Senate Brief

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Rights and Responsibilities of Witnesses Before Senate Committees

This Senate Brief is intended as a short general introduction to this topic. For comprehensive coverage of privilege matters the reader should consult the *Parliamentary Privileges Act 1987*, the *Senate Privilege Resolutions* and other publications listed at the end of this brief.

Introduction

As part of the Senate's role as a check on government, it is a function of Senate committees to inquire into matters referred by the Senate, to gather evidence, to give advice and to make recommendations. In order to properly fulfil that function, the Senate has delegated to committees considerable powers, including the power to compel the attendance of witnesses, the giving of evidence, and the production of documents. Committees have the power to move from place to place, and regularly do so, gathering information around the country and observing problems close to hand. Senate committees provide a valuable input to the legislative process and could not do this without the knowledge and expertise of witnesses from the community and from government.

The Senate has recognised that the rights of witnesses giving evidence before its committees should be protected, and accordingly has adopted a range of practices to safeguard those rights. This brief addresses the powers of Senate committees, and gives an outline of the rights and responsibilities of witnesses before Senate committees. It also looks at the relationship between Senate committees and the executive government, in the context of evidence given and documents presented to Senate committees.

Powers of Senate committees

The powers of Senate committees include the following:

- The power to require people to attend. Committees usually invite witnesses to attend, and witnesses usually attend voluntarily. However, committees may order witnesses to appear before them.
- The power to require the giving of evidence.
- The power to require the production of documents.

Senate committees derive these powers from the Senate itself, which in turn derives its powers from the Constitution (s.49). Since 1987, certain powers, privileges and immunities of both houses of the Australian Parliament have been spelt out in the *Parliamentary Privileges Act 1987*. On 25 February 1988 the Senate supplemented this Act with a set of privilege resolutions, which, among other things, detail the rights of witnesses.

Rights of witnesses

It has been recognised that, in order to balance the considerable powers of Senate committees, witnesses appearing before those committees should be given extensive protection. Witnesses possess considerable legal protection, and also enjoy procedural protection under the privilege resolutions adopted by the Senate.

Legal protection

Legal protection for witnesses is provided by the *Parliamentary Privileges Act 1987* already mentioned.

Witnesses giving evidence or producing documents before Senate committees enjoy the same privileges and immunities as senators enjoy in their participation in Senate proceedings. Thus witnesses receive very wide protection and immunity. Their evidence, either oral or written, cannot be used against them in any proceedings before a court or tribunal. This immunity (sometimes referred to as parliamentary privilege) is regarded as necessary for the Parliament to debate and inquire into matters without fear of interference or of prosecution in the courts. The immunity does not apply if written evidence submitted to a committee is released without its permission, or if statements made in oral

evidence are repeated outside a hearing. However, the *Parliamentary Privileges Act 1987* does provide protection (against intimidation, for example) for those persons preparing submissions or documents for presentation to a parliamentary committee.

Although the same immunities apply to witnesses as they do to senators, the immunities are only certain when the proceedings of the committee follow the rules and proceedings of the Senate itself.

For further information on immunities see Senate Brief No. 11, *Parliamentary Privilege*.

Procedural protection

In addition to the legal protection of parliamentary immunity, the Senate has adopted a number of procedures for the protection of its witnesses. These measures are mainly contained in the privilege resolutions already mentioned. Specifically, Privilege Resolution No. 1 provides that witnesses before Senate committees have the following rights:

