Chapter 9

Members of Parliament

9.1 Since the impetus for reforming whistleblower protections in the 1990s, the relationship between legislated whistleblower protections, the law of parliamentary privilege, and Members of Parliament has been of interest.

9.2 This chapter summarises the work of previous parliamentary committees and the committee's own consideration of the following areas:

- disclosures about Members of Parliament;
- disclosures by Members of Parliament;
- disclosures to Members of Parliament;
- disclosures to parliamentary committees; and
- disclosures about, to and by staff of Members of Parliament.

9.3 For simplicity, unless otherwise specified, this report will refer collectively to Senators and Members of the House of Representatives as Members of Parliament.

Background

9.4 This section provides an overview of previous inquiries and reviews of whistleblower protections and is divided into four time frames: 1994; 2009; 2012–2013; and 2016–2017.

1994

9.5 In 1994 a Senate Select Committee on Public Interest Disclosures (Senate Select Committee) examined the potential involvement of the Parliament and Members of Parliament in whistleblowing. The Senate Select Committee considered suggestions including a parliamentary joint committee to oversee a whistleblower agency and a parliamentary commissioner. The Senate Select Committee also noted a proposal to allow for disclosures to a parliamentary committee, where the parliamentary committee had already undertaken an inquiry into a related matter.[1] The Senate Select Committee noted that in 1994, the Senate Finance and Public Administration Committee considered that such a proposal would be undesirable:

> …a parliamentary inquiry into a whistleblowing episode can easily elevate the status and significance of the episode above any level that could be justified on its merits. Parliamentary committees, in any case, have no power to rectify any malpractice they might find. To the extent that parliamentary involvement would be desirable in a whistleblowing episode,

1 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. 33–34.

> it would best take the form of a committee review of a report on the episode by an independent body.[2]

9.6 The Senate Select Committee recommended the involvement of Members of Parliament to a board to oversee a whistleblower protection agency:

> Parliamentary involvement should be included by the appointment of a Senator and Member of the House of Representatives. The Member should be a government nominee and the Senator a non-government nominee or alternatively the Parliamentary members should include a government and non-government nominee.
>
> Members of the Board should be appointed for a period of three years, with eligibility for reappointment to a second term only.[3]

2009

9.7 Following a broadly based inquiry into public sector whistleblower protections, in 2009 the House of Representatives Standing Committee on Legal and Constitutional Affairs, recommended that:

- Members of Parliament be included as a category of alternative authorised recipients of public interest disclosures;
- if Members of Parliament become authorised recipients of public interest disclosures, the Australian Government propose amendments to the Standing Orders of the House of Representatives and the Senate, advising Members of Parliament to exercise care to avoid inappropriate influence of investigations and public identification on whistleblowers and alleged wrongdoers;
- the Public Interest Disclosure Bill provide that nothing in the Act affects the immunity of proceedings in Parliament under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*;
- parliamentary staff be included in the definition of people who are entitled to make a protected disclosure as a 'public official'; and
- the Commonwealth Ombudsman be the authorised authority for receiving and investigating public interest disclosures made by employees under the *Members of Parliament (Staff) Act 1994*.[4]

9.8 In making those recommendations that committee noted that:

> The privilege of freedom of speech in Parliament and the protection of communications between citizens and Members of Parliament is a

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2 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, p. 111.

3 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. 113–114.

4 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. xx–xxv.

