

Chapter 5

Awareness of powers, advice and protections

Introduction

5.1 As noted in chapter 1, the matters covered in this report 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.

5.2 This chapter is about officers' and agencies' awareness of the principles of parliamentary law and practice which apply in those situations and the sources of advice available to assist them.⁴⁶

5.3 The committee has frequently reported its concerns about the lack of knowledge among public servants and statutory officers about their obligations to the parliament and its committees.⁴⁷ These concerns led the Senate to adopt, and later reaffirm, a resolution in the following terms:

The Senate is of the opinion that all heads of departments and other agencies, statutory office holders and Senior Executive Service officers should be required, as part of their duties, to undertake study of the principles governing the operation of Parliament, and the accountability of their departments, agencies and authorities to the Houses of Parliament and their committees, with particular reference to the rights and responsibilities of, and protection afforded to, witnesses before parliamentary committees.⁴⁸

5.4 The committee reiterated these concerns as recently as June 2010, in considering a bill which purported to prohibit officers disclosing certain taxpayer information to parliamentary committees.⁴⁹

Structure of chapter

5.5 The chapter first deals with the provision of information to the Senate and its committees, focussing on officers' awareness of the extent of the Senate's power to require information. This section includes consideration of some recent, contentious orders for the production of documents by statutory officers.

46 Terms of reference (b), (c) and (d).

47 For example, in the committee's 36th, 42nd, 46th, 64th, 73rd, 89th and 119th reports.

48 Committee of Privileges, 125th Report, paragraph 5.27. For the history of this matter see also paragraphs 4.88; 4.106–4.108; and 5.26–5.31.

49 Senate Committee of Privileges, 144th report, paragraph 3.31 and recommendation at paragraph 4.14.

5.6 The chapter then briefly surveys the information available to officers about the protections afforded them in providing information to senators, and closes with commentary on sources of advice and training.

Provision of information to the Senate and committees

5.7 The terms of reference encompass two interrelated matters with regard to the provision of information to the Senate and its committees:

- awareness of the extent of the Senate's power to require information; and
- awareness of the protections afforded officers providing information.

5.8 The Department of the Prime Minister and Cabinet submits that 'the Senate's power to require the production of documents in the possession of departments and agencies is well understood across the APS'.⁵⁰

5.9 On the other hand, the Clerk of the Senate provided a number of examples to support her contention that the level of awareness among agencies and officers of the extent of the Senate's power to require the production of information is 'patchy'.⁵¹ They include:

- a case in which information was denied in response to Senate orders but released in response to FOI requests;
- claims the parliament is not entitled to information because of statutory secrecy provisions or other presumed statutory limitations, despite long-settled principles of law to the contrary; and
- examples of statutory officers resisting Senate orders for information, on the basis that what the Senate requires is not specified in their enabling statutes.⁵²

5.10 These examples would be familiar to senators. On the basis of such examples, the Clerk concludes:

...there is a failure to recognise the overarching powers of the Houses and the position of Parliament in the accountability framework inherent in our system of constitutional government (which imports both responsible government and federalism). There is also a failure to recognise the importance of section 49 of the Constitution. The powers conferred therein can be diminished only by explicit declaration to that effect.

5.11 While such examples reflect the particular circumstances of individual cases, they also underline the need for officers' attention to be drawn to the principles involved, some of which are set out below.

50 Department of the Prime Minister and Cabinet, Submission 4, p. 3.

51 Dr Rosemary Laing, Clerk of the Senate, Submission 1, p. 6.

52 This matter is further discussed below, under *Contentious orders for documents*.

Protections afforded by privilege

5.12 The committee most recently described the history and operation of the protections afforded by parliamentary privilege in its 144th report:

2.1 The law of parliamentary privilege protects proceedings in Parliament from being questioned or impeached in any place outside of Parliament. The principle has a long and consistent history. It took its first statutory form in 1689 in article 9 of the Bill of Rights. It was inherited by the Commonwealth Parliament in 1901 through section 49 of the Australian Constitution. The principle has been since codified in section 16 of the *Parliamentary Privileges Act 1987*.

