

## Chapter 3

### The Provisions of Concern to the Committee

3.1 This chapter sets out the committee's concerns with the application, operation and consequences of the provisions identified in Appendix 3.

#### Recognition of the main policy of the bill

3.2 Before considering its concerns with these provisions, the committee acknowledges the policy intent of the bill which is to protect the confidentiality of taxpayer information and has the following objectives:

- (a) to protect the confidentiality of taxpayers' affairs by imposing strict obligations on taxation officers (and others who acquire protected taxpayer information), and so encourage taxpayers to provide correct information to the Commissioner; and
- (b) to facilitate efficient and effective government administration and law enforcement by allowing disclosures of protected tax information for specific, appropriate purposes.<sup>1</sup>

3.3 The committee recognises and respects this policy of protecting the confidentiality of taxpayers' affairs and the need for the Australian Taxation Office to have robust protections in place to achieve that policy.

3.4 However, there is a second policy included in the bill, namely, to override the operation of parliamentary privilege by making parliamentary committee operations justiciable, by setting conditions of access between parliamentary committees and their witnesses, by dictating the manner in which parliamentary committees must hear evidence and by making any departure from those conditions a criminal offence. This second policy is a major departure from the long-standing supremacy of parliamentary privilege and a significant trespass on the powers, privileges and immunities of the Houses and their committees and on the rights of witnesses of the Parliament.

#### The provisions of concern

3.5 The Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 contains 5 schedules. Schedule 1 amends the *Tax Administration Act 1953* and contains the main amendment providing for the confidentiality of taxpayer information. The other schedules contain consequential amendments, other amendments, repeals and regulations about transitional matters which are not relevant to the committee's inquiry.

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1 Tax Laws Amendment (Confidentiality of Taxpayers Information) Bill 2009, s.355-10.

3.6 Subdivision 355-B contains provisions governing the disclosure of protected information (as defined) by taxation officers. Subdivision 355-C contains provisions governing the on-disclosure of protected information by other people. Proposed section 350-25 creates an offence for a serving or former taxation officer to disclose protected information. Proposed section 355-155 creates a similar offence for a person or entity who is not a taxation officer. Various exceptions are then created, including in proposed section 355-55, disclosure by taxation officers to Ministers and committees of Parliament. The exception for disclosure to parliamentary committees in proposed subsection 355-55(2) is as follows:

- (2) Section 355-25 does not apply if:
- (a) the record is made for, or the disclosure is to, a committee of one or both Houses of the Parliament; and
  - (b) the making of the record or the disclosure is in response to a request of the committee for the record or the information; and
  - (c) the record or disclosure is for the purpose of the committee performing any of its functions or exercising any of its powers; and
  - (d) in the case of a written disclosure—the disclosure is treated as evidence taken in camera; and
  - (e) in the case of an oral disclosure—the disclosure is made in camera.

Note: A defendant bears an evidential burden in relation to the matters in this subsection: see subsection 13.3(3) of the *Criminal Code*.

3.7 There is no parallel exception for persons or entities other than taxation officers to provide protected information to a parliamentary committee, a point queried by the Scrutiny of Bills Committee and also the subject of a submission to this committee from the Acting Commonwealth Ombudsman.<sup>2</sup> The Assistant Treasurer's response to the Scrutiny of Bills Committee (contained in its *First Report of 2010*) affirms the Government's intention that such information should be provided to committees only by taxation officers. It is therefore an offence for any other person to provide such information to a committee.<sup>3</sup>

3.8 The offence provision for taxation officers is as follows:

**355-25** Offence—disclosure of protected information by taxation officers

- (1) An entity commits an offence if:
- (a) the entity is or was a taxation officer; and
  - (b) the entity:

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2 Acting Commonwealth Ombudsman, *Submission 8*, p.1.

3 Clerk of the Senate, *Submission 1*, p.7.

- (i) makes a record of information; or
- (ii) discloses information to another entity (other than the entity to whom the information relates or an entity covered by subsection (2)) or to a court or tribunal; and
- (c) the information is protected information; and
- (d) the information was acquired by the first-mentioned entity as a taxation officer.

Penalty: Imprisonment for 2 years.

3.9 A further provision of concern to the committee sets limits on disclosure to the Parliament as follows:

**355-60 Limits on disclosure to Ministers and Parliament**

- (1) Sections 355-45 and 355-55 are the only exceptions to the prohibition in section 355-25 on which an entity who has acquired protected information as a taxation officer can rely in making a record of the information for, or disclosing the information to, a Minister, a House of the Parliament or a committee of one or both Houses of the Parliament.

Note: Disclosures that are not prohibited by section 355-25 are not affected by this subsection. For example, a taxation officer may disclose information to a Minister if the Minister is the entity to whom the information relates, or is an entity covered by subsection 355-25(2) in relation to the information.

