

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE NATIONAL ANTI-CORRUPTION COMMISSION (the Commission)

AND

THE ATTORNEY-GENERAL

THE PRESIDENT OF THE SENATE

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

PARLIAMENTARY PRIVILEGE

PART 1 – INTRODUCTION

1. The Commission is established by the Parliament, through the *National Anti-Corruption Commission Act 2022* (Cth) (“NACC Act”), as an independent statutory body with functions and powers to detect, investigate and prevent corrupt conduct in the Commonwealth public sector, including by Parliamentarians and their staff.
2. These include powers to give directions and notices to produce information and documents, to obtain and execute search warrants, to summons witnesses to give evidence at hearings, and to obtain authorisations and warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth).
3. Under section 274 of the NACC Act, nothing in that Act affects the law relating to the powers, privileges and immunities of each House of the Parliament, the members of each House, or the committees of each House and joint committees of both Houses (“Parliamentary Privilege”). Accordingly, the powers of the Commission are subject to and do not override Parliamentary Privilege.
4. The Parliament recognises that the Commission’s functions include the investigation of suspected corrupt conduct involving Parliamentarians and their staff and does not desire to inhibit the Commission’s ability to do so. The Commission desires to respect Parliamentary Privilege while exercising its functions, and recognises the role of the Parliament in determining matters of Parliamentary Privilege.
5. The purpose of this Memorandum of Understanding (MOU) is to establish agreed processes for the exercise of the Commission’s powers in circumstances where issues of Parliamentary Privilege could arise, in order to ensure that Parliamentary Privilege is respected while permissible action by the Commission to detect and investigate corrupt conduct is not inhibited.
6. Nothing in this MOU prevents an alternative approach to a Parliamentary Privilege issue being agreed between the parties, or between the Commission and an individual Parliamentarian.
7. In this MOU:
 - a. a reference to the Clerks includes Deputy Clerks;
 - b. “normally” means other than in exceptional circumstances. Exceptional circumstances may exist where compliance with the normal procedure would jeopardise the integrity of an investigation;
 - c. “overseeing Commissioner” means the National Anti-Corruption Commissioner or Deputy Commissioner with oversight of an investigation as referred to in clause 9;
 - d. “Parliamentarian” has the meaning given in the NACC Act, and includes a former Parliamentarian;

- e. "Parliamentary Privilege Issue" means a question as to whether information, communications, documents and things are subject to Parliamentary Privilege;
- f. "Potentially Privileged Material" means information, communications, documents and things which could reasonably be the subject of Parliamentary Privilege, including any information, documents and things which could reasonably be considered to have been prepared, communicated or obtained 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:
 - i. the giving of evidence before a House or a committee, and evidence so given;
 - ii. the presentation or submission of a document to a House or a committee;
 - iii. the preparation of a document for purposes of or incidental to the transacting of any such business; and
 - iv. the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published;
- g. "Presiding Officers" means the President of the Senate and the Speaker of the House of Representatives;
- h. "quarantine" means set aside and secure in secure storage devices and/or sealed exhibit bags, to which Commission investigators do not have access;
- i. "relevant Clerk" means the Clerk of the Senate or the Clerk of the House of Representatives, according to the House of which a Parliamentarian is a member; and
- j. "Staff Member" means a person employed in the office of a Parliamentarian under the *Members of Parliament (Staff) Act 1984* (Cth) and includes a volunteer and an intern, and a former occupant of any of these roles.

PART 2 – TRAINING AND OVERSIGHT

- 8. The Commission will develop Parliamentary Privilege training resources and ensure that staff who may, in the course of their duties, be exposed to Parliamentary Privilege Issues receive training about Parliamentary Privilege, including how to identify and manage Parliamentary Privilege Issues, and this MOU. The Commission will provide the Clerks with an opportunity to review and comment on its Parliamentary Privilege training resources.
- 9. Where the Commission commences a preliminary investigation or a corruption investigation that involves a Parliamentarian or Staff Member, the process will be subject to the oversight of the National Anti-Corruption Commissioner (Commissioner) or a National Anti-Corruption Deputy Commissioner (Deputy Commissioner), whose approval

must be obtained before any investigative strategy that could reasonably be anticipated to give rise to a Parliamentary Privilege Issue is implemented. The Overseeing Commissioner must be informed of all instances where a Parliamentary Privilege Issue arises in the course of the process.