2.2 As a result of this principle, the Houses and committees, members and witnesses of the Parliament are able to operate without their proceedings being questioned or interfered with in any way.⁵³

5.13 The practical effect is that action may not be taken against an officer (or any other person) for anything they may say as a witness before a parliamentary committee, or for providing information to the Senate. The accountability required of officers is supported by this protection; however, its operation is not well understood. This is especially the case where officers perceive a conflict with ‘secrecy’ provisions or other statutory limitations on the disclosure of information.

5.14 The powers of the Houses include the power to require information and, although there may be jurisdictional limitations, those powers are not limited by statute, except by express words to the contrary. Officers need to be aware that statutory provisions purporting to prevent or restrict the disclosure of information, or to impose penalties for such a disclosure, have no application where the disclosure forms part of the proceedings in Parliament. As explained in the 144th report, the law of parliamentary privilege is not affected by statutory provisions, unless those provisions alter that law by express words.⁵⁴ There are very few statutory provisions which explicitly restrict the Parliament’s access to information.

5.15 As noted in chapter 4,⁵⁵ the committee considers the guidance provided in the revised government guidelines on FOI matters and statutory secrecy provisions to be a marked improvement on the current guidelines. That guidance is relevant both to the provision of information to committees and the provision of information to the Senate itself. Similarly, officers should be aware that the Senate has asserted its right to determine for itself any claim to withhold information from the Senate or its committees. While the process for determining such claims before committees is specified in the 2009 order relating to claims of public interest immunity,⁵⁶ the same

53 Senate Committee of Privileges, 144th Report, *Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009*, June 2010.

54 Senate Committee of Privileges, 144th report, paragraph 2.7.

55 See paragraphs 4.25 – 4.34.

56 See paragraphs 4.6 – 4.14.

principles apply to any other situation in which the Senate requires information of an officer or agency. Any claim to withhold information from the Senate should be supported by a properly developed claim of public interest immunity including an explanation of the harm that would be caused by disclosure of the information.

5.16 One further point worth drawing out is that these principles also apply to independent statutory officers. Such officers, like other persons, are subject to the powers of each House unless there exists an express, statutory provision to the contrary. This matter is considered further below.

Contentious orders for documents

5.17 While the terms of reference address the awareness among officers of the Senate's power to require information, two submissions took the opportunity to query whether the Senate had exceeded the limits of that power in directing orders to two independent statutory officers and requiring each of them to produce reports. Central to the dispute is the question whether the orders are orders for the production of documents, or whether they purport to direct the officers concerned to undertake tasks such as gathering or discovering information not otherwise in their possession.

Background

5.18 Orders directed at the Information Commissioner required him to produce reports on 'the adequacy of the grounds specified by the Government for its refusal to produce' certain information and arbitrating on its release.⁵⁷ Another, directed at the Productivity Commission, required it to produce a report on the design of a process relating to superannuation.⁵⁸

5.19 PM&C submitted that the orders were beyond the powers of the Senate, and appended an opinion from the Australian Government Solicitor (AGS) to that effect. The AGS opinion argues that the Senate cannot require a person to produce documents from information they do not possess:

22 In our view, it is clear that the powers of the Senate do not extend to compelling production of documents which are not in existence, and which the person to whom the requirement is directed would need to create from information not held by or known to the person.

5.20 The opinion also concludes that the Senate, acting alone, cannot compel a person 'to undertake a task, and then create a document evidencing this'⁵⁹ and, further:

46 ...A power to require production of documents is not a power to require original work to be undertaken, at least where not derived wholly

57 *Journals of the Senate*, No. 5, 26 October 2010, pp. 206-8; No. 13, 23 November 2010, pp. 395-6.

58 *Journals of the Senate*, No. 9, 16 November 2010, pp. 301-2. A further motion, also directed at the Productivity Commission is mentioned, although that motion was rejected by the Senate and so did not become an order: *Journals of the Senate*, No. 31, 14 June 2011, pp. 944-5.

59 Department of the Prime Minister and Cabinet, Submission 4, Attachment C, paragraph 43.

from information held by or known to the person required to produce the document.

