

The Senate

Committee of Privileges

Guidance for officers giving evidence and
providing information

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MEMBERS OF THE COMMITTEE

Senator Gary Humphries (**Chair**) (Australian Capital Territory)

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Senator the Hon George Brandis (Queensland)

Senator the Hon John Faulkner (New South Wales)

Senator Scott Ludlam (Western Australia)

Senator Marise Payne (New South Wales)

Senator the Hon Ursula Stephens (New South Wales)

Senator Anne Urquhart (Tasmania)

The Senate

PO Box 6100

Parliament House

CANBERRA ACT 2600

Telephone: (02) 6277 3360

Facsimile: (02) 6277 3199

Email: priv.sen@aph.gov.au

Internet: www.aph.gov.au

Contents

Chapter 1	1
Guidance for officers	1
Background to the inquiry	1
Purpose of the inquiry	2
Structure of report.....	3
Chapter 2	5
Resolutions and guidelines.....	5
Introduction	5
Resolutions of the Senate	5
Assessment of the guidelines.....	6
Origin of the guidelines	8
The revised guidelines	9
Committee comment	10
Chapter 3	11
Requirements for clearance of witnesses and evidence	11
Introduction	11
Deficiencies in the 1989 guidelines.....	11
Officials giving independent accounts of events.....	14
Officials giving evidence in a personal capacity.....	16
Other advice and guidance	17
Conclusions	18
Chapter 4	21
Senate practice and procedure.....	21
Introduction	21
Public interest immunity claims	21
Legal professional privilege and legal advice	23
Commercial-in-confidence material.....	24
Freedom of information (FOI) legislation.....	25
Statutory secrecy provisions.....	26
Right of reply.....	27

Independent statutory officers	27
Conclusion	28
Chapter 5	29
Awareness of powers, advice and protections.....	29
Introduction	29
Provision of information to the Senate and committees.....	30
Contentious orders for documents.....	32
Providing information to senators	36
Sources of training and advice	37
Appendix A	41
List of Submissions	41
Appendix B	43
Sources of advice.....	43

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 “Utigate” 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.

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 the 2.5 m. 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.

Chapter 3

Requirements for clearance of witnesses and evidence

Introduction

3.1 The government guidelines sit at the intersection of two of the Senate's core roles: its role in holding governments to account and the exercise of its inquiry power. It is important that the guidelines assist officials in supporting the accountability of ministers to the parliament, particularly in providing evidence on matters of policy and administration for which those ministers are responsible.

3.2 It must be recognised, however, that the role of officials in providing information to committees will often be broader than that. Committees frequently investigate matters which require the independent accounts of witnesses, including the personal accounts of officials.

3.3 This chapter is about the potential for government advice to its officials to interfere with the Senate's inquiry processes by imposing improper clearance requirements upon officials as witnesses.

Deficiencies in the 1989 guidelines

3.4 Much of the advice in the guidelines concerns processes for approving officials as witnesses before parliamentary committees and clearing the evidence they might give. The current guidelines have been criticised as not distinguishing – or not distinguishing well – between those matters on which it is appropriate to require officials to seek departmental or ministerial clearance and those matters on which it is *not* appropriate to do so.

3.5 For example, the current guidelines, at paragraph 2.4, leave it to the discretion of the departmental secretary (with the minister's 'general consent') to determine the extent to which aspects of the guidelines themselves are to be followed. This makes it difficult to assess what requirements agencies have placed on officials in relation to their interactions with parliamentary committees and, in turn, to assess whether those requirements are appropriate.

3.6 The current guidelines continue:

Committees dealing with individual conduct

2.5 Where a committee is inquiring into the personal actions of a Minister (or official) and seeks information from officials, there may be circumstances where it is not appropriate for the requirements set out in para 2.14 for clearance of evidence to be followed...

3.7 This provision draws quite narrowly the circumstances in which, according to the guidelines, it might not be appropriate to require departmental clearance of information. Further, it is not clear when this provision might be triggered, nor to what degree the stated requirements might be set aside.

