



**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

SELECT COMMITTEE ON PRIVILEGES 2022

(Reference: **Inquiry into possible contempt of the Assembly: Imposition of prohibition notice by WorkSafe ACT**)

Members:

**MR J HANSON (Chair)
MS J CLAY (Deputy Chair)
MR M PETTERSSON**

TRANSCRIPT OF EVIDENCE

CANBERRA

MONDAY, 24 OCTOBER 2022

**Secretary to the committee:
Mr Max Kiermaier (Ph 620 72031)**

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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Amended 20 May 2013

The committee met at 11.56 am.

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

GREY, MS AMANDA, Deputy Work Health and Safety Commissioner, WorkSafe ACT

THE CHAIR: I ask that you put your phones are on silent. The committee wishes to acknowledge the traditional custodians of the land we meet on, the Ngunnawal people, and the committee wishes to acknowledge and respect the continuing culture and contribution they make to the life of this city and the region. Would also like to acknowledge and welcome other Aboriginal and Torres Strait Islander people who may be attending today's event.

We will be hearing today from Work Health and Safety Commissioner, the Select Committee on Estimates, and the Madam Speaker in the Office of the Legislative Assembly. We have the minister appearing tomorrow. There are social distancing and COVID requirements that we are all aware of. Our cleaner over here will be cleaning the seats between witnesses, but that should not be an impost on you guys. We are practicing good hand hygiene. Speak one at a time, and when you do speak, speak directly into the microphone for Hansard. The first time that you speak, please say your name and your appointment so that Hansard can work out who is who.

Today we are being recorded and transcribed, and the proceedings will be published, broadcast and web streamed. You may have a specific question that you wish to take on notice. You can take it on notice and get back to the committee with the detail around that. Our session begins at noon, and I would like to welcome you, Ms Agius.

THE CHAIR: I remind you that there are protections and obligations afforded by privilege. You have the privilege statement that you should have seen. Are you aware of that?

Ms Agius: Thank you. I am aware of the privilege statement.

THE CHAIR: We received your submission on Friday, and I can indicate that once we have got through this session, the committee will be authorising that for publication. It will go up online with the other submissions that are up there. We will do that. Would you like to make an opening statement?

Ms Agius: No, thank you, Mr Hanson.

THE CHAIR: I am going to ask Mr Pettersson if he has a first question, because he has to duck away.

MR PETTERSSON: Thank you. Commissioner, why were the prohibition notices issued to the Assembly?

Ms Agius: I cannot answer that question. That is a question for the inspector that issued the notice. I have seen the notices and I can interpret from the notices why, but

it would be supposition for me to say why.

MR PETTERSSON: Okay. When a prohibition notice is issued, are there methods of internal or external review available?

Ms Agius: Yes, there are. You will notice that on the last page of the notice, it clearly states that there are review mechanisms available. Those review mechanisms sit in the Work Health and Safety Act. They come under section 224, where a person can seek a review of the notice within 14 days of the notice being issued. And then there is a process for that review.

Any relevant person can seek the notice, and that can be either the person the notice was issued to, any of the other officers in the workplace or PCBUs, any of the HSRs in the workplace. They can determine that they would seek a review of that notice. There is also a provision in the Work Health and Safety Act for the reviewer to stay the notice when a review is sought, and that is a decision for the reviewer.

The reviewer can stay a notice either if they have been requested to stay a notice by the person who is seeking the review or if they determine themselves to stay the notice. The reviewer must then provide reasons for their decision. A reviewer can either confirm the decision, overturn the notice, or determine to take a different type of action. And they must give reasons to the person who sought the review for that. If the person who seeks the review is not satisfied with the decision of the reviewer, then they can seek external review at the ACT Administrative and Civil Tribunal.

MR PETTERSSON: Were any of these mechanisms utilised in regard to the prohibition notices issued to the Assembly?

Ms Agius: There were two prohibition notices issued to the Assembly: 5068 and 5078. And in neither of those cases was a review sought.

MR PETTERSSON: Okay. In regard to the two different prohibition notices, could you explain to me, in your view, what the difference was between the two?

Ms Agius: The wording of the prohibition notice?

MR PETTERSSON: Yes; and/or their effect.

Ms Agius: Yes, I can. I need to tell a little bit of a story in order to answer that question. On the morning of 15 August, I received a letter from Madam Speaker. Everybody has seen that letter; it is part of the evidence. Madam Speaker raised significant concerns about the notice and sought withdrawal of the notice. Under section 207 of the Work Health and Safety Act, I have the power to withdraw a notice.

Attached to that letter was the prohibition notice that had been issued by the inspector. When I read the terms of that notice, I became concerned that the notice was quite broad in its impact. When I read the rest of the notice, it was my view, on reading the notice, that it was not the intention of the inspector to, in essence, prevent any committee from operating at the Legislative Assembly. It was my view that the terms of the notice—or it could be read as such—was preventing committees from operating.

Becoming very concerned, I knew that I had the option of withdrawing that notice. I spoke later that morning with the inspector, their manager, and the senior director—you will note that in my chronology—and I directed that they attend the Office of the Legislative Assembly and withdraw the notice. That is the normal operating of my office in the withdrawal of a notice. I would direct the action and then the inspectors would go and do that. In relation to the second notice, prohibition notice 5078, some legal advice was sought on the wording of that notice. It was my view then, and it is still my view, that the notice did not substantially interfere with the operations of the select committee, in that it requested that the select committee conduct a risk assessment and consult with people attending the hearings—sorry; I am just going back to the wording of that notice—or that they hold the hearings virtually. I note that the standing orders were amended during the COVID pandemic to allow committees to hold hearings virtually.

MR PETTERSSON: Thank you. Is it irregular for WorkSafe to change the wording of prohibition notices or to rescind them and issue new ones?

Ms Agius: Yes. Perhaps I will hand over to Amanda Grey, the Deputy Work Health and Safety Commissioner, because Ms Grey briefs me on matters where that occurs, but she has been involved in those types of matters.

Ms Grey: I acknowledge the privilege statement. It is unusual for that type of action to take place. Basically, what would happen in those instances where a prohibition notice is issued—I suppose it most clearly impacted in the construction industry, where there is a commercial imperative—a PCBU would call up, usually the manager or the inspector, and ask what compliance looks like. So we would have a discussion about compliance and if it is possible to comply with the notice. On two occasions that I can recall, the PCBU has indicated that it is impossible to comply with the notice and has asked for the notice to be reviewed—and we have stayed those notices.

In one instance, which was an ACT health entity, the PCBU was able to indicate that they were not able to comply, and asked to meet and discuss the wording of the notice and what the intention of the inspector was. So, together with the inspector, we looked at the wording. The PCBU asked if they could submit wording, and I indicated they were free to submit it, but we were not consulting with them and, in fact, we did not use their wording. They are the only two occasions in the time I have been in this role that I can recall.

Ms Agius: Could I add to that, if you do not mind. There is also the power under the act for the inspector to vary the notice.

Ms Grey: And that happens more frequently.

Ms Agius: That happens more frequently. So, where it talks about reviewing the notice, on the last page of the notice, it does say, “If you have any problems with this, please contact the inspector or you can email WorkSafe.” That often occurs, where a PCBU will ring the inspector directly and they will talk about the intention of the notice and the wording of the notice. And an inspector does have the power to do that, and will do that.

THE CHAIR: On this one specifically, though, 5078, you said legal advice was sought. Who instigated that, the inspector or—

Ms Agius: I did.

THE CHAIR: You did?

Ms Agius: I did.

THE CHAIR: Who drew up the wording of 5078? Was the wording of that drawn up by the inspector or by you, or in conjunction between you?

Ms Agius: No, the wording of that was provided to me by legal, and that was then forwarded to the senior director.

THE CHAIR: So 5078 was written up by a lawyer, not by the inspector?

Ms Agius: Yes; that is correct.

THE CHAIR: Right. Is that normal?

Ms Agius: I beg your pardon; that would be just the first part of 5078, not in relation to forming a reasonable belief. The advice that was sought is: how can the prohibition part, the activity that is to be prohibited, be prohibited without interfering with the hearings? So, it was just that sentence—

THE CHAIR: But the actual effect of the notice that sort of said, “This is what you can do, this is what you cannot do, and this is what the notice says—

Ms Agius: That was all written by the inspector.

THE CHAIR: That was written by the inspector?

Ms Agius: Yes.

THE CHAIR: And that was sent to you to look at, to review or—

Ms Agius: No, it never is. In the last financial year, there were 405 prohibition notices that WorkSafe issued. I do not have a look at those prohibition notices. What occurs is that I delegate those powers to the inspector. They are delegated under section 154 of the Work Health and Safety Act. The inspector is trained on how to write a notice. We have implemented, since I began as Work Health and Safety Commissioner, quite a stringent training program.

Only the inspector can form the reasonable belief to determine whether or not to issue any notice, whether it is a prohibition notice, an improvement notice, or an infringement notice. I cannot direct them to do so. My directions to inspectors sit in a number of places. They sit in our standard operating procedures. We have a standard operating procedure that clearly spells out how an inspector forms a reasonable belief.

But we also have a compliance and enforcement policy, and the compliance and enforcement policy makes it very clear that the inspector must form the reasonable belief.

Nobody else can form the reasonable belief because the reasonable belief is formed on a number of things. It is formed on any information that the inspector is privy to, going and doing the workplace visit, asking questions, seeking information at the workplace visit, viewing the workplace visit, and looking at what is available in the workplace visit. And it is through all of those things that they determine whether or not they can form a reasonable belief that in this case of a prohibition notice that an immediate or imminent risk was present. And that was determined by the inspector.

MR PETTERSSON: One last one. On Monday 15 August, the estimates committee wrote to you, ordering the details of the complainant and the complaint relating to the prohibition notice. On 16 August, the estimates committee extended the period in which you were to respond, and followed this again on 17 August, advising you that you had disobeyed its lawful order by not providing details of the complainant and the complaint. Why did you not provide that information to the committee?

Ms Agius: I did not provide that information to the committee based on privacy reasons. The letter on 16 August to the committee outlines all of those reasons, and they are linked to section 271 of our act.

MR PETTERSSON: Did you find it unusual that an entity that was the subject of a complaint, utilised its powers to try and seek information relating to that complaint?

Ms Agius: Section 271 of the Work Health and Safety Act requires the individual to provide express permission to release their name. That section of the act is there, in essence, to act as a type of whistleblower section, and no PCBU in the ACT can claim that information from the Work Health and Safety Commissioner. As the person who is tasked with upholding the Work Health and Safety Act, in essence, I would be committing a criminal offence if I provided that name. I beg your pardon, I will retract that; I could be open to committing a criminal offence under that section of the legislation.

MR PETTERSSON: Thank you.

MS CLAY: Can I have a supplementary question on that, please?

THE CHAIR: Yes; go for it.

MS CLAY: So you cannot provide the details without seeking permission. Did you seek permission?

Ms Agius: No.

MS CLAY: Okay, would you usually? Why did—

Ms Agius: Because I never have sought permission and I would not ever seek permission from someone.

MS CLAY: Sure.

THE CHAIR: Does not the act say that—

Ms Agius: And that is a regular process.

THE CHAIR: —you are not to provide that information unless it is ordered by a court, or a tribunal, or a body that has the ability to call for documents—

Ms Agius: Yes.

THE CHAIR: —which would include the estimates committee?

Ms Agius: Yes, it does.

THE CHAIR: So the estimates committee, in the act, was able to ask for that information?

Ms Agius: The estimates committee requested the information. It provided me an invitation to provide the information.

THE CHAIR: Okay. So if they had ordered it, that would have been different then if they requested it. Is that right? Are you nodding?

Ms Agius: I would need to confer. Sorry, the question was—

THE CHAIR: They requested it, and you said no, you are not going to provide it. But if they had ordered it formally, then that would have been something that you would have dealt with differently. Is that right?

Ms Agius: I would need to consider my position.

THE CHAIR: Okay. It is pretty clear, though, that aside from their request, from the documents that have been provided, that the complainant was actually the minister's office.

Ms Agius: Absolutely. There is no secret about that.

THE CHAIR: There is no secret that the complainant was the minister's office. The minister was aware of it, and he said as much on the radio on 27 August.

Ms Agius: Yes, he did.

THE CHAIR: So there was a phone call from someone in the minister's office acting on behalf of the minister, and then there was a follow-up email that went to you, that you then forward onto—is it, Bob—

Ms Agius: Mr Robert Alford.

THE CHAIR: And then he forwarded it on. Okay, that confirms it. I now follow-up on some of the things you said before. You said that you were confident that the second notice did not substantially interfere with the operation of the committee. So you are accepting that the first one did. I suppose that, by virtue of the facts, you are saying the second one did not and, as you had to withdraw the first one, you accept that that one did.

Ms Agius: I had concerns that it did not.

THE CHAIR: Yes, okay.

Ms Agius: I had also received the Speaker's letter, so that had alerted me to the fact that there may be issues with that particular notice.

THE CHAIR: Okay. In her submission to this committee, the Speaker—I have no doubt that you have read it—at paragraph 25, makes the assertion that WorkSafe did not take “a constructive approach to the resolution of the relevant issues” and that there was “every appearance of the use of the prohibition notice power as a measure of first resort”. She also suggests that WorkSafe, in their approach, may not have been acting in accordance with the act. That is at paragraph 25, which you no doubt have seen.

The office of the Legislative Assembly makes a similar claim in their submission, at paragraphs 4.9 and 4.10, that the way that WorkSafe behaved was possibly not consistent with the act. And at paragraph 1.16, they have raised a consideration as to whether WorkSafe's use of their powers was reasonable and proportionate. Have you reviewed the actions of your inspector to see whether they were heavy handed?

Ms Agius: There are two problems with me taking that action. Firstly, this matter is before a privilege committee, and I could not question or look into the conduct of an inspector while this matter is occurring. Secondly, if an inspector's decision is to be questioned, the appropriate place to do that is via a review. It would not be affording the inspector procedural fairness for me to go in over the top and review a notice without a request.

THE CHAIR: Right. The assertion has been made by the Speaker, and by the Office of the Legislative Assembly, that the inspectors were not listening and that they were argumentative. You have read the submissions, right?

Ms Agius: Yes, I have read the submissions.

THE CHAIR: And there was an assertion that there was no moving-to-an-improvement notice or anything like that—it was just all fairly heavy handed.

Ms Agius: I am not sure what the relevance is to this question, Mr Hanson, and I would call a point of relevance.

