

Appendix 4

Submission from the Clerk of the House of Representatives

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Parliamentary Joint Committee on Corporations and Financial Services
Parliament House

INQUIRY INTO WHISTLEBLOWER PROTECTIONS – REQUEST FOR COMMENT

Thank you for your letter of 7 June 2017 in which you passed on the Committee’s request for comment on its terms of reference and interaction with the Parliament, parliamentary privilege and the *Parliamentary Privileges Act 1987* (Privileges Act).¹ Given the timeframe for a response I will focus on the application of the *Public Interest Disclosure Act 2013* (PID Act), and the Privileges Act generally in the parliamentary context before I turn to disclosures in respect of the four interactions that you drew to my attention:

1. about wrongdoing by Members of Parliament or their staff
2. by Members of Parliament or their staff
3. to Members of Parliament or their staff; and
4. to parliamentary committees.

I will also refer to the possibility of broadening the coverage of the PID Act in the parliamentary context.

Parliamentary context

General PID Act framework

The PID Act establishes a framework to encourage the reporting and investigation of wrongful conduct (such as fraud, corruption and misconduct) in the Commonwealth public sector by protecting public officials who make disclosures in accordance with its provisions from reprisals. The Act focuses on disclosures being made internally—that is, to a supervisor or agency official appointed to receive disclosures—although in certain circumstances, ‘external’ and ‘emergency’ disclosures can be made to persons outside the official’s ‘home’ agency. The PID Act generally does not cover members of Parliament or their staff, although it does draw in Parliamentary Service employees

¹ See Attachment A for extracts of relevant provisions of the Act.

and former employees. Parliamentary Service employees are also bound to comply with the Code of Conduct in s.13 of the *Parliamentary Service Act 1999*, and are subject to the penalties outlined in s.15 for established breaches.

Public officials included in PID Act coverage

The PID Act includes as ‘public officials’, employees of the Parliamentary Service and former employees² but it does not include members of Parliament or their staff employed under the *Members of Parliament (Staff) Act 1984* (MOPS Act). So, members and their MOPS Act employees are not included as a category of authorised recipients of disclosures (although it may be that they could be the recipients of ‘external’ or ‘emergency’ disclosures under s.26 of the Act).³ Nor does the PID Act cover disclosures about wrongdoing by members of Parliament or MOPS Act employees. Their roles were considered to be very distinct from the roles of public sector employees and to fall more appropriately within the sole jurisdiction of parliament.⁴

Parliamentary privilege preserved

Clause 81 of the original Public Interest Disclosure Bill 2013 had provided, for the avoidance of doubt, the Bill did not affect the powers, privileges and immunities of the Senate, House of Representatives, their members and committees, under section 49 of the Constitution, nor the provisions of the Privileges Act. An amendment moved by the Attorney-General during the House’s consideration in detail, in June 2013, omitted clause 81. The former Clerk of the Senate, Dr Laing, had argued in her submission of 9 April 2013 that because the bill did not expressly apply to Members and Senators, the inclusion of clause 81 was unnecessary and could lead to confusion if it remained. The Senate’s Legal and Constitutional Affairs Committee recommended in its report of June 2013 that the clause be removed.⁵

The history of the PID bill has been so well-canvassed and documented in the Senate Committee’s inquiry and report and the inquiries and reports of the House of Representatives Legal and Constitutional Affairs Committee and Social Policy and Legal Affairs Committee⁶ that it should be very clear that the PID Act is not intended

² See s.69.

³ Also, Ministers exercising statutory powers could be considered to be public officials and staff employed under the MOPS Act could be considered to be contracted service providers, and therefore ‘public officials’, within s.69 of the PID Act.

⁴ See, for example, remarks by then Attorney-General, Hon Mark Dreyfus QC MP, summing up the second reading debate, HR Deb. (19.6.2013) 6408. See also the Government Response to the House of Representatives Legal and Constitutional Affairs Committee report on ‘Whistleblower Protection: a Comprehensive Scheme for the Commonwealth Public Sector’, p.5, responses to Recommendations 3 and 4.

⁵ See the Attorney-General’s acknowledgment of the Senate Committee recommendation, H.R. Deb (19.6.2013) 6417.

⁶ ‘Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector’, 2009, and ‘Advisory report on the Public Interest Disclosure (Whistleblower Protection) Bill 2012’, 2013.

to and does not affect provisions of the Parliamentary Privileges Act or the law of parliamentary privilege generally.

I will refer now to the potential application of the Parliamentary Privileges Act and the law of parliamentary privilege generally in relation to disclosures in the parliamentary context, and then to the four interactions that you referred to in your letter.

Possible application of parliamentary privilege to disclosures of alleged wrongdoing

As the Committee would be well aware, the term parliamentary privilege refers to the special rights and immunities that apply to the Houses, their committees and members, and that are essential for the proper operation of the Parliament. The most significant privilege—and the most relevant for present purposes—is the privilege of freedom of speech. The Parliamentary Privileges Act offers some clarification of the nature and extent of the rights and immunities of the Houses inherited by the House through s.49 of the Constitution.