5.21 A submission from Professor Geoffrey Lindell similarly concludes that the Senate does not possess:

...the power to compel public or private experts to ‘create documents’ in the sense of providing reports or expressing considered opinions on matters that fall within their expertise when:

- those witnesses have not previously provided those reports or expressed those opinions to anyone else; and
- the reports or opinions are otherwise outside their personal knowledge or cannot be collated from documents within their possession.⁶⁰

5.22 The submission from PM&C stated that the AGS opinion was ‘contrary to the view of the Clerk of the Senate’,⁶¹ and the committee received a supplementary submission from the Clerk, addressing ‘various interpretations or misinterpretations’ of her views on the matter. In that submission the Clerk states:

The assumption has been made that the Senate orders are effectively orders requiring those statutory officers to perform certain statutory functions under their respective enabling acts – to conduct a review in the case of the Information Commissioner and to conduct an inquiry in the case of the Productivity Commissioner. This is not the case, and I have not argued that it is or that the Senate has the power to order such actions. My comments have related to the Senate’s power to order the production of documents. The contentious orders were framed as such orders.⁶²

The proper characterisation of the orders

5.23 The committee considers that the orders can only be viewed as orders for the production of documents. The Senate, acting alone, does not have the power to order statutory officers to undertake particular functions, nor to give such officers new functions, nor to confer powers, such as information-gathering powers. The committee is not aware of any authority for such suggestions.

5.24 The committee endorses the passage in *Odgers’ Australian Senate Practice*, cited in the AGS opinion, which states:

Orders for the production of documents may require the production of documents in the possession of a person or body, or the creation and production of documents by the person or body having the information to

60 Professor Geoffrey Lindell, Submission 5, p. 2.

61 Department of the Prime Minister and Cabinet, Submission 4, p. 4.

62 Dr Rosemary Laing, Clerk of the Senate, Submission 6, p. 1.

compile the documents. Some orders require the production by the relevant officers or bodies of statements about particular matters.⁶³

5.25 The committee also endorses the view, put by the Clerk, that the following common ground exists in relation to the Senate's power to order the production of documents:

- the Commonwealth Houses possess the power under section 49 of the Constitution to order the production of documents
- such orders cover documents in existence and in the possession of any person over whom the Commonwealth Houses have jurisdiction
- such orders may be subject to a soundly-based claim of public interest immunity which the Senate has claimed the right to determine
- such orders also cover documents created for the purpose (a 'return to order') from information available to the person to whom the order is directed
- the creation of documents may involve research (including, for example, searching for and examining information to identify what information would be relevant to satisfy the order) and analysis of such information (including, for example, analysis required to correctly categorise the information for the purposes of creating the return).⁶⁴

5.26 The Clerk further submitted that:

the Senate has, on occasion, ordered documents to be produced that require a greater degree of original research and analysis and, on occasion, acquisition of information for that purpose. The Senate has also requested that such work be carried out. The different contexts of each occasion have been explained. While I see these occasions as variations on the application of the power to order documents (albeit quite adventurous variations in some of the cases), others conclude that compliance with the orders provides no proof that the power extended that far in the first place.⁶⁵

5.27 The effectiveness of such orders may depend on whether the person to whom the order is directed possesses the information from which a document may be produced, independently possesses the ability to gather that information, or is in a

63 Harry Evans and Rosemary Laing, *Odgers' Australian Senate Practice*, 13th edition, p 561. That part of *Odgers'* also refers to 'orders requiring statutory bodies to produce reports on matters relating to their responsibilities', including references to the orders discussed here, see pp. 561 – 566.

64 Dr Rosemary Laing, Clerk of the Senate, Submission 6, p. 3.

65 Dr Rosemary Laing, Clerk of the Senate, Submission 6, p. 3.

position to receive that information.⁶⁶ Equally, the effectiveness of orders may depend on the ‘degree of original research and analysis’ that might be involved in producing that document.

5.28 The committee does not consider it useful for the Senate to direct orders for documents at officers (or others) who have no connection with the information sought. It may not be beyond the power of the Senate to do so, but the utility of such an exercise must be doubted. Nor does the Senate have a history of taking that approach. However, the Senate will not always know in advance whether a person is in a position to meet the terms of the order. This does not mean the orders are beyond the powers of the Senate, but it may mean that they are not effective in producing the information the Senate seeks.