3.8 For his part, the Public Service Commissioner notes that the provision is of some assistance:

...but in its current form indicates that while the usual clearance processes may not apply, it does not set out alternative arrangements or give any guidance about appropriate behaviour.¹⁵

3.9 These matters have been the subject of recent criticism by Senate committees.

The HMAS Success inquiry

3.10 In March 2010 the Senate Foreign Affairs, Defence and Trade References Committee tabled a report on questions of privilege arising from its inquiry into events on HMAS *Success*. That committee reported concerns that directives ('DEFGRAMS') issued by the Department of Defence 'effectively deterred' ADF personnel from contacting it about matters relating to its inquiry.¹⁶

3.11 The first DEFGRAM purported to remind Defence personnel of a requirement for ministerial approval of their involvement with parliamentary committees and ministerial clearance of all Defence material to be provided to such committees.¹⁷ A later DEFGRAM conceded the right of Defence personnel to participate in a private capacity but, according to the committee, it did little to undo the damage caused by the first:

The new directive neither withdrew nor contradicted the contents of [the first DEFGRAM] and sent a rather confused message about the distinction between professional and private roles.¹⁸

3.12 What the references committee was seeking in that inquiry was the accounts of people who had witnessed relevant events. The committee drew the distinction between an inquiry 'attempting to ascertain facts that transpired in the workplace and an inquiry into government policy or departmental engagement in, or contribution to, implementing policy.' The committee went on to observe:

In this case, any individual who has relevant information would be entitled to communicate with the committee directly and freely as an ADF member and without any influence from the department. In these instances, however, the individual is only representing his or her personal view or offering his or her particular interpretation of events.¹⁹

15 Mr Stephen Sedgwick, Public Service Commission, Submission 3, p. 3.

16 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, p. 3.

17 Senate Foreign Affairs, Defence and Trade References Committee, *Report*, pp 3–4.

18 Senate Foreign Affairs, Defence and Trade References Committee, *Report*, pp 7–8.

19 Senate Foreign Affairs, Defence and Trade References Committee, *Report*, pp 3.

3.13 The committee concluded that, by interfering with this communication, the DEFGRAMS:

...had the potential to interfere with the work of the committee to the extent that the publication of these documents constituted a possible contempt of the Senate.²⁰

3.14 The references committee noted that, although the DEFGRAMS referred to and relied on the current guidelines, the advice they contained was inconsistent with the requirements of the Parliamentary Privileges Act and the Senate's Privilege Resolutions, notwithstanding that the guidelines state that they should be read in conjunction with those resolutions.

3.15 The impression left by the current guidelines, and apparently relied on in developing the DEFGRAMS, is that officials must in all cases clear their appearances and evidence with their agencies; that their role in appearing before committees is confined to assisting ministers in discharging their accountability obligations to the parliament; and that the only alternative is for the official instead to give evidence in a personal (rather than official) capacity.

The 142nd report of the Privileges Committee

3.16 Similar concerns were raised in this committee's 142nd Report relating to the appearance of a former Treasury official before the Senate Economics Legislation Committee. It came to light during the inquiry that the Secretary to the Treasury had provided his submission to the offices of the Prime Minister and the Treasurer at the same time as it was provided to the committee, without the committee's authorisation. In this context, the committee noted that:

There are circumstances in which it will be appropriate to keep ministers' offices informed of departmental interaction with parliamentary committees. This ground is well covered in the *Government guidelines for official witnesses before Parliamentary committees and related matters* (November 1989).²¹

3.17 The committee went on to identify a distinction between an inquiry into matters of policy or administration and an inquiry into individual conduct:

The Government guidelines are generally directed to the former and acknowledge that there may be special circumstances and procedures applying to committee inquiries dealing with individual conduct. For this kind of inquiry, it is the committee's advice to departments and agencies that they should pay particular attention to any instructions given by the committee regarding submissions, and should not regard themselves merely as an extension of the relevant minister's office (let alone the Prime

20 Senate Foreign Affairs, Defence and Trade References Committee, *Report*, p. 11.

21 Senate Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing in 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, p. 90.

Minister's office), and therefore free to share all relevant information about the inquiry, including submissions, with that entity.²²

3.18 When the committee raised this matter with the Secretary he acknowledged that the guidelines were not particularly clear on the crucial distinction between inquiries into matters of policy and administration and inquiries into individual conduct.²³

Officials giving independent accounts of events

3.19 Where committees are seeking accounts of events from individuals it is important that such accounts are not subject to supervision or influence. As noted by the Clerk of the Senate:

Anything other than an individual's own account has the potential to mislead the committee and may therefore constitute a possible improper interference with the committee's ability to carry out its functions and, therefore, a potential matter of privilege.²⁴

3.20 It is clear that the deficiencies identified by the Senate in the course of these inquiries have influenced the formulation of the revised guidelines. In its first submission to the inquiry, the Department of the Prime Minister and Cabinet accepted (in the context of the HMAS *Success* inquiry) that the 1989 guidelines were deficient in that they did not adequately address situations where an officer gives evidence in relation to particular events or conduct.