Section 16 provides that members, witnesses who give evidence to parliamentary committees, and others who participate in parliamentary proceedings are protected from civil or criminal action and cannot be examined in court in relation to those proceedings. Also, ‘proceedings in Parliament’ cannot be impeached or questioned in courts or tribunals.⁷ Members and others involved in ‘proceedings in Parliament’ enjoy absolute privilege from prosecution and legal proceedings in respect of what they say in proceedings in Parliament—provided what they say complies with House practice and rules. Members are still accountable to the House in respect of their statements and actions.⁸ These protections, if they apply to disclosures of wrongdoing that would otherwise fall within the PID Act, would appear to offer a substantial degree of comfort to those who make disclosures in the parliamentary context.

The Parliamentary Privileges Act clarifies in s. 16(2), to a degree, the meaning of ‘proceedings in Parliament’, defining its broad meaning as ‘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’.. . . But interpretation of section 16 by the Courts has been rare. What might be encompassed by the words ‘for purposes of or incidental to’ the transaction of the business of a House or a committee is not entirely clear and therefore what special immunity—if any—might be available to communications of wrongdoing in these circumstances is unclear. In a decision in the Queensland Court of Appeal it was accepted that certain documents obtained by or provided to a Senator (and related to a subject he had raised in the Senate) did not need to be produced in response to an order because of subsection 16(2).⁹

⁷ See relevant sections at Attachment A.

⁸ Absolute privilege provides an extremely broad protection in respect of statements that might otherwise be the subject of legal action or prosecution. Provided that certain conditions are fulfilled, qualified privilege might offer a defence to an action for defamation. See *House of Representatives Practice*, 6 ed., 2012, at pp 735-6 and p. 731

⁹ *O’Chee v Rowley* [1997] QCA 401; cited in *House of Representatives Practice*, 6 ed., p. 737.

Also, section 16 has been found to cover documents prepared for Senate committee briefings, with the result that they could not be produced in response to a subpoena.¹⁰ If documents or disclosures are made to a member and then are subsequently used in the transacting of business in a House or committee (such as contributing to debate or asking questions in the House or a committee), there may be some protection available. But, in the case of *Rowley v Armstrong* a single Judge of the Supreme Court of Queensland concluded that a person who had communicated a matter to a Senator could not be regarded as participating in ‘proceedings in Parliament’.¹¹ The Senator had apparently used the information in two questions to a Minister and in a debate in the Senate. While the Judge’s comments were not central to his decision, and have been contested as not being well founded, they demonstrate that the further interpretation of section 16 could provide greater clarity.

With respect to other communications, *House of Representatives Practice* states: ‘Conversations, comments or other communications between Members, or between Members and other persons, which are not part of “proceedings in Parliament” would not be expected to enjoy absolute privilege. ... [C]itizens communicating with a Member on matters that have no connection with proceedings in Parliament are not protected.’¹² This could be relevant, for example, to the disclosure by a member to a Minister.

Protection of qualified privilege

A defence of qualified privilege might also be available to actions for defamation against persons communicating information or allegations concerning a Commonwealth department or agency to members when there was no connection with proceedings in Parliament. Broadly that is where there is a duty to pass on the information and an absence of malice in making the disclosure.

Punishment for contempt

The House can treat as a contempt, an act or omission that obstructs or impedes it in the performance of its functions, or obstructs a Member in the discharge of his or her duty, or tends to product such results.¹³ It is possible that reprisals against a person who provided information to a Member, or a against a Member who made a disclosure, even where there was no connection with ‘proceedings in Parliament’,

¹⁰ *Australian Communications Authority v Bedford* (2006), cited in *House of Representatives Practice* at p.737, where *Odgers’ Australian Senate Practice*, 13th edition, p. 60 was also cited.

¹¹ See [2000] QSC 088, available online at <http://archive.sclqld.org.au/qjudgment/2000/QSC00-088.pdf> See *Odgers* at p. 59 for discussion of this and other cases.

¹² *House of Representatives Practice*, 6 ed., 2012, p. 737. See also the report of the House of Representatives Standing Committee of Privileges in 2000 on the ‘Status of records held by Members of the House of Representatives’ and the Committee of Privileges report in 2002, ‘Parliamentary privilege: the operation of the committee, some historical notes and Guidelines for Members’.

¹³ See *House of Representatives Practice*, 6 ed., 2012, p. 749 for discussion of the powers inherited through section 49 of the Constitution.

could be dealt with as a matter of contempt, although this may be of limited comfort. The requirements of s.4 of the Privileges Act would also need to be met:

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

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 ‘for 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

¹⁴ Section 16 and see *House of Representatives Practice*, 6 ed., 2012, pp 693-97.

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 [Phillip] 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.¹⁵ 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.¹⁶

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.¹⁷

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.

I hope this assists the Committee in its deliberations and, of course, I would be pleased to discuss any of these matters in more detail with the Committee if it wishes.

Yours sincerely,

DAVID ELDER
Clerk of the House

21 June 2017

¹⁵Independent Review of the *Public Interest Disclosure Act 2013*, 2016, p. 62.

¹⁶ Pages 62-63.

¹⁷ Recommendations 26 and 27 at p. 63.

