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Senator Trish Crossin
Chair
Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra ACT 2600

Dear Senator Crossin

PUBLIC INTEREST DISCLOSURE BILL 2013

Thank you for the opportunity to provide a submission to the committee on this bill.

I note that the bill applies to the parliamentary departments and will require me as a departmental secretary to implement procedures in relation to my responsibilities under the Act should it become law. The bill gives to the President of the Senate and the Speaker of the House of Representatives the same protections given to a Minister in relation to the scope of disclosable conduct (clause 31), and the adequacy of responses to investigations (under clauses 38 and 39). However, my comments are not concerned with these aspects of the bill but with a tangential, though institutionally significant, issue.

My comments relate to clause 81 of the bill which I believe is unnecessary:

81 Law relating to parliamentary privilege not affected

(1) This Act does not affect the powers, privileges and immunities of:

(a) the Senate; and

(b) the House of Representatives; and

(c) the members of each House of the Parliament; and

(d) the committees of each House of the Parliament;

under section 49 of the Constitution.

(2) This Act does not affect the powers, privileges and immunities conferred by, or arising under, the *Parliamentary Privileges Act 1987*.

If clauses such as clause 81 start to be employed in Commonwealth legislation, it may lead to doubt and confusion about the powers, privileges and immunities of the Commonwealth Houses where none now exists. The committee has an opportunity to nip this unhelpful practice in the bud by recommending the clause's omission, unless those responsible for its policy rationale and drafting can come up with a convincing reason why it should remain.

My submission explains the usual approach to legislating in relation to parliamentary privilege, including by examining relevant examples. It then postulates where clause 81 may have come from and suggests why it is not a helpful practice to encourage.

Unlike the Public Interest Disclosure (Whistleblower Protection) Bill 2012 introduced by Mr Wilkie (the Wilkie Bill), the Public Interest Disclosure Bill 2013 (the PID Bill) will not apply to members of Parliament who will continue to be subject to the existing range of provisions relating to conduct. These provisions are summarised in the departmental publication, Brief Guide to Senate Procedure No. 23 – Provisions governing the conduct of senators and are found in the Constitution, the standing and other orders of the Senate and in various statutes. Persons who "blow the whistle" on alleged misconduct by members of Parliament will continue to enjoy only such protections as may currently be available under the law or the provisions of the relevant House.

Usual approaches to legislating in relation to parliamentary privilege

Given that the bill does not apply to members of Parliament, the inclusion of clause 81 is to be wondered at. It is a very unusual provision in Commonwealth statutes in any case, effectively without precedent. While its lack of appearance may be a matter of drafting practice, there are also very sound policy reasons for the general silence. The principal reason is the underlying constitutional declaration in section 49 of the powers, privileges and immunities of the Houses, their committees and members. These are to be such as are *declared by the Parliament* (emphasis added) and, until declared are those of the United Kingdom House of Commons at the date of Federation. To alter or modify any power, privilege or immunity requires express statutory declaration. Otherwise, those powers, privileges and immunities continue as adopted in 1901.

To give some examples of express declarations, the *Parliamentary Privileges Act 1987* is a partial declaration of the powers, privileges and immunities of the Houses. It modified existing powers, privileges and immunities by abolishing the power of the Houses to expel members, as well as the traditional contempt of defamation of a House, committee or member.[1]

The *Auditor-General Act 1997* expressly limited the power of the Houses or their committees to require the Auditor-General to produce certain information to them. This was a limitation on the otherwise broad power of the Houses to require the production of documents or evidence, and was justified as a safeguard of the independence of the Auditor-General. The limitation had been recommended by the then Public Accounts Committee which examined

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1 Many of the early privilege cases involved complaints from members that they had been defamed by critical commentary in newspapers. A successful complaint could result in the withdrawal of access rights to Parliament House for the relevant journalist or publisher.

the bill. It was described in the explanatory memorandum as a declaration for the purposes of section 49.[2]

More recently, the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 purported to limit the provision of information to the Parliament but it was amended, as a result of an inquiry by the Senate Privileges Committee, to remove the most obnoxious features.[3] The committee's 144th report explains the general principle, accepted for many years, that a statutory secrecy provision does not hinder the provision of information to Parliament without express words limiting parliamentary privilege in those circumstances.

The relevant provisions are now in the *Taxation Administration Act 1953*. What remained, in recognition of the importance of protecting confidential taxpayer information, was a limitation on the provision of such information to the minister, even if it was for the purpose of proceedings in Parliament. It was expressed in the following terms:

> **355-60 Limits on disclosure to Ministers**
>
> (1) Sections 355-45 and 355-55 are the only exceptions to the prohibition in section 355-25 on which an entity who has acquired *protected information as a *taxation officer can rely in making a record of the information for, or disclosing the information to, a Minister, whether or not provided to a Minister in the course of, or for the purposes of or incidental to, the transacting of the business of a House of the Parliament or of a committee of one or both Houses of the Parliament.
>
> Note: Disclosures that are not prohibited by section 355-25 are not affected by this subsection. For example, a taxation officer may disclose information to a Minister if the Minister is the entity to whom the information relates, or is an entity covered by subsection 355-25(2) in relation to the information.
>
> (2) Subsection (1) has effect despite section 16 of the *Parliamentary Privileges Act 1987*, and that section does not operate to the extent that it would otherwise apply to a disclosure of *protected information by a *taxation officer to a Minister.
>
> Note: This subsection does not limit the operation of section 16 of the *Parliamentary Privileges Act 1987* in any other respect. That section continues to operate, for example, to enable taxation officers to disclose protected information to a committee of one or both Houses of the Parliament.

