

SENATE STANDING COMMITTEE OF PRIVILEGES

Correspondence on the application of parliamentary privilege to working papers and reports from the Australian National Audit Office

1. Letter to Mr Ian McPhee, Auditor-General, 15 March 2011
2. Statement by Mr Ian McPhee to Senate Privileges Committee meeting, 24 March 2011
3. Letter to Senator the Hon David Johnston, Chair Senate Privileges Committee, 31 March 2011
4. Letter to Senator the Hon David Johnston, from Dr Rosemary Laing, Clerk, 12 April 2011
5. Letter to Mr Ian McPhee from Senator the Hon David Johnston, 12 May 2011

No. of Pages: 9



AUSTRALIAN SENATE
CANBERRA ACT

COMMITTEE OF PRIVILEGES

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15 March 2011

Mr Ian McPhee
Auditor-General
Australian National Audit Office
GPO Box 707
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email to: ian.mcphee@anao.gov.au

Dear Mr McPhee,

At a recent meeting of the Senate Committee of Privileges, the committee's attention was drawn to recommendations of the 419th report of the Joint Committee of Public Accounts and Audit, *Inquiry into the Auditor-General Act 1997*. The committee's attention was, in particular, drawn to recommendation 8, which suggests that the privileges committees of each house examine in more detail the application of parliamentary privilege to ANAO draft reports and working papers.

Before deciding whether to embark upon such an examination, the committee has agreed it would be valuable to hear from you whether you have any concerns about the application of privilege to such documents and, if so, the nature and extent of those concerns.

The committee has therefore asked me to invite you to attend its next meeting on **Thursday 24 March 2011** to brief the committee on this matter. If this is not possible or convenient, you may wish to consider whether you might be able to send a senior ANAO officer to brief the committee in your place.

I'd be grateful if you could let me know whether you, or another officer, will be able to attend this meeting. Please also let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

Richard Pye
Secretary,
Senate Committee of Privileges

Senate Privileges Committee briefing, Thursday 24 March 2011

Statement by Mr Ian McPhee, Auditor-General

I would like to firstly thank the Committee for its prompt consideration of this matter so soon after the tabling of Report 419 of the Joint Committee of Public Accounts and Audit.

The question of whether parliamentary privilege applies to ANAO draft reports, extracts of draft reports and working papers has arisen in recent JCPAA inquiries into the Auditor-General Act 1997.

In practice, the question arises when the ANAO is served with a subpoena to produce documents relating to one of our audit reports which we receive from time to time. As I understand it, any documents covered by Parliamentary Privilege are not provided by the Commonwealth in responding to a subpoena.

We have received differing advice on whether our draft reports, extracts of draft reports and working papers could be considered to be covered by Parliamentary Privilege.

We did obtain advice in 2001 from the then Solicitor-General (David Bennett) that, amongst other things, concluded that we could proceed on the basis that the working papers created by the Auditor-General for the purposes of preparing audit reports or financial statement audit reports fall within the expression 'proceedings in Parliament' (as used in s16(2) of the Parliamentary Privileges Act) – this position was canvassed in JCPAA Report 386 of August 2001.

Subsequently, on receiving a subpoena in relation to an audit report in 2008 we received advice from a Mr A Robertson S.C. suggesting that audit working papers 'as a class' would not be 'proceedings in Parliament' but that a particular working paper may be. In view of this advice the ANAO did not claim parliamentary privilege in relation to the documents in question but relied on the confidentiality provisions of the Auditor-General Act and other grounds to argue against producing the documents sought.

We do see some merit in having this matter clarified, as it is likely that we will continue to be served subpoenas from time to time in relation to our work.



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31 March 2011

Senator the Hon David Johnston
Chair
Senate Standing Committee of Privileges
Parliament House
CANBERRA ACT 2600

Dear Senator Johnston

I am writing to thank you for the opportunity to meet with the Committee on 24 March 2011 and for the Committee's prompt consideration of the question of the application of Parliamentary Privilege to the working papers and draft reports of the Australian National Audit Office (ANAO), following the recommendation by the Joint Committee of Public Accounts and Audit (JCPAA).

Further to the meeting, with the assistance of the Australian Government Solicitor, we have prepared for the Committee's consideration the following provision that could be included in the Auditor-General Act:

(1) For the purposes of section 16 of the *Parliamentary Privileges Act 1987*, "proceedings in Parliament" includes the preparation of any of the following reports by the Auditor-General that are tabled in the Parliament:

- (a) a report on a financial statement, performance audit, review or examination referred to in Division 1, 2 and 2A⁽¹⁾ of Part 4 of this Act;
- (b) a report under s 25 of this Act.