THE CHAIR: No. You do not call points of relevance, I am afraid. That would be something that I do, but that you do not do, as a witness.

Ms Agius: I would ask you to consider relevance as to how the inspector's conduct fits with the terms of reference that you are looking into my conduct in this matter.

THE CHAIR: Sure.

MS CLAY: We are empowered to look at any other matter, Ms Agius.

THE CHAIR: Yes, that is the decision for this committee; not for you, I am afraid. The points of relevance of what are lines of questioning are a matter for the committee to determine, not a witness. To assist you, my next line of questioning might give you some indication as to why I am asking that question. The initial complaint came from the minister's office.

Ms Agius: Yes, to me.

THE CHAIR: To you. And that was forwarded on. That described significant concerns. And, as I said, the minister has confirmed, on the radio on 17 August, that that was essentially sent on his behalf. I do not think there is any dispute about that. But you then got a complaint from the minister that, with all its email attachments, was not just a simple, "Can you go and have a look at something." It outlined, very specifically, by virtue of the fact that it had the letters between the minister and the committee, exactly what remedy the minister was seeking.

You have a specific complaint from the minister with detailed explanations as to exactly what the minister is seeking as an outcome. How do you assert that that is not a direction or a quasi-direction, because but for that email, but for that complaint, none of this would have happened? As you would be aware, the act makes it very clear that the minister is not to provide specific directions. We have a situation where the minister has sent an email making a complaint with what he sees as the remedy, and then that has flowed down the line to inspectors who have implemented what has been described by the Speaker, and by others, as a heavy-handed approach to essentially shut down that committee. Can you not see that the perception is that you have the minister initiating a complaint that has led to an outcome that was meeting the minister's desires as are articulated in the complaint that he made?

Ms Agius: Well, there is quite a lot in there. Firstly, we never take directions from the minister. That email to me would never be taken as a direction to me or anyone else. That was from the minister's office, I beg your pardon; it did not come from the minister. Sorry, I will just collect my thoughts. We received complaints and concerns about this matter from a number of places. You will note, in my chronology, that I refer to a teams meet. There was a teams meet that I had with senior public servants who were raising issues in relation to having to appear before the budget estimates hearings. They were concerned about their safety. I do not seek to speak for Ms Grey, but I understand Ms Grey was also—

Ms Grey: Senior public servants raised with me concerns of PCBUs—director generals—being able to meet their work health and safety obligations. It went to the waiting area and the construction of estimates for the first time, where several senior public servants were required to be in a waiting area with many people for an extended period of time, which was contrary to the control measures that they had in

place.

THE CHAIR: Can I just go back a step, though?

Ms Grey: Sure.

THE CHAIR: The act says—this is section 2.23—that with regard to the minister and what he can do, it says:

- (3) A direction given under subsection (2) must be of a general nature and not direct the WHS commissioner in relation to a particular investigation or particular regulatory action.

Ms Grey: Yes.

THE CHAIR: He has sent you an email that has set off this chain of events that quite clearly was not general in nature, but the email was very specific about not only the complaint that he had but the remedy that he was seeking in relation to a particular regulatory action.

Ms Agius: I would say a couple of things to that, Mr Hanson. Firstly, we do not invite any information that comes to our office, and we certainly get lots of information into our office. I receive numerous amounts of complaints from all sorts of people every week.

THE CHAIR: Yes, but the minister is not “all sorts of people”, is he? That is the point here. This is not someone coming in from the sideline; this is the minister.

Ms Agius: No, no; I would like to continue, if that is okay. In the email into our office—to me; I beg your pardon—from the minister, the question is not—

Ms Grey: The minister’s office.

Ms Agius: The minister’s office, yes. Thank you very much, Amanda. It was from the minister’s office; it did not come from the minister.

THE CHAIR: Yes, but it had “on behalf of the minister” and no one is disputing—

Ms Agius: Well, I would have to suppose that, because I do not know what was in that person’s mind or what they were doing when they were sending that email to me, except that there was an initial phone conversation where Amanda and I were both present, where I made it very clear, that if there was a matter that that person was concerned about, they needed to put it in writing to me.

I do that, actually, intentionally so that these sorts of things do not happen. I seek information in writing to make those things very clear. You will note that I refer to that email as a complaint, although, on reading the email since it was sent to me, it does seek advice. We deal with every matter that comes into our office as a concern, complaint, enquiry, because to do otherwise would be a dereliction of my duty. To not take seriously a risk to Work Health and Safety that was raised with my office, would

not be carrying out my role as the commissioner diligently. So every matter that we have received is managed in exactly the same way, and this matter was managed no differently to any other matter.

THE CHAIR: But are you saying that there were a number of conversations from government officials who were due to potentially appear before the enquiry that they had raised concerns? That did not lead to any action. You just had a meeting. There was no action that then came out of it. But the email comes in from the minister's office and all of a sudden it is handled as a complaint and an inspector is knocking on the door here and shutting down the Assembly.

Ms Agius: I disagree.

THE CHAIR: So why is it that the minister's email was dealt with so differently?

Ms Agius: It was not. The teams meeting—and you will see it in my chronology—that I had was on that very same day, and I advised the senior director. You will note that in my notebook; it is very clear that I advised the senior director, Mr Alford. The decision whether or not to send inspectors out to the Legislative Assembly sits with the senior director. I do not direct that. I would never seek to direct that. I have managers who do that job, and they are delegated to look at the resources of our office and how they are used. The question really goes to: did our office do anything different in these circumstances? And we did not. Every matter that comes to me is sent either to the deputy commissioner or to a senior director to manage. And you will note that in my email to Mr Alford I very clearly say, “Deal with this matter in the usual way.”—in other words, no differently to anything else.

THE CHAIR: That complaint was sent from Mr Alford to the inspector. So the inspector had the complaint directly from the minister's office, outlining exactly what the minister wanted to achieve, which was articulated in his emails. You do not see that as problematic, given that the act says that you cannot have a direction and the influence that that put on that inspector to achieve a certain outcome? As we have already identified, what they did was inappropriate. You had to withdraw that notice.

Ms Agius: No, I do not think it was influenced. I guess I will give you an example of the sorts of things that come into our office to try and paint a picture. There are times when we receive complaints about safety from competing businesses. So, let us say in a street we may have two bakeries, and one bakery will write to us and complain about safety issues about the other bakery, and then the other bakery will complain to us about safety issues at the bakery across the road. Our inspectors are required, in those instances, to take on board all of those complaints, to look at all of that information, which is all forwarded to them, because they have to form a reasonable belief. They cannot form a reasonable belief without seeing all of the information available and to make a determination. Ultimately, the determination is made on the workplace visit. Sometimes when we receive complaints, they do nothing; at other times they do something, but we cannot be guided by any agendas that anyone else has and we will not be.

MS CLAY: I might just follow up on that. You have had a chance to read the submissions that we have received. There are quite a few there. Are there any

conversations between you and the minister or between your staff and the minister's office other than what we have got in our evidence and submissions? Are there any other conversations, emails?

Ms Agius: Yes. On, I believe, the Tuesday morning, we received quite a significant threat to our office. The threat was reported to the police, and I had very significant concerns about the welfare and safety of my staff.

Ms Grey: Excuse me, Commissioner; this was the Tuesday following.

Ms Agius: I beg your pardon. It was on the 16th—so after all of the things had been in the media. I am not sure how the Speaker's letter arrived in the media, but it did, and that caused some emails to come to our office. One of those was quite a significant, serious complaint.

MS CLAY: Sorry, I just asked about—

Ms Agius: Yes, I am—

MS CLAY: Great, keep going.

Ms Agius: That morning we met to discuss what controls we would need to put in place in our office to minimise any risk to our people. We determined, given the nature of the threat and given that it needed to be reported to the police, that I needed to inform the minister's office that I was essentially stripping back our work because I am required to report to the minister on the operations of the act. I said that we would only be responding to matters of serious concern—notifications—and that I needed to send my people home to work, which meant we would not have inspectors on-call. Because I am required to report the operations of my office to the minister's office, I rang Mr Kandola that morning and advised him that my office had received a serious threat.

As we were meeting in my office—there were Ms Grey, myself and other members of the senior leadership team—my phone rang. It was sitting on the table. It was an unknown call. One of my senior directors said, "Are you going to pick that up?" and I said, "No I am not going to pick that up. I don't know who it is, and we have just had this threat to our office." She then picked up the phone and said, "This is Commissioner Agius's phone." It was the minister, and the minister had rung to check on my welfare and the welfare of our office. During that conversation we did not talk about anything to do with this matter.

MS CLAY: Thank you. I am sorry about that threat; that sounds quite distressful for you and your staff.

Ms Agius: It was extremely distressful for us and for our staff.

MS CLAY: Yes; I am sure.

Ms Agius: And we had staff needing to take leave because of that threat.

MS CLAY: I am sorry to hear that. So, that was a phone call on the 16th?

Ms Agius: It was the date of the email. And, I beg your pardon, Ms Clay; I can confirm the date of that call if you would require it. That is no problem.

MS CLAY: Yes, it would be great if you could send in a written confirmation of when the call was, who it was with and what you discussed. We have a lot of content—

Ms Agius: There was a call that I made and then there was a call back.

MS CLAY: That actually would, I think, really help flesh out what the situation is. There are quite a lot of different activities that happen in this building. Just looking at July and August, we had two committees holding hearings with witnesses; we had 10 committees holding regular meetings; we had sittings a couple of times in that time; we have 25 MLAs who run meetings, see stakeholders and have people in; and functions were on and off during that time. And there were a couple of hundred staff here. There is quite a lot of activity in here. Why is it that, from all that stuff happening in July and August, the activities of one committee with one particular set of hearings, got this attention that led to a prohibition notice? Why was there a different risk assessment for that one thing?

Ms Agius: I guess what I need to explain is how our office operates, in a sense. There are a number of ways in which we can conduct workplace visits. Firstly, we have what we call “proactive visits”—that is all of our visits that we determine need to be conducted because we know that there is a risk in the community in a particular industry. For instance, during COVID we ran quite a lot of proactive workplace visits in the retail sector and the hospitality sector. The other way that we receive and respond to matters that come into our office is if we have a notification. Notifications sit under our act, and notifications are serious incidents such as the incident out at Dickson, where we had the wall collapse. That would be a notifiable incident.

The third way that we receive information into our office, and we respond, is that we receive emails, communication, and phone calls—because we have an on-call phone which is always staffed by an inspector—through things that are occurring or about to occur. And that information may come in from workers, members of the community, members of government, construction companies and PCBUs. So, all of those will be responded to.

In this instance we were advised by a number of people, in a number of instances, that there was an alleged risk. It was an alleged risk, and again I would say that it is a dereliction of our duty, once we become aware of something, not to go out and visit that workplace and to make a determination. And we do it all the time. So, nobody raised anything in relation to any other matter.

MS CLAY: So, you only follow-up the complaint that was made. You do not make an assessment, once you are there, of other activities.

Ms Agius: Not generally, no. Sometimes we do. It depends on the workplace.

MS CLAY: I am interested, because in this particular week there was a sitting as well, and sittings have more people involved than hearings. We have 25 members, and there are a lot of other individuals.

Ms Agius: Do you mean sitting in the chamber?

MS CLAY: Yes, yes. I am just interested that an inspector came and made a risk assessment about a committee and hearings, but issued prohibition notices only about committees and hearings, and did not make any assessment or make any findings about—

Ms Agius: If it was a general workplace visit—a proactive visit—then they would absolutely be going and looking at every single part of the organisation, but because this was in relation to a specific inquiry that had been made to our office, or a specific risk that was raised, then the inspector would be going out just to look at that specific matter.

MS CLAY: So, the way that the original complaint is made then is quite significant, isn't it? If the way that the person frames the original complaint shapes the way the inspection is done and shapes the prohibition notice, that makes it quite significant, doesn't it?

Ms Agius: It should not, because the inspector—the inspectors are trained, and we have standard operating procedures, which actually make it very clear—should be looking at all of these different things in order to form their reasonable belief. So the initial complaint, or advice being sought, would not be significant in how that inspector would then go and carry out their duty. They must carry out their duty in an unbiased way.

THE CHAIR: Seemingly though, there were a lot of activities occurring in this building that were pretty much no different from what was happening with the estimates committee—and in some cases, potentially of more risk. For example, I will give you a look at this, if I could. You can take a bit of cursory glance at the activity going on within the ACT government. That is the minister on the day of the complaint that was made, as I understand it. The estimates committee had various procedures in place to make sure that people were socially distanced and wearing masks and so on. This is an extract that was taken from LinkedIn on the day that the minister wrote his complaint. And you can see there, the minister touching—everyone touching: 18 staff from the directorate.

So, seemingly, there were a lot of activities occurring within the ACT government, within this building, that were no different, or in some cases one could argue, of a much greater COVID safety risk than the estimates committee. But the estimates committee drew particular attention, and that was the one that led to this whole Assembly being shut down by WorkSafe, at the instigation of the minister.

So, how do you explain the fact that we reached a point where there were activities in this building, and throughout the ACT government and community, that were of far less COVID risk, I would assess. I am not an expert. The estimates committee had a plan, and this building had a plan, but it was the estimates committee that drew the

wrath of the inspector, and it led to the inspector putting in a prohibition notice that shut down the Assembly. Can you explain why it—

Ms Agius: I cannot explain what was in the mind of the inspector when they conducted their inspection or when they formed their reasonable belief. And nor should I be expected to.

THE CHAIR: The advice that you got, the legal opinion—

Ms Agius: By Mr Saul Holt.

THE CHAIR: Yes.

Ms Agius: The King's Council advice?

THE CHAIR: That is right.

Ms Agius: Yes.

THE CHAIR: It says:

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

Ms Agius: Yes.

THE CHAIR: I presume, by virtue of the fact that it is focused on the second notice, that there is an acceptance that the first notice did indeed breach privilege—and by virtue of the fact that you withdrew it.

Ms Agius: Well I do not think that question is answered in Mr Holt's advice. And I do not think anyone can determine the answer to that question, except for the court.

THE CHAIR: Well this committee is looking at that matter. So this committee may draw that conclusion. So you are of the view, then, that this matter should be going to a court? I know that was the opinion—

Ms Agius: Well that is what the advice says—

THE CHAIR: That was the advice, but is that your opinion, or do you not have an opinion?

Ms Agius: I do not have an opinion on that matter.

THE CHAIR: Okay.