> fundamental feature of Parliamentary democracy in Australia and is enshrined to some extent in the *Parliamentary Privileges Act 1987*. It is not the intention of the Committee that public interest disclosure legislation interfere with this important democratic feature.[5]

9.9 The House of Representatives Standing Committee on Legal and Constitutional Affairs also noted that it is not common for legislation in other jurisdictions to include parliamentarians as authorised recipients of public interest disclosures. However, some examples include:

- *Whistleblowers Protection Act 1994* (Qld);
- *Whistleblowers Protection Act 1993* (SA);
- *Protected Disclosures Act 1994*, (NSW); and
- *Protected Disclosures Act 2000* (New Zealand).[6]

2012–2013

9.10 In March 2013, the Public Interest Disclosure Bill 2013 (PID bill) was introduced to the House of Representatives.[7] The House of Representatives Standing Committee on Social Policy and Legal Affairs considered both the PID bill and Mr Andrew Wilkie's private member bills. That committee tabled an advisory report in March 2013, recommending that the PID bill be passed.[8] That committee also noted that:

- Mr Wilkie's bills proposed to extend whistleblower protections to disclosures:
  - about misconduct by Members of Parliament;
  - by Members of Parliament and their staff; and
- under the PID bill Members of Parliament and their staff are not considered to be public officials.[9]

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5 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 165.

6 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 157.

7 House of Representatives, *Votes and Proceedings*, No. 160, 21 March 2013, p. 2198.

8 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report, Public Interest Disclosure (Whistleblower Protection) Bill 2012, Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012, Public Interest Disclosure Bill 2013*, May 2013, p. xi.

9 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report, Public Interest Disclosure (Whistleblower Protection) Bill 2012, Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012, Public Interest Disclosure Bill 2013*, May 2013, pp. 19–20, 49.

9.11 The Senate Standing Committee for the Scrutiny of Bills raised a number of questions about the PID bill, but did not draw attention to any matters related to the bill's application to Members of Parliament.[10]

9.12 The Senate Legal and Constitutional Affairs Legislation Committee considered the provisions of the PID bill including the impact on Members of Parliament and their staff. That committee noted that the definition of 'public official' in the bill did not include Members of Parliament or their staff and therefore:

- Members of Parliament and their staff would be unable to make public interest disclosures; and
- their behaviour or conduct could not be the subject of a public interest disclosure pursuant to the legislation.[11]

9.13 While a number of submitters to that inquiry argued for the inclusion of Members of Parliament and their staff, that committee also noted views from the then government that the appropriate supervision of Members of Parliament is by the Parliament.[12]

9.14 Following a recommendation of the 2009 House of Representatives Standing Committee on Legal and Constitutional Affairs, the PID bill included clause 81 which attempted to clarify that clause 26 did not affect the power privileges and immunities of Parliament.[13] After considering a range of views and clarifying that the advice to the 2009 inquiry from the former Clerk of the Senate and the acting Clerk of the House of Representatives related to 'express statutory provisions', the committee recommended removing clause 81 from the Bill (which did not contain an express provision),[14] following advice from the Clerk of the Senate:

> [I]f 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.
>
> …the Senate should be cautious about letting through any provision that could foster the potential limitation of its powers, privileges and immunities

10 Senate Standing Committee for the Scrutiny of Bills, *Sixth report of 2013,* 19 June 2013, pp. 225–230; *Alert Digest No. 5 of 2013,* pp. 79–81; *Alert Digest No. 6 of 2013,* pp. 67–68.

11 Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013 [Provisions]*, June 2013, pp. 25–26.

12 Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013 [Provisions]*, June 2013, pp. 5, 27–28.

13 Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013 [Provisions]*, June 2013, p. 28.

14 Senate Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Bill 2013 [Provisions]*, June 2013, pp. 28–30, 35.

> by implied rather than direct means. Such a stance is consistent with section 49 of the Constitution.[15]

9.15 Clause 81 was removed from the PID bill before it was passed and became the PID Act.[16]

2016–2017

9.16 In October 2016 the government released the Moss Review of the effectiveness and operation of the PID Act. The Moss Review noted that while the PID Act is not intended to capture allegations of wrongdoing by, or about, Members of Parliament, some submissions to the review cast doubt upon whether the legislation has achieved this intention. The submissions suggested that Ministers exercising statutory powers may be public officials under the PID Act, and people employed under the *Members of Parliament (Staff) Act 1984* could be contracted service providers. The Moss Review went on to argue that:

