

Chapter 1

Guidance for officers

1.1 The committee reports to the Senate on its inquiry into guidance for officers giving evidence to Senate committees, and providing information to the Senate and to senators. The reference has more commonly been referred to as the ‘government guidelines inquiry’, as its focus has been the government guidelines for official witnesses before parliamentary committees (‘the guidelines’).¹

Background to the inquiry

1.2 In March 2010, the Senate Foreign Affairs, Defence and Trade References Committee, as part of its inquiry into matters relating to events on HMAS *Success*, reported concerns about directives (known as ‘DEFGRAMS’) requiring ministerial approval of Defence involvement in parliamentary committees and clearance of all material to be provided to committee inquiries by Defence personnel.²

1.3 The references committee was concerned that the DEFGRAMS would dissuade or prevent Defence witnesses from coming forward, and that the requirement for ministerial clearance might influence the evidence given. This was of particular concern because the committee was seeking personal accounts from witnesses about individual conduct, rather than a departmental or Defence view. The references committee concluded that the DEFGRAMS – which referred to and relied on advice in the government guidelines – had the potential to interfere with witnesses appearing before its inquiry. That committee recommended an inquiry into the adequacy of the guidelines.

1.4 In June 2010, the Senate adopted the recommendation and referred the following matter to the Privileges Committee:

The adequacy of advice contained in the Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters for officials considering participating in a parliamentary committee, whether in a personal capacity or otherwise.

1.5 In a background note published on its web pages at that time, the Privileges Committee observed that:

The guidelines have been in place since 1989 and, while they have often been referred to and their deficiencies discussed in the course of Senate committee inquiries (most recently in the 142nd and 144th reports of the Senate Privileges Committee on “Utegate” and statutory secrecy provisions, as well as in the abovementioned Foreign Affairs, Defence and Trade

1 Note that the terms official (used in the guidelines) and officer (used in Senate Privilege Resolutions) are used interchangeably in this report.

2 Senate 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.

References Committee inquiry), they have never been formally considered by the Senate.

The Privileges Committee will now conduct an inquiry into the adequacy of the guidelines and the extent of support and clarification they provide to officials in understanding their rights and obligations appearing as witnesses before parliamentary committees.

1.6 That inquiry lapsed at the end of the 42nd Parliament, but the matter was again referred on 21 March 2011, with expanded terms of reference:

The adequacy and appropriateness of current guidance and advice available to officers giving evidence to Senate committees and when providing information to the Senate and to senators, including:

- (a) the adequacy and applicability of government guidelines and instructions;
- (b) the procedural and legal protections afforded to those officers;
- (c) the awareness among agencies and officers of the extent of the Senate's power to require the production of information and documents; and
- (d) the awareness among agencies and officers of the nature of relevant advice and protections.³

Purpose of the inquiry

1.7 The matters encompassed by the terms of reference involve consideration of three different situations, namely:

- officers giving evidence to Senate committees
- officers providing information which is required by the Senate
- officers providing information to senators.

1.8 What connects the first two matters is the inquiry power of the Senate. Different aspects of the inquiry power include the power to call for witnesses and documents and the power to ask questions. The inquiry power is supported by the law and practice of parliamentary privilege, including:

- The immunities from other aspects of the law which might otherwise prevent the Senate receiving the information it requires to undertake its work.
- The power of the Senate to determine and punish contempts in order to uphold the integrity of its proceedings.

1.9 These powers and privileges – inherited by the Senate from the UK House of Commons by way of section 49 of the Constitution – underpin the work of the Senate, and particularly the investigative work of its committees.

3 *Journals of the Senate*, No. 24, 21 March 2011, p. 700.

1.10 Generally, when a person provides information to the Senate or to a committee, the provision of that information attracts the protection of parliamentary privilege. While this is an important protection, it is not well understood outside of the parliamentary environment.

1.11 The inquiry provided an opportunity to consider the sources of advice and guidance available to officers in the situations described above. The central questions are whether advice is appropriate – that is, consistent with the powers and privileges of the Senate; and whether it is adequate – sufficient to enable officers to understand their rights and obligations in their interactions with the Senate and its committees.

1.12 The government guidelines provide the main published source of advice, from the perspective of the executive government, about the involvement of officials with parliamentary committees. While agencies may properly advise and instruct officials as to how they are to undertake their duties, such advice and instructions must be consistent with the powers and procedures of the Senate. This was the matter at issue in the report of the references committee which prompted this inquiry.

1.13 The provision of information directly to senators raises different concerns. The application of parliamentary privilege to persons providing information to senators depends upon the circumstances of the particular case and the connection with proceedings in Parliament. The committee also considers that requirements to provide information to the Senate (for instance, in response to orders to produce documents) are poorly understood. This is especially the case where officers perceive a conflict between Senate orders and statutory provisions which deal with the disclosure of information. The committee was interested in examining what advice is available to officers about these situations, which are encompassed by the expanded terms of reference.

Structure of report

1.14 The underlying questions in the inquiry are whether advice and guidance is appropriate, and whether it is adequate. It is first necessary to consider the criteria against which this can be measured. The Senate's expectations are set out in a series of procedural resolutions. These are described in chapter 2, which also describes the role of the government guidelines in that context.

1.15 The adequacy and appropriateness of the government guidelines is considered in chapters 3 and 4: chapter 3 deals with requirements for the clearance of witnesses and evidence – the catalyst for the inquiry, while chapter 4 considers the advice contained in the guidelines on other matters of Senate practice and procedure.

1.16 The committee received little evidence on matters beyond the scope of the government guidelines. The other matters covered by the terms of reference are dealt with in Chapter 5, which is principally about awareness among officers of relevant powers, protections and advice.

1.17 The committee thanks all those who submitted material for this inquiry – a list of submissions received is at Appendix A. Those submissions have been published on the committee's web pages.

