PARLIAMENT OF AUSTRALIA
THE SENATE
LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Inquiry into the Parliamentary Privileges Amendment (Royal Commission Response) Bill 2022

Submission of the Royal Commission into Defence and Veteran Suicide

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A. Background

1. The Royal Commission into Defence and Veteran Suicide ('the Royal Commission') was constituted by Letters Patent issued by His Excellency the Governor-General on 8 July 2021. Those Letters Patent, a copy of which is annexed as **Annexure A**, require the Commission to inquire into a number of matters related to the welfare of serving and former members of the Australian Defence Force, especially with respect to suicide (pars (a)–(j) of the Royal Commission's terms of reference). They also (by par. (k)) 'direct' the Royal Commission 'to have regard to the findings and recommendations of previous relevant reports and inquiries'.

2. The Royal Commission has found its work impeded by the extended scope of parliamentary privilege provided by s. 16 of the *Parliamentary Privileges Act 1987* ('the *Privileges Act*'). The impeding has related both to the substantive matters for inquiry and to the direction that the Commission have regard to previous inquiries.

3. In correspondence from the Presiding Officers of the Parliament, the Royal Commission has been advised that parliamentary privilege does not, or need not, impede its work. That advice is incorrect, in both its factual and legal aspects.

4. In its Interim Report, provided to the Governor-General on 11 August 2022, the Royal Commission recommended that the *Privileges Act* be amended to permit certain royal commissions to receive, for limited purposes, evidence of parliamentary proceedings. The recommendation does not involve any abrogation of the privilege as originally prescribed by the *Bill of Rights 1688* (UK)—only a slight departure from the expanded scope provided by s. 16.

5. In its official response to the Interim Report, the Executive Government did not accept the Royal Commission's recommendation. It merely 'note[d]' the recommendation and made some comments, including that '[t]he Government considers that Royal

Commissions can carry out their functions without infringing section 16 (3) (c)' of the *Privileges Act*.

6. However, the impediments presented by s. 16 prevent royal commissions tasked with inquiring into action or inaction of Executive Government from being able to make findings based (wholly or partially) on the contents of parliamentary reports and evidence presented to parliamentary committees. Far from serving the original purposes of parliamentary privilege (protection of parliamentarians and other participants in parliamentary proceedings from criminal or civil action for what they said inside parliament), in the context of royal commissions tasked with inquiring into Executive Government, s. 16 has the perverse effect of shielding the Executive Government from adverse findings by such royal commissions.

7. At least two previous royal commissions have raised the issue of impediments experienced by reason of s. 16: the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and the Royal Commission into Aged Care Quality and Safety. Unless there is reform, some royal commissions will not be able to carry out their functions with full efficacy

B. The proper operations of a royal commission

8. Before embarking on a discussion of the effect of s. 16 on royal commissions, it is convenient briefly to mention how royal commissions operate. Royal commissions chiefly operate by receiving evidence, drawing inferences from that evidence, and then reaching findings and other conclusions based on that evidence. Although a royal commission is not bound by the rules of evidence, and has some flexibility regarding the procedures it uses to obtain and receive evidence, it is nevertheless bound to afford natural justice to affected parties. This entails a requirement that a royal commission base its conclusions on cogent evidence that affected parties have had an opportunity to test to the extent that the circumstances and the flexible principles of natural justice require.[1] In addition to informing itself from evidence received at hearings and through production of documents and information, a royal commission may inform itself of contextual matters from other sources. However, a royal commissioner cannot merely engage in private reading and proceed directly to conclusions that may reflect adversely on others: material that is to be used in that manner must be received into evidence and a fair opportunity given to persons affected to respond before the royal commission can base a formal conclusion upon it.

9. Three presently relevant examples can be mentioned. First, if a royal commission's letters patent made it relevant to inquire into how the Government responded to the

[1] See, *e.g.*, *Mahon v. Air New Zealand Ltd & ors* [1984] AC 808.

recommendations of a previous inquiry then the royal commission would receive evidence of what the recommendations were and evidence of what the Government did in response. The most cogent evidence—and sometimes the only evidence—of what the previous inquiry's recommendations were would be the previous inquiry's report, which would be tendered and received into evidence as an exhibit. Without evidence of what the previous inquiry's recommendations were, no comparison could be made with what the Government later did, and no inference or conclusion could be drawn about whether or not the Government had implemented the recommendation. A conclusion that the Government had not implemented a recommendation (or had implemented it, or had implemented it only in part or poorly) would be a conclusion or inference drawn in part from the evidence of what the recommendation was.