Ms Agius: Mr Holt's advice says that the question of privileges in Australia is in doubt. He has, in his advice, used and referred to decisions in the UK and Canada to make his point.

THE CHAIR: All right.

MS CLAY: I have a supplementary question on that. One of your roles is to advise the minister on the application of your act, and advise how it interacts with any territory law under which you perform a function. Obviously with the first and second notices—you have told us that you got legal advice—did you form a view as to whether you thought issuing the notices was legal?

Ms Agius: I formed a view in relation to the first notice that it was broad and that it should be withdrawn. And I took that action and withdrew that notice. In relation to the second notice, I refer you to the advice of Mr Saul Holt, who is not of the view that the notice was illegal. And nor am I.

MS CLAY: Yes, great. Thank you. I was just having a look on the website at the usual activities that you do, to get a sense of what is normal. We have sort of covered this ground. I understand that you cannot tell us how the inspector formed their reasonable belief; you have stepped that out quite clearly. But I did have a look at the August figures. We had 320 improvement notices in August, and 82 prohibition notices. So about a quarter lead to prohibition notices. Can you tell me, in general terms, what leads to—and what makes it different—you issuing a prohibition notice rather than an improvement notice, or some other kind of action?

Ms Agius: It is clear in the act that a prohibition notice will be issued if there is an immediate or imminent—“about to happen” is the definition of “imminent”—serious risk to workers and others. That is the test for a prohibition notice. An improvement notice is issued when the inspector determines that there are matters within the workplace where improvements can occur.

MS CLAY: But no immediate risk?

Ms Agius: No immediate risk.

MS CLAY: Do you think that is probably what happened in this case with the prohibition notice—that it was seen to be an immediate risk and not a matter for improvement? Or is that something that—

Ms Agius: That is supposition.

MS CLAY: Yes, okay. Sure. Thanks.

THE CHAIR: I will just go back a few steps. You are not able to look at the particular decisions made by the inspector and say whether you are comfortable with them? Do you have to go through a formal review process for that to occur?

Ms Agius: I would need to go through a formal review process or a conduct process.

THE CHAIR: And you have not decided to initiate that? Does that get initiated by you? I mean, surely, given the—

Ms Agius: It would be initiated by their manager.

THE CHAIR: By their manager. All right. But, given the concerns that have been raised by the Speaker, and by the Office of the Legislative Assembly—as I understand it, there was a COVID plan in this building, and they did not want to look at that, and they ignored a whole bunch of other concerns that were being raised—that then did not spark or initiate some sort of review to check that the decisions were—

Ms Agius: Can I refer you just to my submission from Friday, around that question of COVID safety plan, risk assessment and risk matrix, because there is a whole lot of different things involved here. The Work Health and Safety Act requires that, for every new activity in a building or a change in circumstances, the hazards must be identified, and the risks must be controlled. The COVID safety plan—and I have seen it from the chronology that has been provided by the inspector—shows that, firstly, it was in a draft form, and it was dated March 2022. And I know, from looking at the inspector’s chronology, that from that there was a determination that there was no risk assessment; hence the requirement in the COVID plan to have a risk assessment for that particular activity.

Now, that is a requirement of the act. There was a material difference between what was in the COVID safety plan and what eventuated in relation to the budget estimates hearing. In fact, there were a number. Firstly, I saw the email that was provided to me and then referred to the senior director, Ms Brooke Grey. As I have said, it is something that I always do when I receive emails—they are referred on. In that matter I understand there was evidence of consultation. What was being consulted on was a move from the small committee rooms to the chamber—a significant material difference when it comes to COVID safety. People were offered the opportunity of virtual or online hearings. And our inspectors were provided with evidence about the air monitoring testing that had occurred in the chamber.

So when we say that there was a COVID safety plan, a COVID safety plan is an overarching document, but in relation to specific activities, we must determine what the controls are for that specific activity. So having a list of generalised controls does not satisfy the requirement of the act to put in controls for that particular activity and to identify the hazards for that particular activity.

THE CHAIR: But committee hearings had been run under that plan for some time without complaints. And had run safely. Why was this one different? Because of the email?

Ms Agius: Because this matter was raised with our office by a number of different places.

THE CHAIR: Yes, okay. You talked earlier about two bakeries that might make a complaint, so you would consider all that information and put it together. That is a complaint coming from a member of the community. That is very different from a complaint from the minister, when the act makes it very clear that the minister is not meant to do so in relation to particular investigations or regulatory actions

The point being: we have a situation where there are a number of activities happening in this building that have been happening for a while under various plans safely,

without complaint; the minister then had a concern—a sort of ongoing barney with the estimates committee—and you can see that from the various submissions; and then his email leads to a notice being applied to this place that shut down the whole Assembly. That is what we are looking at here—but you do not see that any of that is problematic?

Ms Agius: No, I do not. The reason I do not see that is problematic is, firstly, the email did not come from the minister; the email came from the minister's office. Secondly—

THE CHAIR: So, if it had come from the minister, it would be problematic then?

Ms Agius: Absolutely not. It would not be any different, because we do not deal with any matter in our office differently—it does not matter who it comes from. It does not matter if it comes from a union, if it comes from a PCBU, if it comes from the industry association, if it comes from the Chief Minister. We would not deal with it differently, because we are an independent office and we will not be influenced, we will not be convinced and we will not make a decision based on anybody interfering with our office. It is as simple as that. I would not allow that to occur.

THE CHAIR: But that seems to be what has happened, because of the fact that a prohibition notice was put on that you had to withdraw.

Ms Agius: I, respectfully, Mr Hanson, disagree with you that that is why that prohibition notice was put on.

THE CHAIR: Okay. The Speaker has described this as a case of executive overreach through a third party—that is you, I guess, or your organisation—in the proceedings of the Assembly. So you disagree with the Speaker's view that what happened was that the minister was overreaching and, essentially, used you as part of that overreach?

Ms Agius: Yes, I do. I cannot speak to the minister's role. What I can speak to is my role, and in relation to the actions of our office, we did not do anything wrong in this case.

THE CHAIR: I take it that, from where you sit, you are probably more politically savvy, perhaps, than the inspectors, who are focused very much on the WorkSafe aspects. That body of information from the minister directly to them saying “this is the minister's concerns; this is what the minister is clearly seeking as a remedy”—can you not see how that would put quite a deal of pressure on that inspector, and could be seen to be influencing, or could have influenced, them?

Ms Agius: No.

THE CHAIR: You do not think so?

Ms Agius: No. I would be surprised if that inspector, or any of our inspectors, are aware of who the minister is for work health and safety.

THE CHAIR: How do you explain then the first notice that you had to withdraw?

How do you explain the problems with that?

Ms Agius: That would be supposition. I cannot answer that question—

THE CHAIR: But you accept there were problems with it by virtue of the fact you had to withdraw it.

Ms Agius: I withdrew that notice because, in my view, the notice was too broad. I have made it very clear. The details of the notice that I read were very clear, but I do not believe it was the intention of the inspector for that notice to be that broad. In the inspector's chronology that she wrote to Mr Braddock, there was an email on a Friday evening stating that the hearings could continue. She was not seeking to stop the hearings from continuing. I can find the reference, but you may recall it.

THE CHAIR: I am sure it is somewhere in that package

Ms Agius: It is in the inspector's chronology. It is annexure 16 of her chronology that she wrote to Mr Braddock, letting him know that. That was on the evening of the 12th—making Mr Braddock aware that she was not seeking to stop estimates from running.

THE CHAIR: Alright, great. Ms Clay, do you have any further questions?

MS CLAY: I do not. I am just going to restate something to make sure I have got it clear. I understand that you cannot tell us whether the prohibition notices were appropriately issued, because this rests on the inspector's reasonable belief, and you cannot do that. You can conduct a review of whether that was done properly, but you have not done that because of this committee. You can and did revoke one of those prohibition notices, but I am not quite sure what the grounds were for revoking the first notice if you cannot engage in any supposition or any kind of review of whether or not it was reasonably issued in the first place. It is the third step I am struggling with.

Ms Agius: In relation to a review, the review mechanism must be a request by one of the relevant people. Under the act, we must receive a request for a review within 14 days. That is the only way that we could review the notice, and that request must come from a relevant person. The relevant person might be PCBU officers in the HSR—I have referred to who they are.

MS CLAY: Yes.

Ms Agius: The grounds for me withdrawing the notice, and the power which I have under section 207 of the act, were: I had read the entire notice and it was my view that the inspector, in wording the top of the notice, had come to a conclusion they did not intend to come too, and that section was too broad. So it was the top section of the notice that concerned me.

THE CHAIR: Is your inspector available to appear before this committee should we decide to call them?

Ms Agius: I would assume so.

THE CHAIR: Yes, okay. We may do that, because obviously there are quite a few questions as to why the inspector did what they did that you are unable to answer that may apply.

Ms Agius: Yes.

THE CHAIR: Given that we have reached the time we have, that concludes these hearings. We may have some follow-up questions. Thank you very much for appearing. You will receive a draft copy of the *Hansard* for you to check, so you can make sure it is okay. I will foreshadow that the committee may be interested in calling the particular inspector or inspectors. We will have that discussion. Was it one or two inspectors?

Ms Grey: Two inspectors came, but one inspector issued the notice.

THE CHAIR: So it was just the one inspector?

Ms Grey: Yes.

THE CHAIR: Alright. Thank you very much.

The committee suspended from 1 pm to 2.30 pm.

MILLIGAN, MR JAMES, Member of the Legislative Assembly of the ACT, and Chair, Select Committee on Estimates 2022-2023

BRADDOCK, MR ANDREW, Member of the Legislative Assembly of the ACT, and Deputy Chair, Select Committee on Estimates 2022-2023

THE CHAIR: Welcome back to the public hearing of the privileges committee 2022. We will now hear from members of the Select Committee on Estimates. We are being recorded and transcribed by Hansard. If we have any follow-up questions for you, we will let you know; you will then have a couple of days to respond. Can I make sure that you are aware of the privilege card and the statement? Are you aware of its contents? Thanks.

Mr Milligan and Mr Braddock, thank you very much for attending today. Would you like to make an opening statement?

Mr Milligan: Yes, thank you, Chair. Thank you for the opportunity to come along and speak on this privilege matter. Yes, I have read and understood the pink privilege statement.

I would like to make an opening statement on behalf of the committee, and talk about the evidence surrounding this matter and why this privileges committee has been established.

Mr Braddock and I will represent the committee today. Dr Paterson has written to you, as I understand it, to let you know that she will not be appearing today. She said there is no further information that she needs to add, in addition to the information that has already been provided. Dr Paterson also reserves the right to provide further evidence, if need be.

We would like to assist you in any way that we can. We have been transparent in all of our submissions, and have provided you with considerable documentation. We would also be pleased to provide further evidence and respond to evidence that may arise.

Events started with an email from Mr Gentleman's office on 29 July 2022, which included a request that the minister and his officials attend their hearings by Webex, to ensure COVID safety measures. Accordingly, we forwarded through the link.

We advised the minister on 4 August that the Assembly already had a range of COVID-safe measures in place. We stated that they included social distancing, hand sanitizer, cleaning seats and desks between witnesses, witnesses being free to wear masks, and appropriate arrangements for witnesses vulnerable to COVID, such as working remotely.

Further correspondence followed. This is included in our submission. You would be aware that, on the afternoon of Friday, 12 August, WorkSafe issued a prohibition notice that declared that no committee meetings could take place in the Assembly building. There were issues around whether this was constitutionally valid. However, to give witnesses certainty, we postponed the first week of hearings.

From Monday, 15 August, we worked with all parties to hold estimates hearings. On Tuesday, 16 August we met with Minister Gentleman to discuss a resolution. Shortly after, the minister wrote to the committee pre-empting its decision, and he copied the letter to ministerial chiefs of staff. On Wednesday, 17 August Minister Gentleman made inaccurate media statements about the Assembly's COVID arrangements for committees. WorkSafe had lifted the prohibition notice on Friday, 19 August, and the hearings started the following week.

These events had significant consequences. There was a reputation cost to the Assembly. It gave the impression that the Assembly took a careless approach to COVID safety, when this was not the case. There was a reputation cost to the ACT government. Shutting down the hearings delayed the budget. The prohibition notice had a constitutional cost. A committee of the Assembly could not exercise its authority freely. In effect, the prohibition notice compromised the authority of the Assembly itself.

There were administrative costs. The committee held additional meetings and sent additional correspondence. The Assembly paid for a venue off-site, so that the committee could meet on Monday, 15 August. We expect that deferring the first week of hearings led to additional administration costs for directorates and ministers' offices. It meant committee staff had to work long hours, and this incurred emotional costs for Assembly staff.

We wish to give you all necessary assistance today to clarify these constitutional matters and prevent them from occurring again.

As you will be well aware, the committee will be dissolved on 31 October. We are not going to tell the privileges committee what to do, of course, but if you do have questions, or you would like further information or clarification, it would be great to get that before the committee dissolves. We as a committee could then deliberate on that and provide the evidence or any responses to any questions that you might have.

Mr Braddock and I are happy to take questions.

THE CHAIR: Mr Braddock, do you want to add to that at all?

Mr Braddock: There is one point that I would like to stress. The reason why we ask that, if possible, you send any information or requests to us is not just as a deliberation, but it would also enable us, as a committee, to agree to divulge that information. Once we have been dissolved, that becomes far more difficult for us.

THE CHAIR: Indeed. You made the point in your submission that you think there might have been political interference in the issuing of the prohibition notices. Can you clarify your view?

Mr Milligan: Initially, as I mentioned in my opening statement, Mr Gentleman had requested that he and his officials attend the hearings by Webex. We responded to Mr Gentleman on 4 August, stating that we had COVID-safe measures in place that met the requirements of this building, that we would be holding hearings in person, and that if there was personnel that could not appear in person, for numerous reasons, such

as being unwell, isolating themselves or being vulnerable, they could appear via Webex. That letter is where the issues started to arise, with Mr Gentleman suggesting that we should do this via Webex and not in person. Soon after, we were issued with the prohibition notice.

THE CHAIR: You see them as—

Mr Milligan: We saw that there might have been a pattern of behaviour that we were concerned about. That raised concerns with us.

THE CHAIR: Were there any other concerns between you and the minister, other than the COVID aspect, with the format of estimates—to do with the output classes and things like that? Were you having an ongoing fracas with the minister's office beyond this matter, or was it isolated to just appearing here via Webex?