(2) A reference in subsection (1) to the preparation of a report includes a reference to the preparation of a draft of the report and to the preparation of working papers and other documents for the purposes of, or incidental to, the preparation of the report or draft of the report.

(1) Division 2A has been proposed in the Private Member's Bill introduced by Mr Oakeshott.

The provision covers draft reports and working papers, in whatever form, produced in the course of preparing financial statement audit reports and performance audit reports that are tabled in the Parliament. In the case of those latter reports, they are included in Commonwealth entities' annual reports that are tabled in the Parliament and subject to a summary report to the Parliament late each calendar year.

Based on the legal advice we have received, for draft reports and working papers to be considered to be 'Proceedings in Parliament', as expressed in s16(2) of the *Parliamentary Privileges Act 1987*, an amendment of the Auditor-General Act should be restricted to documentation that relates to an audit report that is tabled in the Parliament. This documentation covers the large majority of our work, although we do issue a small number of audit reports on entity financial statements and other management information that are not tabled in the Parliament. These latter reports are requested by entities and are in addition to the audit reports required by statute.

In the light of the JCPAA's recommendation and the uncertainty that has surrounded this issue for some time, I would be in favour of an amendment of the Auditor-General Act along the lines of the above provision. Subject to the Committee's position and Government support, if timing permits such a provision could be included in amendments to Mr Oakeshott's Private Member's Bill, *Auditor-General Amendment Bill 2011*, that the Government has indicated it intends to introduce when the Bill is next debated.

I am also attaching for the Committee's information, copies of the two legal opinions we have received in relation to this matter that I mentioned at the meeting with the Committee.

I have copied this covering letter to the Prime Minister, the Special Minister of State and the Chair of the JCPAA, Mr Oakeshott for their information.

Yours sincerely



Ian McPhee

Attch.



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12 April 2011

Senator the Hon David Johnston
Chair
Committee of Privileges
Parliament House
CANBERRA ACT 2600

Dear Senator Johnston

Application of parliamentary privilege to Australian National Audit Office

I refer to Mr Pye's letter of 1 April 2011 in which the committee seeks my views on the application of parliamentary privilege to Australian National Audit Office (ANAO) draft reports and working papers created during the preparation of audit reports produced for tabling in the Parliament.

I have also considered the correspondence to the committee from the Auditor-General, dated 31 March 2011 proposing an amendment to the *Auditor-General Act 1997*, and the legal opinions attached to that correspondence: the 2001 opinion from the then Commonwealth Solicitor-General, Mr David Bennett, AO, QC and the 2008 opinion from a Mr A. Robertson, SC.

The statement submitted by the Auditor-General as part of his briefing to the committee on this matter characterises the 2001 advice as concluding:

that the working papers created by the Auditor-General for the purposes of preparing audit reports or financial statement audit reports fall within the expression 'proceedings in Parliament' (as used in s16(2) of the Parliamentary Privileges Act)...

This conclusion is consistent with the long-standing view of the Senate of the scope of parliamentary privilege, and with the legislative scheme set out by the *Parliamentary Privileges Act 1987*.

The absolute immunity afforded by parliamentary privilege applies to proceedings in Parliament. The famous formulation of this protection is in article 9 of the Bill of Rights, 1688, which states:

that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament...

Article 9 applies to the Houses of the Commonwealth Parliament, by way of section 49 of the Constitution, and is now embodied in section 16 of the Parliamentary Privileges Act. Subsection 16(2), which defines the phrase ‘proceedings in Parliament’, relevantly provides:

proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes...

- (b) the presentation or submission of a document to a House or a committee;
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business;

There is no doubt the definition captures the presentation of a document to a House. Whether draft reports and working papers are also covered by privilege turns on the question whether their preparation is ‘for the purposes of or incidental to’ the presentation of such a document.

I note that the 2001 opinion was the subject of discussions between the then Acting Auditor-General, Mr McPhee, and my predecessor Mr Evans in 2002, and correspondence from Mr McPhee to the President of the Senate, tabled on 12 November 2002. The context was a decision of the ANAO to claim parliamentary privilege in relation to working documents it had created during the course of a performance audit conducted in 1997. The basis for the claim was that the documents fell within the term ‘proceedings in parliament’ for the purposes of section 16(2) of the Act. In a letter to the President tabled in the Senate on 14 June 2005 Mr Evans stated:

I advised that this claim was well founded, because the only purpose of an ANAO audit is to make a report to the Parliament, and the whole process of reporting to the Parliament is part of proceedings in Parliament. This distinguishes ANAO from other bodies whose reports may be presented to Parliament only incidentally.