10. Second, a royal commission might wish to rely on the work of a previous inquiry as summarized in its report. The report might, for example, conveniently summarize valuable information that the earlier inquiry had obtained and its use by the royal commission might save considerable public expense. Beyond mere convenience, it will sometimes be the case that the evidence obtained by the earlier inquiry cannot practicably be reproduced or obtained for a second time, say because a witness is no longer available. To rely on such material, the royal commission would receive the earlier report into evidence and then draw inferences and conclusions about the subject matter stated in the royal commission's terms of reference.

11. Third, an earlier report might be direct evidence that certain matters were in the public domain, which might be very relevant to an assessment of the Government's performance with respect to a given issue. To put the matter bluntly: evidence from a Minister or other official that certain matters were not known, and so were not addressed, could be rebutted by the tender of a public report that stated those very matters.

12. But, as discussed below, if the previous inquiry and report were a parliamentary committee's, or otherwise constituted a parliamentary proceeding (for example, a performance audit report submitted by the Auditor-General), then the royal commission could not receive the earlier report into evidence for the purpose of drawing inferences or conclusions of any kind—not to reach conclusions about whether or not the Government had implemented the report's recommendations, nor to rely on information previously obtained, nor to show that a matter was in the public domain. In this way, the expansive form of parliamentary privilege enacted by s. 16 of the *Privileges Act* operates in effect to protect the Executive Government from scrutiny and findings regarding its responses to parliamentary recommendations and thus impedes the legitimate work of royal commissions ostensibly set up and directed to inquire into those responses. This is a perverse outcome and merits reform.

C. The Bill of Rights and the Privileges Act

13. The relevant provision of the *Bill of Rights*, art. 9, provides 'That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.' Article 9 has two features to note. First, it operates to protect freedom of speech. debates and proceedings in Parliament. Second, it provides that protection by imposing a prohibition on impeaching or questioning parliamentary speech, debates and proceedings. Although none of the terms is defined, the basic rule is relatively clear.

14. So are its historical origins and purpose. No doubt the present inquiry will be apprised of those origins and purpose in detail. It is sufficient to note here that they involved the protection of parliament and its members from extra-parliamentary reprisals and consequences for things said and done in the course of the parliament's proceedings. The purpose was not to shield from scrutiny the Executive Government outside Parliament. The recommendation made by the Royal Commission does not in any way impinge upon the purposes of Art. 9.

15. Section 16 of the *Privileges Act*, however, expands both the scope of what is protected by parliamentary privilege and the scope of the prohibition by which the protection is afforded. It provides:

> **Parliamentary privilege in court proceedings**
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> (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.
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> (2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, ***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:
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> (a) the giving of evidence before a House or a committee, and evidence so given;
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> (b) the presentation or submission of a document to a House or a committee;
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> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
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> (d) 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.
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> (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
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> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
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> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.
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> . . .
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> Subsection 3 (1) of the *Privileges Act* provides that *'**"tribunal"*** means any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a Royal Commission . . . .'

16. The expanded scope of the prohibition that subs. 16 (3) creates includes prohibitions on 'relying on the truth' of what is said in Parliament and 'drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament. That is, s. 16 prohibits such purposes even though the Bill of Rights does not.

17. The expanded scope of 'proceedings in parliament' that subs. 16 (2) provides includes not only the presentation (by anyone) of a document to Parliament but also the 'preparation of a document for purposes of or incidental to the transacting of [parliamentary] business and the publication of parliamentary committees' reports.