Mr Milligan: We were having correspondence and discussions on how we would run the estimates. Output classes were an area where there were discussions. It was a decision of the committee that we would run areas as a whole, instead of by individual output classes, because we thought that would be more effective and efficient for the running of estimates. However, if I recall correctly, Mr Gentleman was concerned that, by doing that, we would have too many officials in the one room, and that, instead, he would prefer to have individual output classes, so that there would be fewer people in the room.

We reiterated the fact that we were following the COVID-safe measures, the COVID-safe plan, that we would ensure that room limits were not breached, and that it would operate in a COVID-safe manner.

THE CHAIR: So each room has a limit, and you would not go beyond that limit.

Mr Milligan: Correct.

THE CHAIR: Whether it was an estimates committee or another committee, there would be a certain number of people allowed in the room, and that is the number that would be in the room?

Mr Milligan: Yes, correct. There was correspondence with Mr Gentleman. I would have to check the letter and the date. If we were to run estimates in this room here, we stated that we would be following the current code of requirements. We stated the current room limits that were mentioned for these rooms. We stated that we would not be breaching that. We also mentioned that we had break-out rooms available for additional personnel to appear and to sit in, once this room, if we were to hold it in the Prince Edward Island Room, reached its limit.

MS CLAY: I am interested in the media comments made by the minister. I have heard the radio interview, and there were several pick-ups by other outlets. The minister made statements about estimates, and that was while all of this deliberation was going on and while the prohibition notice was going on. Is it usual for somebody to make statements when they are not on the committee and a matter is before a committee? Is that the normal way?

Mr Milligan: I do not think I can talk to what is procedural process for that. That might be a question better asked of Mr Gentleman. With a committee, when it comes to talking to the media, that decision obviously is agreed on by the committee itself—by the estimates committee. We made an agreement that if we wanted to speak to the media, we could, but given the circumstances of the issues we were facing, we thought it would be best not to comment in the media. We thought they were serious situations and we did not want to add further to that.

In relation to Mr Gentleman making these comments in the media regarding our estimates committee, that is a question for him. We can say that, with the comments that he made, we have come to a conclusion that they were inaccurate. They were not true. In particular, with respect to having up to 40 people in one room, that was not the case at all. In terms of the evidence that he gave in the media, only he can answer that. For us, we made the decision not to speak in the media in relation to these matters.

MS CLAY: I was surprised to hear that, too—40 people in a room. I am not aware of any hearing room in this building where we usually have hearings that takes 40, and we have the numbers posted on the door outside. Has that been your experience?

Mr Milligan: Yes, that is exactly right. During the estimates process in the chamber, the maximum number of people that we had in there was around 32, at the most. We did not even reach that 40 mark. That included the social distancing and the COVID measures that were put in place, and we did not reach that number. I do not know the basis or the foundation of Mr Gentleman's comments in relation to that, but we certainly could not fit 40 people into this room.

MS CLAY: I will ask the minister.

Mr Milligan: Yes, of course.

MS CLAY: We are seeing the minister. It is not for you to say in what capacity those comments were made by the minister—I will ask the minister that—but I imagine that, as chair, you would expect that if somebody was making comments about the committee, it would usually be you, wouldn't it?

Mr Milligan: Yes, absolutely. It was the decision of our committee that if there were any comments in relation to estimates, particularly in the media, that would come from the chair. But we decided not to speak in the media.

THE CHAIR: In the submissions from the Speaker and the Office of the Legislative Assembly, they have raised concerns that the inspector came in, and the prohibition notice was the first resort rather than the last resort. They have raised concerns about the conduct—the lack of fair hearing from the inspector regarding various other staff. What interaction did you have with the inspector or inspectors? Did you get the impression that they were not listening?

Mr Braddock: I have read and understand the privilege statement. I met personally with the inspectors, in combination with the Clerk of the Assembly, on the Friday

afternoon, on the basis that I was the only committee member who was still in the building. I would say that that interaction was professional. We laid out the information we had before her. Not having been on the receiving end, I would not say that it differed from any other inspection of a workplace.

In terms of having the chance to look through the prohibition notice, both the first and the second one, there definitely seemed to be a lack of understanding of some of the complexities of this building and how it operates, in terms of the different activities that are undertaken. For example, the estimates hearings were only one activity out of many that were about to commence or were underway. For example, on that Friday, we had the community hearing day for the estimates committee, which went ahead quite safely, with no issues raised, or complaints or concerns. Yet the prohibition notice prevented the hearings—

THE CHAIR: So you have conducted an activity, which was the community day, with community organisations appearing?

Mr Braddock: Yes.

THE CHAIR: And there were no complaint or concerns raised about that, but when it was going to involve ministers and directorate staff, there were concerns raised?

Mr Braddock: That is what we understand the complaint was that came from the minister's office.

THE CHAIR: When did the inspector first come to the building and speak with you, because you were the one in the building? Was that on the Friday?

Mr Braddock: That was on the afternoon of Friday, 12 August—the same day on which we had just held the community hearings.

THE CHAIR: Did you make the inspector aware that you had just run that day—or can you not recall?

Mr Braddock: I cannot recall if I made her aware of that fact.

THE CHAIR: Do you have anything to add to that?

Mr Milligan: No. Mr Braddock was the only person who spoke directly with the inspector.

THE CHAIR: Did you feel that they were acknowledging what you were saying but it did not match what went into the prohibition notice, they were not listening, or is it difficult to speculate?

Mr Braddock: It is a difficult question to answer, because there was a lot of legal question in play, which I think was not being actively considered. With the benefit of, let us say, two months hindsight and legal advice, we now have more certainty, whereas at that point in time there was, let us say, by-the-letter application of the WHS Act.

THE CHAIR: That is with regard to the privileges-type aspects that you are talking about?

Mr Braddock: Not just the privileges but also the legal validity of the actual prohibition notices.

MR PETTERSSON: I will take a stab in the dark, because I missed the first question. Hopefully, it has not been asked before. What was the difference between the hybrid model of hearings that Minister Gentleman was referring to in his letters and the hybrid model of hearings referred to in your correspondence?

Mr Milligan: We asked for clarification in terms of how Mr Gentleman would like to see a hybrid model, because we wanted to know from him what that would look like. The model that we proposed was for ministers and officials to attend in person. Obviously, officials or ministers that were unable to attend in person, due to illness, COVID, or being isolated or vulnerable, could attend via Webex. That was our proposal.

Mr Gentleman, however, came back with another proposal, if I remember correctly. He stated that ministers and officials would appear via Webex and, if they chose to appear in person, they could do so. You can see the nuance between those two proposals, I guess. That could be the alternative in terms of the hybrid model. But it was unclear to us, and that is why we asked, “What does a hybrid model look like for you?”

MR PETTERSSON: What was the effect of those different models? How would that have affected the way you conducted your hearings?

Mr Milligan: The committee’s main focus was to ensure that the estimates committee was run properly, efficiently and effectively, and to ensure that, at all times, we followed the COVID-safe measures in this place. We operate under the provisions of the work health and safety committee, who came up with those provisions on the COVID-safe plan, and admin and procedure, and we followed that, to the letter. We were playing a straight bat. That allowed us to have hearings in person, provided we followed room limits. We also thought at the same time, and still do now, that it was in the best interests of the community as well to see that the estimates hearings were being run effectively, efficiently and in person. That is what we were proposing and putting forward.

MR PETTERSSON: Does it make any difference—holding hearings in person or online?

Mr Milligan: Once again we followed the measures that were approved by the work health and safety committee and were in place for this building. We thought it would be in the best interests to hold those estimates meetings in person, and anyone who was unable to appear in person could appear via Webex.

MR PETTERSSON: What I am trying to get to is: why did you want them to appear in person? Would that have improved your ability to question them?

Mr Milligan: You saw via the estimates hearings that there were some issues with Webex—hearing the questions being asked and getting a response. There were some issues with that. Naturally, in person, you do not get that. In person, you can hear the questions quite clearly and you can respond. We thought that that would be the most effective and efficient way to run the estimates.

Mr Braddock: Also, by way of a comparison, out of the other eight jurisdictions of states, territories and national government, in their latest round of estimates, six held solely in-person hearings and two ran on a hybrid model. We felt this was quite appropriate in terms of allowing not just the timely efficiency of being able to answer questions directly, without people being on mute or not hearing the question properly, but also that efficiency and effectiveness, where you are able to see the non-verbal cues from witnesses, and you can engage in more of a conversational approach rather than an interrogation-style approach, back and forth.

THE CHAIR: In terms of scrutiny of the budget, which is what estimates is about, your view was that scrutiny of the budget would be done better through being in person where possible?

Mr Milligan: Far more effectively and efficiently in person.

THE CHAIR: Whereas the minister had a different view?

Mr Milligan: He presented a different view, yes. Originally, he presented a different view.

MS CLAY: There is a lot of correspondence between your committee and the minister, and there is also a chronology setting out meetings that occurred.

Mr Milligan: Yes.

MS CLAY: There are a lot of different roles that the minister plays. He is the minister with responsibility for WHS, he is the Manager of Government Business and he is a witness before estimates. Do you have clarity about the role in which he was talking to you in different—

Mr Milligan: Initially, the minister was talking to us in his role as a minister; then, from correspondence we had post that, and not liking our proposal, that is when I think that he switched his role or position to that of Manager of Government Business. From the tone of his letters and correspondence, it seemed that he was talking on behalf of the parliament, on behalf of ministers on the government side.

MS CLAY: When you say initially as minister, do you mean as minister for WHS?

Mr Milligan: As minister appearing for his portfolios—not necessarily just WHS but for his portfolios.

MS CLAY: One of the letters says that it is written on behalf of the government.

Mr Milligan: Yes.

MS CLAY: You would have received that letter as if it was written in his capacity as the Manager of Government Business, I am assuming—probably initially as WHS minister and then largely as Manager of Government Business.

Mr Milligan: I would have to check the signature blocks, yes.

Mr Braddock: Initially, as a minister in the broad, then as minister for workplace health and safety and then as Manager of Government Business—across those three roles during the course of the incident.

MS CLAY: Was it confusing? Do you think there is anything that could be done differently if somebody is in that position? We all have different roles at different times. Is there anything that could have been done to clarify what role somebody is speaking in at different points?

Mr Milligan: I think it is up to the person writing the letter or correspondence to make it clear what position they are responding in, whether that is as the minister with responsibility for their portfolios or as the Manager of Government Business. It certainly would have made it much clearer for us, I guess, to know what position he was approaching it from. It was certainly made clear later in the piece that he was approaching it from the side of government business.

I will add to that, if I can. The estimates committee had just over 30 official meetings—31. Out of that, 16 of those meetings were additional meetings, just in relation to the prohibition notice and in relation to the privilege matter. Just on the prohibition notice, the committee had five additional meetings, as part of the 30 that we had, and 11 on the privilege matter. That goes to the impact that this has had on the committee, the impact potentially on the cost as well, and the stress associated with the committee and the support staff of the OLA.

The point I am getting to is that if correspondence was maybe clearer from the start, and discussions were held a little earlier, we might have been able to prevent some of that. That being said, the committee's main focus was to get the estimates process happening. That was our main focus. We needed to not delay it any further, but there were barriers that we were facing that prevented us from starting the estimates hearings when they were originally scheduled to start.

THE CHAIR: You said in the conclusion to your submission that it can be construed that the minister acted at odds with the separation of powers and respect for the rule of law. Can you expand on what you mean by that?

Mr Milligan: We thought that the minister talking in the media was at odds with what the minister's role should be, and talking on behalf of the committee. We think that the correspondence that the minister sent to the committee and chiefs of staff was out of the responsibility, and out of the remit of the estimates committee.

Mr Braddock: I would answer that by saying it came back to that pattern of behaviour, and Mr Milligan highlighted two instances. Others would include

continuing the negotiations with the committee as to what that potential hybrid model could look like, whilst at the same time a complaint had been made to the regulator. We would note that you can see from the regulator's notes that an inaccurate picture was presented to the regulator in the form of no online options being available, whereas that was definitely not the case, and it is something that the committee had made clear.

THE CHAIR: Do you think that the minister misrepresented what was going on to WorkSafe?

Mr Braddock: In the WorkSafe Commissioner's handwritten notes from the telephone conversation of 11 August, specific mention is made of the line "no online attendance". I believe those are the exact words.

THE CHAIR: Whereas you are saying that that was an option that you had provided?

Mr Braddock: That was an option that was available. We see this as being part of a pattern of behaviour. I would add that the minister continued to negotiate on the basis that the prohibition notice was legally valid and did not have any questions about it, whereas that was something that was of ongoing concern. From the Speaker's letter and from impending legal advice, we knew there were issues here. We were trying to set up the estimates process as quickly as possible without constitutionally putting our foot in it, in terms of the requirement to consult with, potentially, public servants. We have no role as a committee to actually consult with them, before they appear as witnesses.

THE CHAIR: You have said that the minister interfered with the committee's authority to undertake hearings. I take it from what you have said today and from your submission that you had formed the view as a committee that in-person hearings, with the ability to do online for people for particular reasons, was the best way to scrutinise the budget through the estimates hearings. The minister, through a pattern of behaviour, interfered with that process, culminating in him making a complaint to WorkSafe that then shut down those hearings, in a sense, to force you to comply with his preferred option of doing things. Is that how it played out?

Mr Milligan: I am not too sure as to the actual reasoning why Mr Gentleman made that complaint with WorkSafe. If you were to look at it from an outside perspective, you may come to that conclusion.

THE CHAIR: Is that the view that you formed? You said acting against the rule of law—

Mr Milligan: We have a suspicion—

THE CHAIR: and interfering with the committee's authority to undertake hearings. There was the view that there may have been political interference. It is pretty strong language.

Mr Milligan: We are of the view that we believe that, potentially, Mr Gentleman wanted to use his influence to a degree to get what he wanted on how estimates would

be run. But that is just our interpretation of it. We do not have evidence to suggest that—

THE CHAIR: From your view, that is the perception of the estimates committee?

Mr Braddock: That is the submission from the estimates committee. We have all agreed with those words. With respect to the motives of Mr Gentleman, I would leave it to him to respond on that. We would say it is a question for the privileges committee to actually—

THE CHAIR: I am just trying to get your view. The complainant: did you seek advice or information from the WorkSafe Commissioner as to who that was?

Mr Milligan: Yes.

THE CHAIR: She did not provide that to you, but you may have seen in this morning's hearing that it is evident that that was the minister through his office; that is, the minister's office. Why were you seeking that information?

