NOTES FOR AMENDMENTS TO INCLUDE SECTION 27A IN THE CORRUPTION CRIME AND MISCONDUCT AMENDMENT BILL 2017

PREPARED BY SOLICITOR-GENERAL

1. The proposed amendments are designed to provide for a greater degree of Parliamentary oversight of investigations by the Commission of members of each House of Parliament.

2. The proposed amendments correspond with the checks and balances which apply to the Commission when investigating judicial officers. Those checks and balances are set out in section 27 of the existing Act.

3. The proposed amendments also incorporate the substance of the matters in the supplementary notice paper raised by the Honourable Alison Xamon. The change in wording is to ensure uniformity of language with section 27.

4. There are three major parts to the proposed amendments in section 27A.

5. First, subsection (1) provides for the Commission to give notice to the Parliamentary Inspector if it receives or initiates an allegation against a member of a House of Parliament. That provides the same level of oversight that every other person investigated by the Commission receives, but it ensures that the fact of an investigation concerning a member is particularly drawn to the Parliamentary Inspector’s attention. The Parliamentary Inspector is therefore able to audit and report upon the investigation, if warranted. Of course, that mode of Parliamentary oversight operates in hindsight. However, that does not mean that it is unimportant. It is the same type of check or balance which applies to all other public officers.

6. Secondly, subsection (2) contains the fundamental obligation for the Commission to have proper regard to the importance of preserving Parliamentary privilege. That provision must be read in conjunction with section 3(2), which expressly provides that nothing in the Act affects, or is intended to affect, the operation of Parliamentary privilege. In other words, the Commission is bound to give effect to the privilege and cannot override it, and the Commission is expressly obliged to have proper regard to the privilege in performing its functions.
7. Given these express legislative directions to the Commission, it should be assumed that the Commission will not knowingly infringe upon Parliamentary privilege.

8. The most likely area of difficulty will arise if the Commission takes one view about the scope of Parliamentary privilege, and a member of Parliament takes a different view. That situation calls for a practical method of resolution.

9. The third part of the proposed amendments contained in section 27A is designed to provide a practical mechanism to assist in resolving differences of view between the Commission and a member of a House. Subsection (3) requires the Commission to act in accordance with any conditions and procedures formulated in consultation with each House of Parliament. In other words, what is contemplated is that the Commission and each House formulate agreed conditions and procedures relating to the practical issues which will inevitably arise, in advance of specific questions of Parliamentary privilege needing to be resolved in particular cases. Those conditions and procedures will need to be worked out separately with each House. Until they are developed, and even after they have been agreed, the Commission still has the basic obligation not to override Parliamentary privilege, and to consider it in performing its functions.

10. The formulation of conditions and procedures in advance of particular issues arising gives each House of Parliament the opportunity to regulate the Commission's conduct in advance of specific cases. That is another form of Parliamentary oversight.

11. It should be observed that the obligation contained in subsection (2) is designed to ensure that the Commission proceeds having proper regard to the importance of Parliamentary privilege. If the Commission has complied with agreed conditions and procedures formulated under subsection (3), and these agreed conditions and procedures cover a particular case, it would be expected that the Commission would have satisfied the obligation in subsection (2).

12. It is always open for a member of a House of Parliament who is subject to a Commission investigation, either during the investigation or subsequently, to disclose the fact of the investigation and the circumstances of it, to the House and to seek a determination by the House about matters of Parliamentary privilege, assuming that this disclosure is itself within the
scope of Parliamentary privilege. Nothing in Part 9 of the Act affects a
disclosure permitted by the Act, and the Act expressly preserves
Parliamentary privilege. See sections 3(2) and 151(4)(h). If that disclosure
occurs, the House will have a further opportunity of Parliamentary
oversight in respect of the Commission.

13. It is true that there is no particular obligation which requires the
Commission to notify a House of Parliament about the existence of an
ongoing investigation so that the House may monitor the progress of that
investigation. That is intentionally so. It is a matter of policy whether a
House of Parliament should be entitled to know, and monitor, an existing
investigation as it happens. There are obvious dangers to the integrity of an
investigation being disclosed whilst it is occurring.

14. One further matter should be mentioned. There is potentially a risk that
the Commission may take a different view about the scope of
Parliamentary privilege to a member of the House, in respect of an issue
which is not dealt with by conditions and procedures which have been
formulated between the Commission and the House of Parliament.
Depending upon the scope of the agreed conditions and procedures, that
may well be a narrow class of case. The risk just mentioned needs to be
weighed against the risk to the integrity of an investigation if the
circumstances of the investigation are disclosed to Parliament in every
case.