- (2) Subsection (1) has effect despite any power, privilege or immunity of either House of the Parliament, of the members of either House of the Parliament or the committees of either or both Houses of the Parliament, except to the extent that those powers, privileges or immunities can be invoked to compel the disclosure of protected information.
- (3) However, nothing in this Subdivision affects the law relating to the powers, privileges or immunities of either House of the Parliament, of the members of either House of the Parliament or of the committees of either or both Houses of the Parliament in relation to the recording or disclosure of particular protected information if the information has been disclosed in accordance with section 355-45 or 355-55.

Note: A reference in subsection (3) to members of either House of the Parliament includes a reference to Ministers.

3.10 In the committee's view, the provisions are complex, poorly drafted and very difficult to understand, a point made very strongly to the committee by Dr Twomey in both her submission and oral evidence:

The first and most obvious point is that the meaning of cl 355-60 is most unclear.....As a constitutional lawyer who is familiar with parliamentary privilege, I find this provision extremely confusing. What hope does a taxation officer have in interpreting these provisions?<sup>4</sup>

3.11 In their evidence to the committee, Treasury officers conceded that the intention of the provisions was not clearly expressed:

I think it is meant to mean that those restrictions that are dealt with in the previous sections do not apply if the committee invokes its power to compel, and I think that is perhaps where the drafting-if I can be critical of the drafting with hindsight-might be wrong.<sup>5</sup>

3.12 It is a fundamental principle, essential to the rule of law, that legislation should be clearly drafted and able to be understood by those who are subject to it. In the committee's view, the provisions in Subdivisions 355-B and 355-C do not pass that basic test. Further issues associated with unclear drafting are discussed below under "Workability of the provisions".<sup>6</sup>

### **The creation of offences for providing information to parliamentary committees**

3.13 The intention of the bill is to consolidate and standardise the various secrecy provisions that exist across the taxation legislation. It appears to the committee that the policy decision to include the provision of information to parliamentary committees in the legislative scheme has been poorly thought through. Uniform provisions have been applied to circumstances where they are entirely inappropriate. The most unacceptable feature of the provisions is the creation of offences applying to persons who provide information of a certain type to committees. The idea that a person might be punished for providing evidence to a committee runs counter to the whole thrust of the law of parliamentary privilege for the past three and a half centuries, law which has existed to protect the operations of parliament and its committees from outside interference, including by protecting the right of witnesses to give evidence and punishing those who would interfere with that right. As suggested in her evidence by the Clerk of the Senate, the bill is asking the Parliament to legitimise behaviour which it would otherwise treat as a contempt.<sup>7</sup>

3.14 Senate Privilege Resolution 6 includes the following contempts:

#### **Interference with witnesses**

(10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence

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4 Dr Anne Twomey, *Submission 2*, p.1.

5 Mr P. McCullough, *Evidence*, p.5.

6 See below, paragraph 3.37 et seq.

7 *Evidence*, p.2.

given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

### **Molestation of witnesses**

(11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.<sup>8</sup>

3.15 Indeed, the Parliament regards interference with, or the imposition of a penalty on, witnesses to be such a serious matter that it included a criminal offence in the *Parliamentary Privileges Act 1987* as an alternative to the contempt jurisdiction in appropriately serious cases.<sup>9</sup> As the former chair of the committee pointed out during the public hearing on the bill, the offences in the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 are in direct contradiction of the offence in section 12 of the *Parliamentary Privileges Act*.<sup>10</sup> Although Treasury officers put forward the view that any uncertainty about the relationship between the *Parliamentary Privileges Act* and the new offence provisions would be resolved by the fact that the new offences were a later enactment and would therefore take precedence over the *Parliamentary Privileges Act*, this view was disputed by the Clerk of the Senate on the basis that any abrogation of parliamentary privilege required an express declaration to that effect.<sup>11</sup> It was also rejected during the public hearing by the former chair of the committee in the following terms:

**CHAIR**—Sure. But what does trouble me is that it seems to me that this runs right up against section 12 of the *Parliamentary Privileges Act* of 1987, in particular subsection (2), which says:

(2) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of:

(a) the giving or proposed giving of any evidence; or

(b) any evidence given or to be given; before a House or a committee.

And then there is a penalty. Now you have got one statute saying a person cannot be punished for giving evidence to the parliament or one of its committees and then this statute says a person shall be punished if they do give a defined category of evidence if requested or compelled by the parliament or one of its committees. With all due respect to the written Treasury submission, it is absolutely not an adequate response to say that this Act impliedly repeals or impliedly amends the *Parliamentary Privileges Act* to that extent. The *Parliamentary Privileges Act*, which itself gives effect to and continues the provisions captured by section 49 of the

8 *Standing Orders and other orders of the Senate*, June 2009, Privileges Resolutions, p.110.

9 *Parliamentary Privileges Act 1987*, s.12.

10 *Parliamentary Privileges Act 1987*, s.12.