In other words, the usual immunity applicable to proceedings in Parliament was limited in these particular circumstances. The fact that the powers of the Houses and their committees were otherwise unaffected was stated in the note following subsection (2), together with an

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2 A 1994 version of the bill had contained a clause which was claimed to be an implied restriction on the powers of the Senate. It was noted by the Scrutiny of Bills Committee, criticised by the then Clerk of the Senate and replaced with an express limitation as required by section 49.

3 For example, the original bill included an offence of providing certain information to Parliament, in direct contradiction of centuries of parliamentary law and practice which protects people who provide information to Parliament.

example of how the ordinary law of parliamentary privilege would continue to operate. Under the *Acts Interpretation Act 1901*, notes do not form part of the Act but may be used as extrinsic materials to assist interpretation. Though providing guidance, the note has no legal effect on the scope or application of the unaffected powers. It served to distinguish what had not been affected from powers, privileges and immunities that were affected by section 355-60.

The committee may recall that these provisions were recently cited as the reason why the Australian Taxation Office could not provide details of the mining tax revenue to the Treasurer or Finance Minister to respond to orders from the Senate. However, the Senate was able to rely on its otherwise unaffected powers to order the Tax Commissioner to produce the information to the Economics References Committee, which he duly did.

These examples all demonstrate a consistent and considered approach to legislation dealing with issues of parliamentary privilege. In all cases, parliamentary committees were instrumental in achieving an acceptable outcome.[4] Parliament cannot necessarily rely on the Executive to understand and look out for its institutional interests. It must sometimes take concerted steps to ensure that those interests are reflected accurately in legislation.

The one case where a provision comparable to clause 81 of the PID Bill appears in Commonwealth statutes is in section 10 of the *Evidence Act 1995*. Section 15 of that Act is also of interest:

> **10 Parliamentary privilege preserved**
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> (1) This Act does not affect the law relating to the privileges of any Australian Parliament or any House of any Australian Parliament.
>
> (2) In particular, subsection 15(2) does not affect, and is in addition to, the law relating to such privileges.

> **15 Compellability: Sovereign and others**
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> (1) None of the following is compellable to give evidence:
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> (a) the Sovereign;
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> (b) the Governor-General;
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> (c) the Governor of a State;
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> (d) the Administrator of a Territory;
>
> (e) a foreign sovereign or the Head of State of a foreign country.

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4 Apart from the provisions necessitated by adverse court judgments in the case of *R v Murphy* (1986), the provisions of the Parliamentary Privileges Act were developed by the Joint Select Committee on Parliamentary Privilege and the bill was introduced by the then President of the Senate, Senator McClelland.

(2) A member of a House of an Australian Parliament is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending:

(a) a sitting of that House or a joint sitting of that Parliament; or

(b) a meeting of a committee of that House or that Parliament, being a committee of which he or she is a member.

The distinguishing feature here is that the *Evidence Act 1995* is part of a scheme of substantially uniform national legislation, based on a NSW bill, and does not therefore represent standard Commonwealth drafting practice. Section 10 preserves the law of parliamentary privilege in *all* Australian jurisdictions, not just the Commonwealth, because not all jurisdictions have an equivalent constitutional provision to section 49. It is located in Part 1.2 which concerns the application of the Act and its effect on, and relationship to, other laws. Section 10 therefore serves an identifiable purpose.

The rationale for clause 81

Unlike section 10 of the *Evidence Act 1995*, the rationale for clause 81 of the PID Bill is not so apparent.

Normally, it could be expected that an explanatory memorandum might cast some light on the question. Unfortunately, the notes on clause 81 simply restate the words of the bill and there is no indication of what its purpose is, tucked away in Part 5—Miscellaneous, or of any relationship to other clauses. In contrast, the explanation for clause 82 (Other investigative powers etc. not affected) is reasonably illuminating.

Two questions are worth asking:

- Does it matter that there is a clause in the bill that appears to do nothing, to have no purpose and to be without explanation?
- If clause 81 is providing a useful and necessary protection of parliamentary privilege, why does a similar provision not appear in any other statute creating rights and obligations that may affect the Parliament or its members?

As I have explained above, if the powers, privileges and immunities of the Houses, their committees and members are to be altered or modified, an express statutory declaration is required. If there is no such change to those powers, privileges and immunities, then it is simply not necessary to state that they are unaffected.