PART 3 – DIRECTIONS AND NOTICES TO PRODUCE

10. Where the Commission issues a direction or notice to produce information, documents or things to a Parliamentarian or Staff Member, the direction or notice to produce will allow a reasonable time for compliance in all the circumstances, to enable the person to seek advice from the Clerk, Presiding Officer and/or a lawyer, and for a claim of Parliamentary Privilege to be made.
11. If a Parliamentarian or Staff Member wishes to claim that information, documents or things required to be produced are subject to Parliamentary Privilege, the Parliamentarian or Staff Member must inform the Commission and the relevant Clerk before the compliance time specified in the direction or notice that they wish to make a claim, and produce the information, documents or things subject to the claim to the relevant Clerk for safekeeping, pending resolution in accordance with Part 8 of this MOU.

PART 4 – SEARCH WARRANTS

12. Normally, the Commission will not execute search warrants on the person or premises of a serving Parliamentarian or Staff Member on a scheduled parliamentary sitting day, unless otherwise agreed with the Parliamentarian or the relevant Presiding Officer.
13. Prior to executing a search warrant on a Parliamentarian or Staff Member, whether at Parliament House, an electorate office, a residence or elsewhere, the Commission will:
 - a. inform the relevant Presiding Officer or Clerk;
 - b. normally, inform the Parliamentarian (or a senior Staff Member) and arrange a time for execution so as to minimise interference with the performance of the Parliamentarian's duties.
14. Prior to executing a search warrant on a Parliamentarian or Staff Member, the Commission will provide the Parliamentarian or Staff Member with a reasonable opportunity to review the warrant and obtain advice from the relevant Presiding Officer, Clerk and/or a lawyer. The Commission will take reasonable steps to limit the amount of irrelevant material required to be reviewed during the search – for example, by using keywords if searching electronic devices. The Parliamentarian or Staff Member may be invited to provide assistance locating the material that is the subject of the warrant to facilitate the search, and to identify Potentially Privileged Material.
15. The Commission will provide the Parliamentarian or Staff Member with a receipt listing all material seized during the execution of a search warrant, regardless of whether or not it is subject to a claim of Parliamentary Privilege. If requested, practicable and lawful, the Commission will permit the Parliamentarian or Staff Member to access and copy seized

material while it remains in the Commission's possession, in the presence of an authorised officer of the Commission.

16. Where Potentially Privileged Material within the scope of the warrant is identified or found and proposed to be seized, the Commission's executing officer must:

- a. make a list of the Potentially Privileged Material and quarantine all Potentially Privileged Material;
- b. if practicable and lawful, permit the Parliamentarian or Staff Member, in the presence of the Commission's executing officer, to make copies of the material;
- c. deliver the quarantined material to the relevant Clerk for safekeeping pending resolution in accordance with Part 8 of this MOU;
- d. while the material remains quarantined, if requested, practicable and lawful, permit the Parliamentarian or Staff Member to access and copy the material while it remains in the Clerk's custody, in the presence of an authorised officer of the Commission.

PART 5 – HEARING SUMMONSES

17. Normally, the Commission will not issue a hearing summons requiring a serving Parliamentarian or Staff Member to appear to give evidence on a scheduled parliamentary sitting day, unless otherwise agreed with the Parliamentarian.

18. Normally, prior to issuing a hearing summons requiring a Parliamentarian or Staff Member to appear to give evidence, the Commission will:

- a. inform the relevant Presiding Officer or Clerk;
- b. inform the Parliamentarian (or a designated Staff Member) and arrange a time for the hearing so as to minimise interference with the performance of the Parliamentarian's duties.

19. Where:

- a. a hearing summons addressed to a Parliamentarian or Staff Member includes a requirement to produce information, documents or things at the hearing; and
- b. the Parliamentarian or Staff Member wishes to claim that information, documents or things required to be produced are subject to Parliamentary Privilege,

the Parliamentarian or Staff Member must take reasonable steps to inform the Commission and the relevant Clerk before the hearing date specified in the summons that they wish to make a claim, and produce the information, documents or things

subject to the claim to the relevant Clerk for safekeeping pending resolution in accordance with Part 8 of this MOU.

