and when the clarifying amendment commenced. While it is the government's view that the amendment is merely reinforcing those universal principles, which are longstanding and which were acknowledged by the Speaker in the previous session, there was concern that some stakeholders, on reading that legal advice, may have been put into a state of confusion. The bill certainly addresses that and seeks to do it urgently; thus the element of retrospectivity.

MR BRADDOCK: So for clarity, you are referring to the Walker advice that was provided to the Speaker and which was then submitted to the privileges committee?

Mr Young: Indeed.

MR BRADDOCK: Thank you.

MR PETTERSSON: Thank you. The WorkSafe Commissioner, in her submission, suggests a further amendment that clarifies who is an officer within this workplace. Has the government considered this submission and do you have any thoughts on it at this stage?

Mr Gentleman: No. At this time we are still considering that submission.

MR PETTERSSON: Okay. Did the government seek legal advice in drafting the bill? I know the government was unable to share its legal advice with the privileges committee. Is the government in a position, for this inquiry, to share any legal advice it has received on the bill and the Speaker's proposed amendments?

Mr Gentleman: Yes. The Parliamentary Counsel's Office provided advice to us on the construction of this bill to amend the act.

MR PETTERSSON: Are you in a position to share that legal advice with the committee this time, or is the same as the privileges committee?

Mr Gentleman: It will be the same as what you see in the presentation of the bill. Mr Young?

Mr Young: Advice from the Solicitor-General has been received and has been shared with the Speaker. That is my understanding. As to whether it can be shared any more widely, any matters of privilege need to be considered, so I think we would have to take that on notice.

MR PETTERSSON: If you would, that would be wonderful. One of the recommendations of the privileges committee was that an MOU be established between WorkSafe and the Assembly. We have heard today that that has not progressed as quickly as some might hope. Is there a role that you could take to maybe further facilitate that work?

Mr Gentleman: Thanks, Mr Pettersson. I understand that the Select Committee on Privileges recommended the possible MOU between the Speaker and the WHS commissioner in its report. The government is yet to provide a response to that report. We still have not responded to that report that was tabled last year. When the Chief Minister introduced the amendment bill, he referred to suggestions about the desirability of the Assembly and WorkSafe working together. We certainly will consider that as we look at that report.

MR PETTERSSON: Wonderful. Thank you.

THE CHAIR: On behalf of the committee, I would like to thank you, Mr Gentleman, for appearing today on behalf of the ACT government. When available, a proof transcript will be forwarded to witnesses to provide an opportunity to check the transcript and identify any errors in transcription. If witnesses undertook to provide further information or took questions on notice in the course of the hearing, answers to those questions would be appreciated within one week from the date of this hearing.

The hearing is now adjourned. On behalf of the committee, I would like to thank all the witnesses who have appeared today. If members wish to lodge questions on notice, please provide them to the committee secretary within five working days of the hearing. Thank you very much.

Mr Gentleman: Thank you, Chair. Thank you, members.

The committee adjourned at 1.55 pm.