11 The Treasury, *Submission 6*, p.3 & Dr R Laing, Clerk of the Senate, *Submission 1*, p.2.

Constitution, although technically merely another Act of the Commonwealth parliament, is a fundamental constitutional statute. Now you do not impliedly amend a fundamental constitutional statute like that. It is unheard of. I think that a court would struggle to say that a statute like the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 effects an implied amendment to a fundamental constitutional statute. The court would at least expect that there was an express amendment to section 12 of the Parliamentary Privileges Act, and it may be that that is necessary.<sup>12</sup>

3.16 The committee notes that none of the other existing statutory provisions limiting the powers, privileges or immunities of Parliament involve offences. It is the committee's firm view that the use of an offence provision to limit the relationship between parliamentary committees and their witnesses is unacceptable in principle and offensive to the separation of powers.

3.17 The committee also received evidence that the offence provisions created possibly unintended consequences for the relationship between persons other than tax officers, and parliamentary committees.

3.18 In a submission to the inquiry, the Acting Commonwealth Ombudsman advised that the bill will cause difficulties to the Ombudsman's work by interfering in the relationship between the Ombudsman and parliamentary committees.

The Commonwealth Ombudsman often appears before Parliamentary committees to provide comments and information on a range of matters within his jurisdiction, including taxation matters. The operation of the bill as it appears to affect the Ombudsman is in possibly restricting taxation information that can be provided to the Ombudsman by the Australian Taxation Office and possibly impacting on the information that the Ombudsman can provide to Parliamentary committees.

The bill provides, at s 355-155, that an entity commits an offence if it discloses information it acquired under the exceptions in Subdivisions 355-B and C. As noted above, the exceptions in section 355-50 and 355-60 do not seem to cover the usual provision of information to the Ombudsman; similarly none of the exceptions in Subdivision C apply to information given to the Ombudsman. This leads to the awkward situation that the Bill presently does not clearly provide for the disclosure of taxation information to the Ombudsman other than under its formal coercive powers of s 9 (which is rarely used) but if it did, then the restrictions on on-disclosure of information would then apply to the Ombudsman. This would include restricting the provision of information, by the Ombudsman, to a Parliamentary Committee.<sup>13</sup>

The committee sees this as an example of the inevitable problems caused by unnecessary legislation.

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12 Senator Brandis, *Evidence*, p.7.

13 Acting Commonwealth Ombudsman, *Submission 9*, p.1.

3.19 The ALRC was also critical of the over-reliance on criminal sanctions in statutory secrecy provisions:

criminal sanctions should only be imposed where they are warranted - when the disclosure of government information is likely to cause harm to essential public interests - and where this is not the case, the unauthorised disclosure of information is more appropriately dealt with by the imposition of administrative penalties.<sup>14</sup>

### **Justification for the provisions**

3.20 Apart from the inappropriate use of an offence provision, the committee was concerned by another threshold issue, namely, the lack of any demonstrated need for the provisions.

3.21 The question that should always be asked with any proposed statutory provision, is "what is the need for the provision and what is the evil which it seeks to remedy?" One of the oldest rules of statutory interpretation, the mischief rule, has at its core the question, "what is the mischief or defect which is not provided for in the law as it stands at present?"

3.22 In addressing this point, the Clerk of the Senate noted in her submission to the committee:

There are no known instances where Senate committees have requested (or ordered the production of) tax file numbers or other information pertaining to individual taxpayers. There is one occasion where a document which may have included a tax file number was tabled in the Senate. It was subsequently established that the number was part of a longer reference sequence on correspondence and was not identified as a tax file number (*Senate Debates*, 19 June 1996, p. 1805).<sup>15</sup>

3.23 Parliamentary committees rarely investigate individual cases and while they are often approached by individuals with an individual case, such cases are not usually investigated. Rather they serve as an illustration of systemic or wider policy issues.

3.24 As to whether Senate committees would ever inquire into the taxation affairs of individual taxpayers, the committee considers this would be highly unusual. As noted by the Clerk of the Senate, it has not happened in the past:

there is no justification that has been put forward for these provisions. In my view they are unnecessary. They are addressing a problem that does not exist. Committees have not needed individual taxpayer information to conduct the kinds of inquiries they undertake, which tend to be into

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14 ALRC, *Submission 7*, p.2.

15 Clerk of the Senate, *Submission 1*, p.13.

systemic issues. Historically, committees have not asked for this kind of information.<sup>16</sup>

This was also acknowledged by Treasury officials in evidence before the committee:<sup>17</sup>

**Senator FARRELL**—To get back to the point that Dr Laing is making, she is saying that no case has been made out for this. The example you are giving, I think, is where a tax officer is reluctant to provide the information at all. There is no suggestion here that the tax officer is going to be prohibited from providing the information. The only restriction is that it be in camera. Presumably, then, you have had circumstances where the information has been required in circumstances where it has not been in camera?

**Mr McCullough**—No, not that I can recall where it has been required by the committee not in camera.

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**Senator FARRELL**—Can you give us an example where a tax officer has been required by a committee to give evidence about an individual's tax circumstances and that has not been in camera?

**Mr McCullough**—No, I cannot, but I have given you what I thought were—

**Senator FARRELL**—Okay, can you stop at that point. Is that the point you are making, Dr Laing?

**Dr Laing**—Yes, Senator, and I think you could also say that the evidence of the Treasury officer shows that the existing system works.<sup>18</sup>

3.25 Moreover, questioning of the need for these statutory secrecy provisions also arose during the Economics Legislation Committee consideration of the bill. During that committee's public hearings on the bill on 25 February 2010, the following evidence was given by Treasury officers:

**CHAIR**—Do you have any instances where identifiable information has been provided? Can you provide an example of that?

