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Mr Mark Dreyfus QC MP
Chair
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

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Dear Mr Dreyfus

WHISTLEBLOWING

Thank you for your letter of 12 December 2008 extending your committee's invitation to make a submission for the purpose of its inquiry into whistleblowing protection in the public sector. Time does not permit a full treatment of the subject, but I hope that the following observations may be of some interest to the committee.

As a good starting point for the committee's inquiry I commend the Public Interest Disclosures Bill 2007 introduced by then Senator Andrew Murray. This bill was developed over several years. It was first introduced in 2001 and subjected to inquiry and report by the Senate Finance and Public Administration Committee. A revised version of the bill, reflecting the recommendations of that committee, was introduced in 2002. That bill was the subject of further analysis and comment, resulting in the 2007 bill which is the one currently before the Senate. The bill provides possible sets of answers to the questions posed by your committee's terms of reference. I consider that the bill is a very balanced treatment of the relevant issues.

One of those issues requires particular attention from the parliamentary point of view. The bill provides for public interest disclosures to members of either House of the Parliament (subclause 9(1)). It is appropriate that members of the Parliament be authorised recipients of public interest disclosures. The bill also contains a provision that nothing in it affects the immunity of proceedings in Parliament under section 49 of the Constitution and the *Parliamentary Privileges Act 1987* (subclause 6(1)). It is vital that the latter provision be included in any legislation providing for public interest disclosures. As the explanatory memorandum accompanying the bill points out, without such a provision there is a danger that the legislation would be interpreted as partly extinguishing parliamentary privilege attaching to the disclosure of information to members of the Parliament. Government lawyers would almost certainly interpret such legislation in that way in the absence of the non-derogation provision in respect of parliamentary privilege.

Under the law of parliamentary privilege, as explicated by the *Parliamentary Privileges Act 1987*, the disclosure information to members of the Parliament in appropriate circumstances falls within the category of “acts done ... for purposes of or incidental to” proceedings in Parliament, and is therefore protected by parliamentary privilege. The appropriate circumstances include, for example, a request to a member of the Parliament to initiate a parliamentary inquiry (in the inclusive sense of that expression) into a matter. This issue is referred to in the Senate Privileges Committee reports and other authorities listed in *Odgers' Australian Senate Practice*, 12th ed., 2008, pp 45-6. It is important that this aspect of parliamentary privilege be left to operate in conjunction with, and unaffected by, any statutory regime for public interest disclosures to members of the Parliament. The ability of citizens to communicate with their parliamentary representatives, and the capacity of those representatives to receive information from citizens, should not be restricted, inadvertently or otherwise, by a statutory public interest disclosure regime.

I would be pleased to provide further information to the committee should the committee so require.

Yours sincerely

(Harry Evans)