20. Where in the course of giving evidence at a hearing, a Parliamentarian or Staff Member wishes to claim that information, documents or things called for by a question are subject to Parliamentary Privilege:

- a. the Parliamentarian or Staff Member (or legal representative) shall state the claim and its grounds;
- b. the presiding Commissioner may accept the claim, in which case the Parliamentarian or Staff Member is not required to provide the information, document or thing; and
- c. if the presiding Commissioner does not accept the claim, they shall make a record of the relevant questions and the claim and reasons for not upholding it, and submit it to the relevant Clerk for resolution in accordance with Part 8 of this MOU.

PART 6 – COVERT POWERS

21. An authorisation or warrant under the *Telecommunications (Interception and Access) Act 1979* (Cth) or the *Surveillance Devices Act 2004* (Cth), that permits interception of communications, disclosure of data or surveillance of a Parliamentarian is a sensitive matter. The Commissioner and General Manager Operations must be informed of the intention to seek such an authorisation or warrant. In accordance with clause 9 of this MOU, the approval of the overseeing Commissioner is required before application for any such authorisation or warrant is made.

22. Where the Commission, with the approval of the overseeing Commissioner, intends to exercise a covert power such as a warrant or authorisation where it is reasonably foreseeable that it could capture Potentially Privileged Material, the Commission will notify the relevant Clerk, in confidence, of the nature of the investigation. The Commission will:

- a. give due consideration to any advice that the relevant Clerk may provide regarding mitigation strategies if the investigation may interfere with parliamentary proceedings;
- b. in consultation with the relevant Clerk appoint a reviewer (who is independent from the investigation but may be a staff member of the Commission):
 - i. to review all information captured under the warrant before it is provided to investigators, and identify and quarantine Potentially Privileged Material that is relevant to the investigation; and
 - ii. to advise on and provide evidence for any potential extensions to the warrants, noting this will necessitate approval by the overseeing Commissioner as well as a judge and have already been notified to the Clerk prior to executing them.

23. Where, in circumstances to which clause 22 does not apply, it appears to the monitor that a telecommunications intercept or surveillance device has captured Potentially Privileged Material, the monitor must consult with the Assistant Director Electronic Collections and

the Operations Legal Team and if it is determined to be Potentially Privileged Material quarantine it.

24. Where Potentially Privileged Material is quarantined in accordance with clause 22 or 23, the Commission will retain it for safekeeping pending resolution in accordance with Part 8 of this MOU.
25. The Commission will destroy material captured through the use of covert powers that is not relevant to the investigation, in accordance with applicable legislation, regardless of whether it is subject to Parliamentary Privilege.

PART 7 – THIRD PARTIES

26. Where the Commission requires production of information, documents or things that are held by a third party on behalf of a Parliamentarian (for example, an email account that resides on a third party server) and reasonably anticipates that a Parliamentary Privilege Issue may arise, then the Commission will in the first instance request the information directly from the Parliamentarian, unless doing so is not reasonably practicable or might prejudice the investigation. If the relevant Parliamentarian wishes to make a privilege claim then Part 3 or Part 4 above will apply.
27. Where the Commission requires production of information, documents or things that are held by a third party on behalf of a Parliamentarian as referred to in clause 26 and it is not reasonably practicable to request it directly from the Parliamentarian or doing so might prejudice the investigation, the Commission will inform the relevant Clerk in confidence of the nature of the investigation, and will:
 - a. give due consideration to any advice that the relevant Clerk may provide regarding mitigation strategies if the investigation is seen to potentially raise Parliamentary Privilege Issues; and
 - b. in consultation with the relevant Clerk, appoint a reviewer (who is independent from the investigation but may be a staff member of the Commission) to review all information obtained before it is provided to investigators, and identify and quarantine Potentially Privileged Material that is relevant to the investigation.
28. Where Potentially Privileged Material is quarantined under clause 27, the Commission will retain it for safekeeping pending resolution in accordance with Part 8 of this MOU.
29. The Commission will destroy material obtained under clause 27 that is not relevant to the investigation, in accordance with applicable legislation, regardless of whether it is subject to Parliamentary Privilege.