Mr Milligan: To get a better understanding of what the complaint was about. The prohibition notice stated that there was risk, serious risk, with holding the hearings as we were proposing to, without any clear indication as to what that risk was. We wanted information in terms of what we needed to do, and what that risk was, so that we could ensure the estimates proceedings would go ahead.

THE CHAIR: Had you presumed that the complaint had come from the minister?

Mr Milligan: No, we did not presume it had come from there. We did not know where the complaint was coming from; hence that was the question that we wanted to know about.

THE CHAIR: If someone has made a complaint about the committee and you are trying to find out who made that complaint, do you not see that that could have a bit of a chilling effect on complainants? There is a privacy element to this, if someone is making a complaint about you and then you are trying to find out who that was.

Mr Milligan: The advice that we received stated that we were entitled to ask for that information, based on the advice that we received, so we decided to write to the commissioner seeking that information. We then, obviously, received a letter back from the commissioner stating the reasons why she could not provide that information. The committee then decided that, because this matter had already been referred to the privileges committee, and the committee's main focus was on running the estimates, we would leave that matter for the privileges committee to look at.

THE CHAIR: So you requested it?

Mr Milligan: Yes.

THE CHAIR: She came back with a response that said no, for various reasons.

Mr Milligan: Yes.

THE CHAIR: You then took no further action. You did not move to compel or demand?

Mr Braddock: No. We decided to refer it to the privileges committee as the better place to actually resolve the question.

MR PETTERSSON: I want to go back to the purpose that you stated for why you sought the complaint and complainant from WorkSafe. Would you repeat that reason for me?

Mr Milligan: We wanted to know the nature of the complaint and what the risk was to the estimates committee running estimates in person here at the Assembly, because it said that there was a serious risk. We were not aware of what that risk was. We wanted to understand what that was. We were following the COVID-safe measures that WorkSafe and the work health and safety committee had put in place for this building. We followed that strictly to those requirements. A prohibition notice was placed on it, saying we could not operate because of serious risk, and we wanted to know what that risk was.

MR PETTERSSON: What information were you seeking to glean that was not apparent in the prohibition notice itself?

Mr Milligan: The prohibition notice said that there was serious risk. We wanted to know what that serious risk was, and what the nature of the complaint was. The Assembly and the parliament had been operating for months before. We have had other committee hearings. We have had public hearings. The chamber has operated. We were operating under exactly the same COVID measures as they were, so what was the difference between our estimates committee operating and any other duty of this parliament?

MR PETTERSSON: I am trying to get to the point of why you would use the powers of the Assembly to lawfully compel someone to write that information when there is a raft of other things you could have pursued. There were mechanisms within the WHS Act—

THE CHAIR: I do not think they did compel, though. They requested and did not compel. From the evidence this morning—

Mr Milligan: No, we requested.

THE CHAIR: there was no compulsion.

MR PETTERSSON: Okay. My question is: why did you not utilise the mechanisms within the WHS Act to seek a review of the prohibition notice? Why did you not consult with the inspectors to try and glean more information as to the nature of the prohibition notice? Why did you go immediately, without pulling the trigger, essentially to loading the gun and trying to compel this information?

Mr Braddock: To answer that question, firstly, by that point, there had already been two sets of engagement with the inspectors, on the Friday afternoon and on the Monday morning. There already had been that level of engagement. We had not received legal advice at that point in time, in terms of the WHS Act. That was not yet an avenue that would be available to the committee, and it would not be, for the entire duration of the prohibition notice, because we were busy trying to comply with the terms of the prohibition notice in order to get the hearings underway. We did not have the means or ability to ask, or request a review—whatever the terminology is—under the legislation at that point.

MS CLAY: There were a couple of engagements between the committee and the WHS inspectors. I do not know whether you know that this morning we did ask the WorkSafe Commissioner about how that individual had made their decisions. She essentially said she could not provide any advice. We do not actually know a lot about what happened in those conversations. I am interested—and if you cannot recall or if it did not come up, just say so—in knowing, when the committee spoke to the WHS inspector, whether that conversation was about the fact that sittings were also taking place at the same time.

Mr Braddock: I cannot recall. I am not sure whether the Clerk of the Legislative Assembly is also appearing. He did meet with them far more than I did. I was there for only a brief window on the Friday afternoon. He may well have raised that specific item. I cannot recall whether I raised it.

MS CLAY: I will put it to the Clerk; thanks.

MR PETTERSSON: My question has kind of been touched on. I would like you to articulate how the prohibition notices affected your ability to conduct the work of this parliament. Could you be as specific as possible about things that it stopped? My observation would be that you continued to conduct committee meetings and make decisions. You were also able to conduct hearings. If you could articulate the elements that were stopped and the impact that would have, I would appreciate that.

Mr Milligan: All of that information is in our submission. It is quite clear in our submission how this prohibition notice impacted the running and operation of the estimates. For example, at the first meeting, on Monday, 15 August, we had to meet offsite because it prevented the committee from meeting in person. The OLA staff had to book and pay for a room, and we had to meet and operate there. Earlier, as I have already mentioned, we had 11 official meetings, just on the privilege matter, and we had another five on the prohibition matter.

It interrupted the scheduled operation of estimates. It pushed us back a further week. It had a massive impact on our directorate officials, as well as ministers' offices, because calendars were already scheduled, the sitting calendar for the estimates was already scheduled, and we had to delay it. We then had to write numerous letters to directorate officials and ministers notifying them of the change. We then had to reschedule the week that we had missed out on, for two weeks down the track. It had a significant impact on how the estimates were run.

Also, it was a legal matter for the estimates committee. The Speaker was seeking legal

advice. Because the Speaker was seeking legal advice, the committee did not apply to seek legal advice. We were waiting on that from the Speaker. That legal advice has just come through now. Obviously, it is a bit late. We went through the hearings as scheduled. Knowing that legal advice now, I cannot necessarily say what we would have done, but it would have contributed to the decision going forward on estimates, on how it was going to run.

I thought the prohibition notice was quite unclear, as well, in terms of why just the estimates committee was targeted. I think the original prohibition notice pretty much targeted all Assembly business, all activities happening in this parliament; hence that is why we had to hold our own committee meeting offsite. But then, with a new prohibition notice to be implemented, and to have the effect on us to the degree that it did, it was quite significant.

The other question, too, was that there was not any real correspondence with the commissioner on the notice with the committee—nothing in real detail. Why was there not an improvement notice given? Why did it go straight to a prohibition notice? Earlier today, the commissioner stated that, out of 300-odd notices that were sent out, only 80—around that—were prohibition notices. We will have to check *Hansard* for the facts. The rest were improvement notices. So why wasn't an improvement notice issued to the committee?

Also, with all due respect, it would have been good if the commissioner actually looked at how this parliament operates, in terms of its processes and procedures, so that they can properly understand how committees operate. Work health and safety put together the COVID-safe measures on how to operate here. It would have been, I think, beneficial if the commissioner knew exactly how committees operated. Maybe if the commissioner sought some advice and directed the prohibition notice correctly to the right committees, that may also have had an effect. We might have been able to operate a lot sooner than we did.

At the end of the day, this prohibition notice said that, with pretty much any undertaking here, any committee would have to go off and do their own COVID risk assessment, and they would have to do their own COVID-safe plan. But we operate under the work health and safety committee advice, and we did so. If that had been made clear at the very start, we might have seen a completely different situation.

MR PETTERSSON: On that, you said you were operating under the COVID safety arrangements of the Assembly. Was that binding or enforceable on you? Who was responsible for implementing COVID safety within the committee room?

Mr Milligan: I think that is a question for admin and procedure, if you want to seek advice in terms of that. We are an estimates committee. Our responsibility was to run estimates. We cannot give you advice in terms of who is responsible for ensuring that the COVID-safe measures are implemented.

MR PETTERSSON: I take it from that that you do not think you were the one responsible?

Mr Milligan: We followed the COVID-safe measures. We ensured that they were

followed. I think we even sought advice to make sure that they were followed.

Mr Braddock: As members, we are all PCBUs for the purpose of the act, and responsibilities for that. A lot of the legal doubt crept in regarding our responsibility to the witnesses that appear in front of committees and whether they actually constitute a worker for the purposes of the act.

There is a responsibility under the act to actually consult with workers. That is something that a committee can easily do with statutory office holders or officers of the Legislative Assembly; but, constitutionally, we cannot actually consult with members of the ACT public service. So how could they be considered to be workers for the purposes of the act? A similar idea would involve the courts. If they were required to consult with witnesses appearing as part of trials, how would they consult with them on COVID-safe arrangements? Would they actually close down court operations if they had not consulted with the witnesses?

There is this understanding of the technicality regarding what our role is as individual members and what we assume as collective members of a committee for the safe conduct of the activity, being the hearings. In that case we are reliant on what has been agreed by admin and procedure as the COVID-safe plan across the entire jurisdiction, which also covers committee hearings, and ensuring that is applied.

For example, at the moment we have hand sanitiser in front of us. There is a cleaner right here who will be cleaning between witnesses. Those are exactly the same arrangements that were in place at estimates hearings.

MR PETTERSSON: I want to follow up on that point. I think it is an important one. You are not sure if you were ultimately the responsible individuals for the safety of people in that committee—

Mr Milligan: We ensured that we followed the correct procedures and we put everything in place. We ensured that we did that. We consulted with ministers' offices and statutory office holders, and we instructed them on the measures that were put in place. They agreed to those measures. We have letters here saying that they agreed to those measures.

MR PETTERSSON: No, I want to be very specific. I am not interested in the individual components we had in place; my question is: who do you think was responsible? Are you unsure who was ultimately responsible for the safety of people in the committee hearing? Was it the Speaker, the Clerk or yourselves? You can say you are not sure; that is acceptable as well.

Mr Braddock: I would say there is a collective responsibility. The Speaker, the Clerk, us as individual members and also us as a committee, have a range of responsibilities. Is it perfectly clear as to who is responsible for exactly what in a hearing? Maybe that is something that has to be clarified in the COVID-safe plan.

THE CHAIR: With the precincts, it is the Speaker; but when it comes down to making sure that the committee is conducted safely, it is the committee. If I am looking at this committee, as it is being run now, I struggle to see what the difference

is between what is happening here and what was being proposed for estimates. Is there any difference in the proceedings? Hand sanitiser, cleaners, limits in the room?

Mr Milligan: It is the same.

Mr Braddock: Same.

THE CHAIR: What was it that meant this committee hearing could meet today, as it is, whereas estimates could not?

Mr Braddock: I would rephrase the question: what would stop the recurrence of a complaint being made and the WorkSafe inspectors coming in to ensure closing down—

Mr Milligan: This committee now.

THE CHAIR: This committee now.

Mr Braddock: This committee right now? Legally, there is nothing at the moment. That was the point we were struggling with when we were trying to get hearings up and started again: how do we consult with witnesses? How do we meet the terms of the prohibition notice, while doing it in such a way that we do not give up on the constitutional point of who we actually are allowed to consult with? How do we resolve this question going forward, which is partly the legal advice that the Speaker has received? That needs to be resolved.

THE CHAIR: Indeed.

MR PETTERSSON: On that point, you did undertake a consultation.

Mr Braddock: We did, only with those that constitutionally we could consult with. That would be less than half of the actual witnesses that appeared.

THE CHAIR: That is ministers and statutory office holders?

Mr Milligan: Yes, correct. They are the people that we invited to estimates. We did not invite public officials because we did not believe that that was our area.

THE CHAIR: On that point, you invited ministers?

Mr Milligan: Yes, and statutory—

THE CHAIR: And statutory office holders. If the ministers decided to bring an entourage, that was really a matter for them.

Mr Milligan: Yes, and for them to consult with their—

THE CHAIR: For them to consult with their staff. One could construe from that if the minister believed that having 10 people would be too much, he did not have to bring 10 people with him.

Mr Braddock: We would have no role in actually consulting with those individual—

THE CHAIR: You cannot dictate that. You said that you requested the minister to attend. Did you request that staff attend?

Mr Milligan: Our final proposal was the fact that we invited the ministers only, and statutory office holders, and any other witnesses could appear via Webex.

THE CHAIR: When was that?

Mr Milligan: I will have a look now.

THE CHAIR: In essence, you could not direct workers to attend because they are not your workers; you could only direct the ministers, so you are talking about one person sitting there, not—

Mr Milligan: Yes, correct.

THE CHAIR: There would be no-one in this room, unless the minister invited them.

Mr Braddock: Exactly, because we cannot meaningfully consult with them. We have to go through the minister's office, anyway.

THE CHAIR: You can get that another time.

Mr Milligan: I will grab that another time. There are so many letters.

MR PETTERSSON: Going through some of your correspondence, with Mr Milligan's letter of 28 July, the language is that "times have been scheduled for you to appear, and this letter confirms this timing for you and your officials to appear before the committee". In the letter of 4 August, the committee says that it looks forward to discussing the minister's portfolios, and discusses rearranging session times. In Mr Milligan's letter of 11 July, he states that the committee expects relevant officials to be in attendance at all times. You were of the belief that officials would be in attendance; you did not think it was just going to be the minister.

Mr Braddock: We would hope that officials would be in attendance.

MR PETTERSSON: The language shows that you would assume they would be there. It would be normal to assume that because that is how it always works. Is it reasonable to assume that everyone involved in this process thought that you had an expectation that the minister and officials would be in attendance?

Mr Milligan: And we also ensured that we put there that if people could not attend, for reasons, they did not have to attend. If they were unwell, isolating, had COVID, were related, or were vulnerable, they did not have to attend in person.

MS CLAY: We have two prohibition notices. There was one on the Friday and one on the Monday. The one on the Friday stopped the committees. The commissioner

changed it, modified the words, on the Monday. The overall impact, whether that first one stayed or whether it had been modified, was delays; we pushed back estimates by a week. The point of all of these processes—budget estimates and committee hearings—is scrutiny of how the government spends money and scrutiny of how the government makes laws and policies. Do you think this has had an impact on scrutiny this year?

Mr Milligan: I can talk on behalf of the estimates. I think the estimates committee ran efficiently and effectively. I think the budget was well scrutinised. We had great attendance. We had a lot of officials there. I thought it was run efficiently and effectively; probably more effectively than it has done in the past, just quietly.

MS CLAY: So it actually improved scrutiny?