18. Section 16 therefore clearly covers the evidence given to parliamentary committees and reports of those committees.

19. Importantly, it can also extend to the work and reports of officers deemed by statute to be officers of parliament and who submit reports to Parliament. As we explain below, s. 16 prevents royal commissions tasked with inquiring into government from making findings referable to performance audit reports of the Auditor-General.[2] Similar issues also arise with respect to reports of the Ombudsman.[3]

D. Three examples

20. Three examples from the work of the Royal Commission illustrate various aspects of the problem created by s. 16.

The Constant Battle

21. One of the prior reports most potentially significant for the work of the Royal Commission is the Senate Foreign Affairs, Defence and Trade References Committee's report *The Constant Battle: Suicide by Veterans* (2017). It contains information on which the Royal

[2] See subs. 8 (1) and 17 (4) (a) of the *Auditor-General Act 1997* (Cth); and Senate Standing Order 166.

[3] See ss. 17 and 19 of the *Ombudsman Act 1976* (Cth).

Commission might wish to rely. It contains recommendations that the Royal Commission might wish to compare with what the Government did in response to them.

22. As noted, but for parliamentary privilege (as extended by s. 16), the most efficient way of relying on the work reported in *The Constant Battle*, and the most cogent and orderly way of reaching conclusions on the extent to which the Government's responses actually implemented the recommendations made, would be to use the report as evidence. That cannot be done.

23. The Royal Commission has adopted a not-wholly-satisfactory work-around. It has received into evidence a copy of the Government's official response to *The Constant Battle*, as published on a government website. That official response purports to quote the recommendations in *The Constant Battle*. The Royal Commission took this as evidence of what the Government understood the recommendations to be and proceeded on that basis. It also used a Productivity Commission report's account of what was said in *The Constant Battle* as secondary evidence of some background information. This is reflected in the Royal Commission's Interim Report (p. 187; footnotes omitted):

> On 15 August 2017, a report of the Senate's Foreign Affairs, Defence and Trade References Committee, titled *The Constant Battle: Suicide by Veterans*, was tabled in Parliament. For reasons of parliamentary privilege . . . we make no comment about this report's content, nor seek to draw any inference from it. According to the Productivity Commission report, the Committee 'found the legislative framework for the veterans' compensation system to be complex and difficult to navigate' and 'was concerned that inconsistent treatment of claims for compensation and lengthy delays in the processing of claims were key stressors for veterans and their families'.
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> In October 2017, the Australian Government published a document titled 'Australian Government Response to the Foreign Affairs, Defence and Trade Committee Report: *The Constant Battle: Suicide by Veterans*' . . . . According to the Government Response . . . the Senate Committee made recommendations that:
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> - 'the Australian Government commission an independent study into the mental health impacts of compensation claim assessment processes on veterans engaging with the Department of Veterans' Affairs and the Commonwealth Superannuation Corporation' and use '[t]he results of this research … to improve compensation claim processes' (Recommendation 2)
> - 'the Australian Government make a reference to the Productivity Commission to simplify the legislative framework of compensation and rehabilitation for service members and veterans … this review [to] examine the utilisation of Statements of Principle in the determination of compensation claims' (Recommendation 6).
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> The Government response to each of these points was 'Agreed'.

In this and some other cases, the Royal Commission will be able to examine how the Government has responded to what the Government response says were the Senate Committee's recommendations, but not make a definitive finding on whether or not the actual recommendations have been implemented.

24. On this occasion, so far, it may be that the problem has risen only to the point of inelegant circumlocution. But what if a party were to dispute the accuracy of the Government response's apparent quotation of a parliamentary committee's recommendations? Such a dispute could only be resolved by reference to the parliamentary committee's report—except that parliamentary privilege precludes such a resolution.

25. Perhaps more importantly in practice, an issue may arise not about the exact wording of a parliamentary committee's recommendations but about their purpose, intent and proper construction. On several occasions, Commonwealth officials testifying before the Royal Commission about whether or not the Government had implemented prior inquiries' recommendations said that the 'intent' was supported[4] or agreed[5] or even had been implemented even though the recommendation as worded had not been implemented.[6] The resolution of a dispute about whether or not a recommendation's 'intent' had been implemented would often require reference not merely to the words of the recommendation but also to the context provided by the report in which the recommendation was made—but, again, in the case of a parliamentary committee's report (or another case of a parliamentary proceeding, such as an Auditor-General's performance audit report), parliamentary privilege precludes such a resolution.