3.21 The submission stated that:

...where a committee is inquiring into a particular event, it would be appropriate for any submission explaining relevant departmental policies or practices to be cleared in the usual way through the minister and departmental executive, and for the secretary to determine which employees should attend and give evidence in relation to those matters. However, employees whose involvement in the inquiry is a result of them being witnesses to the event in question should be able to explain their version of the event to the committee without clearing their evidence with the minister or departmental executive, or seeking their permission to attend.²⁵

3.22 This position is now reflected in part 1.5 of the revised guidelines. That part first recognises the different capacities in which officials might appear:

1.5 Types of witnesses

1.5.1 Officials can make submissions and appear as witnesses in an official capacity or in a personal capacity. Within these two broad categories there

22 Senate Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing in 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, p. 90.

23 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, p. 6.

24 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, p. 6.

25 Department of the Prime Minister and Cabinet, Submission 4, p. 2.

are distinctions that affect the clearance of submissions, selection of witnesses and preparation for appearances before committees. Depending on the nature of the inquiry that the committee is undertaking, the same officials can fall into either or both of these categories.

3.23 In relation to officials giving evidence in an ‘official capacity’, the revised guidelines then make distinctions on the basis of the character of matters on which evidence is being given. Evidence by officials ‘as representatives of their departments or agencies to explain the administration and implementation of government policies and programs’ is stated to be subject to various clearance requirements, which take account of the interests of agencies in exercising a level of control over information. On the other hand, evidence by officials in relation to particular events or conduct they have witnessed is specifically excluded from such requirements:

1.5.3 ...On occasion witnesses may choose or be required to give personal accounts of events or conducts that they have witnessed. This situation can arise in the course of any committee hearing but will most often arise when a committee is inquiring into a particular event and the accounts of individual witnesses are required to allow the committee to ascertain the facts surrounding the event. In such cases, *witnesses must not have requirements placed upon them that might deter them from giving evidence or cause them to feel constrained about the nature or content of their evidence.* [emphasis added]

Committee comment

3.24 The committee agrees strongly with that guidance. Witnesses in those circumstances (including people contemplating giving evidence to a committee) must not have such requirements placed upon them and, equally, must not apprehend that that such requirements exist.

3.25 The explicit recognition that there are circumstances in which it is appropriate that officials – giving evidence in an official capacity – must be free to do so unencumbered by clearance requirements is a significant advance and represents a substantial improvement on the existing guidelines. The committee considers that this approach in large part answers its concerns arising from the DEFGRAMS matter.

3.26 From the committee’s perspective, and from the perspective of the protections embodied in privilege law and practice, the same principle applies regardless of the nature of the matter on which evidence is given. While the character of a matter may justify an agency’s seeking to discuss with an officer the evidence to be given, in no circumstances should a department interfere with a witness contrary to the relevant privilege resolutions.

3.27 It is that risk – the potential to interfere with the rights of witnesses and with the work of committees – which must be borne in mind when determining what requirements might appropriately be placed upon witnesses, rather than any particular categorisation of the character of evidence or any artificial distinction as to the capacity in which a witness appears.

Officials giving evidence in a personal capacity

3.28 As has been noted, the current guidelines and related advice have been criticised for requiring officials to choose between giving evidence in an official capacity, subject to clearance requirements, or in a personal capacity. In this context, the Clerk of the Senate notes that the requirement to make such a choice is potentially harmful:

...because it invites public service managers to exert pressure on potential witnesses in respect of their evidence and therefore to influence that evidence or the giving of it.²⁶

3.29 The Clerk's submission goes on to identify other problematic aspects which can arise when officials are required to make this choice.²⁷ The committee concurs with these criticisms of the current guidelines. It is inappropriate to require officials to make such choices, and the potential for interference with witnesses and potential witnesses (contrary to the Privilege Resolutions) is clear.

3.30 Regardless of the capacity in which officials provide information, agencies must respect their rights to communicate with the parliament. This principle has often been referred to by the committee, most recently in its 151st report, which stated that:

...there is an untrammelled right for witnesses to communicate with parliamentary committees. This right adheres in whatever capacity a person gives evidence, whether professional or personal.²⁸

The revised guidelines

3.31 As has been noted above, these difficulties are largely dealt with in the revised guidelines by explicitly providing that officials may – in an official capacity – give accounts of matters independently of their agencies.

