

APPENDIX 1

ADVICES FROM THE CLERK OF THE SENATE



Parliament of Australia
Office of Senator Shayne Murphy
Labor Senator for Tasmania

6 December 1994

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Mr Harry Evans
Clerk of the Senate
Suite SG 39
Parliament House
CANBERRA ACT 2600

FAXED
6 12 94 8:30 am

BY FAX: (06) 277 3199

Dear Harry

I am seeking your advice on a couple of matters relating to the new Select Committee for Unresolved Whistleblower Cases.

Firstly, I would like to know what jurisdictional rights/powers a Senate Committee has to demand documents that are in or under the control of a State Government.

Secondly, assuming a Senate Committee has the power to send for persons and documents, what powers does it have if such documents are refused or persons refuse to appear on the basis of protection under certain aspects of a State Constitution or the Australian Constitution as it relates to the difference between State and Commonwealth Laws or State Government Regulations?

It would be greatly appreciated if I could have your advice on these matters as soon as possible.

Yours sincerely

SHAYNE M MURPHY
Labor Senator for Tasmania

smm:jlm





AUSTRALIAN SENATE

OFFICE OF THE CLERK OF THE SENATE
hm/10195

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600
TEL (06) 277 3350
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6 December 1994

RECEIVED - 6 DEC 1994

Senator S M Murphy
The Senate
Parliament House
CANBERRA ACT 2600

FILE	✓ SC- WB WC
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Dear Senator Murphy

SELECT COMMITTEE ON UNRESOLVED WHISTLEBLOWER CASES - POWERS

Thank you for your letter of 6 December 1994 in which you seek advice on the powers of the Select Committee on Unresolved Whistleblower Cases, particularly the power to require the production of documents within the control of a state government.

The Select Committee has been given the powers, in paragraph (6) of its resolution of appointment of 1 December 1994, to require the attendance of witnesses, the giving of evidence and the production of documents. These powers are conferred on the Committee pursuant to standing order 34. The powers to require the attendance of witnesses, the giving of evidence and the production of documents are among the undoubted powers of the Senate under section 49 of the Constitution. The Senate may delegate these powers to its committees, but only the Senate may punish default as a contempt. The power to punish contempts is codified by the *Parliamentary Privileges Act 1987*.

There are no explicit limitations on these powers to require the attendance of witnesses, the giving of evidence and the production of documents. There are probably, however, two relevant implicit limitations on the powers.

First, the powers may be confined to inquiries into subjects in respect of which the Commonwealth Parliament has the power to legislate. There is judicial authority for the proposition that the Commonwealth and its agencies may not compel the giving of evidence and the production of documents except in respect of subjects within the Commonwealth's legislative competence (*Attorney-General for the Commonwealth v Colonial Sugar Refinery Co Ltd* 1913 15 CLR 182; *Lockwood v the Commonwealth*

1954 90 CLR 177 at 182-3), and, if the matter were litigated, the High Court might well hold that this limitation applies to the inquiry powers of Senate committees.

Secondly, it could well be held that the inquiry powers of the Senate do not extend to members of state parliaments and officers of state governments. There is no authority for this proposition, and the matter has not been litigated, but the High Court could arrive at such a conclusion by reference to the federal nature of the Constitution and the doctrine that the Commonwealth may not impose a requirement inimical to the integrity of the states (something like this reasoning was used in *Melbourne Corporation v the Commonwealth* 1947 74 CLR 31; *Queensland Electricity Commission v the Commonwealth* 1985 159 CLR 152).

Whatever the legal situation, it is a parliamentary rule, and a rule of the Senate, that the inquiry powers are not exercised in respect of members of the House of Representatives (standing order 178), and as a matter of first principle the same rule extends to members of state and territory parliaments. Senate committees as a matter of practice have in the past accepted this rule, and have not endeavoured to exercise their inquiry powers in respect of members of state parliaments or officers of state governments. Such persons have given evidence before Senate committees on invitation and voluntarily. The Senate has also accepted the application of the rule to state parliaments in making requests to state houses for the attendance of their members before the Select Committee on the Australian Loan Council (*Journals of the Senate*, 5 October 1993, p. 565-6)

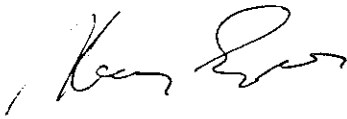
It is possible that, should the matter be litigated, the courts would apply the parliamentary rule as a rule of law and find that the inquiry powers of the Senate do not extend to state or territory parliaments or state or territory officers.

If a Senate committee issues a subpoena requiring the attendance of witnesses, the giving of evidence or the production of documents and is met with a refusal, the committee has no power to take any further action, but can only report the matter to the Senate. It is then for the Senate to determine whether it should treat the refusal as a contempt and seek to impose any penalty. It is at the stage of the attempted imposition of a penalty that a person in receipt of a subpoena, such as a state minister, member of parliament or other office-holder, could challenge in the courts the exercise of the Senate's powers. It is possible that the attempted exercise of the inquiry powers could be challenged at an earlier stage, such as on the issue of a subpoena.

My advice to all Senate committees is that they should observe the parliamentary rule and the past practice and not seek to summon members of state or territory parliaments or state or territory officers, or to require them to give evidence or to produce documents. Such persons should be invited to appear or submit documents if a committee desires to take evidence from them, and any invitation to state or territory officers should be directed to the relevant state or territory minister. In the event of an invitation being declined, a committee should not take the matter any further.

Please let me know if I can provide any further information or assistance in relation to this matter.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Harry Evans', with a stylized, cursive script.

(Harry Evans)



Parliament of Australia
Office of Senator Shayne Murphy
Labor Senator for Tasmania



7 December 1994

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Mr Harry Evans
Clerk of the Senate
Suite SG 39
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CANBERRA ACT 2600

FAXED

7-12-94
9.25 am

BY FAX: (06) 277 3199

Dear Harry

Further to my request of 6 December, relating to the Select Committee for Unresolved Whistleblower Cases, I would again appreciate your advice on some further matters:-

- a) Following its inquiry, and should the Committee's findings be contrary to the outcomes already found in particular cases, would the Committee have any powers to:-
 - i) order compensation for the people concerned?
 - ii) order a judicial inquiry into the particular cases?
 - iii) provide any assistance to the persons concerned other than finding in their favour?

Again, this advice would be appreciated at the earliest opportunity.
Thank you.

Yours sincerely

SHAYNE M MURPHY
Labor Senator for Tasmania

smm:jl/m



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hm/10202

7 December 1994

Senator S M Murphy
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Murphy

**SELECT COMMITTEE ON UNRESOLVED
WHISTLEBLOWER CASES – POWERS (2)**

Thank you for your letter of 7 December 1994 in which you seek further advice on the powers of the Select Committee on Unresolved Whistleblower Cases.

The Committee has no power to order that compensation be paid to persons, to order a judicial inquiry into particular cases or to provide any assistance to persons other than making findings in their favour. The Committee can only recommend such steps. The Senate itself, acting alone, would not be able to take any of those steps, as they would require legislation or action by the executive government.

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

Yours sincerely

(Harry Evans)