

**REQUEST FOR ADVICE - APPLICATION OF PARLIAMENTARY PRIVILEGE TO
AUSTRALIAN NATIONAL AUDIT OFFICE**

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.