3.32 Part 6 of the revised guidelines goes on to deal with the appearance of officials 'in a personal capacity'. It acknowledges the right of officials to appear in that capacity. This is distinct from the situation in which, under the current guidelines, officers are effectively forced to choose between clearing evidence with their agencies or appearing in a personal capacity.

3.33 The rights of officials are emphasised throughout the Part 6:

6.1.1 Nothing in these guidelines prevents officials from making submissions or appearing before parliamentary committees in their personal capacity, and the *Parliamentary Privileges Act 1987* makes it clear that an agency has no power to prevent an official from doing so...

6.1.3 There is no intention for there to be any restriction arising from these guidelines on officials appearing before parliamentary committees in their 'personal' capacity...

26 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, p. 9.

27 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, pp. 9–10.

28 See Committee of Privileges, 151st report, pp. 9–10.

6.1.5 An official who gives evidence in his or her personal capacity is protected by parliamentary privilege and must not be penalised for giving that evidence.

3.34 The committee welcomes these clear statements about the rights of witnesses, and the prohibition on penalising officials for giving evidence in this capacity.

3.35 Much of the rest of this part of the revised guidelines contains advice on matters officials might consider in deciding whether to give evidence in a personal capacity and in determining the content of the evidence they might give. These considerations include: whether, and when, to advise their agencies [6.1.2]; the APS Values and Code of Conduct; and considerations about making comment on ‘matters which fall within or impinge on their areas of responsibility’ [6.1.3]. On this last matter the revised guidelines add:

6.1.4 An official contemplating giving evidence in a personal capacity in these circumstances might consider discussing his or her intentions with the departmental executive or agency head or other senior officials, as the views that he or she wishes to put forward might be covered in the agency’s submission or the evidence of official witnesses. There is, however, no obligation on the official to do so.

3.36 In short, the guidelines give primacy to the rights of officials and the protections which must be afforded them, but set out a range of practical matters for them to consider. This is a sound approach, provided that the exhortation to consider various matters does not amount in any particular instance to improper influence of a witness.

Other advice and guidance

3.37 Paragraph 6.1.1 of the revised guidelines, in relation to appearances in a personal capacity, notes that ‘Individual agencies may also have developed advice for their own staff on these matters.’

3.38 The committee has no evidence about the extent of other advice given by agencies to officials which cover similar ground or overlap with the guidelines in other areas. The Clerk of the Senate refers to this matter in her first submission, commenting that:

The nature, extent and accuracy of such material are unknown. If examples come to notice, it tends to be because they are problematic...²⁹

3.39 The committee considers it would be useful for the government to provide an assurance that no agency will give instructions or provide advice that is inconsistent with the guidelines themselves and with the requirements of privilege. The committee also considers that, wherever possible, any such supplementary advice to officials about their interactions with the parliament and its committees should be publicly available.

29 Dr Rosemary Laing, Clerk of the Senate, Submission 1, p. 2

Conclusions

3.40 In formulating guidance for officers, agencies must be wary of exerting inappropriate pressure on them. They must ensure that the provision of guidelines and the giving of advice does not amount to an improper interference with witnesses or potential witnesses.

3.41 Agencies must be wary of anything which may invite (or may be interpreted as inviting) public sector managers to exert such pressure. Agencies must also be wary of communicating or implementing such guidelines in a manner which amounts to – or is apprehended by officers as amounting to – an improper interference.

3.42 As has been noted in this chapter, the committee is pleased that the guidelines are being revised and welcomes the fact that they have been extended to cover many of the deficiencies which prompted this inquiry.

3.43 The committee notes, however, that the potential remains for the advice in contained in the guidelines to come into conflict with the privileges which properly attach to the work of the parliament.

3.44 The guidelines make much of the role of officials in assisting ministers to meet their accountability obligations and also deal with the circumstances in which officials might be called upon to give evidence of matters personally within their knowledge without supervening constraints (in essence, the DEFGRAM problem). This acknowledgement that, at least in defined circumstances, officials essentially have a direct accountability obligation to the parliament and its committees is also welcome. The committee emphasises the need for agencies to recognise that officials may also, in other circumstances, be called upon – or may choose – to give evidence without the sanction of their agencies and that, in those circumstances, officials receive the protection of privilege.

3.45 The guidelines provide sound, practical advice about requirements which ought (or ought not) apply in a range of circumstances. However, no set of guidelines can adequately deal with all eventualities, and the committee considers it important to remind agencies and officials of the underlying principles:

- the untrammelled right of persons to communicate with parliamentary committees
- the need for agencies to refrain from interference with witnesses, including potential witnesses, and with their evidence
- that the proper remedial action where disputed evidence is given is for agencies to take the opportunity to provide committees with supplementary evidence
- the need for witnesses and those submitting evidence to committees to follow the instructions of those committees in relation to publication of that evidence.