Mr Milligan: I think the setting in the chamber worked really well for us. There was less interruption in between witnesses speaking. There were more witnesses present. I thought that allowing a whole section of the directorate to be asked questions, not just single output classes, enabled more efficient and effective asking of questions, without too much interference.

MS CLAY: Do you think that week of delay has caused any knock-on effects or the ability to schedule other hearings?

Mr Braddock: It has had knock-on effects in terms of our report being delayed by a week, which means there was a week less for government to consider the report and respond to it. It means there was one week less for members to have the report, and conduct their own research or views before debating the budget. That time impact was definitely there.

MR PETTERSSON: Circling back to a line of questioning before, with the meeting that you held offsite, what impacts did that have on the decision-making, scrutiny or processes of the committee?

Mr Milligan: It had an impact financially on the Assembly, because we had to hire a room. We had to go offsite, so there were questions in relation to security, and being in an environment where we could talk about privileged matters. There was that impact. In terms of impact on the secretariats and their staff, that is a question that you would have to direct to them.

It certainly was concerning and a bit stressful for us to know where we could meet. This was important. Estimates were meant to start that day, and they were being delayed. It was not in our interest to delay estimates at all. In order to get the estimates report done, allow time for the government to respond to that report and then the debate in the chamber, we had no interest whatsoever in delaying that.

Mr Braddock: Literally, we met offsite. Because we were required to do so by the terminology of the prohibition notice, we then walked back here into the Assembly, straight into a sitting, with even more members sitting in the one place. It is about looking at what was actually possible under the terms of this prohibition notice. I understand that another committee had to meet virtually, with members actually

outside the building, in order to comply with the terms of that initial prohibition notice, because of the uncertainty it created.

THE CHAIR: By virtue of the fact that it was withdrawn, I think there was an acceptance that that was problematic, as set out in paragraph 9 of the WorkSafe Commissioner's submission. We are coming to a close. Are there any further questions?

MR PETTERSSON: Yes. Circling back to a line of questioning about your request for the complainant and the complaint from WorkSafe, there is a letter from Mr Milligan on 17 August which outlines that there has been previous correspondence between WorkSafe and Mr Milligan, a letter explaining that a request was made pursuant to standing order 239, which provides a committee to have the power to send personal papers and records. The letter set out that a failure to provide the information to the committee may constitute a contempt under standing order 277. The letter noted that "the committee, noting you have disobeyed its lawful order, resolves today to refer the matter to the Speaker understanding order 276, privilege and contempt".

Mr Milligan: Yes, advice was given to us, and we followed that advice.

MR PETTERSSON: You did compel—

Mr Milligan: We requested. I think that letter stated we requested. Is that correct; do you have it in front of you?

MR PETTERSSON: Compelled through the standing orders—people's papers and records—and then you said that WorkSafe had disobeyed a lawful order. So you did utilise the standing orders to compel that information.

Mr Milligan: Okay, so what is your question?

MR PETTERSSON: My question is: why did you use that mechanism and not the range of mechanisms also available to you?

Mr Milligan: Do you know what those range of mechanisms are? At that time, we received that notice, estimates were meant to run, they had been cancelled, and we were trying to ensure that estimates would get up and running straightaway. We sought advice, and the advice was that we were able to do this. The committee agreed, "Okay, let's do that, and we will see what response we get back from it."

MR PETTERSSON: I am in no way suggesting that you could not—

Mr Milligan: That was the advice that was given to the committee, and that was the decision that the committee decided to take, going forward.

MR PETTERSSON: Knowing now that there are other mechanisms available, both within the WHS Act and maybe through communicating with the inspectors at the various points of interaction, do you think there was a better way to get the stated reason, which was more information about what the complaint was?

Mr Milligan: That is presuming that you think we know of all the other mechanisms available. That is presuming that you think we have legal advice in terms of what is available. The committee, as it is about to be dissolved this week, did what we could during that process, based on the advice that we got. I cannot say what I would do otherwise, right now, based on what information I know, because I have not been given any additional information on what is available—what other options were available for us at the time.

MR PETTERSSON: I would say that most regular folks, when they get a prohibition notice, do not try to compel the WHS Commissioner to give them the name of the complainant. Most people, when they experience a prohibition notice, probably work in a more constructive manner with WHS, through its act, to try and remedy the situation in the most immediately accessible way, instead of utilising this unique mechanism to try and get that information.

THE CHAIR: Given the timing, we might take that as a statement. One that we may need to follow up as a committee, though, is that the commissioner said this morning that she did not think that she had been compelled, just requested.

Mr Milligan: Exactly, and it did say “request”.

THE CHAIR: My understanding is that she saw that she had been requested, denied that request and was never compelled. That is the view of the commissioner and that is your view as well. We will leave it there. Thank you both for attending today. If we do have any follow-up questions, we will make sure we get them to you in a timely manner, given that the committee will expire in a few days time. You will get a copy of the draft transcript for you to check. Thank you very much for your attendance today.

BURCH, MS JOY, Speaker of the ACT Legislative Assembly

DUNCAN, MR TOM, Clerk of the ACT Legislative Assembly

TURNER, MS RACHEL, Executive Manager, Business Support Branch, Office of the Legislative Assembly

THE CHAIR: Good afternoon, and welcome. We are now going to hear from Madam Speaker and the Clerk, representing the Office of the Legislative Assembly. We are being recorded and transcribed. Can you please acknowledge that you are both aware of the privilege statement.

Madam Speaker: Yes. Aware; thank you.

THE CHAIR: Madam Speaker, I invite you to make an opening statement, if you wish to do so.

Madam Speaker: No, I am happy just to go straight into questions. I think my submission covers thoughts and where I think this is at.

THE CHAIR: Great. In paragraph 6 of your supplementary submission you say that you regarded this as:

... a case of executive overreach, through a third party, in the proceedings of the Assembly. To be clear, ‘the Assembly’ refers to the functions and proceedings of the Assembly and all its committees.

What do you mean by “ministerial overreach” in that respect?

Madam Speaker: Well, it is executive overreach. Tom is probably better at explaining this, but in the Latimer House principles there are three arms of good governance. The executive includes the ministry, the cabinet, but also those statutory bodies which report to them, one of which is the WorkSafe Commissioner, so that is why I refer to interference through a third party of the executive arm of government.

THE CHAIR: Right. So you believe that the actions of WorkSafe, in doing what they did, were overreach—or are you talking about the minister, in this respect?

Madam Speaker: The prohibition notice was overreach, I firmly believe. The advice from Bret Walker is that parliamentary privilege is unique and must be protected, and this prohibition notice was an overreach to that. As a workplace, OLA absolutely responds. I have been very clear about this from the get-go. Part of the frustration with the narrative around this is that I believe that OLA is a safe workplace; we have safe work practices. But the process of parliamentary proceedings, in the chamber and in committees, is unique and cannot be inhibited or interfered with through a prohibition notice such as was issued.

THE CHAIR: Right; so you see that it was basically an improper interference?

Madam Speaker: Yes.

THE CHAIR: Yes. On the conduct of the inspector, or the inspectors, at paragraph

25 you say that it was not a constructive approach to the resolution of the various issues—that the prohibition notice was a measure of first resort and, indeed, they may have been in breach of their own act. Can you give us—and the Clerk might be in a better position to—

Madam Speaker: Because I have not met with the inspector or the commission.

THE CHAIR: Yes.

Madam Speaker: But the Clerk has.

THE CHAIR: What has caused you to form that view?

Mr Duncan: Sorry; can you just repeat that question, please?

THE CHAIR: Yes. Paragraph 25 of Madam Speaker's submission talks about WorkSafe and that it was not a constructive approach to the resolution of the issues that they had raised. It is in the OLA submission as well. It goes to the attitude of the inspector—that they came in here and, seemingly, they knew the outcome before they started, almost. That is the inference that I get. Madam Speaker said that it was a measure of first resort, so what has your interaction been with the inspectors that has given rise to those comments but also the ones in the OLA submission?

Mr Duncan: Thank you, Mr Hanson. I confirm that I have read the privilege statement. I first met the inspectors when they came into the building that Friday afternoon. I was the instigator in trying to find out what was the nature of the complaint. I was probably less concerned about who lodged it, because I was trying to ascertain—as section 195 of the act says—what was the immediate and imminent exposure to a hazard that the inspectors were trying to deal with. So I was kind of flummoxed, I guess. Bearing in mind that public hearings had been held in the months leading up to the activity, there had been a whole range of activities going on in this building and face-to-face meetings had been occurring in ministers' offices and members' offices, I am just a little bit surprised that this particular face-to-face meeting somehow caused the inspector some concern.

THE CHAIR: There are obviously COVID plans in the Assembly—

Mr Duncan: Correct.

THE CHAIR: because that has sort of dictated how the Assembly has operated, and also committees. Did they acknowledge that work or not?

Mr Duncan: They did; they seemed to be fixated on the fact that the date of the COVID-safe plan was March. But, in fact, on 1 August the COVID-safe plan had been sent to the members of the admin and procedures committee, with a view to consulting with all members.

All members, of course, are PCBUs. It has long been acknowledged in this building that the Work Health and Safety Act does apply to this building, and it especially applies to members, and myself as a PCBU. Following that consultation, it was then

going to go to the Work Health and Safety Committee. So we did have an assessment of the risks of all activities, be it meetings in ministers' offices, be it committee hearings, be it chamber proceedings, and we thought that we were complying. We had done the risk assessment and we were complying in a COVID-safe way to the risk of COVID.

THE CHAIR: Yes. And I presume that, because COVID was fluctuating, that plan fluctuated as well; right?

Mr Duncan: It has been revamped about six or seven times. Members have been consulted, and the Work Health and Safety Committee has been consulted, on each and every occasion, as far as I can tell.

Madam Speaker: And there will be another version coming up now that the orders have changed; the Public Health Act has changed. Jumping in while Mr Duncan has a drink of water: I got served the prohibition notice on the Friday afternoon/evening. I wrote to the commissioner on the Monday morning, seeking for it to be withdrawn. You will all remember that we were actually sitting in the chamber on Monday morning when I made a statement to all members, tabled the letter that I sent to the commission and sought to have the prohibition order lifted by 10.00 am because estimates was to start at 10.30 am, following the activities in the chamber.

The commissioner has not replied to that letter. She replied through her lawyer, but she has not sought to engage with any understanding or reply to the letter, the substance of the letter. I note that this morning there was a recognition that the Friday prohibition notice was indeed problematic, which is why the inspectors returned to the Assembly on the Monday morning. You may recall that the Clerk was absent on the Monday morning because, as we were dealing with a matter before the Assembly on the Monday morning, the Clerk was dealing with the inspectors. The prohibition notice was not lifted by 10 am. Indeed, it was just revised.

MS CLAY: Just to clarify, Mr Duncan: you spoke to the WHS inspectors when they came on the Friday.

Mr Duncan: I did.

MS CLAY: Yes, and did you point out explicitly all of the other activities happening in the building, including the fact that we were sitting in the Assembly with more members than usually appear in an estimates hearing?

Madam Speaker: Certainly, on the Monday you did because—

Mr Duncan: Certainly, on the Monday. I cannot say that I did do that, but I did indicate that there were a range of activities that were going on in the building. A lot of the meeting was spent just outlining to the inspectors how committees operate—the fact that there were seven standing committees and two select committees in operation and that sort of thing—and who was a PCBU and who was not a PCBU, and the fact that the Speaker was not responsible for the operation of estimates committees and nor was I. The estimates committee operates independently, as does this committee, and as does every committee. So I think there was a lot of explanation of how the

system of parliament operated.

MS CLAY: Thank you.

MR PETTERSSON: Is the estimates committee like the other committees of this place? In structure I guess they are the same, but the activities that they undertake are larger scale than standing committees.

Madam Speaker: Well, it is a select committee. Select committees can be singular focused and their focus can be enormous or quite broad or quite narrow. One would argue that an estimates committee's focus is quite narrow because it is simply looking at the budget, as complicated as the budget is. It just looks at the budget, which is one of the primary accountability and scrutiny aspects of any parliament.

MR PETTERSSON: Estimates hearings are the largest hearings of the year?

Mr Duncan: Not necessarily. It depends on the subject matter. The Gungahlin Drive extension inquiry, back in the day, when they were looking at that, had a huge number of public hearings and large numbers, as I recall. I have not done a comparison of which committee attracts the most witnesses, but it does vary. But you are guaranteed, usually, a large crowd, I would concede, Mr Pettersson. You kind of know that ministers like to bring a lot of officials with them—

MR PETTERSSON: They do.

Mr Duncan: to justify the expenditure of the territory. It is the minister's call as to who they call and how many witnesses they bring.

THE CHAIR: So the ministers could have just appeared by themselves, if they were concerned about—

Madam Speaker: And their one and two ICs.

THE CHAIR: One or two, yes. So certainly, within the constraints of the committee room, it would not have—

Madam Speaker: This room can hold 18. I think that COVID-safe is 18 for this room. And in the months preceding estimates, this room actually had hearings with ministers and executives.

THE CHAIR: Yes, and I think that is one of the issues that we are grappling with—that there were committee hearings all the way up to that point. Indeed, on the Friday they had had the community day. There has been activity since, including this committee and other public hearings, and there have been sittings of the Assembly, but for some reason estimates led to the prohibition notice. There has not been one since. I guess that is one of the reasons we are here: to try and grapple with that.

Madam Speaker: When you find that answer, you let us know, Mr Hanson.

THE CHAIR: I was hoping you might illuminate us.

MR PETTERSSON: In regard to when the WorkSafe inspectors turned up, did they need to be given permission to enter the precincts?

Madam Speaker: For this I am going to refer to Tom and also to Rachel.

Mr Duncan: No, I do not think they needed to be admitted. I mean, the building was open at that stage. Earlier on in the year, you will be aware that the building was closed, but at that stage the building was open. Do you mind if I just get Rachel's input?

MR PETTERSSON: The more the merrier.

Mr Duncan: There is a requirement, as I understand it, for the—

Madam Speaker: Rachel, come and take a seat.

THE CHAIR: Grab a seat.

Madam Speaker: Do you mind if she joins us?

THE CHAIR: No, no; the more the merrier.

MS CLAY: Welcome.

Madam Speaker: Yes.

THE CHAIR: Up to 18.

Mr Duncan: There is a requirement that the work health and safety inspectors need to notify members of the Work Health and Safety Committee, but I will cross to Rachel.

Ms Turner: I have read and acknowledge the privilege statement.

THE CHAIR: Brilliant.