The statement from the Auditor-General to the committee submits that the status of audit working papers was thrown into doubt by the 2008 advice, ‘suggesting that audit working papers “as a class” would not be “proceedings in Parliament” but that a particular working document may be’.

In my view the doubt as to the application of privilege to the draft reports and working papers in question is overstated. The 2008 opinion canvasses subsection 16(3) of the Parliamentary Privileges Act (which prevents the use of parliamentary proceedings in court proceedings for a wide spectrum of purposes) and subsection 16(4) (about *in camera* evidence, a provision which seems to me to have no relevance to the matter on which advice was sought). The opinion simply dismisses the application of the Act without explanation. It also fails entirely to consider subsection 16(2) of the Act, which is the basis for any claim of privilege in relation to such documents. As such, I cannot see that the opinion dislodges the reasoned conclusion drawn in the 2001 opinion of the Solicitor-General.

Nevertheless, the desire for certainty in this matter is understandable. The amendment suggested in the Auditor-General’s correspondence would appear to provide this. It does not seek to extend the coverage of privilege, and the question of whether a particular document is covered by privilege will appropriately turn on whether the creation of the document is properly connected to the preparation of a report to be tabled in the parliament.

My one reservation about the proposed amendment is that it may raise an implication that documents produced by other agencies in similar circumstances might not be covered by privilege. As the intent of the amendment is to clarify the position of such documents created by the ANAO, my preference would be to see it reframed as an amendment 'for the avoidance of doubt' (or, to use the modern drafting style, 'to avoid doubt'). This approach is consistent with the language of section 16 of the Parliamentary Privileges Act, language carefully chosen to prevent a restricted meaning being given to the definition of 'proceedings in Parliament' and other article 9 terms as they are used in the different Australian jurisdictions and elsewhere.

I note, in passing, that the report of the Joint Committee of Public Accounts and Audit which raised this matter muddies the water by drawing a link between the status of the Auditor-General, under the *Auditor-General Act 1997*, as an independent officer of the Parliament and the application of parliamentary privilege to the Auditor's work. It is accepted that this status is symbolic. This is made clear by in subsection 8(2) of the Act, which provides that 'There are no implied functions, powers, rights, immunities or obligations arising from the Auditor-General being an independent officer of the Parliament.' There are no implications in the law of parliamentary privilege arising from this status.

Let me know if I can be of any further assistance in relation to this matter.



(Rosemary Laing)



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12 May 2011

Mr Ian McPhee
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Dear Mr McPhee,

Thank you for briefing the Senate Committee of Privileges recently on the recommendations of the Joint Committee of Public Accounts and Audit concerning the application of parliamentary privilege to ANAO draft reports and working papers. Thank you also for your letter of 31 March 2011 proposing that the matter be addressed with an amendment to the *Auditor-General Act 1997*, and the legal opinions attached to that correspondence: the 2001 opinion from the then Commonwealth Solicitor-General, Mr David Bennett, AO, QC and the 2008 opinion from a Mr A. Robertson, SC.

The committee has considered the information you provided and sought advice on the matter from the Clerk of the Senate, a copy of which is attached.

On the information before it, the committee considers that the doubt raised by the 2008 opinion as to the application of parliamentary privilege to draft reports and working papers is overstated. As the Clerk's advice notes, the 2001 opinion 'is consistent with the long-standing view of the Senate of the scope of parliamentary privilege, and with the legislative scheme set out by the *Parliamentary Privileges Act 1987*.' Recognising the desire for certainty, however, the committee is generally supportive of the proposed amendment.

The committee draws your attention, however, to the reservation spelled out in the Clerk's advice about the language of the amendment. The committee accordingly recommends that the amendment be reframed as an amendment 'for the avoidance of doubt' to prevent any unintended restriction of the meaning of the term 'proceedings in Parliament' in the *Parliamentary Privileges Act 1987* and in other applications of the law of parliamentary privilege.

I am sending a copy of this letter to the Chairs of the House of Representatives Privileges and Members' Interests Committee and the Joint Committee of Public Accounts and Audit, for their information.

Please let me know if the Privileges Committee can be of any further assistance in relation to this matter.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'David Johnston', written in a cursive style. The signature is positioned to the right of the typed name.

(David Johnston)
Chair