



AUSTRALIAN SENATE

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Dr Ian Holland
Secretary
Senate Community Affairs Committee
Suite S1 59
Parliament House

Dear Dr Holland

**ACCESS TO *IN CAMERA* EVIDENCE VIA DISCOVERY PROCESSES OR SUBPOENA IN AUSTRALIA
OR OVERSEAS JURISDICTIONS**

The committee has asked for advice about the status of *in camera* evidence and the circumstances in which it might be vulnerable to disclosure through legal processes in Australia or overseas.

In broad terms, parliamentary privilege is a use immunity which protects proceedings in Parliament from being impeached or questioned (that is, used for forensic purposes) in a court or tribunal. The immunity is codified in section 16 of the *Parliamentary Privileges Act 1987* which defines the term "proceedings in Parliament" to include the giving of evidence before a committee and the evidence so given. Subsection 16(3) prescribes what "impeached or questioned" encompasses while subsection 16(4) prohibits a court or tribunal from requiring the production of *in camera* evidence unless it has been published by a House or a committee. Section 13 of the Act provides that it is an offence for a person to publish *in camera* evidence without the authority of a House or a committee.

In Australia, the protection of *in camera* evidence is absolute and no court or tribunal can require its production. The Parliamentary Privileges Act has no extraterritorial jurisdiction, however, and absolute privilege applies only within Australia. It cannot protect witnesses or evidence in another country. If a court outside Australia required the production of evidence given to an Australian parliamentary committee, it could be argued that the evidence was immune from disclosure under Australian law and, in the case of *in camera* evidence, that it was an offence under Australian law to disclose it and that the court should therefore not require its disclosure. No court outside Australia could be bound by such an argument and, indeed, in a case involving the rights of individual litigants claiming damages against a company which had manufactured or distributed allegedly injurious medical devices, the

court may well favour the claims of the litigants against the company over the niceties of the law of parliamentary privilege in Australia and order the production of the *in camera* evidence.

The inability of the Parliamentary Privileges Act to protect even *in camera* evidence outside Australia raises the question of the form in which access to the evidence is provided. Current practice relating to *in camera* evidence is for secretariats to provide only hard copy to witnesses and for electronic copy not to be circulated. The committee could consider providing a single hard copy of the *in camera* evidence to the relevant witness and directing that further copies not be made. It could also consider directing that the evidence not be circulated to overseas offices of the company, although such an order may be difficult to enforce. If the evidence physically remained in Australia then it would continue to be protected by parliamentary privilege. Once it leaves our shores, then it is potentially vulnerable to discovery or other legal processes in overseas jurisdictions.

Please let me know I can be of any further assistance.

Yours sincerely



(Rosemary Laing)