Resolution of disputes

5.29 If officers to whom orders for documents are directed are unable or unwilling to comply with a requirement to produce information, they should report that fact to the Senate, providing reasons, and allow the Senate to determine for itself how to respond. This is consistent with the Senate resolution on public interest immunity claims and the principles which support that process. This is also no different in principle than the response expected of a witness before a Senate committee who is unable or unwilling to answer a question.

5.30 It is for the Senate then to determine how it will respond to a refusal to meet such an order, and that determination necessarily depends on the circumstances of the particular matter. As senators would be aware, the resolution of such disputes is invariably political (rather than judicial), often entailing negotiations about what information may be provided, even if the original order is resisted.

Committee comment

5.31 Whatever the resolution of the particular disputes, it is important (for the purposes of this inquiry) to note that the power sought to be exercised is the inquiry power of the Senate. A statutory office-holder is not immune from the inquiry powers of the Houses and their committees merely because the office is established under statute. To repeat the words of the committee’s 144th report:

2.7 What is required is an express statutory declaration that a provision is intended to affect the powers, privileges and immunities of the Senate and the House of Representatives before it can be effective.

5.32 That report describes the inclusion by the Parliament in the *Auditor-General Act 1997* of an express limitation on the Houses’ inquiry powers as an example of the

66 For instance, paragraphs 78 and 79 of the AGS opinion appear to accept that there is scope for each officer to produce reports of the nature of those ordered, on their own initiative, ‘after a request from the Senate’; the orders directed at the Information Commissioner drew on the language of the ‘parliamentary reform agreements’ of September 2010 which proposed such matters be referred to that officer; the Productivity Commissioner confirmed at an estimates hearing that he expected to receive a reference on the matter in question under the Productivity Commission Act (submission 6, pp. 3–4).

exceedingly rare use of such provisions. In the absence of such express declaration, statutory officers are subject to the inquiry powers of the Houses, as are other persons.

5.33 The committee considers it undesirable that the current stand-off be interpreted as imputing any general principle that the Senate's inquiry powers do not apply in respect of independent statutory officers, contrary to settled principles. Equally, it is important to debunk the characterisation of the contentious orders as anything other than orders for the production of documents, to be considered and responded to on that basis.

Providing information to senators

5.34 The application of parliamentary privilege to officers providing information to senators depends upon the circumstances of the particular case. As noted by the Clerk of the Senate:

It is very clear that the provision of information to the Senate (whether or not pursuant to order) is protected by parliamentary privilege, as is the presentation of information or documents to a committee. What is less clear is the status of communications with individual senators. Explanatory material tends to focus on what is covered by parliamentary privilege rather than what is not covered.⁶⁷

5.35 For instance, the absolute immunity afforded by parliamentary privilege applies where the provision of information is 'for purposes of or incidental to' proceedings in parliament.⁶⁸ The committee was interested in examining the advice available to officers about the nature and limitations of this protection, but it appears there is little in the way of government advice on the matter.

5.36 The revised guidelines, at paragraph 7.1.4, advise officials that they do not have the protection of parliamentary privilege when briefing party committees. However, there is no equivalent advice in Part 8 in relation to officials briefing individual members of parliament, where parliamentary privilege may or may not apply, depending on the use the member makes, or intends to make, of the information.

5.37 The Public Service Commissioner in his submission outlines the guidance in the current government guidelines about briefings by officers to 'party committees and individual members of Parliament', with a focus on departmental and ministerial clearance of information, but does not consider the applicability of privilege.⁶⁹

5.38 The PM&C submission refers to the government response to a House of Representatives committee inquiry into whistleblowing protections within the Australian public sector, mentioning that privilege provides 'some protection to

67 Dr Rosemary Laing, Clerk of the Senate, Submission 1, p. 5.

68 Section 16, *Parliamentary Privileges Act 1987*.

69 Mr Stephen Sedgwick, Public Service Commissioner, Submission 3, p. 4.

Members of Parliament and those who provide information to them in some circumstances'.⁷⁰

5.39 The Clerk lists a number of useful sources, including references in *Odgers' Australian Senate Practice*, a paper by a former Clerk of the Senate, a report of the House Privileges Committee and guidelines produced for members by the Department of the House of Representatives.⁷¹