For example, if clause 20 (which provides an offence of disclosing identifying information) were intended to apply to proceedings in Parliament, it would be necessary to limit the application of parliamentary privilege and, in particular, section 16 of the *Parliamentary Privileges Act 1987* in respect of such conduct, to enable a member of Parliament who identified a whistleblower in debate to be prosecuted for doing so. It is the absence of such an express limitation that preserves the freedom of speech of members of parliament, not the inclusion of some vague provision at the end of the bill that says that the privilege etc is unaffected.

The significant question to ask is whether the clause does any harm.

While there may not be any immediate harm, there may be an insidious and cumulative effect that leads to doubt and confusion about the scope and application of parliamentary powers, privileges and immunities, at the Parliament's expense.

If, as I suspect, clause 81 has been included in the PID Bill because it was copied directly from clause 61 in the Wilkie Bill (as many of the clauses in the PID Bill appear to have been), then there is already evidence of clauses being included in a bill because they appear elsewhere and they look important, rather than because they serve a purpose.

In contrast to the PID Bill, the Wilkie Bill does apply to members and senators (and persons employed under the *Members of Parliament (Staff) Act 1983*) who are included in the meaning of "public official" in clause 11 of that bill. Although the definition of "disclosable conduct" (clause 9) includes nothing that would appear to catch any aspect of a member's participation in "proceedings in Parliament" and therefore to raise issues of parliamentary privilege, it is likely that clause 61 was included to provide an explanation about what the bill does not apply to, not because it was intended to have any legal effect. As we have seen, if the bill did seek to alter or modify parliamentary powers, privileges or immunities, the alteration would need to be specified so that it could act as a declaration for the purposes of section 49. In the absence of any such declaration, there can be no question of any change to the law of parliamentary privilege.

Clause 61 is therefore as redundant in the Wilkie Bill as clause 81 is in the PID Bill. Its presence in the Wilkie Bill, however, is probably a function of that bill's status as a private member's bill. In such bills it is not unusual to attempt to present a complete policy package that can be understood by its terms alone. This may mean that explanatory material is included in the bill that does not alter the legal effect of the scheme, or that drafting shortcuts are used, particularly on matters that are marginal to the central policy intent. Private members' and senators' bills are prepared with minimal resources and it is worth noting that a similar approach to explain the application of the scheme was used in the National Integrity Commissioner Bill 2010, introduced by former Senator Bob Brown, and the 2012 version of the bill introduced by Mr Bandt.[5] These bills also applied to members of both Houses and MOPS Act staff.

It is only in recent years that explanatory memoranda have become more common for private members' and senators' bills, including because of exhortations from the Scrutiny of Bills Committee. However, because of the resourcing issue, such documents are often rudimentary. The explanation for clause 61 in the Wilkie Bill is also a simple restatement of the clause (as it was for clause 4 of the National Integrity Commissioner Bills). The government explanatory memorandum to the PID Bill is no better. It should be, particularly if there is any rationale to the clause.

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5 Clause 4 of both bills provides:

> **4 Saving of powers, privileges and immunities**
> This Act does not affect the powers, privileges and immunities of each House of the Parliament, and of the members and committees of each House.

While such clauses may do no harm in isolation, the examples above demonstrate how a clause in one bill may be imitated in another without any analysis of its purpose. When government bills start imitating private members' bills, the virus is in danger of spreading. If such clauses become relatively common, then questions may arise about the effect of bills in which they are *not* used, leading to an argument that, in the absence of such a provision, the powers, privileges and immunities of the Houses may be modified *by necessary implication*.

While I may be accused of taking too purist a view, this is not a theoretical possibility. It has already been tried in relation to the Senate's dispute with the government in the 1990s about the effect of secrecy provisions, in general, and the secrecy provision in the then *National Crime Authority Act 1984*, in particular.[6] Conflicting opinions on the issue were produced in the context of attempts by the then Parliamentary Joint Committee on the National Crime Authority to obtain information from the NCA. A second opinion produced by the Australian Government Solicitor conceded that a general secrecy provision cannot limit the provision of information to inquiries by the Houses or their committees unless the provision is framed to have that effect. The opinion contended that a secrecy provision could have such an effect either by express words in the provision or by necessary implication drawn from the statute, a position not accepted by the Senate (see comments above on the 144th report of the Senate Privileges Committee).

The Australian Law Reform Commission, in its 2009 report, Secrecy Laws and Open Government in Australia, noted that the question whether parliamentary privilege could be abrogated by necessary implication was a controversial one on which no definitive view or court ruling had emerged (paragraphs 16.195-8, pp. 595-6).

In the absence of such a ruling, the Senate should be cautious about letting through any provision that could foster the potential limitation of its powers, privileges and immunities by implied rather than direct means. Such a stance is consistent with section 49 of the Constitution.

I would be happy to provide any further assistance or clarification that the committee requires.

Yours sincerely

(Rosemary Laing)

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6 For an account of the dispute, see *Odgers' Australian Senate Practice*, 13th edition, chapter 2, pp. 65-70.