**Mr Rutherford**—I cannot, actually. I have been involved in the project for the last two or three years, and I did ask the ATO officers working alongside us whether they could think of any particular instances. I imagine it has happened before, because the ATO does have formal guidance for its officers. But certainly it is not a common occurrence and, as a result, neither the ATO nor I in my own experience could identify any particular case. I guess the point to reiterate is that it is a very rare circumstance where

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16 *Evidence*, p.2.

17 *Evidence*, p. 6.

18 *Evidence*, p.11.



it would be required. But the bill acknowledges that, in some limited circumstances, it might.<sup>19</sup>

3.26 The Rule of Law Association of Australia (RoLAA), an association which has as one of its objectives a reduction in the complexity, arbitrariness and uncertainty of Australian laws, also submitted to the committee that the need for the provision had not been made out:

as far as RoLAA is aware no parliamentary committee has ever sought any information on the affairs of individual taxpayers, and properly left such matters to the Australian Tax Office. It should be left to the good sense of parliamentarians to determine what matters should be reviewed by them and how, without limiting the fundamental right of parliamentary privilege which is there to benefit all those whom they represent.<sup>20</sup>

3.27 In a submission received by the committee from the Acting Commonwealth Ombudsman, the lack of a need to provide individual taxpayer information to parliamentary committees was also noted:

It would be extremely unusual for the Ombudsman to provide information to a Parliamentary Committee that would identify or be reasonably capable of identifying an entity (an essential component of the definition of protected information).<sup>21</sup>

3.28 It is of concern to this committee that such a significant policy change as it affects the Parliament is being proposed in the knowledge that there has been neither demonstrated nor persuasive need for it.

3.29 In response to questioning by the committee, Treasury officials said that the purpose of the provision was to give certainty to officers appearing before parliamentary committees:

to be able to look on the face of the Act that they deal with and say, “Right, I cannot disclose this to a committee unless it is in camera”.<sup>22</sup>

3.30 While the committee appreciates the concern of Treasury officials to ensure that taxation officers know where they stand and the conditions under which they may disclose information to a parliamentary committee, it is clear to the committee that this matter should not be the subject of legislation. Rather, it should be a matter of training for taxation officers:

**Senator McLUCAS**—Mr McCullough, I come back to Senator Farrell’s point. I still do not understand the motivation or the need for these elements of the bill. I understand your point that officers appearing in front of

19 Economics Legislation Committee, *Inquiry into the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 – Provisions, Evidence*, 25 February 2010, p.3.

20 Rule of Law Association of Australia, *Submission 4*, p.2.

21 Acting Commonwealth Ombudsman, *Submission 9*, p.1.

22 *Evidence*, p.5.

committees who have protected information that they carry are nervous about talking about that or being compelled to talk about that, but isn't that an internal training issue? You just tell people: 'You are allowed to say these things to a Senate committee. If they ask you, "What's Jan McLucas's tax file number?" you can say, "I'm sorry; that's protected information". I think that is an issue for your training of your officers to appear in front of a committee rather than a very, very big stick to break this nut.'<sup>23</sup>

3.31 This is a point that has been made on numerous occasions by the committee when it has drawn attention to the need for senior officials to be more knowledgeable of their obligations when dealing with parliamentary committees.<sup>24</sup>

3.32 Although no evidence was given to the committee that parliamentary committees had ever asked for tax officers to provide the kinds of sensitive taxpayer information that the bill is designed to protect, the committee appreciates that there may be such a requirement in the future.

3.33 In fully considering this matter, the committee has given thought to how, in that rare but possible circumstance that a disclosure over which the Treasury officials have expressed concern might occur, existing protections might operate? On this point it took evidence from the Clerk of the Senate that there already exist well established procedures within the Senate for dealing with such a need, should it ever, on the rare occasion acknowledged by Treasury officials, arise, as follows:

If they did, however, there are well established procedures formalised in various Senate resolutions to deal with these requests. For example, a claim of public interest immunity would be the obvious solution in such cases should they ever arise, and there are clear procedures to deal with these. Moreover, potential harm to the privacy of an individual is a well established ground of public interest immunity.<sup>25</sup>

3.34 The committee draws attention to these well established practices which the Parliament already has in place for the protection of privacy, including in the very specific area of taxpayer confidentiality.

3.35 The Standing and other Orders of the Senate make comprehensive provision for these matters. Standing Order 25(14) authorises any legislative and general purpose standing committee to meet and transact its business in private session. Standing Order 37 sets out procedures for dealing with in camera evidence obtained by Senate committees. Privilege resolution 1 sets out "procedures to be observed by Senate committees for the protection of witnesses", including ensuring all witnesses are afforded the opportunity to give their evidence in a private session of the

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23 *Evidence*, p.13.