3.46 Agencies and officials should look to those principles and to the resolutions of the Senate where there is any doubt about the application of privilege to officials in their interactions with Senate committees.

Chapter 4

Senate practice and procedure

Introduction

4.1 Compared with the 1989 version, the proposed revised guidelines greatly expand the advice available to officers about relevant Senate resolutions and the committee welcomes this development. For the most part, the committee considers that the advice is appropriate.

4.2 The committee endorses the advice at paragraph 2.11.1 of the revised guidelines that officials should familiarise themselves with relevant Privileges Resolutions. The committee would go further and recommend that officials ensure they have a reasonable understanding of all resolutions which might apply to their interactions with the Senate and its committees. This is a matter which has been the subject of repeated Senate resolutions.³⁰

4.3 In this chapter, the committee makes some observations about the revised guidelines' treatment of the following:

- Public interest immunity claims
- Legal professional privilege and the provision of legal advice
- Commercial-in-confidence material
- Freedom of information legislation
- Statutory secrecy provisions
- Right of reply
- Application of the guidelines to independent statutory officers.

Public interest immunity claims

4.4 On 13 May 2009 the Senate passed a resolution setting out procedures for dealing with claims to withhold information on the basis of 'public interest immunity'. The Procedure Committee has considered the operation of the order and found 'anomalies which indicate that ministers and officers need further to familiarise themselves with the order.'³¹ As the Clerk of the Senate has noted:

Too many public servants are still not providing proper reasons for declining to answer questions and several very senior public servants seem to think that there exists an independent discretion to withhold information from the Parliament and its committees independently of public interest immunity... The guidelines would have more practical value if they

30 The committee comments on this matter further in chapter 5.

31 Senate Procedure Committee, *Fourth report of 2009*, November 2009, p. 1. See also *Third report of 2009*, August 2009.

explained how to raise a public interest immunity claim and what the next steps are.³²

4.5 In September 2009, the Department of the Prime Minister and Cabinet (PM&C) provided written advice to all secretaries on the Senate order of 13 May 2009.³³ This advice has also been incorporated as Attachment A to the revised guidelines. Sections 4.4–4.6 of the revised guidelines also address public interest immunity claims, providing further practical advice on the operation of the order.

4.6 This part of the revised guidelines is introduced as follows:

4.4 Public interest immunity

4.4.1 While the parliament has the power to require the giving of evidence and the production of documents, it has been acknowledged by the parliament that the government holds some information which, in the public interest, should not be disclosed.

4.7 While technically correct, the reader may be left with the impression that there are settled categories of information which the government has an independent discretion to withhold. As noted above,³⁴ the Senate has never accepted the existence of ‘Crown’ or ‘Executive’ privilege, in the sense that there exists any category of documents or information held by the executive government which is beyond the reach of the Senate’s inquiry power. Rather, the Senate has always insisted on its right to determine what information it requires to undertake its work and, accordingly, to determine for itself any claim from the executive government that information should be withheld.³⁵

4.8 The guidelines go on to outline the operation of the 2009 order, which provides the mechanism by which such claims are properly to be made and determined.

4.9 The committee notes the description in paragraph 4.6 of ‘generally accepted grounds’ for public interest immunity claims. The committee emphasises that any such claims must be raised in the manner described by the 2009 order, including by indicating not only the ground under which a claim is made but also the harm that might be occasioned should the information be provided.

32 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, p. 11.

33 Department of the Prime Minister and Cabinet, Submission 4, p. 2.

34 See paragraphs 2.4 – 2.5.

35 This flows from the powers inherited by the Senate from the House of Commons, by way of section 49 of the Constitution, and from the accountability of the executive government to the Parliament under the Constitution. See also the revised guidelines at 1.3.1:

1.3. Accountability

1.3.1 A fundamental element of Australia’s system of parliamentary government is the accountability of the executive government to the parliament. Ministers are accountable to the parliament for the exercise of their ministerial authority and are responsible for the public advocacy and defence of government policy...