15. If the Commission obtains information which a member considers to be
the subject of privilege, in respect of an issue which is not dealt with by
conditions and procedures which have been formulated between the
Commission and the House of Parliament, there are at least three options
available to a member.

16. First, the member may himself or herself disclose the matter to Parliament,
and seek to have the relevant House determine any question of privilege,
assuming that this disclosure is itself within the scope of Parliamentary
privilege. As explained, nothing in Part 9 of the Act affects a disclosure
permitted by the Act, and the Act expressly preserves Parliamentary
privilege. Practically speaking, this course is only available when
Parliament is sitting, but it could still be effectively utilised at any stage
before the Commission provides a report with findings to Parliament. A
House of Parliament could inform itself of the circumstances, and
determine whether certain information was, or was not, privileged. That
should provide a practically effective remedy in most cases which fall outside the agreed conditions and procedures, assuming that Parliament sits regularly.

17. Secondly, the member might seek to have the question of whether the Commission has acted lawfully determined by a Court. That is, the member may claim that the Commission has infringed the privilege and has not had proper regard to the privilege in carrying out its functions.

18. Statutory bodies must always comply with their express statutory obligations, and courts generally have jurisdiction to enforce such obligations, by a range of remedies. These include declaratory relief to the effect that a body has acted unlawfully, and injunctive relief to prevent or rectify unlawful action.

19. The proposed amendments introduce the express statutory obligation contained in section 27A(2) of the Act. As explained, this express obligation, read in conjunction with section 3(2), means that the Commission is bound to give effect to the privilege and cannot override it, and the Commission is also expressly obliged to have proper regard to the privilege in performing its functions. If it does not comply with these specific obligations, it will not act lawfully.

20. A Court generally has a discretion whether to grant relief such as an injunction to prevent, or rectify, a breach of a statutory function. However, a Court might be reluctant to do so, if this involves adjudicating upon a matter of Parliamentary privilege which is exclusively within the domain of Parliament or if it involves a fragmentation of an investigation, which would not necessarily result in charges. That was the basis of the decision of Justice French (as he then was) in *Crane v Gething* [2000] FCA 45, which was affirmed on appeal in *Crane v Gething* [2000] FCA 762.

21. However, a substantial distinction between that case, and the proposed amendments here, is that *Crane v Gething* did not involve enforcing any express statutory obligations of the type in sections 3(2) and 27A(2) relating to the functions of a statutory body. That case involved magistrates administratively issuing search warrants to gather evidence from a Senator.

22. There was no question of enforcing the statutory functions of the magistrates to act lawfully, by reference to obligations expressly referring to Parliamentary privilege. The existence of the express statutory obligations relating to Parliamentary privilege in the proposed amendments
means that the existence of privilege is not simply something which relates to a dispute between the executive government and Parliament. The existence of privilege defines the lawfulness of the actions of a statutory body, which are expressed by reference to the existence of the privilege.

23. The decision of the Full Court of Western Australia in *Halden v Marks* (1995) 17 WAR 447 also states that there are generally only two types of case in which a Court will involve itself in decisions concerning Parliamentary privilege. The first category of case is where a question of parliamentary privilege is raised in a case already before the Courts. The second category of case is where a court has been asked to review action by Parliament to enforce its proceedings, most commonly where Parliament has, by warrant, sought to subject a citizen to restraint by arrest. Apart from these categories of case, the Full Court indicated that, either as a matter of jurisdiction or propriety, a Court will not consider questions of Parliamentary privilege as these questions are exclusively for Parliament.

24. Again, the categories of case referred to in *Halden v Marks* did not relate to a situation where the lawfulness of the conduct of a statutory body depended upon express statutory obligations related to having proper regard to the scope of Parliamentary privilege.

25. While it is not possible to say whether a Court would choose to intervene in each potential case which may arise, or how a Court would exercise its discretion to give a remedy in each case, the existence of the statutory obligations in the proposed amendments would assist in confining the actions of the Commission, and would also provide the basis for a possible judicial remedy to an aggrieved member.

26. The third option for a member would be to wait and see whether any charges were laid as a result of an investigation. If and when that occurred, the member could test the scope of privilege in a Court, in defending the charges. The Court would need to rule upon the extent of the privilege in determining the admissibility of evidence which the member claimed to be privileged.

27. While these three options are not altogether failsafe, the risks of compromising the integrity of an investigation, as it happens, seem to be greater than the risks of the privilege being wrongly infringed by the Commission, given the type of checks and balances contained in the proposed amendments.