26. It is notable that during the Royal Commission's hearings the Commonwealth objected to the tender of the Government response to *The Constant Battle* unless it were redacted to remove the quotations from the parliamentary committee's report, contending that even that tender would involve a breach of parliamentary privilege.[7] Although the Royal Commission ruled against the objection, the objection shows that the Commonwealth's position on parliamentary privilege is even more restrictive than the Commission's. It also indicates the difficulty that could arise were the Royal Commission to take a Government response as evidence not merely of the government's understanding of a parliamentary committee's recommendation (or other parliamentary proceeding) but as direct (albeit hearsay) evidence of what was actually said in a parliamentary proceeding.

27. To the extent that in other forums the Commonwealth and its officers have suggested that royal commissions are not impeded by parliamentary privilege, and that therefore reform is not needed, the suggestion is contradicted by the Commonwealth's official position in the Royal Commission that such evidence cannot be received by a royal commission lest parliamentary privilege be breached.

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4 Royal Commission Transcript, p. 21-1871 at lines 9, 10 and 19.

5 Royal Commission Transcript, p. 21-1893 at line 30.

6 Royal Commission Transcript, p. 21-1892 at lines 25 and 40; see also p. 21-1896 at lines 39-42 and p. 21-1937 at lines 14-30.

7 Royal Commission Transcript, p. 21-1857-1858; see also the Royal Commission's Interim Report at p. 267 [46].

Parliamentary inquiry into transition from the Australian Defence Force

28. Another important report on the subject-matter of the Royal Commission's terms of reference is the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade's report *Inquiry into transition from the Australian Defence Force (ADF)* (2019). This time, there has been no work-around, for, so far as the Royal Commission has so far discovered, the Government has not published a response. The Royal Commission's Interim Report was confined to saying (in the course of a simple chronology of prior reports):

> In April 2019, the Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade's report titled *Inquiry into Transition from the Australian Defence Force (ADF)* was published. Again, for reasons of parliamentary privilege, the Royal Commission declines to comment on, or draw inferences from, the content of the Report.

Neither the report, nor its content could be used. (In completeness, the Royal Commission is developing another, partial work-around. It is too early to tell how successful it will be.)

Auditor-General's report on Defence's implementation of cultural reform

29. Another potentially significant document is the Auditor-General's report *Defence's Implementation of Cultural Reform* (Report No. 38 of 2020–21) ('the ANAO Report'), a report of a 'performance audit' within the meaning of s. 17 of the *Auditor-General Act 1997* (Cth) ('the *AG Act*'). During the Royal Commission's first hearing block, held in Brisbane in December 2021, it was tendered by Counsel Assisting and the Royal Commission received it into evidence. Counsel Assisting did not invite the drawing of any inference or conclusion from it.

30. In January 2022, the Australian Government Solicitor, acting for the Commonwealth, wrote to the solicitors assisting the Royal Commission:

> 5. The 2021 Audit Report is a document which comes within section 16(2) and constitutes 'proceedings in Parliament'. Therefore, although a copy of the 2021 Audit Report may presently be available to the Royal Commission, s 16(3) of the Parliamentary Privileges Act 1987 operates to prevent the Royal Commission from formally receiving the report, or from posing any question or making any comment or submission about its contents for the purpose of drawing any inference or conclusion.
>
> 6. Parliamentary privilege would also operate to prevent the authors of the 2021 Audit Report from giving any evidence about the report. In light of this, we respectfully suggest that the Royal Commission may not see any utility in calling the authors of the report to give evidence.

During the Royal Commission's third hearing block, senior counsel for the Commonwealth maintained the objection and further objected to the ANAO report's being displayed during the hearing in a way that permitted the public to see it.[8]

31. Upon reflection, although the tender had not been unlawful because it was not made for any of the purposes proscribed by s. 16 of the *Privileges Act*, to avoid doubt Counsel Assisting withdrew the tender of the ANAO report and disavowed any intention to invite inferences or conclusions to be drawn or reached.

32. According to Prof. Anne Toomey, in 'Can Parliamentary Privilege be Used to Shut-Down Parliamentary Accountability?':[9]

> The Auditor-General is an officer of Parliament whose performance audit reports are prepared for the purpose of tabling and debate in Parliament and therefore attract parliamentary privilege.