- To be given reasonable notice of the meeting of the committee, and to be supplied with the committee's terms of reference, a statement of the matters expected to be raised at the hearing, and a copy of Privilege Resolution No. 1. Witnesses are normally invited to appear, and are summoned only where a committee makes a deliberate decision that the circumstances warrant the issue of a summons. Where appropriate a witness shall be supplied with a transcript of relevant evidence already taken;
- To submit a written submission prior to appearing to give oral evidence. Submissions are covered by parliamentary privilege and become committee documents and must not be released unless the committee has authorised their publication. Before appearing at the hearing a witness should be given reasonable opportunity to raise any matters of concern relating to their submission or the evidence they are to give;
- To answer only those questions that are relevant to the committee's inquiry;
- To apply to the committee to be accompanied by counsel and to consult counsel for advice. If the committee declines the application, the witness must be notified of the reasons. Counsel who address the committee are treated in the same way as any other witness, and cannot claim any legal professional privilege;
- To object to answering any questions on any ground, for example, that an answer would be self-incriminating, or would be an invasion of privacy. Committees must consider and determine any objections by a witness, but may insist on an answer;
- To be free of interference or improper influence (for example, through intimidation, or promise of inducement) in respect of evidence that may be given before a committee. Committees are required to investigate and report to the Senate on any evidence of such interference;
- To give evidence in private session or make a confidential written submission, subject to the agreement of the committee. It is important to note, however, that the committee and the Senate itself have the power to subsequently publish the evidence if they so decide. A witness has the right to be informed of this possibility. It should also be noted that the option of a private hearing is not available when Senate committees are considering estimates of expenditure;
- Reasonable opportunity to respond in writing and by appearing before the committee to any evidence given to a committee that adversely reflects on them. This right of reply is available to all persons, not only witnesses;
- Reasonable opportunity to correct errors in the transcript of their evidence, and to submit supplementary evidence.

Responsibilities of witnesses

The responsibilities of witnesses before Senate committees are effectively the converse of the rights of those witnesses. Witnesses have the following responsibilities:

- To attend a committee hearing when summoned by the committee;
- Not to release a written submission unless the committee has authorised its publication;
- To give evidence that is not false or misleading;
- To produce documents relevant to the committee's inquiry if ordered to do so;
- To be prepared to fully justify any objections to answering questions or any requests to give evidence in private session.

The executive government and Senate committees

To a considerable extent, the effectiveness of Senate committee inquiries relies on the information and expertise provided by the executive government and its officials, that is, public servants. Senate committees regularly require the input of public servants when inquiring into current issues, into proposed legislation, and into estimates of government expenditure.

Government officials as witnesses

When appearing as witnesses, public servants have the same rights and responsibilities as other witnesses, but as servants of the executive government, some particular provisions apply. Paragraph (16) of Senate Privilege Resolution No. 1 places certain constraints on committees examining public servants, and the 1989 government guidelines for official witnesses before parliamentary committees should also be consulted.

The key point to note regarding government officials appearing before parliamentary committees is that committees cannot ask officials to give opinions on matters of policy. The advocacy and defence of government policies and administration is the preserve of ministers, not public servants. It is the role of public servants to provide full and accurate information to the Parliament about the factual and technical background to policies and their administration, in order to assist the committee's understanding of the issues involved. Officials may, if the minister agrees, discuss policy options for dealing with a particular issue.

Where there is a difficulty in providing an answer to a committee, an official witness should state that there is a difficulty, indicate to the committee the nature of the difficulty, and seek to refer the matter to a superior officer or the minister. The official must be given reasonable opportunity to do this. It is ultimately the responsibility of the minister to resolve the issue. Only a minister can make the decision to decline to provide information to a committee, and therefore accept political responsibility for any subsequent dispute between the committee and the executive government.

Public interest immunity and claims of commercial confidentiality

The executive government and ministers are frequent subjects of attempts by the Senate to exercise its powers to require the giving of evidence and the production of documents. Ministers may seek to avoid attendance at committee hearings or avoid having to produce documents by claiming what was formerly known as crown privilege or executive privilege, and is now usually known as public interest immunity. This term refers to a claim of the executive government to be immune to the requirement to present certain documents or information to the courts or to the houses of Parliament. Grounds for claiming public interest immunity include, for example, that disclosure may be a threat to national security, or to individual privacy.

The Senate acknowledges that there is some information which ought not to be disclosed, and committees on occasion agree not to seek the information or documents. However, the existence of public interest immunity in respect of the Parliament can be determined only by the houses of Parliament themselves. The Senate has not conceded the existence of any conclusive public interest immunity in relation to its proceedings.