24 Privileges Committee, 36<sup>th</sup>, 42<sup>nd</sup>, 46<sup>th</sup>, 64<sup>th</sup>, 73<sup>rd</sup>, 89<sup>th</sup>, 119<sup>th</sup> Reports. Also see report of the Foreign Affairs, Defence and Trade References Committee, *Report on Parliamentary Privilege - Possible interference in the work of the committee: Inquiry into matters relating to events on HMAS Success*, March 2010.

25 *Evidence*, p.2.

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committee. Finally, the committee draws attention to a resolution setting out the procedures to be followed by Senate committees and witnesses in relation to claims of public interest immunity. An application under this resolution, could, for example, include an application by a witness that they not be required to divulge confidential taxpayer information unless it is received on an in camera basis, or an application that it not be divulged at all.

3.36 The committee concludes that the Parliament already has strong safeguards and mechanisms for the protection of taxpayer confidentiality. The committee further concludes that the need for the provisions has not been made out.

### **Workability of the provisions**

3.37 The committee has already noted the direct clash between the proposed offences and the offence in section 12 of the Parliamentary Privileges Act. The provisions also set up a more fundamental clash with parliamentary privilege.

#### *The effect of section 16 of the Parliamentary Privileges Act*

3.38 Paragraph 355-55(2) (c) of the bill before the committee provides:

the record or disclosure is for the purpose of the committee performing any of its functions or exercising any of its powers.

3.39 What is of concern to the committee is that while the requirement for “the record or disclosure is for the purpose of the committee performing any of its functions or exercising any of its powers” sounds reasonable, once that requirement is in the statute it becomes justiciable. It is justiciability which causes the collision with parliamentary privilege. If a matter were ever to come before a court under this provision, the court would be required to adjudicate on whether the record or disclosure was for the purpose of the committee. It would involve a court inquiring into the relevance of the committee's activities to its terms of reference. This is a matter which has always been considered to be the exclusive responsibility of each House in relation to its own committees and beyond the competence of courts to adjudicate on.

3.40 Furthermore, there would be a need to lead evidence. Questions would be asked about whether the record or disclosure was for the purpose of the committee performing any of its functions or exercising any of its powers; about what was the purpose of the committee; and about what any of the committee's functions or powers were. Evidence of these matters could only come from parliamentary proceedings. The likely source of such evidence would either be debate in the House establishing the terms of reference of the committee's inquiry, or deliberations of the committee in interpreting or applying the terms of reference. This would be needed to establish what the “purpose of the committee in performing any of its functions or exercising any of its powers” was. Inevitably, the court would be involved in all manner of questioning about the committee proceedings themselves.

3.41 As noted by the Clerk of the Senate in her submission:

For example, proving that an officer provided the information to a committee in response to a request from the committee would involve questioning of that request: was it a request specifically for that information; if not specifically, what was it about the request that led the officer to interpret it as such? What was the committee's purpose in making the request? In relation to the requirement for the disclosure to be for the purpose of the committee performing any of its functions or exercising any of its powers, there would need to be an assessment of the relevance of the request to the committee's terms of reference, involving the interpretation by a court of those terms of reference.

This is precisely what subsection 16(3) of the Parliamentary Privileges Act proscribes as unlawful. The freedom of proceedings in parliament from questioning in any place outside of parliament has been fundamental to the integrity of parliamentary operations for centuries and certainly since it first received statutory expression in Article 9 of the Bill of Rights in 1689. Subsection 16(3) of the Parliamentary Privileges Act provides:

- (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:
  - (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
  - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

In the case of a prosecution under section 355-155, it would be necessary to show that a person was not a tax officer and that they gave particular evidence to a committee. While the production to a court of a transcript of the committee evidence that showed such a disclosure would not necessarily amount to an impeachment or questioning of proceedings in parliament contrary to subsection 16(3), it is almost certainly the case that no defence would be possible without reliance on the parliamentary proceedings.<sup>26</sup>

3.42 Dr Twomey agreed that the provision will cause real practical questions of parliamentary privilege to arise once a matter is litigated under the provision:

The defendant bears the evidential burden in relation to the application of the exception to cl 355-25. This means that a taxation officer would have to

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26 Clerk of the Senate, *Submission 1*, p.12.

establish that he or she received a ‘request’ from a parliamentary committee for the protected information, that it was ‘for the purpose of the committee performing any of its functions or exercising any of its powers’ .....Whether or not the request for the information was ‘for the purpose of’ the committee performing its functions or exercising its powers would not only be difficult to establish, but could potentially raise issues of parliamentary privilege if it were alleged that the request had been made for private or gratuitous purposes that did not fall within the committee’s functions or powers. Section 16 (3) of the *Parliamentary Privileges Act* provides that in proceedings in any court it is not lawful for evidence to be tendered or questions asked concerning proceedings in Parliament for the purpose of questioning the intention or good faith of anything forming part of those proceedings in Parliament. Is it intended to override section 16(3) (which derives from the *Bill of Rights* 1688) or is it intended that the defendant be left unable to lead the evidence necessary to satisfy the evidential burden laid upon him or her?<sup>27</sup>

3.43 The extent of these practical problems was evident in questioning by committee members:

**Senator O’BRIEN**—It has been the occasion that a witness has asked to give evidence in camera and has given that evidence in camera but that the committee has resolved the evidence should then be published. Would that witness be protected?