4.10 In many ways the resolution arose because of claims made upon ‘generally-accepted’ grounds (such as reliance on blanket ‘commercial-in-confidence’ clauses) which, upon closer examination, provided no sound basis for withholding information as it could not reasonably be held that there would be any harm to the public interest in the particular circumstances of the case. The advice in paragraph 4.6.2 on this point is sound:

4.6.2 The Senate Order of 13 May 2009 made it clear that committees will not accept a claim for public interest immunity based only on the ground that the document in question has not been published, is confidential, or is advice to or internal deliberations of government; a minister must also specify the harm to the public interest that may result from the disclosure of the information or document that has been requested.³⁶

4.11 Senators are all too familiar with misconceived claims that information cannot be provided merely because it is confidential, is advice to government or forms part of internal government deliberations. It is to be hoped that this revised guidance will promote adherence to the 2009 order and the freer flow of relevant information in this area.

4.12 The committee also notes the advice in the revised guidelines about the opportunities for taking questions on notice:

4.15.1 While it is appropriate to take questions on notice if the information sought is not available or incomplete, officials should not take questions on notice as a way of avoiding further questions during the hearing. If officials have the information, but consider it necessary to consult the minister before providing it, they should state that as a reason for not answering rather than creating the impression that the information is not available.

4.13 It is entirely proper in relevant circumstances for an official to take a question on notice in order to allow the minister to determine whether to make a public interest immunity claim. As noted by the Procedure Committee:

The procedures set out in the order do not affect the ability of ministers and officers to take questions on notice in order to obtain required information or to consider questions, and also do not affect the ability of officers to refer any question to a minister under paragraph (16) of the Senate’s Privilege Resolution no. 1.³⁷

4.14 The committee agrees that it is proper in such circumstances that the official inform the committee of the reason for taking the question on notice.

Legal professional privilege and legal advice

4.15 The committee notes the advice in Part 4.8 of the revised guidelines on legal professional privilege and legal advice.

36 Department of the Prime Minister and Cabinet, Submission 7, pp 10–12.

37 Senate Procedure Committee, *Third report of 2009*, August 2009, p. 1.

4.16 In 4.8.1, the guidelines suggest that it would be inappropriate for legal advisers, owing a duty to their clients, to disclose legal advice. The advice indicates that ‘All decisions about disclosure of legal advice resides with the minister or agency who sought and received that advice.’ In 4.8.2, the guidelines advise that it will ‘generally be appropriate’ to provide information about the provision of advice, but that decisions about disclosing the content of advice are decisions for the minister.

4.17 While legal professional privilege has no status in the proceedings of parliament, the revised guidelines appropriately provide a mechanism to ensure that decisions about the disclosure of legal advice may be made the relevant minister.

4.18 Paragraph 4.8.3 on the provision of legal advice states, in part, that:

...Officials should provide committees with such information as they consider appropriate, *consistent with the general understanding that the government’s legal advisers do not provide or disclose legal advice to the parliament...* [emphasis added]

4.19 The Senate has never accepted the supposed convention that legal advice is not provided to the Senate and its committees, possibly because of the many occasions when such advice has been provided. This committee’s advice, and the advice of the Procedure Committee, is that claims to resist the disclosure of legal advice ought be raised in accordance with the Senate order of 13 May 2009 on public interest immunity claims. The Procedure Committee has identified possible grounds on which such claims might appropriately be made.³⁸

4.20 The committee considers that it would be appropriate for the revised guidelines to adopt that approach.

Commercial-in-confidence material

4.21 In February 2004, PM&C provided advice to departmental secretaries in relation to the Senate order of 30 October 2003 relating to claims to withhold information from the Senate on the ground that it is commercial-in-confidence.³⁹ That advice has largely been incorporated as Attachment B to the revised guidelines. Section 4.10 of the revised guidelines also provides guidance to officers on commercial-in-confidence material.

4.22 The advice recognises:

4.10.1 There is no general basis to refuse disclosure of commercial information to the parliament, even if it has been marked ‘commercial-in-confidence’. The appropriate balance between the interests of accountability (i.e. the public interest in disclosing the information) and the appropriate protection of commercial interests (i.e. the public interest in the information remaining confidential) should be assessed in each case.

38 See Senate Procedure Committee, *Third report of 2009*, August 2009, p. 2.

39 Department of the Prime Minister and Cabinet, Submission 4, pp 2–3.

4.23 The revised guidelines set out the process required by the 2003 order, and suggest some factors that officers and agencies might appropriately take into account in making decisions about the provision of such information.