> While the actions of Ministers 'with which a person disagrees' are explicitly excluded from the meaning of disclosable conduct (s.31(b)(i)), this provision is too narrowly drafted to exclude Ministers or staff members from the operation of the PID Act entirely.[17]

9.17 The Moss Review also noted that the Commonwealth is the only jurisdiction in Australia which intends to exclude scrutiny of Members of Parliament and/or their staff members from similar legislation.[18] The Moss Review noted that:

> The Review considers that members of Parliament and their staff members require robust scrutiny. Their role within the Parliament and Australia's system of government relies upon their integrity and accountability to the people of Australia for the decisions they make. While the existing institutions to scrutinise wrongdoing by members of Parliament and their staff have extensive powers, they are also inherently politicised and rarely used without sustained public media coverage. For Ministerial staff, the political nature of their role is reflected within the Code of Conduct for Ministerial Staff which explicitly notes that any sanctions will only be imposed after consultation with the relevant Minister by the Prime Minister's Chief of Staff. The employment of other staff members relies upon the satisfaction of the parliamentarian they serve for their continued tenure. The rigour or otherwise of these arrangements is ultimately a matter for the Parliament.[19]

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15 Dr Rosemary Laing, Clerk of the Senate, *Submission 1 to the Inquiry into the Public Interest Disclosure Bill 2013 [Provisions]*, Senate Legal and Constitutional Affairs Legislation Committee, June 2013, pp. 5, 7.

16 PID Act, p. 78.

17 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, 15 July 2016, p. 62.

18 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, 15 July 2016, p. 62.

19 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, 15 July 2016, p. 63.

9.18 The Moss Review recommended that:

- the PID Act be amended to clarify that its provisions do not apply to reports about alleged wrongdoing by Members of Parliament and their staff, or allegations made by them; and
- consideration be given to extending the application of the PID Act to Members of Parliament or their staff if an independent body with the power to scrutinise their conduct is created.[20]

9.19 In December 2016 the Treasury consultation paper on its review of tax and corporate whistleblower protections in Australia sought the views of stakeholders on, amongst other things, whether:

- whistleblowers should be allowed to make a disclosure to Members of Parliament, and what criteria should apply; and
- whether tax whistleblowers should only be protected for disclosure to the Australian Tax Office and not to other external parties including Members of Parliament.[21]

9.20 At the time of drafting this report, Treasury had not published the submissions or an outcome from the consultation process.

The current inquiry

9.21 In this inquiry evidence that the committee received, insofar as it mentioned Members of Parliament, was about disclosures to Members of Parliament with a small number of comments on disclosures about Members of Parliament.[22] Therefore, in this section the committee will summarise the evidence it received about disclosures to Members of Parliament, but notes that, in order to clearly understand the potential interplay between whistleblower protection laws and parliaments, it is useful to distinguish between the following:

- disclosures by Members of Parliament;
- disclosures about wrong doing by Members of Parliament;
- disclosures to parliamentary committees; and
- disclosures about, to and by staff of Members of Parliament.

20 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, 15 July 2016, p. 63.

21 Treasury, consultation paper, *Review of tax and corporate whistleblower protections in Australia*, December 2016, pp. 23, 35.

22 See for example: Maurice Blackburn Lawyers, *Submission 69*, p. 5.

Evidence received about disclosures to Members of Parliament

9.22 Some submitters and witnesses supported protection for disclosures to Members of Parliament.[23]

9.23 When asked about disclosures to Members of Parliament, Dr Brand told the committee that having 'a good clearing house advisory service offered through an office of the whistleblower' should obviate much of the need for whistleblowers to go to third parties such as Members of Parliament.[24]

9.24 The GIA did not support extending whistleblower protections for disclosures to Members of Parliament.[25] The GIA explained:

> Parliamentarians have the benefit of [parliamentary] privilege which allows them to publicise whistleblower disclosures with no risk of defamation to themselves. However, such actions may unfairly prejudice any subsequent investigation into the whistleblower disclosures.[26]