...

**O’BRIEN**—If that were challenged, the officer would have to establish that the disclosure was for the purpose of the committee performing any of its functions or exercising any of its powers, which would be another test that the witness would have to satisfy. What I am saying is that the court would say that may be true, but was the committee doing something else. Sorry, does 355-55(2)(c) also apply?

**Mr McCullough**—I am struggling to imagine a circumstance where a committee—

**Senator O’BRIEN**—What I am getting too is this. If the committee had a term of reference, would that enable the court to examine whether the question put or the information which came before the committee fell within the terms of reference? That would be a bit of a slippery slope for a witness, I would think, if there were some question mark as to whether the evidence fell within the terms of reference of the committee....

**Senator O’BRIEN**—It may not be empowered to inquire into a matter. The court might find that the matter it was inquiring into with that particular question was not strictly speaking germane to the terms of reference before the committee and therefore it might not be a matter which complies with 355-55(2)(c) and therefore, whatever else happens, the witness may not have that defence. Is that a reasonable proposition?

**Mr McCullough**—I am sorry, we are out of my depth here. I would have to take legal advice on the question of whether, if a committee was operating outside its power, the witness was protected if the witness gave it in camera.

**Senator O'BRIEN**—It does seem to me that it is self-evident that that matter would have to be entertained by the court if it were looking at these provisions as a defence.<sup>28</sup>

3.44 The significance of this problem is immediately apparent. Apart from the committee's firm in-principle view that such a breach of the separation of powers, of having the courts investigating the internal operations of parliamentary committees, is unacceptable, two immediate consequences need to be dealt with. Either proceedings in Parliament would necessarily be called into question, in contravention of section 16 of the *Parliamentary Privileges Act 1987*, or the Privileges Act would have to be read down so as to permit such questioning. This problem was pointed out by the Clerk of the Senate in her submission to the committee:

My main concern is that the exception in subsection 355-55(2) to the prohibition in section 355-25, and the prohibition in section 355-155, would appear to be unworkable unless the *law* relating to the powers, privileges and immunities of the Houses - and specifically section 16 of the *Parliamentary Privileges Act 1987* - is read down to permit proceedings in parliament to be questioned in a court to the extent necessary for a defendant to bear the evidential burden in respect of the matters listed in subsection 355-25(2) or for the prosecution of an offence under section 355-155.<sup>29</sup>

3.45 As has already been set out in Chapter 2 above, such a reading down of the powers, privileges and immunities of the Parliament provided for in section 49 of the Constitution may only occur by an express statutory declaration. The provisions in question do not provide such an express statutory declaration. As the Clerk points out:

Unlike the case with the *Auditor-General Act 1997*, there is nothing in either the bill or the Explanatory Memorandum to identify the provisions as a declaration for the purposes of section 49 of the Constitution. The provisions do not meet the test suggested by the ALRC in its recent report on secrecy provisions because their intention is not clearly stated. As noted above, the need for an express declaration rather than the drawing of an inference by necessary implication is required by the very clear terms of section 49 of the Constitution.<sup>30</sup>

3.46 In evidence before the committee, Dr Twomey emphasised the importance of having a clear declaration that parliamentary privilege is being overridden:

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28 *Evidence*, p 7.

29 Clerk of the Senate, *Submission 1*, p.11.

30 Clerk of the Senate, *Submission 1*, p.12. See also paragraph 2.16 above in relation to ss 37(3) of the *Auditor-General Act 1997*.

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I think it is important for the parliament to make very clear what it is proposing to do in relation to privilege. If the parliament intends that its committees and its houses shall still have the power to compel the disclosure of these documents and that any disclosure made pursuant to such compulsion not be an offence then that needs to be clearly stated, and not as an exception to an exception as it arises under section 355-60(2).<sup>31</sup>

*Are the provisions effective in protecting sensitive taxpayer information?*

3.47 The bill declares that the power of Houses of Parliament and their committees to compel the production of information is not affected by the provisions in question. This led Dr Laing to query how effective the provisions were in protecting sensitive taxpayer information:

the offences in the bill are useless anyway as a means of protecting sensitive information. There is nothing in the bill, and this has been confirmed in the explanatory material and previous evidence of Treasury officers, that prevents committees and the Houses exercising their powers of compulsion. So this information could be acquired if the committee agreed to summon the witness and require the answering of questions. There is no limitation on use of compulsive powers. There is no restriction on committees publishing material they get, so even if they followed the procedures in the bill, took the evidence in camera, there is nothing to prevent them publishing that information once they have taken it. So this suggests to me that it is not the sensitive information per se that is important, because this bill does not prevent sensitive information being disclosed to parliamentary committees. It seems to me the focus is not in the right place because what the bill does is place limits on tax officers and others in their dealings with parliamentary committees.<sup>32</sup>