4.24 The committee considers this advice to be generally appropriate. In particular the committee notes the sound advice in paragraph 4.10.6:

As with any other public interest immunity claim, a claim around commercial-in-confidence information should be supported by reference to the particular detriment that could flow from release of the information.⁴⁰

Freedom of information (FOI) legislation

4.25 Part 4.9 of the revised guidelines deals with the application of the *Freedom of Information Act 1982* and, in the committee's view, deals with that matter well. It is clear to the committee that officials well-versed in freedom of information procedures will often – inappropriately – seek to apply these same procedures to decisions about disclosure of information to the parliament and to its committees. As the revised guidelines make clear,⁴¹ the FOI Act establishes only minimum standards for the disclosure of documents and, in any case, has no application to parliamentary inquiries.

4.26 Paragraph 4.9.1 suggests that the FOI Act may be considered 'a general guide to the grounds on which a parliamentary inquiry may reasonably be asked not to press for particular information.' The committee considers that to be a reasonable approach, provided officers subsequently follow the proper process for making public interest immunity claims.

4.27 That paragraph goes on to observe that 'any material which would be released under the FOI Act should...be produced or given to a parliamentary committee, on request. It might be added that information which actually *has* been released under the Act should similarly be produced.

4.28 The most cogent advice provided in the paragraph is as follows:

...officials should bear in mind that, because of the Executive's primary accountability to the parliament, the public interest in providing information to a parliamentary committee may be greater than the public interest in releasing information under the FOI Act.

4.29 If the committee were to make any suggestion here it would be that the guidelines again make clear that any proposal to withhold information from the Senate or a Senate committee must be made in accordance with the 2009 order on public interest immunity claims.

40 Department of the Prime Minister and Cabinet, Submission 7, pp 13–14.

41 Paragraph 4.9.1.

Statutory secrecy provisions

4.30 This committee's 144th Report addressed the interaction between statutory secrecy provisions and parliamentary privilege in some detail in the context of a bill which sought to place conditions on the access by parliamentary committees to certain taxpayer information. In that report, the committee referred to its 36th Report where it found that:

...there is a widespread perception throughout the public service that statutory secrecy provisions limit the information that public servants can provide to parliament and its committees.⁴²

4.31 As the committee noted, this is clearly incorrect, but the pervasiveness of this view can frustrate legitimate attempts by parliamentary committees to obtain the information they require to conduct their inquiries.⁴³

4.32 In its first submission to the committee, PM&C indicated that it intended to expand on the guidance to officials relating to secrecy provisions in legislation.⁴⁴ The revised guidelines now provide the following guidance:

4.11.2 The existence of secrecy provisions in legislation does not provide an automatic exemption from providing information to the parliament unless it is clear from the provision that a restriction has been placed on providing information to a committee or a House of the parliament (section 37 of the *Auditor-General Act 1997* is an example)...

4.33 The committee notes that there are, in fact, very few statutory provisions which explicitly restrict the parliament's access to information. The committee considers that the further advice in paragraph 4.11.2 is appropriate:

4.11.2 The fact that the parliament has included secrecy provisions in legislation suggests, however, that an official may be able to put to a committee a satisfactory case for not providing requested information, at least in public hearings. If the official's case is not accepted by the committee and the official remains concerned about providing the information, it would be open to the responsible minister to make a public interest immunity claim...

4.34 The committee recommends that officials familiarise themselves with the advice in its 144th Report before seeking to rely on a statutory provision to justify a claim to withhold information from a parliamentary committee.

4.35 The committee makes further comments about officers' awareness of the extent of the parliament's power to require information in chapter 5.

42 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, p. 7.

43 Senate Committee of Privileges, 144th Report, p. 7.

44 Department of the Prime Minister and Cabinet, Submission 4, p. 2.

Right of reply

4.36 The revised guidelines now also provide guidance about adverse comment which might be made about officials in evidence before committees, and about the right of reply procedure, relating to persons referred to in the Senate. This advice indicates that an official has the same rights as any other person as are provided for by Privilege Resolution 1(13) (general referred to as the *adverse comment* process) and Privilege Resolution 5 (*Person referred to in the Senate*). The committee considers it appropriate that officials are given this advice.

4.37 The committee notes the advice in paragraph 5.7.3 that ‘Officials proposing to exercise their right of reply should inform their departmental secretary or agency head.’ Presumably that advice is intended to be subject to the same sort of caveats as were dealt with at paragraph 3.35, above. From the committee’s perspective, officials may exercise their rights under these resolutions whether or not they advise their agencies. In some cases it would be inappropriate to impose such a requirement.

