

Chapter 2

Resolutions and guidelines

Introduction

2.1 The focus of this inquiry has been the government guidelines for official witnesses before parliamentary committees. These are the main published source of formal advice provided by the government to its officials to guide their interactions with, and appearances before, parliamentary committees. Much of that advice is also relevant to the interactions officials may have directly with members of parliament and in understanding the requirements of the Houses themselves.

Resolutions of the Senate

2.2 The guidelines themselves have no particular standing in parliamentary procedure. *Odgers' Australian Senate Practice* observes:

The guidelines are based on the principle that public servants have a duty to assist parliamentary inquiries, and are generally consistent with the rules laid down by the Senate, but have no status in proceedings of Senate committees other than as persuasive principles.⁴

2.3 The Senate's own view of the rights and obligations of witnesses appearing before its committees is set out in a series of declaratory resolutions. A number of resolutions also declare the scope of the Senate's power to require information in the exercise of its inquiry powers.

2.4 The first submission from the Clerk of the Senate describes the development of some of those resolutions. Chief among them is the assertion by the Senate in 1975 of its power over witnesses and its right to determine claims of Crown Privilege (a right now reflected in the Senate's 2009 resolution relating to the determination of claims of public interest immunity). The 1975 resolution was in the following terms:

- (1) The Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.
- (2) Subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.
- (3) The fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.

4 Harry Evans and Rosemary Laing, *Odgers' Australian Senate Practice*, 13th edition, 2012, p. 550.

- (4) Upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim (*Journals of the Senate*, 16 July 1975, p.831).

2.5 As the Clerk points out:

The Senate has never modified its position on these matters. It has not conceded that there is such a thing as executive privilege and has maintained the right to determine any matters of privilege, including claims of public interest immunity.⁵

2.6 The best known among the relevant resolutions are the Privilege Resolutions, adopted by the Senate on 25 February 1988 following the commencement of the *Parliamentary Privileges Act 1987*.⁶ The Privilege Resolutions declare the manner in which the Senate itself will observe its privileges and exercise its contempt powers, including by delegating particular powers and providing mandatory procedural directions to its committees.

Assessment of the guidelines

2.7 The approach the committee has taken in considering whether the guidelines are appropriate is to assess whether they are consistent with the positions set down by the Senate in such resolutions.

2.8 One of the most important aspects of this involves assessing the guidelines in the context of the prohibitions in the *Parliamentary Privileges Act 1987* and the Privilege Resolutions against conduct that may interfere with witnesses appearing before Senate committees.

Interference with witnesses

2.9 Pursuant to section 4 of the *Parliamentary Privileges Act 1987*, any conduct may constitute an offence against a House (that is, a contempt) if it amounts to, or is intended or likely to amount to, an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

2.10 As has been noted many times, the committee regards the protection of persons providing information to the Senate, and in particular of witnesses before parliamentary committees, as the most important duty of the Senate (and therefore the committee) in determining possible contempts.⁷

5 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, p. 3.

6 The Privilege Resolutions are available on the committee's web pages.

7 Committee of Privileges, 125th report, *Parliamentary Privilege – Precedents, procedures and practice in the Australian Senate 1966–2005*, p. 46.

2.11 In determining whether particular acts amount to a contempt, the committee has regard to the list of possible contempts in Privilege Resolution 6. In relation to the protection of witnesses, the Senate has determined that:

A person shall not, by... improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.⁸

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.⁹

2.12 Breaches of those prohibitions may be treated by the Senate as contempts. Of particular concern in this inquiry is the potential for the giving of advice to amount to an interference with witnesses.

The potential for contempt in the provision of advice

2.13 Agencies need to have regard to both of the above prohibitions in providing advice and guidance to their officers. This can be a difficult area, because agencies have the right and obligation to give directions to their officers in the course of their duties. Nevertheless, in giving such directions (as in any other conduct) agencies must be wary of exerting improper influence upon officers who are witnesses, or who are contemplating becoming witnesses, whether the effect of that conduct is to dissuade the officer from giving evidence or to improperly influence the content of evidence. Agencies must also refrain from imposing any penalty upon an officer, either because of that officer's decision to give evidence to a committee, or because of the content of that evidence.

2.14 Agencies should have regard to the principles set out in the committee's 141st report:

1.23 ... the committee agrees that it would be useful to set out clear guidance for any person who seeks to take action of any kind against another person as a consequence of their evidence to a Senate committee. **The committee's advice is that such action should not be taken in any circumstances.** If it is taken, such action may constitute a contempt of the Senate. A person's right to communicate with the parliament and its committees is an untrammelled right, overriding all other considerations.

2.15 As the main published source of advice for officials appearing before Senate committees, it is important that the government guidelines do not interfere with the right of officials to communicate with committees. The 141st report continued:

1.24 There is a very simple remedy available to any employer or professional organisation or any other body whose staff or members may make submissions to a parliamentary committee that do not accord with the official policy or practices of the organisation. The remedy is for that body

8 Privilege Resolution 6(10).

9 Privilege Resolution 6(11).

to make its own submission to the committee in question, dissociating itself from the submission of the individual and indicating that the views expressed by the individual are not the official views of the organisation. Under no circumstances is it acceptable... for the organisation to take the matter up with the individual directly and threaten disciplinary action as a result of the individual's communication with the committee.¹⁰

2.16 In communicating and implementing advice, agencies must similarly be wary of improperly influencing their officials and of creating an environment in which officials apprehend improper pressure in making decisions about giving evidence.

