

**Submission to the Joint Select Committee re the
*Parliamentary Privilege Amendment
(Royal Commission Response) Bill 2022***

1. This submission is in support of the *Parliamentary Privilege Amendment (Royal Commission Response) Bill 2022* (the **Bill**).
2. The Bill would implement Recommendation 7 of the Interim Report of the Royal Commission into Defence and Veteran Suicide (**RCDVS**) tabled on 11 August 2022 (the **Interim Report**):

50. Without change, certain applications of parliamentary privilege will continue to impede this and future Royal Commissions.

Recommendation 7: Provide exemption from parliamentary privilege

Where their terms of reference require an examination of government, Royal Commissions should be made exempt from section 16(3)(c) of the *Parliamentary Privileges Act 1987* (Cth).

3. The Interim Report deals with Parliamentary privilege in Part 6.1.1-6.1.3 (extracted at the end of this submission). The Interim Report, the RCDVS states that "*parliamentary privilege ... claims have **seriously, adversely constrained** our ability to inquire into and receive the necessary evidence*" (Interim Report, Executive Summary para 21, emphasis added).
4. I support the Bill because - in a context much less grave than the issues the RCDVS has to deal with - I have personal experience of s16(3) of the *Parliamentary Privileges Act* (the **PP Act**) operating in a way I believe is contrary to the public interest and deeply unfair.
5. On 14 October 2022, I made a submission to the Joint Select Committee re the National Anti-Corruption Commission Bill 2022. A copy of that submission is **attached**. In short my experience of the PP Act is this:

- (a) I am a public official who made a public interest disclosure under the *Public Interest Disclosures Act 2013* (Cth) (the **PID Act**): I blew the whistle after a Commonwealth agency knowingly gave false evidence¹ to Parliament.
- (b) After my disclosure, the agency withdrew the false evidence to Parliament: conduct which in my view amounts to an admission.
- (c) But then in the Federal Court², the agency claimed Parliamentary privilege to avoid liability for reprisal action ... **a Commonwealth agency that lied to Parliament then used Parliamentary privilege to defeat whistleblower protections in Court: [\[2021\] FCA 960](#).**

6. The Government response to the Interim Report asserts that Royal Commissions “*can carry out their functions*” without infringing PP Act s16(3). That may be so, but the Interim Report provides compelling details showing how the public interest is not served when, because of Parliamentary privilege, Royal Commissions are conducted in ways that are “**seriously, adversely constrained**”.
7. The Interim Report notes that Royal Commissions other than the RCDVS have experienced similar problems with the operation of Parliamentary privilege:

49. Parliamentary privilege can only be waived by Parliament as the holder of the privilege, through legislation.³³ Commissioners Tracey and Briggs raised this issue during the Royal Commission into Aged Care Quality and Safety with parliamentary officers.³⁴ It was also mentioned by Commissioner Hayne during the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.³⁵

More examples of Parliamentary privileges causing adverse constraints to Royal Commissions are identified in the “Waiver of Privilege” chapter of the 2003 book *Parliamentary Privilege* by Enid Campbell (pages 124-143).

8. The Australian Government Solicitor Legal briefing [No. 95](#) on Parliamentary privilege states:

Section 16(3) provides that the specified uses of proceedings in Parliament are ' t lawful'. This is not qualified by circumstances or conditions and involves no exercise of a discretion by the court or tribunal. It is, in short, an 'absolute prohibition.'²⁵

9. Because s16(3) creates an absolute prohibition, **s16(3) invites all-or-nothing legal challenges**. Legal challenges of that nature are likely to hinder a Royal Commission's ability to operate if an issue of Parliamentary privilege is raised.
10. The new subsection 16(6A) of the PP Act that would be enacted by the Bill (**Proposed s16(6A)**) uses similar drafting to subsection 16(6) of the PP Act. Subsection 16(6) contains a form of words (highlighted in yellow) by which Parliament has sensibly limited the effect of the Parliamentary privilege **in relation to a category of proceedings** (highlighted in pink):

(6) **In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.**

(A similar formulation is used in PP Act subsection 16(5)).