Committee comment

5.40 While there are clearly some valuable sources of information available on this matter, the committee considers it would be useful for it to be compiled in a more accessible form. During this parliament, the committee has also provided advice to the Auditor-General on the applicable principles⁷² and similarly dealt with the matter in a submission to the Privileges Committee of the New Zealand Parliament.⁷³ The committee intends to incorporate the substance of this advice in its next general report.⁷⁴

Sources of training and advice

5.41 The evidence received in this inquiry did not canvass in a methodical way the level of awareness among officers of relevant matters, however a number of submissions outlined sources of advice and training available to assist officers in understanding their rights and obligations.⁷⁵

5.42 PM&C referred to the detailed advice available to officials in the government guidelines and in additional sources about 'the powers of the Parliament and the accountability obligations of APS employees'. The submission listed a number of relevant sources, and added:

PM&C considers that it would be reasonable to expect that most APS employees, particularly SES officers who are the most likely to appear before a parliamentary committee, would be familiar with some or all of these documents.⁷⁶

70 Department of the Prime Minister and Cabinet, Submission 4, p. 4. Public interest disclosure legislation is currently before the Parliament, and the committee does not intend to reflect on that matter in this report.

71 Dr Rosemary Laing, Clerk of the Senate, Submission 1, p. 5.

72 That advice was tabled in the Senate on 16 June 2011, and is available online: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=priv_ctte/taled_docs/Audit_working_papers/taled_correspondence_16june2011.pdf

73 That submission is available from the New Zealand Parliament's web site: http://www.parliament.nz/en-NZ/PB/SC/Documents/Evidence/?Custom=00DBSCH_PRIV_11058_1

74 To replace the committee's 125th report, *Parliamentary privilege: Precedents, procedures and practice in the Australian Senate 1966–2005*.

75 A list of the main sources of advice referred to in submissions appears at Appendix C.

76 Department of the Prime Minister and Cabinet, Submission 4, p. 3.

5.43 The Public Service Commissioner referred to data indicating:

...that almost all agencies have SES staff that are required to appear before committees from time to time, and that the strategies adopted to support their employees in understanding their obligations include:

- mandatory training courses for recently appointed SES staff
- voluntary (i.e. self-nominated) training courses
- internal guidelines
- internal briefing prior to attendance
- learning through observation of committees in action
- simulation exercises.

5.44 The Public Service Commissioner also noted the availability of APSC training to prepare APS employees appearing before committees as witnesses, including:

...discussion of their rights and responsibilities based on material prepared and published by the Senate, legal advice prepared by the Australian Government Solicitor, and a detailed consideration of the Guidelines prepared by the Department of the Prime Minister and Cabinet.⁷⁷

5.45 The Clerk of the Senate described the sources of legislative and procedural authority for the exercise of relevant powers and privileges, from which rights and responsibilities may be inferred, and outlined publications produced by the Department of the Senate which might assist officers, including *Odgers' Australian Senate Practice*, the *Annotated Standing Orders of the Australian Senate* and other practice guides which are published online.

5.46 The Clerk also suggested that there is scope for more comprehensive online publications, directed at witnesses, in the following areas:

- basic committee proceedings and how to interact with committees
- Senate powers and immunities and the operation of parliamentary privilege.

Committee comment

5.47 The committee welcomes the suggestion that the Senate department could produce additional online resources, and agrees that it would be appropriate for the committee itself to include more comprehensive guidance on these matters in its next general report. In doing so, the committee considers it may be useful to replace the chronological narrative structure of its general reports to produce, in effect, a practice manual on parliamentary privilege as it applies in the Senate and its committees. The committee intends to incorporate in that report the principles set out in this and other recent reports.

77 Mr Stephen Sedgwick, Public Service Commissioner, Submission 3, pp. 5–6.

5.48 As noted in earlier chapters, the committee welcomes the revision of the government guidelines. Recognising that those guidelines provide the main source of government advice to officials about their interactions with Senate committees and, more generally, with the Senate, the committee looks forward to their implementation. The committee also trusts that the other sources of advice and guidance referred to in submissions to the inquiry will then be updated to take into account the revision of the government guidelines and the commentary in this report.