Ms Turner: Under the act, the inspectors have particular powers where they can enter the building in order to view the particular issue that the complainant has raised, or if they have identified one. They can also just inspect a workplace. So it would depend on the reason that they accessed the building that day, and they should have clearly communicated that with the staff as they entered the building.

MR PETTERSSON: So—

Mr Duncan: But no Work Health and Safety Committee?

Ms Turner: Well, they also have a responsibility. They have the right to enter the building. As soon as is reasonably practical, they are required to advise an elected health and safety representative in the building. That step did not occur.

MR PETTERSSON: I am still a bit confused; bear with me. So they did not need permission to enter the precincts? They did not seek it?

Madam Speaker: It is my understanding that they rang the Clerk and notified him that they had a complaint, had a concern, and that they wanted to come in. I was off site. I had Friday in the community, meeting with constituents. My conversation with Tom was: “Invite them in. Let them come in. As far as I am concerned, our place is COVID safe and has good practices in place. If there is any confusion, come in and you will see the quality of our work and that we do know how to operate a safe committee.” I was then very, very surprised on the Friday afternoon, coming out of a four o’clock meeting with a constituent, to find out that I had been served a prohibition notice.

Mr Duncan: Can I just add that I think there is provision—and I am just looking at my submission—for serving a notice while the Assembly is sitting. That is different. It has precinct and privilege matters as well. That is not the point of your question, but, yes, there are issues about serving a notice on a sitting day.

MR PETTERSSON: One of the things that was raised was OLA’s COVID safety plan. Is that binding on committees?

Madam Speaker: It applies to the precinct and any of the activities within the precinct. So it would apply to committees; it would apply to what goes on in your office and what goes on on the second floor.

MR PETTERSSON: Who is responsible for the COVID safety plan in a committee meeting?

Madam Speaker: I would hazard a guess that each individual MLA is responsible for adhering to the COVID-safe plan. As I think one of the estimates committee members said today, it is a collective responsibility. Each MLA is a PCBU. We sign up to operate in a safe manner as a member here. I think we started developing the COVID-safe plan back in early 2020. It was distributed in the middle of 2020, formalised through admin and procedure and through the various party rooms and the WHS committee. That has had various iterations as we have gone through the glorious last couple of years of COVID and how it needs to apply to a safe workplace.

MR PETTERSSON: It is my understanding, from various submissions, that you, as Speaker, are not responsible for the decisions the committee makes. If a committee did—

Madam Speaker: Nor am I responsible for your decisions, thank goodness.

MR PETTERSSON: Yes. So if, as a committee, we were to decide to do something dangerous or unsafe, you are not responsible. Is that what you are telling me?

Madam Speaker: No, no. That is where I would, under the precincts act, be able to come and say to you, “You have to operate under these rules.” That is my interpretation. You take the responsibility to operate safely, as a PCBU within these precincts.

MR PETTERSSON: So doesn't that ultimately make you responsible?

Mr Duncan: There are different PCBUs. There are a whole range. I am a PCBU. You are a PCBU. Kathy Leigh is a PCBU. She is responsible for ACT public servants, so she has a responsibility as well to ensure that, when coming to this building, they are safe. But we operate under a COVID-safe plan and it covers all the activities, as I said in my earlier evidence, of this building. Whether it is a meeting in the minister's office, there is the responsibility to physically distance and do all the things that we discussed in the COVID-safe plan. It is expected that the committees would abide by that, just as, equally, you would in your own office, and just as I would in our office. I hope that answers your question.

MR PETTERSSON: Somewhat. It is just the language of "expected" to follow. I am really trying to get to the point of: if a committee does make a decision to do something that is unsafe, who is responsible for the wellbeing of people in that room?

Mr Duncan: There is a Work Health and Safety Committee for this building, and people have got the right to go to the Work Health and Safety Committee and raise that. The Work Health and Safety Committee will presumably escalate that. I am looking to Rachel as to what the process is. That would eventually come to the Speaker and me, and we would look at whether there were any unsafe COVID activities going on. We would make an assessment as to whether that needed to be adjusted and we would probably make contact with the committee chair and say, "It has been brought to our attention that you might not be following the COVID-safe plan for the building." But no-one ever alerted us. There is no record of any worker—

Madam Speaker: No.

Mr Duncan: Rachel?

Ms Turner: There was no complaint made either through the Work Health and Safety Committee or through RiskMan, which is the reporting system, which is what the intranet says to do. I think one way to look at it is to unpack it the other way. If an attendee was to identify a risk, what should they do? The normal practice would be to notify their elected health and safety rep or their PCBU. So it could be any member, because all members have PCBU responsibilities.

MR PETTERSSON: I am still somewhat stuck here on the specifics for a committee, because the standing orders say that committees can conduct the meetings where and when they like, and in any way, in line with the standing orders. So if a committee was operating within those standing orders but was doing something unsafe, are you telling me that, as the Clerk and the Speaker, you could stop the committee from doing those things?

Madam Speaker: Well, put it this way: I think you are looking at a hypothetical and no committee has ever done anything that has been recognised as that. Nor has it been put to anybody within OLA that any committee has operated in an unsafe manner.

MR PETTERSSON: I would just say that I do not think it is a hypothetical, because

we are currently talking about prohibition notices where someone has said that committees were operating in an unsafe way.

Madam Speaker: Yes, someone has said it, but it is yet to be proven. Just go back to the Monday, the Monday when 25 members sat in the chamber under the same COVID-safe plan that had been in place for two years previously, under current conditions. If you remember, we have gone from having no more than 13, to fully masked in the chamber, to having 25. We have made physical changes to the chamber to accommodate the various points of the journey.

On the Monday we had 25 MLAs sitting in the chamber, but at 10.30 am a committee of three could not meet with ministers. They are the same committee members, the same individuals, who were sitting in the chamber with the very same ministers that should have appeared in a committee, yet that was prohibited. My argument is that that prohibition notice was an overreach and should not have been served. Therefore, regarding your argument about somebody saying that is unsafe, to me it was not unsafe and the prohibition notice should not have been issued.

MS CLAY: I am interested in some of the media comment that was made by the minister. Is it usual for a minister to make comment to the media about a committee matter when a committee matter is on foot? Is that normal?

Madam Speaker: I am not going to speak for the minister. There was a lot of narrative and it was disappointing, some of that narrative. It got to the point where I spoke with Tom and we put out a statement of clarification because I found it incredibly disappointing to have the notion out in public that this was an unsafe workplace.

We have been operating under safe conditions for two years. We have been very clear on my expectations. The members of the admin committee will know that I have been on the cautious side of every move around masking and making sure that we had extra space and desks put in the chamber so that we could be safe. So it was disappointing, and the Clerk and I felt it necessary to put out those points of clarification to counter the misinformation that was out there.

MS CLAY: I wonder, Mr Duncan, if you wish to add anything about speaking to the media or about committees?

Mr Duncan: I am loathe to tell ministers what to say to them. I do not think I am allowed to tell any member what to say to the media. All I can say is that it is not unusual, in the lead-up to estimates committees—in fact, any committees but mostly estimates committees—for there to be a bit of discussion between the committee and the ministers about scheduling, about when ministers are going to appear on which days and things like that.

Sometimes the committee would prefer ministers to appear on a certain day and the ministers reject that. My observation of this is that this has taken it to a whole new level. Committees run inquiries; it is not witnesses that run inquiries. Witnesses may have a view about how an inquiry should be run, but in the end it is a committee that decides. You have decided who you want to appear today, you have decided which

witnesses to appear, and you have decided which submissions to publish. It is really the authority of the committee that runs committee inquiries, not witnesses.

MS CLAY: And do you feel that there was any reputational damage? Some of the comments were misleading. They talked about 40 witnesses crammed into rooms where that was simply not possible; nor was it the standard procedure for this committee. They took our COVID numbers too, in a way, that was quite misleading. Do you feel that there was any media, reputational or general harm?

Madam Speaker: Without talking for the Clerk and for Ms Turner, I felt disappointed, as Speaker of this place, that people in the community would think that we do not care about workers and that we are free and easy with their safety, particularly in the middle of a pandemic. That is completely opposite to my concern for workers, which is why we did not mess about. We got a COVID-safe plan in place quite early. We started developing it in March 2020, which was almost at the threshold, at the start of the pandemic being recognised and noticed here.

And we have responded at every point. When we could give a little, we have given. When we had to pull back, we pulled back. As for the reputation of the Assembly, I believe it was disappointing that anyone could think that I do not care about a safe workplace, because that is absolutely not the case. So it is professionally disappointing and personally disappointing.

MS CLAY: Thank you.

Mr Duncan: I would just add that—a bit more big picture—regarding the reputation of the Assembly, anything that envisages that an executive agency can shut down a committee of the Assembly, and maybe the Assembly itself, is just so contrary to the system of Westminster government that we inherited.

I have discussed this incident with some of my clerk colleagues and they are very surprised at what has occurred and very interested to see the outcome of this privileges committee, because it invokes a range of issues in relation to privilege. Someone has described this as an issue of worker safety; I do not particularly see it through that lens.

I think what this committee is about is whether the privileges of the Assembly were interfered with; whether the committee was interfered with. You have got legal advice—conflicting legal advice now—but it seems pretty clear that the legal advice that the Speaker was provided with points to a pretty clear path.

Madam Speaker: Just on that, we worked through that first week of delay to get the outcomes. Getting the budget scrutinised was important. Without a budget, the community is worse off for it. We recognised that there was an imperative. Aside from thinking that this should not have even been issued, and the notion of parliamentary privilege aside, there was still just the fundamental mechanics of doing what we could to get estimates back on track as soon as we could.

There happened to be Commonwealth Parliamentary Association conference, which Mr Pettersson and I and the Clerk attended, in Canada. On the other side of the world

I was greeted by various speakers from Australia and from other parliaments, non-Australian parliaments, and they were aware of this issue and they were quite concerned. The question was: “How did that happen and what are you doing about it? Nothing can stop parliament.” At the end of my submission you would even have seen the commonwealth Senate, on both sides, Labor and Liberal, saying, “The executive cannot interfere with the functions of parliament.”

THE CHAIR: There is the executive in its role as the statutory authority, WorkSafe, but there is also the minister’s role. Given that the complaint, it became clear, came from the minister, and the minister was, at the same time as being minister for WorkSafe, also the Manager of Government Business, responsible for liaising with the committee, and was due to be a witness before the committee, do you think that exacerbated the problem in terms of the privilege aspects?

Madam Speaker: As the Clerk said, there is usually a little bit of argy-bargy between the executive and the estimates committee, or indeed any committee that invites a member of the executive to come in, about timing and how they go through that process. It is up to the minister to articulate what hat he was wearing at various times.

THE CHAIR: I suppose the point is that you are saying that there is this normal argy-bargy that happens. That is what happens; right? There is negotiation. But in this case WorkSafe—who have overreached, in your view—have been set off. But for the minister’s email, this would not have happened.

Madam Speaker: You are right.

THE CHAIR: So it is the minister’s email that has instigated what you have considered to be executive overreach.

Madam Speaker: Yes.

THE CHAIR: So it is difficult to separate the two.

Madam Speaker: It is. Looking at the published corro, that was initiated before the final exchange of letters was concluded. My read of the correspondence is that they were both talking hybrids but were almost like ships passing in the night, not recognising that they were both seeking the same outcome. And someone then asked WorkSafe to have a look.

WorkSafe came in on the Friday afternoon. I think they had limited understanding of the workings of this place, the various structures. It is a complex work environment. So we got the prohibition notice and then the Clerk met again with the inspectors on the Monday morning. It may have softened the prohibition, but the notice still interfered with the mechanics because it was directing a committee as to how it could function.

THE CHAIR: Indeed.

MR PETTERSSON: I was wondering if, at this point, you had a view as to whether the prohibition notice was lawful or unlawful, and when did you come to that

opinion?

Madam Speaker: I personally believed it was not. I did seek legal opinion, and the Walker advice clearly supports my view. You would just need to look at paragraph 45 of the legal advice, where he clearly states that it was unlawfully issued. I cannot remember his exact words, but let me find it for you:

... does not have the power ... to issue a prohibition notice ...

It is quite simple.

MR PETTERSSON: And did you form that view at that point, upon receiving the advice or had you suspected that—

Madam Speaker: I believed that that was the position, based on, again, early advice from and discussion with the Clerk. Every bit of legal commentary to me has been that parliamentary privilege cannot be interfered with, and the prohibition notice did that. Again, my submission is that we need to separate WHS, for the safety of workers and having a safe workplace—which I do not argue about. That is what we all should be committed to doing. But how does that then sit with parliamentary privilege.

In my submission I have also made commentary or suggestions—not that one can suggest to a privilege committee—that it is worth looking at the commonwealth parliament, who have made amendments to their WHS to provide clarity. Also, as an Assembly, we have an MOU with the AFP, with ACT Policing. So is it worth considering an MOU with a body that, rightly, has a place? But it has to understand its place within the operations of parliamentary process and proceedings.

The Chief Minister brought an amendment to the chamber last week, and I welcome that. I think it is a start, but I have also written to the scrutiny committee because I propose to move an amendment when we come back. I think clarifying WHS here is important. I am happy to table this.

THE CHAIR: Thanks. Just as a point of clarification: is that an amendment to the Chief Minister's—

Madam Speaker: Yes, yes. Which is—

THE CHAIR: Yes.

Madam Speaker: Which adds that, notwithstanding clarity on WHS and MLAs being responsible under the banner of the PCBU, that does not interfere or cut across or exclude parliamentary privilege and the independence of a parliament.

THE CHAIR: Okay. I notice that you have also, in your submission, talked about a resolution, looking at recent activity up on the hill, where there was a joint resolution in the Senate where they reaffirmed the parliament's commitment to parliamentary privilege. You recommend that something like that also would be of use in the Assembly.

Madam Speaker: Yes. I think that goes to some of the work that the chief did last week in introducing that amendment, and that is why I will be seeking to put an amendment forward.

THE CHAIR: Sure. Also in your submission, you talk about a resolution—not an amendment to the act but a resolution.

Madam Speaker: Yes.

THE CHAIR: So you think of that as reconfirmation for us all?

Madam Speaker: I think there is merit whether you have a resolution or whether you use what sits within our continuing resolutions, where we have the code of conduct for MLAs and where we have Latimer House principles. There are a suite of continuing resolutions that we could affirm as a parliament.

