



Parliament of Australia

President of the Senate

Speaker of the House of Representatives

D22/250620

Mr Nick Kaldas APM
Commissioner and Chair
Royal Commission into Defence and Veteran Suicide
GPO Box 3273
SYDNEY NSW 2001

Dear Commissioner

Thank you for your letter of 26 July 2022 regarding parliamentary privilege and the Royal Commission into Defence and Veteran Suicide. We recognise the Commission's interest in drawing on parliamentary inquiries and reports. We agree that there is much of value in the findings and recommendations of parliamentary committee inquiries, and in reports of the Auditor-General prepared for the Parliament. Many earlier commissions have similarly had regard to parliamentary material. Our advice is that this aim can largely be met without disturbing privilege.

As background, it is useful to note the nature and scope of the law of parliamentary privilege.

Parliamentary privilege in the relevant sense descends from Article 9 of the UK Bill of Rights 1689, which declares that 'proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. This declaration was partly codified by the *Parliamentary Privileges Act 1987*. Section 16 of the Act defines what is meant by 'proceedings in Parliament' and goes on to describe what 'questioned or impeached' effectively means for the purposes of proceedings before courts or tribunals (including Royal Commissions).

However, 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 scope of the immunity was discussed in the 2009 Australian Law Reform Commission report you referred to, in which the ALRC noted:

The privilege of freedom of speech may prevent Royal Commissions or the recommended Official Inquiries from investigating allegations of misconduct made in Parliament. In practice, however, a number of inquiries have investigated such claims or conducted

investigations touching on the proceedings of Parliament. Although courts have differed on the issue, it appears that Royal Commissions or Official Inquiries will infringe parliamentary privilege if they inquire into the motives, intentions or truthfulness of a speaker in Parliament, or allow witnesses to be cross-examined in relation to words spoken or documents tabled in Parliament. [paragraph 17.104]

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 – for instance, as background material or to establish matters of fact – and it does not prevent the Commission or any other body leading its own evidence on the same matters.

In essence, parliamentary privilege is a *use* immunity but not a *derivative* use immunity. This means that, although the Commission may not forensically examine parliamentary evidence, it may conduct its own inquiries based on information gleaned from the parliamentary proceedings without infringing subsection 16(3). In other words, the Commission can use this material to develop lines of inquiry and independently pursue matters.

Moreover, there is nothing to prevent witnesses providing the Commission with evidence that is substantially the same as evidence they have given in parliamentary proceedings, whether this evidence is given orally or by way of written submission. Similarly, the submission of documents with a prior existence to a committee inquiry does not prevent those documents also being received and considered by the Commission. For example, if witnesses provided a committee with records of their interactions with government departments and agencies, there is nothing to prevent those documents being given to the Commission and used to investigate matters or question witnesses about their contents.

Special protections exist for *in camera* evidence and it is not lawful for a Royal Commission to require or accept any *in camera* evidence given to a parliamentary committee. Again, however, there is nothing to prevent a person who provided *in camera* evidence to a committee preparing a new document for the Commission containing substantially the same evidence, or providing the same evidence to the Commission as oral evidence.

As noted, submissions and documents received and published by parliamentary committees may be referred to by the Commission as background material, provided that the restrictions on use set out in subsection 16(3) are adhered to. This is a well-established path.

For instance, the Royal Commission into Aged Care Quality and Safety initially raised similar concerns with the then Presiding Officers, and it seems that they were satisfied with the response they received. The Commission subsequently published Background Paper No. 8 – A history of Aged Care reviews, exemplifying the fact that parliamentary material could be put before the Commission. That background paper noted:

Many of the previous reviews and inquiries relevant to the Royal Commission's terms of reference have been conducted by Parliamentary Committees. In line with the requirements set out in s 16(1) of the *Parliamentary Privileges Act 1987* (Cth), the Royal Commission draws on the findings and recommendations of those reports as background information. Nothing in this background paper is intended to draw, or invite the drawing of, inferences or

conclusions wholly or partly from those reports. This approach has been confirmed as appropriate by the presiding officers of the Parliament.

Going to the examples in your letter, there is nothing to prevent the Commission drawing on the findings and recommendations of parliamentary committees reports as background information, or to establish matters of fact. This would seem to include the use of such materials to establish that a particular recommendation was made, or identify when information was published. Further, parliamentary privilege does not extend to activities that occur in response to the Parliament's work but which do not themselves form part of parliamentary proceedings. It would not prevent the Commission investigating whether the executive government has taken any action in response to published findings or recommendations (and, if so, what).

To make these points in another way, your letter seeks our support for an amendment to the Parliamentary Privileges Act to insert a limited exemption to allow the Commission to use parliamentary material as evidence. The suggestion is that relevant material should be able to be used by the Commission, provided it was not used:

- to draw adverse inferences about the Parliament, its Houses, committees, members, work or proceedings, or
- to impugn any person's testimony or submission to the Parliament or committee, or any person in respect of providing such testimony or submission.

Our advice is that the law of parliamentary privilege, as it currently stands, would already seem to permit the Commission to use published parliamentary material, provided it was not used in those ways.

Yours sincerely

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(Senator the Hon Sue Lines)
President of the Senate
Date: 10 August 2022

(The Hon Milton Dick MP)
Speaker of the House of Representatives
Date: 11 August 2022