33. For the following reasons, it can be seen that the ANAO report was and is covered by parliamentary privilege and so cannot be put to any meaningful use by the Royal Commission:

(1) The Auditor-General is, by subs. 8 (1) of the *AG Act* an 'independent officer of Parliament'.[10]

(2) By par. 17 (1) (a) of the *AG Act*, the Auditor-General has the function of conducting performance audits of Commonwealth entities. By par. 17 (4) (a), the Auditor-General 'must' cause a copy of each performance audit report to be tabled in Parliament. By subs. 17 (5), he or she 'may' provide a copy or extract to Ministers and others who, in the Auditor-General's opinion, have a 'special interest' in the report or the content or the extract.

(3) The ANAO report was transmitted to parliament and included a letter of transmission addressed to the President of the Senate and the Speaker of the House of Representatives in which it was said that the report was being presented '[p]ursuant to Senate Standing Order 166.' A 'snapshot' on p. 6 noted that '[t]his audit provides the Parliament with independent assurance on the effectiveness to date of Defence's implementation of the strategy'. It is readily concludable that the ANAO report was, in the words of subs. 16 (2) of the *Privileges Act*, created for 'purposes of or incidental to . . . the transacting of the business of a House' and later published pursuant to S.S.O. 166.

(4) There is no doubt that the act of presenting or submitting a document to a House of Parliament, the act of preparing a document for the purpose of its being so

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8 Royal Commission Transcript, pp. 16-1417-1418.

9 Published on AUSPUBLAW (22 January 2020)**:** https://auspublaw.org/2020/01/can-parliamentary-privilege-be-used-to-shut-down-parliamentary-accountability (accessed 10.1.2022).

10 Note also the limited effect of this provision: see subss. 8 (2) and (3).

presented or submitted, and the act of publishing a document pursuant to S.S.O. 166 are acts within the meaning of 'proceedings in Parliament' for the purposes of s. 16 of the *Privileges Act*. The content of such a document is part of the acts of preparing, presenting, submitting and publishing it and is therefore also part of the proceedings. To exclude the content of the document from a description of those acts would be to describe those acts incompletely. This conclusion is reinforced by the definition of 'proceedings in parliament': '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'.

34. Even if it were to be accepted that, like many legal issues, there are contrary arguments, the presence of uncertainty and risk is an effective impediment. The fact that the Commonwealth itself asserts that parliamentary privilege applies to the Auditor-General's performance audit reports, combined with the severe penalties that might be imposed upon counsel assisting for tendering, or royal commissioners for accepting, such reports into evidence for any of the proscribed purposes, effectively precludes acceptance of those contrary arguments. Legislative reform is needed.

E. Consideration of contrary arguments

35. The Royal Commission is aware of various contrary arguments to the points made in this submission. In a letter dated 10 and 11 August 2022 ('the Presiding Officers' letter), responding to a letter from the Chair of the Royal Commission, the Speaker of the House and the President of the Senate have set those contrary arguments out in support of their assertion that s. 16 of the *Privileges Act* is not an impediment to the work of royal commissions. The Chair's letter is annexed as **Annexure B**; the Presiding Officers' letter is annexed as **Annexure C**. The Government's response to the Royal Commission's Interim Report (**Annexure D**) is presumably informed by the same contrary arguments.

36. The contrary arguments do not hold up to scrutiny. For the reasons that follow, they should not be accepted and cannot justify maintaining the current form of s. 16 of the *Privileges Act*.

37. It is true that a royal commission may, with care, make some derivative use of proceedings in parliament, refer to such proceedings in the course of work that does not involve the receipt of evidence (for example, in discussion papers), and receive evidence of parliamentary proceedings for a purpose that is not proscribed (although any value in doing so would be very small). But these limited uses of parliamentary proceedings are no answer to the impediment of not being able to receive evidence of parliamentary proceedings for the purpose of drawing inferences or reaching conclusions directly from them.

38. Even if there is room for reasonable minds to differ on the proper construction of the *Privileges Act*, there is still a need for reform, for, as just indicated, no counsel assisting and no royal commissioner could safely tender or receive evidence on the basis of a mere contestable argument that privilege would not be breached.