3.48 Other witnesses were of the view that the declaration preserving the ability of the Houses to compel the production of information was not entirely clear. In a submission to the committee, Dr Twomey expressed considerable concern at the confusion which the provisions would cause:

The problem is that all these provisions are so unclear, it is impossible to know what to make of them. Personally, they just make my head spin. Heaven only knows how a court would interpret them. This is the nub of the problem. How can Parliament be asked to limit the privileges and powers of its Houses when it cannot really know how the legislation would operate in practice will be interpreted by a court? Clearly greater clarity is needed, especially in relation to such an important matter.<sup>33</sup>

3.49 In giving evidence to the committee, Dr Twomey again emphasised the confusion the provisions would cause for both taxation officers and the courts:

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31 *Evidence*, p.3.

32 *Evidence*, p.2.

33 Dr Twomey, *Submission 2*, p.4.

My other real concern is that both from the point of view of the taxation officer and the courts, I think the provisions are very, very unclear in the way that they operate. I note that the Clerk mentioned then that it is not intended at all to limit the powers of the Houses or committees to compel evidence. The difficulty though is that the provisions themselves are not abundantly clear in relation to that point. The way the provisions work is that you start off with a basic offence, saying you cannot disclose information, and then you move to section 355-55(2) which says that the offence does not apply if the taxation officer is giving information to the parliamentary committee in response to a request, for the purpose of the committee's functions and powers and the evidence disclosed in camera. But then you move to section 355-60 and it says the only exceptions to the original offence provision in relation to giving information to the parliament are those in section 355-55(2) above, which is the one I just mentioned, or if the information has already been made public.

So that is all right. You can understand that. But then you get to section 355-60(2), which says that subsection (1) has effect despite parliamentary privilege except to the extent that the powers, privileges or immunities can be invoked to compel the disclosure of protected information. That is where things become very difficult, because the problem is that you have had an express offence; an express exception—something that says the exceptions are completely exclusive—and then something that says they are exclusive unless you compel evidence, but it does not say that the compulsion of evidence is itself an exception to the original offence. So you have to imply that, and that is where everything starts becoming confusing and, I would imagine, (a) difficult for a taxation officer who has to work out whether they are obliged to give information or not and (b) very difficult for a court that needs to interpret what parliament intended.<sup>34</sup>

3.50 In its submission to the committee, the Rule of Law Association of Australia, expressed concern that “the wording of the proposed amendments offend the rule of law as there is a lack of clarity on what protections remain for a taxation officer who was to provide information to Parliament”.<sup>35</sup> The submission went on to support Dr Twomey's submission relating to the lack of clarity of the provision, noting “The lack of clarity as identified by Dr Twomey, has the potential to waste many hours of the courts' time”.<sup>36</sup>

3.51 In evidence before the committee, Treasury officers acknowledged on several occasions that the provisions could have been expressed better.<sup>37</sup>

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34 *Evidence*, p.3.

35 Rule of Law Association, *Submission 4*, p.2.

36 Rule of Law Association, *Submission 4*, p.2.

37 *Evidence*, pp.5,6,7.



3.52 The committee concludes that the provisions are not clearly expressed, that they will cause confusion for taxation officers and courts alike and that they are therefore unworkable.

*Do the provisions place an individual in an unfair position?*

3.53 It is also of concern to the committee that even before the provision is enacted, its scope is not understood. Moreover, the policy which it purports to implement (of providing certainty and clarity for the responsibilities of taxation officers), is clearly not being met.

3.54 Dr Twomey was particularly concerned that the provisions placed an onerous burden on tax officers and were fundamentally unfair;

one of the points that Dr Laing makes is one that concerns me as well—that is, the position of the taxation officer upon whom an evidential burden is placed in relation to establishing the conditions upon which evidence is given to a parliamentary committee under section 355-55(2), under which the defendant, being the taxation officer, would somehow need to establish an evidential burden in relation to the fact that the information was requested and that it falls within the purpose of the committee’s functions and powers.<sup>38</sup>

3.55 Dr Laing suggested that the focus on individual officers was misplaced:

Looked at through the parliamentary end of the telescope, this bill is asking you to sanction behaviour that you would otherwise treat as a contempt. It is proposing to punish witnesses on account of evidence they give to parliamentary committees, and the very existence of an offence provision of this nature may operate as a threat and a deterrent to potential witnesses, and this is something the parliament has hitherto taken very seriously indeed. In my view, the offence provisions are obnoxious in principle. Why would any parliament allow these sorts of provisions without compelling justification? But if parliament is going to limit itself in the way in which it approaches this kind of information, wouldn’t it be better to do it from another angle and to focus on the sensitive information itself and to say something like, ‘A person cannot be required to disclose the information’. This is what the provision in the Auditor-General Act does and also there are some other provisions in the Migration Act which are framed in that way. The big difference is that they are not offence provisions. To me it is quite bizarre that a proposed limitation on the capacity of parliament to carry out its function should take the form of an offence that can be committed by a witness.