On 13 May 2009 the Senate passed an order setting out the process to be followed by public sector witnesses who believe that they have grounds for withholding information from Senate committees. In essence, the order requires that witnesses state recognised public interest grounds for withholding information and, at the request of a committee or any senator, refer the matter to the responsible minister, who is also required to state recognised public interest grounds for any claim to withhold the information. The order does not change the existing procedures of the Senate, but consolidates the formerly established, but not always followed, process, for the guidance of public sector witnesses in the future.

Claims that particular information held by government is commercial-in-confidence do not provide grounds for resisting disclosure of the information on the basis of public interest immunity. Such claims must be soundly based in order to justify overriding the right of Senate committees to call the executive to account.

A resolution of the Senate in 2003 declared that the Senate and its committees would not accept claims of commercial confidentiality unless made by a minister, accompanied by a ministerial statement of the basis for the claim, including a statement of the commercial harm which might result from the disclosure of information.

Parliamentarians as witnesses

Under the principle of comity, a house of Parliament does not seek to compel the attendance of members of another house (including members of state or territory parliaments). It is common, however, for members of the House of Representatives and members of state and territory parliaments, including ministers, to appear by invitation or by request before Senate committees, to assist with committee inquiries.

Ministerial staff and ex-parliamentarians as witnesses

The staff of ministers can be compelled to attend hearings of Senate committees. Their position as employees of ministers does not entitle them to any

claims of immunity against being summoned to appear and give evidence. They have the same rights and responsibilities as any other non-parliamentary witness. Similarly, ex-parliamentarians including ex-ministers are not entitled to claims of immunity.

Contempt of the Senate and remedies for contempt

When the actions of a witness or another person influencing a witness have the effect of obstructing the inquiries of a Senate committee (or future inquiries), those actions may be treated as contempts. Examples of such offences include:

- Refusing without reasonable excuse to answer a question;
- Giving false or misleading evidence;
- Failing to attend or to produce documents when required to do so;
- Intimidation of a witness;
- Adverse treatment of a witness;
- Wilfully disturbing a committee while it is meeting.

The Senate refers allegations of contempt to its Committee of Privileges for consideration and report. This committee has developed a considerable body of case law concerning parliamentary privilege, especially in respect of the rights and obligations of witnesses, interference with witnesses and the giving of misleading evidence.

The committee has, for example, inquired into a case where the chairman and senior members of a statutory body attempted to place restrictions on another member of the body from giving evidence. Although no contempt was found to have been committed, the committee was highly critical of the actions of the statutory body.

In another case, the Committee of Privileges investigated an allegation that a witness received adverse treatment from his superior officers as a result of his appearance at a joint committee hearing. Senior officers of a statutory body imposed a penalty on the junior officer, who had given evidence in a private capacity. The Committee of Privileges found that a contempt had been committed and was strongly critical of the officers and the organisation.

The *Parliamentary Privileges Act 1987* provides that a House of Parliament may impose terms of imprisonment or substantial fines for individuals and corporations as a penalty for contempt. To date the Senate has not had occasion to use either of these penalties, preferring an educative and preventative approach. The Senate has accepted apologies and remedial action, and has encouraged government officials in particular to attend training courses on the rights and obligations of witnesses before parliamentary committees.

Further reading

Harry Evans and Rosemary Laing (eds.), *Odgers' Australian Senate Practice*, 13th edn, Department of the Senate, Canberra, 2012. Available on the Internet at http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers

The *Parliamentary Privileges Act 1987* and the *Senate Privilege Resolutions* appear as appendices A and B to the 125th Report of the Senate Committee of Privileges, which is available online at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=priv_ctte/completed_inquiries/2004-07/report_125/index.htm.

A number of documents for the guidance of witnesses at Senate committee inquiries are available on the Internet at http://aphnew.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=wit_sub/index.htm. These include the document 'Government guidelines for official witnesses before parliamentary committees and related matters', November 1989.

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