39. The Presiding Officers' letter refers to the relatively limited original scope of parliamentary privilege reflected in the *Bill of Rights'* prohibition on questioning or impeaching parliamentary proceedings and then states that s. 16 'goes on to describe what "questioned or impeached" effectively means . . . .' With respect, s. 16 does not merely describe what 'questioned or impeached' means: it significantly expands what it is prohibited. The prohibition in par. 16 (3) (a) is not limited to questioning or impeaching (or anything of that kind) but extends even to 'relying on the truth . . . of anything forming part of . . . proceedings in Parliament'. The prohibition in par. 16 (3) (b) similarly is not limited to questioning or impeaching but extends to 'establishing' the matters mentioned. By par. 16 (3) (c), it would be unlawful for evidence to be tendered or received to invite or draw an inference from findings or other content in a parliamentary report, even if that inference were entirely consistent with the findings or other content expressed in the report, because no words of qualification limiting the prohibition to 'questioning' or 'impeaching' (or anything of that kind) appear in par. 16 (3) (c) either.

40. The Presiding Officers' letter says:

> the immunity attaching to proceedings in Parliament is reasonably narrow. In a practical sense, the only significant prohibition is that witnesses cannot be examined directly on their parliamentary evidence.

The presently relevant prohibitions imposed by s. 16 are, however, far broader. Section 16 extends beyond examination of witnesses. It covers tendering and receiving documentary evidence, inviting or drawing inferences, and making submissions and even comments. It also extends to questioning 'any person' (par. 16 (3) (b)), not just a witness who appeared before Parliament.

41. The Presiding Officers' letter refers to the Australian Law Reform Commission's report No. 111, *Making Inquiries* (2010), reproduces paragraph 17.04 of that report, and then states:

> The immunity in section 16(3) prevents the use of parliamentary material for such purposes. However, it does not prevent the use of such material for other purposes . . . .

The ALRC report gives two examples. Importantly, the prohibited use mentioned in paragraph 17.04 of the ALRC report was not presented by the ALRC as an exhaustive description of the scope of the prohibitions imposed by parliamentary privilege. The paragraph relevantly referred to 'inquir[ing] into the motives, intentions or truthfulness of a speaker in Parliament, or allow[ing] witnesses to be cross-examined in relation to

words spoken or documents tabled in Parliament'. It therefore addressed only one element of the prohibitions imposed by parliamentary privilege—the prohibition on questioning proceedings in Parliament imposed by par. 16 (3) (a)—and did not address either of par. 16 (3) (b) or (c).

42. The Presiding Officers' letter twice says that it is permissible to use proceedings in Parliament 'to establish matters of fact', but, at best, that proposition must be heavily qualified. To establish a matter of fact is an exercise in drawing inferences from evidence. The Presiding Officers' letter goes on to say that '[t]his [proposition] would seem to include the use of such [parliamentary] materials to establish that a particular recommendation was made, or identify when information was published'. At best, the proposition does not merely 'include' such uses but would be confined to such uses. More importantly, the greater the extent to which a royal commission's report scrupulously avoided drawing or inviting any inference from recording the mere fact of something said in the course of parliamentary proceedings, the greater the extent that the royal commission's report would merely be including information without a purpose. Conversely, the mere juxtaposition of a royal commission's receiving into evidence a parliamentary committee's report and receiving evidence of what the Government did in respect of the of subject-matter of the parliamentary committee's recommendations might arguably tend to found an allegation that the tender of the evidence was actually inviting an inference or conclusion to be drawn about whether or not the recommendations had been implemented, running a risk of an allegation of breach of parliamentary privilege.

43. In any event, s. 16 precludes a royal commission from reaching its own conclusions by relying (even in part) on evidence presented to Parliament, or on findings of fact, or other content, in a parliamentary report. In short, a royal commission is unable to 'have regard' to the findings or recommendations of previous relevant parliamentary reports if that would involve giving any weight to them in reaching the Commission's own findings and making its own recommendations. Perhaps a royal commission could reach a bare conclusion that something was said in Parliament on a particular day, but s. 16 would be breached if the royal commission drew any secondary conclusion from what was said.