In this context I would like to remind the committee that in its 49th report, which was on the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill, it specifically rejected the idea of individual public servants carrying the can for what were, in effect, disputes between the parliament and the executive over access to information. It also rejected the

idea of the courts having a role at the adjudication of disputes with the executive.<sup>39</sup>

3.56 In its 49th report, the committee examined a private senator's bill which proposed that parliamentary orders for documents should be able to be enforced by the courts, with the courts having the opportunity to review any claims of public interest immunity made in respect of the documents.<sup>40</sup> Specifically, the bill was designed to ensure that when a minister in one House, who is immune from the contempt powers of the other, instructs a public servant to disobey an order of that other House, a mechanism is available to bring that minister before a court with a capacity to make orders binding on the Minister concerned, rather than on a public servant caught in a conflict between the operation of two contradictory orders.<sup>41</sup> The committee, and all witnesses to that inquiry, accepted that the position of a public servant without such protection was untenable but it nonetheless rejected the need for the bill, concluding that the existing arrangements were appropriate.<sup>42</sup>

3.57 The reality is that Parliament and its committees are accustomed to dealing with the Executive and finding solutions to potential impasses over access to information, without subjecting individual public servants to penalties. The bill would reverse this practice and inappropriately subject individual tax officers and others to penalties in situations where political solutions have traditionally been applied.

3.58 The committee acknowledges the bill's intention to provide greater guidance to individual tax officers but reaffirms its earlier conclusion that such guidance is best provided by better training rather than criminal sanctions.

### **Interference with the operations of parliamentary committees**

3.59 An issue related to the clash between parliamentary privilege and the provisions in the bill is the extent to which any statute should purport to direct the operations of individual parliamentary committees. In the case of tax officers, they do not breach the proposed provisions if, in addition to the other conditions in subsection 355-55(2), their disclosures to parliamentary committees meet the following tests:

(d) in the case of a written disclosure - the disclosure is treated as evidence taken in camera; and

(e) in the case of an oral disclosure - the disclosure is made in camera

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39 *Evidence*, p.2.

40 Privileges Committee, 49<sup>th</sup> Report, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994*, September 1994.

41 Privileges Committee, 49<sup>th</sup> Report, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994*, September 1994.

42 Privileges Committee, 49<sup>th</sup> Report, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994*, September 1994.

3.60 As well as raising the problem of justiciability, the provisions as drafted indicate a lack of understanding of the parliament's procedures for handling in camera evidence. Effectively prescribing the manner in which parliamentary committee must receive evidence is an interference in the operations of the parliament and its committees which is wrong in principle:

**CHAIR**—My point is that it is not for the executive government to instruct committees of parliament what their powers are to be; it is for the parliament to establish its own committees, which is done by resolution rather than by act of parliament.<sup>43</sup>

3.61 Existing Parliamentary procedures for dealing with sensitive information have been noted in paragraphs 3.33-3.35. The committee is of the view that these existing procedures are sufficient to safeguard any sensitive information that might be required by a committee as part of its investigations.

3.62 It is also of concern to the committee that even before the provision is enacted, its scope is not understood. Moreover, the policy which it purports to implement (of providing certainty and clarity for the responsibilities of taxation officers), is clearly not being met.

3.63 Parliamentary committees have experience in, and established processes for, handling sensitive or private information:

**CHAIR**—.....It may very well be that, in an unusual case like that, it is perfectly appropriate and indeed at the core of the functions of the committee to examine publicly the tax affairs of a person.

**Mr McCullough**—Yes, Senator, and if that is the case then the committee can compel the production of protected information under 355-60(2).

**CHAIR**—Which rather supports Dr Laing's position that the parliament should not tie its hands in saying that this can only ever be done in camera.

**Mr McCullough**—Except that that is not what the bill does. It allows the committee to decide, 'No, we want to have this publicly, so we can compel it.' It just, again, puts the witness, the person who is providing the information, in a clear position. They know they have been compelled, so they are no longer under the other restriction.

**CHAIR**—All right.

**Senator McLUCAS**—That would be done by the committee, not by your bill.

**Dr Laing**—Exactly.

**Senator McLUCAS**—That is what would be happening.

**Mr McCullough**—If it were not for this bill, without a compulsion a witness might be appearing and would have the difficulty in a public hearing of not providing it. They would have to—

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43 Senator Brandis, *Evidence*, p.14.

**Senator McLUCAS**—I do not necessarily think so, because the practice would be that the committee would deliberate and decide to compel the witness to appear. The witness could request that the material be provided in camera. The committee can make a decision about that one way or the other.

**Mr McCullough**—To that extent, I would submit that the bill supports that existing practice.

**Senator McLUCAS**—Which is the point from the Clerk. That is the point I think the Clerk is making, that the committee will decide its destiny. The fact that you have a piece of legislation is pretty well irrelevant. Have I got that right?

**Dr Laing**—I think that is right, Senator McLucas. The bill is not necessary to do what you say is its purpose.

3.64 The committee concludes that the provisions are not clearly expressed, that they will cause confusion for taxation officers and courts alike and that they are unworkable.