

The Senate

Procedure Committee

Committee proceedings and public interest
immunity claims: order of the Senate of
13 May 2009

Senators caring for an infant: standing order 175

Third 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

THIRD 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.

COMMITTEE PROCEEDINGS AND PUBLIC INTEREST IMMUNITY CLAIMS: ORDER OF THE SENATE OF 13 MAY 2009

On 13 May 2009 the Senate passed an order to govern the raising and treatment of claims of public interest immunity in committee proceedings. Part of that order required the committee to review the operation of the order and to report to the Senate by 20 August 2009.

The Senate's order of 13 May 2009, a copy of which appears in the attachment to this report, sets out the process to be followed in hearings of Senate committees when officers of the Commonwealth consider that they should raise a claim that information should not be provided to the committee because the provision of the information would be in some way harmful to the public interest. Basically, the order requires an officer in that situation to state the harm to the public interest that could result from the disclosure of the information, and to refer the matter to a responsible minister if requested by the committee or a senator. On receipt of such a reference, the responsible minister is required to consider the matter and state whether, and on what ground, the information should not be provided because of possible harm to the public interest. The committee or a senator, if not satisfied with the minister's statement, may refer the question to the Senate. The order does not specify the public interest grounds on which information might be withheld, as the categories of such grounds, while well known, are not closed, in that it is conceivable that new grounds could arise. The order also does not prejudge any particular circumstance in which a claim may be raised, but leaves the determination of any particular claim to the future judgment of the Senate.

The order applies only to proceedings in committees, and does not apply to question time in the Senate, to which different rules apply under standing order 73 and past presidential rulings.

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.

Under the order it is open to a minister representing another minister at a committee hearing to refer any public interest immunity claim to the responsible minister. It is also open to a Senate minister who is responsible for the matters under consideration to

defer, and further consider, a decision on whether to make a public interest immunity claim.

The order is broadly consistent with the *Government Guidelines for Official Witnesses before Parliamentary Committees* which have been in effect since 1989, and which indicate that public interest grounds should be the basis of any claims of public interest immunity, which should be made by ministers.

The estimates hearings from 25 May to 5 June 2009 were the first estimates hearings since the order was passed, and the first occasion on which the order would be likely to be invoked.

As with all estimates hearings, the questions which gave rise to possible invocations of the order amounted to only a very small percentage of the proceedings, and the vast majority of questions were answered, with a great amount of otherwise unavailable information disclosed.

In most cases, recognisable public interest grounds were not clearly raised for refusals to answer questions, but such grounds were implied in several instances.

On several occasions ministers and officers claimed that advice to government is not disclosed, without raising a public interest ground as required by paragraph (7) of the Senate's order. There were also claims that legal advice to government is not disclosed. Advice, including legal advice, to government has been disclosed in many cases in the past. The public interest immunity grounds which could be raised as grounds for not disclosing advice include that disclosure of the advice would interfere with the ability of government freely to deliberate within government on policy options, and that disclosure of legal advice could prejudice the position of the Commonwealth in possible future legal proceedings.

On several occasions commercial confidentiality was implied as the basis for declining to provide information. The Senate's resolution of 30 October 2003 requires that, when such a claim is made, a statement of the commercial harm that may result from the disclosure of the information should be made.

Other public interest grounds that were implied but not explicitly stated included prejudice to legal proceedings, disclosure of Cabinet deliberations, ongoing law enforcement investigations and national security. If such grounds were explicitly raised by officers, referred to ministers on request in accordance with the Senate's order, and claimed by responsible ministers after consideration, they would no doubt be given due weight by the committee and the Senate.

In other cases questions were refused on grounds which did not correspond to recognised public interest grounds. In one case the implied ground of privacy of remuneration arrangements was suggested, contrary to past resolutions of the Senate declaring that remuneration from public funds should be disclosed.

Consideration of these and other occasions in the estimates hearings leads the committee to the following conclusions.

- It should be appreciated that the term “public interest immunity claim” is simply a generic term for every claim by a witness that a question should not be answered or information not supplied; it is not some special category of claims, over and above which there is an executive discretion to withhold information.
- It should be appreciated that the order is a procedural order of the Senate governing proceedings in Senate committees, and applying to public sector witnesses.
- Witnesses need to be familiar with recognised grounds of public interest immunity claims, to be able to determine how they apply to particular instances, and to be able to articulate them in their application to those particular instances.
- Public interest immunity claims made by officers should be referred to ministers on request, and only ministers may make a considered claim on behalf of government that information should not be provided.
- It should be appreciated that, in making a public interest immunity claim, witnesses are, in effect, making a submission to the individual questioner and the committee in the first instance and ultimately to the Senate that the Senate should not insist on particular information being provided.

The committee will keep the operation of the order and its application to committee hearings, particularly estimates hearings, under review, and will report to the Senate again as necessary.

The Senate Department conducts regular seminars for senior public servants on their relationship with Senate committees, and those seminars in future will include special attention to the Senate’s order. The committee considers that this will assist in securing proper observation of the order in committee proceedings.

SENATORS CARING FOR AN INFANT: STANDING ORDER 175

Standing order 175 provides:

- (1) Visitors may attend, in the galleries provided, a sitting of the Senate.
- (2) A person other than a senator, a clerk at the table or an officer attending on the Senate may not:
 - (a) attend a meeting of the Senate in private session; or
 - (b) enter any part of the Senate chamber reserved for senators while the Senate is sitting.
- (3) Paragraph (2) does not apply in respect of a senator breastfeeding an infant.

- (4) The Usher of the Black Rod shall, subject to any direction by the Senate or the President, take into custody any person who enters any part of the chamber reserved for senators while the Senate is sitting, or causes a disturbance in or near the chamber, and a person so taken into custody shall be discharged out of custody in accordance with an order of the Senate.

On 18 June 2009 the President requested that a child of a senator be removed from the chamber during a division. As a result of that occasion, the following suggested amendment of the standing order was referred to the committee for consideration and report by 7 September 2009:

Paragraph (3) to be amended to read:

- (3) Paragraph (2) does not apply in respect of a senator breastfeeding an infant, or, at the discretion of the President, a senator caring for an infant briefly, provided the business of the Senate is not disrupted.

The committee considered this proposed amendment. A majority of the committee believes that it would be undesirable to extend the existing exemption from the standing order, and therefore does not recommend the proposed amendment. In the view of the majority of the committee, it would create an undesirable inroad on the principle that the floor of the Senate is reserved for senators and officers in immediate attendance on the Senate, and would create uncertainty as to the scope of the proposed exemption. Senator Bob Brown dissents from this conclusion.

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

ATTACHMENT

PUBLIC INTEREST IMMUNITY CLAIMS ORDER OF THE SENATE, 13 MAY 2009

- (1) If:
 - (a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and
 - (b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee,

the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

- (2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.
- (3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.
- (4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.
- (5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.
- (6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

- (7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).
- (8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).