44. The Presiding Officers' letter refers to advice to the effect that the law of parliamentary privilege 'would already seem to permit the Commission to use published parliamentary material, provided it was not used' in two ways, namely "to draw adverse inferences about the Parliament' or 'to impugn any person's testimony or submission to the Parliament'. Such tentative advice ('seems') would not provide a prudent person with sufficient comfort or protection to proceed with a tender or receipt of evidence that, although of value to the public purpose of a royal commission, might entail a breach of parliamentary privilege.

45. In any event, the advice is plainly inconsistent with the clear language of subs. 16 (3), which is not limited to impugning testimony or submissions (but expressly extends even to *relying* on proceedings in Parliament), and is not limited to the drawing of adverse inferences (but extends to drawing any inference, without qualification).

46. Finally, the Presiding Officers' letter points out that 'there is nothing to prevent the Commission . . . leading its own evidence on the same matters'. So much may be accepted, in the sense that there is no legal impediment imposed by parliamentary privilege against a Royal Commission attempting to lead its own evidence on the same subject-matter as was included in a parliamentary report. However, this is no answer to the fact that parliamentary privilege impedes review of the implementation (or otherwise) of a parliamentary committee's recommendation. There may also be other significant impediments. For example, a key witness may be dead or otherwise unavailable, or may raise an excuse for not providing to the royal commission the evidence she or he provided to Parliament. To take the Auditor-General and staff of the Australian National Audit Office as an example, it is not clear that they could be compelled to give in evidence to a royal commission the opinions that they expressed in reports to Parliament. At the very least, it would be wasteful, inefficient and time-consuming for a royal commission to be required to attempt to re-adduce the evidence that the Parliament has already received, and to reassess that evidence, to reach a finding that has already been made.

F. Conclusion

47. The Royal Commission is not the first royal commission to find parliamentary privilege impeding its work. Absent reform, it will not be the last.

48. In its Interim Report, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry identified two earlier parliamentary committee reports relevant to its work. The Commissioner observed: 'Parliamentary privilege precludes me from canvassing what was said to, or decided by, either of the Parliamentary inquiries.'[11]

49. On 7 March 2019, the Commissioners of the Royal Commission into Aged Care Quality and Safety wrote to the Parliament's Presiding Officers to inquire about the possibility that Parliament might waive its privilege. After noting that the reports of several parliamentary committees were 'relevant . . . and provide excellent information of a policy nature that they [wanted] to draw upon in [their] work', the Commissioners observed:

[11] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report*, September 2018, vol 1, p 190.

> One consequence of s 16(3)(c) [of the *Privileges Act*] is that we cannot have regard to any of the findings or recommendations made in any report of any Parliamentary committee . . . . by way of, or for the purposes of, drawing inferences or conclusions from them. This applies to the hearings we conduct, and the reports we prepare.

No waiver was given. Without amendment of s. 16 of the *Privileges Act* it is difficult to see how any purported waiver could be valid.

50. On the basis of the Royal Commission's work to date, it presently appears that a number of valuable recommendations have been made by parliamentary committees that may not have been implemented (or fully and effectively implemented) by the Executive Government. Parliamentary privilege is impeding a full examination of these matters and the Royal Commission obtaining an understanding of the reasons and accountability for any failures in that regard. It does not seem likely that the true purposes of the *Bill of Rights* and the *Privileges Act* included facilitating an obscuring of accountability of the Executive Government in respect of implementing parliamentary recommendations, but that is what is occurring.

51. This is a perverse outcome meriting a legislative response. It is, therefore, a matter that only the Parliament can address.

17 October 2022

Mr Nick Kaldas APM Commissioner Chair	The Hon. James Douglas KC Commissioner	Dr Peggy Brown AO Commissioner

ANNEXURES

A. Letters Patent establishing the Royal Commission
B. Chair's letters to President of the Senate and Speaker of the House of Representatives dated 26 July 2022
C. President of the Senate and Speaker of the House of Representative's letter to the Chair dated 10 and 11 August 2022
D. Government's response to recommendations in the Royal Commission's Interim Report