Appendix 3
Submission from the Clerk of the Senate

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21 June 2017

Parliamentary Joint Committee on Corporations and Financial Services
Parliament House
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By email: corporations.joint@aph.gov.au

I write in response to your letter, dated 7 June 2017, which I take to be an invitation from the Corporations and Financial Services Committee to provide a submission on aspects of its current inquiry into whistleblower protections.

The catalyst for the inquiry was the adoption of a scheme of protection in relation to the Registered Organisation Commission, together with government undertakings to investigate and, eventually, legislate for broader whistleblower protections across public and corporate sectors. In this regard, the committee's terms of reference contemplate "a comprehensive whistleblower protection regime for the corporate, public and not-for-profit sectors".

The phrase *whistleblower protections*, here, connotes a regime of procedural and legal protections for persons making disclosures (usually alleging maladministration or wrongdoing), provided those disclosures are made by a prescribed method to an authorised recipient. The committee seeks my views on the interaction between whistleblower protections and parliamentary privilege. My attention is particularly drawn to disclosures *about*, *by* or *to* members of parliament and their staff; and disclosures to parliamentary committees.

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.

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 (eg, 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.

Yours sincerely,

(Richard Pye)