Independent statutory officers

4.38 The introduction to the revised guidelines states that they are ‘designed to assist departmental and agency officials, statutory office holders and the staff of statutory authorities in their dealings with the parliament.’ The guidelines go on to state:

1.1.1 ...It is recognised, however, that the role and nature of some statutory office holders and their staff will require the selective application of these *Guidelines*, depending on the individual office holder’s particular statutory functions and responsibilities...

2.9.1 Both Houses regard statutory office holders and the staff of statutory authorities as accountable to the parliament, regardless of the level of ministerial control of the authority.

4.39 That position is consistent with a resolution of the Senate relating to the accountability of statutory office holders, adopted in 1971, which is in the following terms:

- (1) That whilst it may be argued that statutory authorities are not accountable through the responsible minister of state to parliament for day-to-day operations, they may be called to account by parliament itself at any time and that there are no areas of expenditure of public funds where these corporations have a discretion to withhold details or explanations from Parliament or its committees unless the Parliament has expressly provided otherwise.

4.40 The resolution was reaffirmed in 1974, 1980, 1984 and 1997. This last reaffirmation was as a result of the 64th report of the Committee of Privileges.⁴⁵

45 See Committee of Privileges, 125th report; paragraph 5.28.

Conclusion

4.41 The committee again thanks PM&C for providing an opportunity to comment on the proposed revised guidelines. The committee trusts that its comments will be of assistance to the government in finalising the guidelines and looks forward to their implementation.

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/tabled_docs/Audit_working_papers/tabled_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.

Appendix A

List of Submissions

Submissions [2010 inquiry]

- 1 Dr Rosemary Laing, Clerk of the Senate, Parliament House, Canberra ACT

Submissions [current inquiry]

- 1 Dr Rosemary Laing, Clerk of the Senate, Parliament House, Canberra ACT
- 2 Mr Tom Duncan, Clerk of the Legislative Assembly for the Australian Capital Territory
- 3 Mr Stephen Sedgwick, Commissioner, Australian Public Services Commission, Canberra ACT
- 4 Mr Barry Sterland PSM, Acting Deputy Secretary, Department of the Prime Minister and Cabinet, Canberra ACT
- 5 Professor Geoffrey Lindell, South Australia
- 6 Dr Rosemary Laing, Clerk of the Senate, Parliament House, Canberra ACT, supplementary submission
- 7 Ms Renee Leon, Deputy Secretary, Governance, Department of the Prime Minister and Cabinet, Canberra ACT, supplementary submission incorporating revised guidelines

Appendix B

Sources of advice

Sources of authority

- The Constitution (ss 49 & 50)
- *Parliamentary Privileges Act 1987*
- *Public Service Act 1999*
 - APS Values
 - s 13 – Code of Conduct
 - s 15 – Sanctions
 - s 57(2) – ‘The Secretary of a Department must assist the Agency Minister to fulfil the Agency Minister’s accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of the Department.’

Senate resolutions

- Senate Privilege Resolutions (especially resolutions 1 and 6; and resolution 2, in relation to the Privileges Committee)
- Standing orders and other resolutions and orders of the Senate, including:
 - witnesses – powers of the Senate (16 July 1975)
 - accountability of statutory authorities (9 December 1971, 23 October 1974, 18 September 1980 and 4 June 1984)
 - expenditure of public funds (25 June 1998)
 - accountability to Parliament -- study of principles by public servants (21 October 1993)
 - claims of commercial confidentiality (30 October 2003)
 - public interest immunity claims (13 May 2009)

Senate committee reports

- Senate Procedure Committee, *Third Report of 1992*
 - (The report rejected the application of FOI exemptions to the provision of information to Parliament)

- Senate Committee of Privileges, *125th Report: Parliamentary privilege: precedents, procedures and practice in the Australian Senate 1966–2005*, December 2005

Guidance published by the Senate department

- *Odgers' Australian Senate Practice*, 13th edition – chapter 17
- *Annotated Standing Orders of the Australian Senate* (entries relating to standing orders 176–183)
- Senate Committee Office publications
 - *How to make a submission to a Senate Committee inquiry*
 - *Notes for the guidance of witnesses appearing before Senate Committees*
 - *Procedures to be observed by Senate Committees for the protection of witnesses*

Government advice

- *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*
- Advice from PM&C issued in February 2004 relating to the making of commercial-in-confidence claims
- Advice from PM&C issued in September 2009 relating to the process for making claims for public interest immunity
- *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads*
- *Foundations of Governance, a document published by the APSC (in particular, the chapter on Accountability)*
- *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads*
- *Supporting Ministers, Upholding the Values – in particular, Part 2.2.8: responding to questions on notice and appearing before parliamentary committees*