The Senate

Procedure Committee

Rules for question time

Public interest immunity claims: operation of the order of the Senate of 13 May 2009

Fourth report of 2009

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MEMBERS OF THE COMMITTEE

Senator the Hon John Hogg
President of the Senate

Senator the Hon. Alan Ferguson
Deputy President and Chair of Committees, **Chair**

Senator the Hon Chris Evans
Leader of the Government in the Senate

Senator the Hon Nick Minchin
Leader of the Opposition in the Senate

Senator the Hon Eric Abetz

Senator Bob Brown

Senator the Hon John Faulkner

Senator Annette Hurley

Senator the Hon Joe Ludwig

Senator Stephen Parry

The Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3360
Facsimile: (02) 6277 3199
E-mail: harry.evans@aph.gov.au
Internet: http://www.aph.gov.au/Senate/committee/proc_ctte

PROCEDURE COMMITTEE

FOURTH REPORT OF 2009

The committee reports to the Senate on the following matters referred by the Senate to the committee and considered by the committee.

RULES FOR QUESTION TIME

The committee has further considered the modified rules for question time adopted by the Senate on 13 November 2008 and continued on 4 December 2008 in the form of a temporary order for 2009.

The committee has resolved to recommend the continuation of these rules on a trial basis, subject to one modification. The committee considers that there would be value in restricting supplementary questions to thirty seconds to encourage conciseness and perhaps to provide time for a further one or two more questions.

The committee suggests that the modified rules be prescribed in another temporary order to operate for the remainder of this Parliament and for the first two sitting weeks of the next Parliament, and that the operation of the rules be reviewed before the expiration of that time. The proposed temporary order is shown in the attachment.

PUBLIC INTEREST IMMUNITY CLAIMS: OPERATION OF THE ORDER OF THE SENATE OF 13 MAY 2009

In accordance with the undertaking given in its Third Report of 2009, the committee has further reviewed the operation of the order of the Senate of 13 May 2009 governing the making of public interest immunity claims in Senate committee hearings.

The committee considers that the supplementary estimates hearings of 19 to 23 October 2009 indicated a greater appreciation of the intention and effect of the order and a better adherence to it. There were, however, a few anomalies which indicated that ministers and officers need further to familiarise themselves with the order.

The hearings began with a statement by the Special Minister of State and Manager of Government Business, Senator Ludwig, in the Finance and Public Administration Committee, to the effect that the government would fully comply with the order. The committee welcomes this statement. Following his statement there were questions about whether there would be a practice of taking questions on notice so as to consider whether public interest immunity claims could be raised, without articulating the

grounds of those claims at the hearings as contemplated by the Senate's order. This point was discussed by senators but not fully resolved. The committee trusts that appropriate judgment will be exercised by ministers and officers in taking questions on notice.

In the same committee there was a repetition of the claim that advice to government is never disclosed, which is not correct (a formal written advice to the government was released on 29 October in connection with the debate in the Senate on the medical services table), and is explicitly stated by the Senate's order not to be a reason in itself for refusing information. When pressed on this point, the minister took the question on notice. The claim that advice to government is never disclosed was repeated in at least one other committee.

An occasion on which the order might properly have been applied was somewhat confused: a senator asked about the existence of an Australian Federal Police brief while disclaiming any intention of asking about its content. This led to a dispute about whether his questions were about the content, and the chair ruling questions out of order without any procedural ground for doing so. The legitimate public interest grounds that could have been raised, relating to law enforcement investigations and national security, were not articulated.

One exchange raised the question of whether there is yet a full understanding of the Senate's order. The Secretary of the Department of Education, Employment and Workplace Relations refused to answer questions about priority employment areas, and when asked for a public interest ground, stated that her refusal was not a public interest immunity claim. This resembles similar answers given in the previous estimates hearings. Some information was provided and questions taken on notice, to the satisfaction of the questioning senator, so the issue was unresolved.

That committee obtained from another Department of Education, Employment and Workplace Relations officer the proper acknowledgement that he could not claim legal professional privilege as a reason for not answering questions about legal advice. This is a point that has caused some difficulties in the past.

Failure to articulate an appropriate public interest immunity ground for not answering questions also occurred in other hearings. The Official Secretary to the Governor-General declined to reveal communications within Government House without invoking the legitimate ground of freedom of communication between executive officers and their personal staff. In the Foreign Affairs, Defence and Trade Committee hearing, "sensitivities" were raised on several occasions as reasons for not answering questions, with a failure to articulate the appropriate public interest grounds of prejudice to foreign relations and national security.

The Australian Broadcasting Commission refused to disclose the salaries of its leading television personalities, a matter which has a long history, and which led to Senate resolutions from 1971 declaring that statutory bodies do not have a general discretion to withhold information about public expenditure. On this occasion the exchange was inconclusive.

The committee reiterates that the Senate order requires that the withholding from committees of advice to government requires some public interest ground, and that there is not a general discretion to withhold information without a statement of a public interest ground. Any claim by officers to withhold information on public interest grounds must on request by a senator or a committee be referred to a responsible minister, as required by the order.

The committee will review the operation of the order again after the next round of estimates hearings.

In the meantime, the Senate Department will continue to acquaint departments and agencies with the order in the seminars on Senate procedures which are held for public officers. Secretaries of departments will again be reminded of the order at the appropriate time.

Alan Ferguson
Deputy President
and Chair of Committees
Chair of the Procedure Committee

ATTACHMENT

QUESTION TIME

PROPOSED TEMPORARY ORDER

That the following modified rules for question time operate as a temporary order, in conjunction with standing orders 72 and 73, from the beginning of 2010 for the remainder of the 42nd Parliament and for the first two sitting weeks of the next Parliament:

(a) primary questions shall be limited to one minute and answers to them to two minutes;

(b) two supplementary questions shall be allowed to each questioner, each supplementary question shall be limited to thirty seconds and the answers to them to one minute each; and

(c) answers shall be directly relevant to each question.