Then there is the notion of an MOU. That sets out, in addition to what is in the WHS Act, which Ms Turner spoke about, how you notify, under what conditions, and the various people who can come in. It is about how we engage in that. For example, the MOU with the police clearly defines how and when they can come into the building. There is merit in all of those things, and I would leave that with the committee to consider.

THE CHAIR: They are interesting suggestions. If you look at the two legal advices, and their opinions—

Madam Speaker: I only have one in front of me.

THE CHAIR: WorkSafe’s opinion is due to be published. Has it been published yet? It is up online. It argues that this is a matter that should be resolved before the courts, rather than by the committee. But you are of the view, or the opinion, that this is a matter for the committee?

Madam Speaker: I heard the commissioner make reference to the advice that sets parliamentary privilege in doubt. I have not spoken to a speaker who considers parliamentary privilege to be in doubt or expendable in any way, shape or form. So I will stick by Bret Walker’s advice, which says that this was out of step. But, for clarity, out of an abundance of caution—which seems to be a phrase used often now—we should make sure that we are very clear on our responsibilities under WHS, but also that, as a parliament, we are very clear on our responsibilities to uphold the separation of powers and parliamentary privilege.

MR PETTERSSON: Just on that, before deciding that the Select Committee on Privileges should proceed, did you consider another remedy, like an internal review through the WHS Act or maybe an injunction in the court?

Madam Speaker: My first statement was: “This is not on. It has got to be withdrawn. I uphold my right to have my day in court.” But as it moved through, within about 48 hours I realised that the critical thing was to get budget estimates on track as soon as possible so that the business of the Assembly could continue, and indeed the good

folk of Canberra would have a budget passed, and so that all those initiatives could be progressed. A court hearing would have been quite time-consuming. It would have been a long time in coming, I believe. We would have had to wait for advice and get all those instructions in place, in which case the budget would have been delayed even further.

As far as seeking a review goes, it was my view that, because it should not have been issued, I was not going for a review that would have just been withdrawn. Again, the review process is 14 days. So another 14 days would have meant that we would not have passed the budget last sitting. We would be coming back in November to pass the budget at the earliest. Again, I believed that we had a safe workplace; I believed that this was overreach. The principle was: “Let’s get the budget done, for the benefit of all.” That was behind my timing and thinking.

MR PETTERSSON: As Speaker, should you be considering the timeliness of bills in your decision-making?

Madam Speaker: I am responsible for this place, but I am also a member of parliament. I am also an elected member of the community and I want to see budgets passed and good programs that this government can put together delivered, not stalled by something that I believe should not have happened in the first place.

Mr Duncan: If I could just add to that? I think the Speaker is here for the good governance of the territory. She is here to ensure that the Westminster traditions are upheld. The budget is the most important bill the government can introduce. If the government fails to pass the budget then, by convention, it should resign. Because of its importance, it needs to be scrutinised. That is recognised across every commonwealth parliament. So I think that Madam Speaker was keen to ensure that that scrutiny occurred in a timely fashion.

The Financial Management Act provides, I think, that five-twelfths of the expenditure can be rolled over to that year. I might have to go back and confirm that. In other words, the territory resources run out at the end of November. If you delay the passage of the appropriation then you get to a stage where government services may not be able to be provided. I could stand corrected on that. I am not an expert on the Financial Management Act. But it is important, for the governance of the territory, that a government gets to put its budget before the parliament, have it considered, have it scrutinised, and proceed to try and get it passed. I think that is a very important process. As for going off to court to argue about parliamentary privilege, the best place to determine parliamentary privilege is in a privileges committee, not in a court. I think we are following the correct action by getting a privileges committee to determine the extent of our privilege and where it should land and should not land.

MS CLAY: We had the first prohibition notice that clearly would have stopped work, and then the second prohibition notice that caused delays to budget estimates and had a knock-on effect for other committees and scheduling hearings. Do you feel that any of this has affected the scrutiny of the budget or the scrutiny of other government policy and laws?

Madam Speaker: I would be loath to comment on that. Budget estimates went

through in the end. As an observer of that, they were diligent in their questions. The budget estimates committee report was tabled. The government has responded. I think the estimates committee did an exceptional job under the circumstances, with a level of outward pressure about: “How do they go about their business, given the environment?” So there was tension. But, as an observer, and from the processes, I think they have done it. But it is unfortunate that a committee potentially sits there and thinks—in many ways it goes back to Mr Pettersson’s question—“Am I doing everything right? Am I putting anybody at risk? What am I doing?” So it introduced an unnecessary potential tension, which I think is unfortunate.

MS CLAY: I do not know if you will be in a position to answer this, but I will ask. We have heard that there is a whole framework for WHS. That obviously applies to PCBUs and people working in this building, and it applies in general terms. We heard that, to your knowledge, you had not had, through any of those channels, WHS concerns raised previously. You would not necessarily know, if they did not come through you. It is interesting to me. It looks, from where you are sitting, as though the first complaint that got made about WHS and COVID safety was from the minister’s office to the commissioner. Is that how it looks?

Ms Turner: That is correct. If the process worked correctly, I should be aware. The whole-of-government RiskMan system exists. Everyone has access to it. That would be one of the ways to report that a power lead was near water, for example. That is how you would do it. The other way is that all PCBUs have a health and safety representative who sits on a committee that I chair. They are there for workers to report potential dangers, potential hazards.

MS CLAY: And since March 2020, when we have been operating with a pandemic and various iterations of a COVID-safe WHS plan, there have not been COVID safety complaints raised through those measures?

Ms Turner: There have not. That is correct.

MS CLAY: Thank you.

Ms Turner: And we do have it as an agenda item at almost all Work Health and Safety Committee meetings.

MS CLAY: Thank you.

MR PETTERSSON: This is more of a broad question than specifically to the facts and what occurred, but does a parliamentarian have a right to access the precincts of parliament?

Madam Speaker: Pardon me?

MR PETTERSSON: Does a parliamentarian have a right to access the parliamentary precincts?

Madam Speaker: Do you have a right?

MR PETTERSSON: Yes.

Madam Speaker: I would say yes.

Mr Duncan: Yes, and if you are denied that right, that is a breach of privilege. That would be contempt. There are lots of cases, going over the years, where parliamentarians have been prevented, due to protest activity around the building, from trying to get into the building. I recall that many years ago there was a dispute where various buses were placed around the Assembly building. I am not too sure whether members were denied entry, but it certainly made it difficult for them to get in. But certainly anything that interferes with the work of the chamber or of committees is a contempt. So, yes, if a parliamentarian is detained from or not able to perform their work then that is a breach of privilege and a contempt.

Madam Speaker: The cover of that is—and we are just talking about a safe workplace—if an MLA had had COVID, under the Public Health Act they would have to isolate and be excluded, but that Public Health Act instrument has lapsed; it is gone. I am currently talking to admin and procedure and the WHS committee—and the WHS committee has agreed to it all, bar a couple of editorial-type changes—about the fact that, that under the precincts act, I am looking to maintain a safe workplace. That is, if you have COVID you stay away from the precinct and take advantage of the working from home opportunity.

So there is a slight conflict in your question and proposition, in that I would expect that if a member got COVID they would honour the instructions or the advice under the precincts act to stay away. If you had COVID you would not be offering a safe workplace if you came in and sat in your office, with your staff. So whilst I absolutely agree with what the Clerk just said, there are these nuances that are driven by making sure that we actually have in place a safe workplace.

THE CHAIR: Mr Duncan, your submission—although it is not signed by you, it is from OLA—at paragraph 4.2 it says,

The committee may wish to consider whether, by issuing a prohibition notice on the Speaker on a day when the Assembly was sitting ... provisions of standing order 277(f) were in any way enlivened.

And that says:

A person shall not serve or execute any criminal or civil process in the precincts of the Assembly on a day on which the Assembly meets except with the consent of the Assembly or of a person authorised by the Assembly to give such consent.

So there is the issue of the prohibition notice and whether it should have been given, with regard to the committee, but the other issue is that you cannot actually put in a civil process, which one would presume this is, on a day that the Assembly meets. So there is a sort of exemption. Can you extrapolate on that and on what sort of authority standing order 277(f) is? Is a breach of that a breach of privilege?

Madam Speaker: That is definitely a Clerk question.

THE CHAIR: It is a Clerk question, yes.

Mr Duncan: I think that is put there for reasons such as where people take legal action against a member—serve that on a member to try and distract them from sitting or for a defamation proceeding. There are rules for every parliament to prevent that sort of activity. A member's first call is to the parliament. That is why all members are exempt from jury duty. Your first duty is to undertake your very important constitutional scrutiny roles, both here in the committees and in the Assembly. There are a range of these standing orders that are put in place to reflect that, and this is one of them. This is one designed to ensure that.

THE CHAIR: Do you think that the prohibition notice that was issued on the sitting day contravenes standing order 27(f)?

Mr Duncan: Well, that would be a view of the privileges committee.

THE CHAIR: I am asking for your view, though. We will form a view. It may not necessarily be consistent with yours, but I am asking for your view.

Mr Duncan: If I was asked to give advice to a privileges committee or to any member—

THE CHAIR: Let's do that.

Mr Duncan: I would say that it looks pretty much like breaching. I do know the circumstances because I was there when it happened, but I think that is—

THE CHAIR: You were instantly aware of what was going on. I am seeking your advice here as a witness, but as the Clerk we refer to you when it comes to standing orders, as you are aware, and I am saying that I am seeking advice. I am sure that Madam Speaker does not always follow your advice, but she would seek it anyway, and I am asking for your advice.

Mr Duncan: With these types of advices I would write to you, Mr Hanson, and I may well come back to you with some more detailed advice. But, off the cuff, I would say that, yes, there are indications that that standing order may have been invoked.

THE CHAIR: Okay. The estimates committee seemed pretty keen to conduct their hearings in person where possible, because their view was that the scrutiny of the budget at the committee hearings was best done face to face. It is more effective. You get a better result in person, as we are today. That is why we did not take the chamber offline as well. Do you have a view on that? Was that just a matter for the committee to decide or, as the Speaker, do you think that, where possible, with COVID-safe arrangements, face-to-face is the preferable way to conduct this, rather than online? Or do you not have an opinion?

Madam Speaker: It is up to the committees, but my role as Speaker was to put as many conditions in place so that the committees then had a choice. If they want to meet in person then having a safe environment, having different rooms set out, provides the committee with the choice to do that. Without a COVID-safe plan, if we

had just ignored the risks and not put the strategies in place, then they would have been focused on the only option—being online.

It is important, I think, for a Speaker to provide both options. This estimates committee actually held their hearings in the chamber, and that has always been an option. This has been the room for many, many years where public hearings of estimates and other committees have traditionally been held. But through this process to get estimates back on track, we used the chamber. If that is what it takes then that is what it takes, and as Speaker I had no hesitation.

THE CHAIR: We are conducting this committee hearing here, and there are room limits and so on. Was that a necessary condition or are you not sure?

Madam Speaker: It was an option that we afforded the committee. The committee took that up and it seems to have been well received by ministers and witnesses. I think it highlights everything else that we have done in our COVID-safe response. The only difference is that it was in the chamber and not here. Everything else still applied. I think I heard this morning that the capacity of this room is 18, with various rooms on offer. The waiting area and the reception room could have been used as overflow as well. It was not convenient and I think that would have perhaps interrupted proceedings, so when the committee came and said, “Can we use the chamber so that more people can be there?” I said, “Do.”

THE CHAIR: So the chamber was not necessarily more COVID safe. It was perhaps more convenient.

Madam Speaker: Yes.

Mr Duncan: If I can just add to what Madam Speaker said, I have long advocated that, for the estimates committee, the chamber should be used—or for any committee where there are a large number of witnesses. And it is not just witnesses; it is members. As you will know, sometimes estimates committees have five members, but then you get the shadows turning up and you get an interested government backbencher whose electorate might be covered, and sometimes on that side of the table you can have 10 members asking questions, and that tends to be quick.

You have been in the situation where the member is here and the witness is here, and the member here is asking a question of the witness there, and optically it does not look good. Just practically, I think it made sense to have a big meeting, a large number of witnesses and large numbers of members, in a larger venue. I made the suggestion years ago and I made it again this year, and for this year, for whatever reason, it was taken up. I do not know why.

Madam Speaker: And we may see more of it now that it has started to be used and people will be comfortable in using it.

MR PETTERSON: I want to jump in on that point, to reiterate that the observation just made on how large estimates committee meetings may be is useful evidence. I have another question in regard to the OLA submission. The submission outlines concerns with the section of the prohibition notice which states:

Workers have been directed to attend this planned activity.

Reading through some of the correspondence between the committee and the minister, in Mr Milligan's letter of 28 July there was a language such as, "Times have been scheduled for you to appear and this letter confirms this time for you and your officials to appear before the committee." In Mr Milligan's letter of 11 July he states that "The committee expects relevant officials to be in attendance at all times." Would a reasonable person believe that the minister and officials had been directed to attend?

Mr Duncan: No, because there is no mention in any of the correspondence that officials have been directed to attend. They have been invited to attend. It is up to the minister to attend, as I said in an earlier answer, and how many officials he or she may wish to bring. You have invited us to attend today. You did not direct me to attend. I came. The normal operating procedure for Assembly committees is that they invite witnesses to appear before them and usually witnesses are very keen to take that opportunity up. And I think ministers are very keen to take that opportunity up, to justify their expenditure and highlight the budget that is being considered by the Assembly.

MR PETTERSON: Mr Milligan says he expects relevant officials to be in attendance at all times.

Madam Speaker: That could just be underscoring that their preference is face to face. He also goes on to say that those who cannot attend can be on Webex. It is not my letter. I am just assuming.

Mr Duncan: I think it is your expectation that I will be here for the whole time I am giving evidence. I do not think it is more than that—that if you are giving evidence before a committee then you will appear for the time that you are invited to appear.

THE CHAIR: We are going to have to leave it there, but, Madam Speaker and staff, thank you very much for appearing today. If we have any follow-ups we will let you know.

Madam Speaker: Thank you. I think the Clerk will ponder your question about the standing order and come back to you.

THE CHAIR: The problem is that you said that the committee should consider it. To be frank, when we are considering those things, the person we would seek advice from is the Clerk.

Madam Speaker: Rest assured; I will ask him to come back to you.

THE CHAIR: It is interesting, but it is not necessarily the main game. Thanks very much for appearing, and we will see you back in the chamber.

Madam Speaker: Thank you.

The committee adjourned at 4.31 pm.