9.25 DLA Piper held a similar view and noted that Members of Parliament do not have the same capacity to conduct investigations as regulators.[27]

9.26 The Law Council informed the committee that on balance it considers that:

- disclosures to third parties such as Members of Parliament should not be protected under the proposed reforms; and
- entities to which disclosures may be made should only include those which will treat the information confidentially.[28]

9.27 As discussed earlier, the advice of the former Clerk of the Senate to the 2013 Senate Legal and Constitutional Affairs inquiry appeared to settle the uncertainty relating to application of the PID Act to disclosures to Members of Parliament.[29] However, the committee notes that this inquiry has received further suggestions for changes and is also considering private sector whistleblower protections.

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23 Whistleblowers Australia, *Submission 59*, p. 4; Mr Richard Wilkins, Submission 61, p. 4; Mr Howard Whitton, Director, The Ethicos Group, *Committee Hansard*, 23 February 2017, p. 14; Mr Joshua Bornstein, Director/Principal, Maurice Blackburn Lawyers, *Committee Hansard*, 27 April 2017, p. 45.

24 Dr Vivienne Brand, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 53.

25 Ms Maureen McGrath, Chair, Legislation Review Committee, Governance Institute of Australia, *Committee Hansard*, 28 April 2017, p. 25, 30.

26 Governance Institute of Australia, *Submission 54*, p. 12.

27 DLA Piper, *Submission 8*, pp 4–5.

28 Law Council of Australia, *Submission 52*, pp. 13, 26.

29 Dr Rosemary Laing, Clerk of the Senate, *Submission 1 to the Inquiry into the Public Interest Disclosure Bill 2013 [Provisions]*, Senate Legal and Constitutional Affairs Legislation Committee, June 2013, pp. 5, 7.

The committee therefore sought further advice from the Clerks of the Senate and the House of Representatives.

Advice from the Clerks

9.28 In order to give prominence and easy future access to the submissions by the Clerks on the relationship between whistleblower protections and Parliamentary Privilege, the committee includes key excerpts from both submissions in the sections below and provides the complete submissions in Appendices 3 and 4 of this report.

Clerk of the House of Representatives

9.29 Mr David Elder, Clerk of the House of Representatives, provided the following advice to the committee:

> **Disclosures about wrongdoing-four interactions**
>
> I am supposing that the disclosures you refer to relate to wrongdoing in the sense of 'disclosable conduct' within s.29 of the PID Act and not to personal or professional disagreements and not matters that could appropriately be dealt with in a less formal or public way.
>
> **1. Disclosures about wrongdoing by Members of Parliament or their staff**
>
> It is clear from debate during the passage of the PID Act that parliament itself is seen as the most appropriate venue for allegations about any such wrongdoing. If a disclosure of wrongdoing were made about a Member, I would expect it would most likely be made by another Member who ensured that it fell within 'proceedings in Parliament', as discussed above, and that he or she complied with House rules and practices when making the disclosure. I would also expect that disclosures about wrongdoing by staff of Members would be made at least in the first instance to the employing Member. Ministerial staff are subject to a Code of Conduct for Ministerial Staff.
>
> **2. Disclosures by Members of Parliament or their staff**
>
> If a disclosure of wrongdoing were to be made publicly by a Member, I would expect the Member who wanted to enjoy the protection of parliamentary privilege, to ensure that it fell within 'proceedings in Parliament', as discussed above, and that he or she complied with House rules and practices when making the disclosure. I would also expect a staff member of a Member to pass on to the Member disclosures that had been made and in doing so to seek as far as possible to bring the disclosure within 'proceedings in Parliament'. It is possible although unlikely that a Member or staff member could fall within the category of 'public official' by being former staff of agencies covered by the PID Act and bring a disclosure within the terms of a public interest disclosure under s.26 of the Act. If so I expect they would make an internal disclosure to an appropriate person in their former agency, and if necessary an external disclosure or emergency disclosure to any person other than a foreign public official. If seeking to rely on the protections of the PID Act, the Member or staff member would need to comply with the PID Act.

