



BRIEFING NOTE

Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017

Introduction

1. My advice is sought in relation to the effect of the proposed amendment to s3(2) of the *Corruption, Crime and Misconduct Act 2003* in clause 5 of the *Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017*.
2. In that context I am asked to provide advice as to:
 - (a) The history of s 3(2) of the *Corruption, Crime and Misconduct Act 2003* ("the *CCM Act*"), including any amendments made to it;
 - (b) Whether the proposed amendment affects Parliamentary Privilege, including the respective roles of the Corruption and Crime Commission ("the CCC") and the Privileges Committees of Parliament in relation to the matters affected by the amendment.

The Proposed Amendment Briefly Described

3. Section 3(2) of the *CCM Act* was originally inserted into the *Corruption and Crime Commission Act 2003*, as it was then known, by the *Corruption and Crime Commission Amendment and Repeal Act 2003*.
4. The subsection, in its original form, provided:
 - (2) Nothing in this Act affects, or is intended to affect, the operation of the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891* and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable exclusively by a House of Parliament, unless that House so resolves.

5. The subsection remained in that form until the passage of the *Corruption and Crime Commission Amendment (Misconduct) Act* 2014, which (by s 6(5)), deleted the word "exclusively", and the words ", unless that House so resolves". The form of the subsection after that amendment was:

(2) Nothing in this Act affects, or is intended to affect, the operation of the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891* and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable by a House of Parliament.

6. The amendment proposed by clause 5 of the *Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill* 2017 would re-insert the word "exclusively", such that the subsection would then read:

(2) Nothing in this Act affects, or is intended to affect, the operation of the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891* and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable exclusively by a House of Parliament.

Effect of the Amendment – Significance of the Word Exclusively

7. The effect of the proposed amendment rests on the significance of the word "exclusively".

8. Prior to the removal of the word "exclusively", s 3(2) did not prevent the CCC from exercising powers in relation to a range of misconduct by members of Parliament. This was because there was a range of conduct which constituted **both** a breach of the *Parliamentary Privileges Act* 1891 and a criminal offence.

9. For example, certain misconduct by Members of Parliament under s 8 of the *Parliamentary Privileges Act* 1891 could also amount to an offence under the *Criminal Code*. This is particularly so with respect to sections 55 to 61 of the *Criminal Code*, which are offences involving interference with the proper operation of Parliament, including corruption offences such as members of Parliament receiving bribes.

10. There are also offences contained in Chapter XIII of the *Criminal Code* which provide a series of offences in relation to corruption and abuse of office. Given the definition of "public officer" in the *Criminal Code*, it is clear that many of those offences would relate to offences of corruption committed by members of Parliament in that capacity.
11. Many of these *Criminal Code* offences comprise elements which are substantially identical to some of the offences set out in s 8 of the *Parliamentary Privileges Act* 1891, or breaches of Parliamentary Privilege generally. Bribery of a Member of Parliament is probably the clearest example of conduct which would comprise both an offence against s 61 of the *Criminal Code* and an offence punishable by Parliament under s 8 of the *Parliamentary Privileges Act* 1891.
12. In creating the *Criminal Code* offences referred to, Parliament has ceded its previously **exclusive** authority to deal with conduct of the character referred to in s 8 of the *Parliamentary Privileges Act* 1891. Offences under these provisions of the *Criminal Code* may properly be investigated by the police and prosecuted in the Courts. Insofar as conduct by a Member of Parliament or another person constitutes both an offence against the *Criminal Code* and s 8 of the *Parliamentary Privileges Act* 1891, the Courts and the relevant Houses of Parliament may have been said to have had **concurrent** jurisdiction.
13. Given the concurrent jurisdiction of the Courts and Parliament in relation to that "conduct", it cannot be said that punishment in respect of the conduct which gives rise to an offence against s 8 of the *Parliamentary Privileges Act* 1891 was, following the introduction of the relevant *Criminal Code* offences, determinable **exclusively** by Parliament. That conduct may well amount to an offence against the *Criminal Code* and, indeed, "misconduct" for the purposes of the *CCM Act*.
14. The removal of the word "exclusively" *Corruption and Crime Commission Amendment (Misconduct) Act* 2014, had the potential effect that - even though suspected conduct may well amount to an offence against the *Criminal Code*

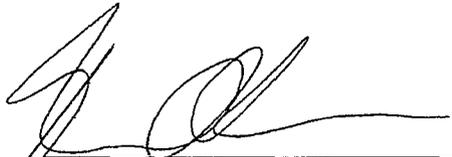
and, indeed, "misconduct" for the purposes of the *CCM Act* - if that conduct would also amount to a breach of Parliamentary Privilege, it could not be the subject of a CCC investigation. This is because the matter would be determinable by a House of Parliament.

15. Reinsertion of the word "exclusively", would remove that potential effect, so that the CCC would be able to investigate conduct over which there was concurrent jurisdiction of the Courts and Parliament.

Effect on Parliamentary Privilege of the Amendment

16. The amendment would leave the powers and privileges of Parliament unaffected. Indeed, the broader purpose of s 3(2) of the *CCM Act* is to ensure that the privileges of Parliament are not affected by the *CCM Act*.
17. For example, the Parliament, and its Privileges Committees, would retain their full authority in relation to the investigation and determination of breaches of the privileges of Parliament, including all of the offences under s 8 of the *Parliamentary Privileges Act 1891*. The amendment does not affect those powers at all.
18. Similarly, Parliamentary Privilege would still have a role to play in the investigation and prosecution of these *Code* offences, whether by the CCC, as part of a misconduct investigation, or an investigation by the police, as part of a criminal investigation. For example, Parliamentary Privilege may preclude the obtaining and adducing of various types of evidence.
19. In this regard a distinction needs to be drawn between the powers of Parliament under the *Parliamentary Privileges Act 1891* (which exclusivity the *Code* provisions affect) and the immunities enjoyed by the House, their members and committees (under s 1). The *immunities* of a House of Parliament and of a member of a House are not affected by the existence of these *Code* offences

20. For example, Article 9 of the *Bill of Rights* 1689, which provides “*that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament*”, may, in a particular case have an impact on the extent of an investigation by the CCC or a prosecution in a Court for an offence against the *Criminal Code*. It is settled that Article 9 of the *Bill of Rights* is made applicable in Western Australia by the *Parliamentary Privileges Act* 1891, s1: *Halden v Marks* (1995) 17 WAR 447 at 461.
21. There have, at various times been issues raised as to whether the privileges of Parliament in this respect should be altered or different provision made for the manner in which investigations may be conducted (See, e.g., the Report of the Select Committee of Privilege on a Matter Arising In the Standing Committee on Estimates and Financial Operations, November 2007; Review of the Corruption & Crime Commission Act 2003, by Gail Archer SC, February 2008).
22. These issues concern the manner of exercise of the CCC's powers. They were raised, for example, in Report 44, Standing Committee on Procedure and Privileges, A Matter of Privilege Raised by Hon Sue Ellery MLC, November 2016, which recommended that a Memorandum of Understanding be developed between the CCC and the Houses of Parliament in that regard.
23. Those are issues that are ongoing, and in relation to which differing views have been taken by the CCC and Committees of Parliament (as reflected in Report 44, Standing Committee on Procedure and Privileges, A Matter of Privilege Raised by Hon Sue Ellery MLC).
24. While important, those issues are separate from the one dealt with by the amendment, which is whether the CCC (as with the police) can investigate certain conduct at all.



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