11. The drafting of PP Act s16(6) does not in terms limit Parliamentary privilege. Instead it says that nothing in the provision "**shall be taken to prevent or restrict**" (emphasis added) the conduct of certain types of proceeding. In effect, the provision is a direction from the Parliament to the courts not to allow Parliamentary privilege to impede a specified type of proceeding. The approach of s16(6) seems capable of significantly reducing legal challenges and impediments to the operation of Royal Commissions.
12. While Proposed s16(6A) directly adopts the wording of Recommendation 7 of the Interim Report, the Committee could also consider if the intent of Recommendation 7 can be achieved by drafting which:
 - (a) restricts the operation of PP Act s16(3) by reference to **a category of proceeding**, ie the proceedings of Royal Commissions;
 - (b) applies to the entirety of s16(3) rather than just subsection (3)(c); and
 - (c) rather than giving Parliamentary privilege unconditional precedence over all Royal Commissions, creates a mechanism for Parliament to:

- (i) preserve Parliamentary privilege in relation to matters specified in a certificate; or
- (ii) certify that Parliamentary privilege does not apply to matters specified in a certificate.

13. The Committee could consider, for example, new subsections for PP Act s16 in these terms (or along these lines):

(6A) In relation to proceedings of a Royal Commission, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict evidence being tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for a purpose identified in subsection (3) except as specified in a certificate issued under subsection (6B) .

(6B) If the President of the Senate, the Speaker of the House or the Chair of a Committee signs a certificate stating that the powers, privileges, and immunities of the Senate or of the House of Representatives, or of the members and the committees of a House apply to the matters identified in the certificate, subsection (6A) does not apply in relation to those matters.

(6C) The President of the Senate, the Speaker of the House or the Chair of a Committee may also sign a certificate stating that the powers, privileges, and immunities of the Senate or of the House of Representatives, or of the members and the committees of a House do not apply to matters identified in the certificate.

14. The new proposed Subsections (6B) and (6C) use a similar approach to the current s17 of the PP Act, which provides:

17 Certificates relating to proceedings

For the purposes of this Act, a certificate signed by or on behalf of the President of the Senate, the Speaker of the House of Representatives or a chairman of a committee stating that:

- (a) a particular document was prepared for the purpose of submission, and submitted, to a House or a committee;
- (b) a particular document was directed by a House or a committee to be treated as evidence taken in camera;
- (c) certain oral evidence was taken by a committee in camera;
- (d) a document was not published or authorised to be published by a House or a committee;

- (e) a person is or was an officer of a House;
 - (f) an officer is or was required to attend upon a House or a committee;
 - (g) a person is or was required to attend before a House or a committee on a day;
 - (h) a day is a day on which a House or a committee met or will meet; or
 - (i) a specified fine was imposed on a specified person by a House;
- is evidence of the matters contained in the certificate.

15. The alternative subsections (6A) and (6B) suggested above could, in my submission, create a framework that allows for a better, more nuanced balancing of the public interest in maintaining Parliamentary privilege and the public interest in Royal Commissions being conducted effectively and without serious adverse constraints. It would allow for a case-by-case consideration by the Parliament (through its delegated officials) of the extent to which matters to be addressed by a Royal Commission (or Royal Commissions generally) should be constrained by Parliamentary privilege. Alternative subsection (6C) would enable Parliament to specifically exclude the operation of Parliamentary privilege in some circumstances..
16. Currently the PP Act is an overly broad and blunt instrument. It creates unforeseen problems and unintended consequences that can only be addressed by the passage of further legislation (which is often too high, and difficult, a bar). The Bill in its current form would avoid some of those problems. The Bill could potentially also be amended so that it not only addresses Recommendation 7 of the Interim Report, but also provides a mechanism for dealing with similar issues which will, inevitably, arise during other Royal Commissions.

Endnotes

[1] Or, to use the wording in the [Senate Privilege Resolutions](#), it did not “[believe on reasonable grounds](#)” the evidence was “[substantially true in every material particular](#).”

[2] **Note:** ***suppression orders apply*** to the Federal Court proceedings, but the non-publication orders have an exception where publication occurs with the consent of the parties. This submission is made with the consent of the parties.

[3] The highlighting and bolding of quoted text has been added by me for emphasis.