3. Disclosures to Members of Parliament or their staff

In making disclosures to a Member or their staff, a person may or may not fall within the protection of the umbrella of 'proceedings in Parliament' depending on the circumstances surrounding the communication. As already noted, what is encompassed by 'proceedings in Parliament' and, in particular, what is ' or purposes of or incidental to' the transacting of the business of a House or committee is not entirely clear. If the allegations were serious, it may be that a Member would endeavour to ensure the disclosures fell with the umbrella of 'proceedings in Parliament.

4. Disclosures to parliamentary committees

During their inquiries, House committees and joint committees sometimes receive submissions and oral evidence from people who include allegations about perceived wrongdoing of Commonwealth government departments and agencies and staff. The protection of absolute privilege applies to such submissions and to such evidence in accordance with the provisions of the Parliamentary Privileges Act. House standing orders 236 (power to call for witnesses and documents), 242 (publication of evidence), and 256 (witnesses entitled to protection) may also be relevant to disclosures of wrongdoing to committees.

Section 12 of the Parliamentary Privileges Act provides that a person shall not, by fraud, intimidation, force or threat, ... or by other improper means, influence another person in respect of any evidence given or to be given, or induce another person to refrain from giving any such evidence. So, in addition to the immunity available in respect of evidence that falls within 'proceedings in Parliament', this statutory offence provision complements the protections available to witnesses who might make disclosures to parliamentary committees.[14]

Future: the implications of including Members as authorised recipients of disclosures and the subject of public interest disclosures.

The Committee would be aware of some criticisms surrounding the omission of Members in particular, but also their staff, from coverage of the PID Act as recipients of disclosures and the subject of disclosures.

The inclusion of Members and Senators as authorised recipients of disclosures would increase the number of people to whom disclosures could be made and acknowledge their role as representatives. I am not sure that Members necessarily would consider they have the requisite resources to undertake such a significant role in addition to their existing responsibilities. The PID Act is complex and its requirements are rigorous. Members do not have the stable, institutional resources enjoyed by other agencies included in the Act. They also operate in an environment that is founded on freedom of speech and political difference and it may be difficult to maintain and be seen to maintain necessary confidentiality and to avoid perceptions that political considerations could have an influence on disclosures and the way they were treated.

In his Review of the PID Act, Mr [Philip] Moss AM noted that the Commonwealth is the only Australian jurisdiction to exclude scrutiny of members and their staff from similar legislation and compared the range of

> provisions relating to Members and staff in other jurisdictions. Mr Moss considers that allegations of wrongdoing by or about members or their staff should be scrutinised by Parliament, for example through the House Standing Committee of Privileges and Members' Interests and the Senate Standing Committee of Privileges. He also notes submissions were made about the incomplete exclusion of members and their staff, with Ministers exercising statutory powers possibly being considered to be public officials, and MOPS Act staff possibly being considered to be contracted service providers and has called for clarification.
>
> While Mr Moss considers that members and their staff should be subject to robust scrutiny, he also notes the likelihood of politicisation and extensive media coverage that would follow alleged wrongdoing. Mr Moss recommends that the Act be amended to make clear that it does not apply to reports about alleged wrongdoing by Senators, Members and their staff, or allegations made by them. He also recommends that consideration be given to extending the application of the PID Act to members or their staff if an independent body with the power to scrutinise their conduct is created.
>
> My view is that, at present, issues relating to the conduct of members, unless they amount to criminal conduct, are best dealt with by the Parliament, and the relevant House to supervise, in particular through the relevant Privileges committee. The continued oversight of members' conduct by parliament would perhaps be considered to be more effective if Members and Senators were subject to a Code of Conduct. I draw the Committee's attention to the Discussion Paper presented on 23 November 2011 following the House of Representatives Standing Committee of Privileges and Members' Interests inquiry into a Draft Code of Conduct for Members of Parliament. With respect to members' staff, I agree that their role is substantially different from other staff in the public sector and so I consider that, for now, it is not appropriate for them to be covered by the PID Act as recipients of disclosures or as the subjects of disclosures.[30]