Origin of the guidelines

2.17 There have been several iterations of the guidelines, with the first version issued by the government in 1978. A revised version was issued in 1984 in response to an exposure report of the Joint Select Committee on Parliamentary Privilege and stated to be guided by the principles of the *Freedom of Information Act 1982*. The third, current version was tabled in the Senate on 30 November 1989. This version took account of the *Parliamentary Privileges Act 1987* and the adoption by the Senate of the Privilege Resolutions.¹¹

2.18 Since the current guidelines were produced, the Department of the Prime Minister and Cabinet (PM&C) has twice issued supplementary advice:

- In February 2004, regarding the order of the Senate of 30 October 2003 dealing with information claimed to be 'commercial-in-confidence'
- In September 2009, regarding the order of the Senate of 13 May 2009 dealing with claims that information should be withheld on the basis of claims of public interest immunity.¹²

2.19 An update to the guidelines is warranted by their age alone, given the changes that have occurred both in the machinery of government and in the role and operation of the Senate committee system since they were issued. For instance, while it was common for ministers to appear at hearings into bills in the early 1990s this has long since ceased to be the case. Around half of the bills introduced in any year are referred to Senate committees, and it is now routine for officials to appear before committees, without ministers, to provide explanations of policies and their proposed implementation. As the Clerk of the Senate points out, the 'absence of a minister can leave officials in an invidious position, particularly when the matter being inquired into is controversial.'¹³

10 Senate Committee of Privileges, 141st report. The committee further discussed the application of these principles in its 151st report, at paragraphs 1.48 – 1.53.

11 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, pp 2–4.

12 Department of the Prime Minister and Cabinet, Submission 4, pp 1–2.

13 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, p. 5.

2.20 The expanded estimates process, broader and more numerous policy inquiries, and parliamentary oversight of departments and agencies also bring hundreds of officials before Senate committees each year. The committee considers that, with far more officers appearing before committees, it is desirable that they have comprehensive, up to date guidance as to their roles and responsibilities as witnesses.

The revised guidelines

2.21 The Department of the Prime Minister and Cabinet (PM&C), in its submission of June 2011, indicated that the guidelines were being revised. In 2012, the department provided a supplementary submission containing proposed revised guidelines,¹⁴ and indicated that it intended to finalise them after the committee reports on this inquiry. The revised guidelines, as referred to throughout this report, are reproduced in the volume of submissions accompanying the report.

2.22 The committee thanks the department for providing the revised guidelines and for the opportunity to comment on them. They represent a substantial improvement on the 1989 guidelines, both in scope and in content, and it is clear that they seek to address the concerns which prompted this inquiry.

2.23 In particular, the committee welcomes the expansion of the guidelines in relation to:

- officials giving evidence in relation to particular events or conduct;
- officials appearing as witnesses in a ‘personal capacity’;
- the processes for making public interest immunity claims;
- legal professional privilege and legal advice;
- the processes for making claims of commercial confidentiality;
- the effect of statutory secrecy provisions;
- processes for taking questions on notice;
- replying to written questions and questions taken on notice; and
- the right of officials to reply to adverse evidence.

2.24 The revised guidelines state their purpose in the following terms:

1.1.1 The guidelines are designed to assist departmental and agency officials, statutory office holders and the staff of statutory authorities in their dealings with the parliament...

2.25 They refer appropriately to the powers of the parliament, and the sources of those powers:

1.2.1 There are obligations and protections that govern anyone who volunteers or is required to provide information to the parliament. These obligations and protections flow primarily from the Constitution and the

14 Hereafter referred to as ‘*the revised guidelines*’.

Parliamentary Privileges Act 1987, supplemented by privilege resolutions adopted by both the Senate and the House of Representatives and by the Standing Orders of both houses. While very rarely called upon, the parliament has the power to impose penalties for contempt...

1.2.2 The Guidelines detail obligations and protections, providing references and links to primary documents.

2.26 Finally, after describing the accountability of the executive government to the parliament, and officials' roles in aspects of that accountability, it is noted that:

1.3.3 The Guidelines are intended to assist in the freest possible flow of information to the parliament.

2.27 The committee welcomes this statement of intent.

Committee comment

2.28 While strictly having no procedural standing, the guidelines offer practical advice as to how officials should interact with parliamentary committees and, to a lesser extent, directly with the Parliament and with parliamentarians. The guidelines are understandably informed by government policy positions, particularly in relation to the handling of information which (from the perspective of the executive government) ought be subject to government control. The committee makes no criticism of this approach, however officials must be alert to the fact that the Senate and its committees may differ from ministers, departments and agencies in their assessment of the circumstances in which government control is appropriate or the degree of government control which might appropriately be exercised.

2.29 Where there is doubt about such matters, the committee's advice is that agencies and witnesses alike should bear in mind both the abovementioned commitment to 'the freest possible flow of information to the parliament' and the principles which underpin a person's 'untrammelled right' to communicate with the Parliament and its committees. Resolutions of the Senate declare the manner in which the Senate and its committees will deal with many common situations officials will find themselves in during committee inquiries and provide the surest guide as to the rights and responsibilities of officials as witnesses. Some of these are explored in the next chapters.

2.30 Rather than dwell on the 1989 guidelines, the committee has focussed on assessing the revised guidelines. Chapter 3 of the report assesses how the revised guidelines deal with the matters which prompted this inquiry, namely circumstances in which officials must be free to provide evidence to committees independently of agencies. Chapter 4 assesses the revised guidelines against other matters of Senate practice and procedure.