PART 8 – RESOLUTION OF PARLIAMENTARY PRIVILEGE ISSUES

30. Where Potentially Privileged Material has been quarantined pending resolution under clauses 11, 16, 19, 24, 28 or 31 or a question has been submitted for resolution under clause 20 above:

- a. If the Commission notifies the Clerk that it no longer seeks access to the Potentially Privileged Material or any part of it, then:
 - i. such material in the custody of the Clerk that was seized from or produced by the Parliamentarian or Staff Member is released to the Parliamentarian;
 - ii. such material in the custody of the Commission under clauses 24, 28 or 31 is to remain quarantined until it can be destroyed in accordance with the applicable legislation.
- b. If the Parliamentarian notifies the Clerk that they no longer claim privilege or fails within 10 business days (or other period agreed by the Commission and the Parliamentarian) after being informed that the material has been entrusted to the Clerk or quarantined by the Commission to notify the Clerk and the Commission that a claim for privilege is being maintained in respect of the Potentially Privileged Material or any of it, then:
 - i. such material in the custody of the Clerk that was seized from or produced by the Parliamentarian is released to the Commission;
 - ii. such material in the custody of the Commission under clauses 24, 28 or 31 may be released to investigators.

The Commission will take reasonable steps to confirm the claim is not being pursued including attempting to seek that confirmation from the Parliamentarian.

- c. Otherwise, upon request from either the Commission or the Parliamentarian, the Presiding Officer shall at the first practicable opportunity put the matter before the relevant House so that the question of whether Parliamentary Privilege applies may be determined. It is the intention of the parties that any procedure established by the relevant House for making a determination will take into account the need to avoid prejudice to a Commission investigation and unfair damage to a person's reputation, and (except where doing so would prejudice or risk an investigation) will allow the Commission and the Parliamentarian an opportunity to make submissions.
- d. The relevant Clerk will notify the Commission and (unless the Parliamentarian has not been notified in order to avoid prejudice to a Commission investigation) the Parliamentarian within one business day of the determination being delivered.
- e. If a determination is made that the Potentially Privileged Material or any part of it is privileged, then:

- i. such material in the custody of the Clerk that was seized from or produced by the Parliamentarian is released to the Parliamentarian; and
- ii. such material in the custody of the Commission under clauses 24, 28 or 31 is to remain quarantined until it can be destroyed in accordance with the applicable legislation.

f. If a determination is made that the Potentially Privileged Material or any of it is not privileged, then:

- i. such material in the custody of the Clerk that was seized from or produced by the Parliamentarian is released to the Commission; and
- ii. such material in the custody of the Commission under clauses 24, 28 or 31 may be released to investigators.

PART 9 – MISCELLANEOUS

31. The parties acknowledge that Parliamentary Privilege Issues may arise in other circumstances not contemplated by this MOU. For example, the Commission may execute a search warrant on a person who is not a Parliamentarian which may capture Potentially Privileged Material. Where such issues arise, the Commission will apply the spirit and intent of this MOU and seek advice from the relevant Clerk about how to appropriately deal with Parliamentary Privilege Issues. If the Commission obtains Potentially Privileged Material in the course of its investigations the Commission will quarantine it and retain it for safekeeping pending resolution in accordance with Part 8 above.

32. The Commission will report to the Presiding Officers and the Privileges Committees within 90 days after the end of each financial year on the following matters:

- a. the types of covert powers that were exercised in respect of Parliamentarians and Staff Members and the number of instances each type of covert warrant was executed; and
- b. the types of corrupt conduct being investigated under those powers.

33. This MOU may be varied in writing executed by all parties.

34. This MOU comes into effect on the day the last signatory executes it.

SIGNATURES

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Senator the Hon Sue Lines
President of the Senate

Date: / / 2024

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The Hon Milton Dick MP
Speaker of the House of Representatives

Date: / / 2024

.....
The Hon Mark Dreyfus KC MP
Attorney-General

Date: 27/11/2024

.....
The Hon Paul Brereton AM RFD SC
National Anti-Corruption Commissioner

Date: 27 / 11 / 2024