Advice from the Clerk of the Senate

9.30 Mr Richard Pye, Clerk of the Senate, provided the following advice to the committee:

> Senate Clerks have previously made submissions on proposals for "public interest disclosure" schemes. For instance, in December 2008, Harry Evans submitted to a House of Representatives committee inquiry that he considered it "appropriate that members of the Parliament be authorised recipients of public interest disclosures". Similarly, in my view, there is no obstacle to including, in a properly-designed scheme, mechanisms for disclosures about, by or to members (or their staff), provided the distinction between privilege law and the whistleblowers protection regime is maintained.

30 Mr David Elder, Clerk of the House of Representatives, *Submission 75*. See appendix 4 of this report.

I make the following observations about maintaining that distinction in different situations.

Disclosures by or about members

If it is intended that the regime include disclosures by or about members (and their staff), then conduct which forms part of parliamentary proceedings should be carved out of the definition of disclosable matters, to preserve the operation of the privilege law.

Generally, participants in parliamentary proceedings are protected by privilege law in two ways. The first involves the use of the contempt powers of the two Houses, whose purpose is to protect the ability of the Houses, their committees and members to carry out their functions without improper interference. For instance, the Senate may determine that conduct which obstructs or impedes its work, or that of its members, amounts to a contempt — that is, an offence against the Senate — and may punish a person for undertaking such conduct. It would be highly undesirable to limit or interfere with the powers of the two Houses to deal with such matters by overlaying a statutory disclosure scheme in relation to those proceedings.

The other way participants may be protected by parliamentary privilege is by a legal immunity descended from Article 9 of the Bill of Rights, 1688. Parliamentary privilege in this sense is an evidentiary rule that prevents "proceedings in Parliament" from being used in courts or tribunals for prohibited purposes; traditionally, for the purposes of "questioning or impeaching" those proceedings. Both of those terms are defined in section 16 of the *Parliamentary Privileges Act 1987*. This prohibition sits at the core of parliamentary freedom of speech. It protects parliamentary proceedings from external interference. Again, it would be highly undesirable to undermine this protection by constraining the operation of those provisions.

In relation to conduct other than in connection with parliamentary proceedings, no doubt an appropriate regime for disclosures about members and their staff could be devised. For instance, in his Public Interest Disclosure Bill 2007 [2008], former Senator Andrew Murray proposed that the Presiding Officers of the Commonwealth Parliament be authorised to receive disclosures about members of their respective Houses.

In relation to disclosures by members, provided such disclosures are made in accordance with the process prescribed by the statute, there is no reason for disclosures by members and their staff to be handled differently than disclosures made by others.

Disclosures to members

If members are to be designated as authorised recipients in a statutory disclosure scheme, their roles and responsibilities must be adequately defined by the statute in a manner which does not affect (or derogate from) the law of parliamentary privilege, as explicated by the Parliamentary Privileges Act. In this regard, Harry Evans submitted to the House Legal and Constitutional Affairs Committee in 2008:

It is important that this aspect of parliamentary privilege be left to operate in conjunction with, and unaffected by, any statutory regime for public interest disclosures to members of Parliament. The ability of citizens to communicate with their parliamentary representatives, and the capacity of those representatives to receive information from citizens, should not be restricted, inadvertently or otherwise, by a statutory public interest disclosure regime.

There are several points to note about privilege and a statutory disclosure regime working together.

First, a non-derogation clause may be appropriate, although this would depend on the design of the statute. In this regard I note that, in its report on the Public Interest Disclosure Bill 2013, the Legal and Constitutional Affairs Legislation Committee endorsed the advice of the then Clerk of the Senate, Dr Rosemary Laing, that a non-derogation clause is necessary and appropriate only where a statute expressly provides for disclosures to be made to members, as such a provision may otherwise be interpreted to modify, alter or affect the powers, privileges and immunities of the Houses or their members [see paragraphs 3.21–3.24, under the heading *Clause 81 and preservation of parliamentary privilege*].

Secondly, it is useful to keep in mind that different roles and protections may co-exist. For instance, as noted above, former Senator Murray's bill would have authorised the Presiding Officers to receive disclosures about members of their respective Houses. The Presiding Officers' powers, functions and responsibilities here – like those of other authorised recipients – would initially be those specified in the statute under which the regime is to operate. That is, they would be administrative, rather than parliamentary, in nature. If a Presiding Officer subsequently put such a disclosure before their House, or a parliamentary committee, the usual protections of parliamentary privilege would apply, and the matters would be dealt with in accordance with the procedures of the House. Similarly, the powers, functions and responsibilities of other members, if designated as authorised recipients, would initially be those specified in the statute, but any subsequent use of disclosures in connection with parliamentary proceedings would attract absolute privilege. In those circumstances, a person making a disclosure may receive both the protections adhering under the statute and the protection of privilege.

Finally, it may be appropriate for addition considerations to apply before members were authorised to receive disclosures. For instance, former Senator Murray's bill provided a mechanism for members to receive “external disclosures” only in specified exceptional circumstances, including where “internal disclosures” to proper authorities (e.g., heads of affected agencies) had not been adequately dealt with. This would be a matter for consideration in developing the policy detail.

Disclosures to parliamentary committees

The difficulty of maintaining the distinction between privilege and other statutory protections where parliamentary committees are involved militates against their inclusion as authorised recipients. Nevertheless, as noted above, the Presiding Officers and other members of parliament in receipt of

> disclosures may initiate the reference of disclosures to committees, or otherwise raise them in parliamentary proceedings. In those circumstances, persons making disclosures may be protected both under the statute and by parliamentary privilege.
>
> No doubt there would also be a role for Senate committees in overseeing any proposed statutory regime, particularly where an authority is charged with administering the disclosure regime.
>
> **Conclusion**
>
> Notwithstanding my view that privilege law and statutory whistleblowers protection regime may co-exist, the complexities of defining and maintaining the distinctions between them should not be underestimated. No doubt there will be opportunities to address these matters in more detail if and when relevant legislation is put before the Parliament.[31]

Committee view

9.31 The committee notes that while some submitters supported extending whistleblower protections to disclosures made to Members of Parliament, several strong arguments were made against pursuing this course of action.

9.32 In particular, the committee notes that parliamentary privilege affords parliamentarians the ability to publicise whistleblower disclosures with no risk of defamation action being taken against the parliamentarian. At the same time, however, such publicity may prejudice any subsequent investigation into the whistleblower disclosures, as well as potentially leading to the exposure of the whistleblower's identity.

9.33 In this regard, the committee also notes the argument that Members of Parliament do not have the same capacity as regulators to investigate matters, and furthermore, that it is not the function of parliamentary committees to seek to resolve matters.

9.34 Noting the evidence from the Clerks of both Houses of Parliament, the committee draws attention to the inherent complexities that would arise in trying to draw and maintain the distinction between privilege law and a statutory whistleblower protection scheme. Being cogniscent of these complexities, the committee is cautious about suggesting any change that might constrain either the understanding or the operation of parliamentary privilege.

9.35 Noting the recommendations of the Moss Review and the findings of the 2009 inquiry into whistleblowing conducted by the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Committee recommends that consideration be given to extend the application of whistleblower protections to federal Members of Parliament and their staff if an independent body with powers to scrutinise them is created.

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31 Mr Richard Pye, Clerk of the Senate, *Submission 74*. See appendix 3 of this report.

9.36 The committee also considers that external disclosures should be protected if they are made to a federal Member of Parliament or their staff (see Chapter 8).