

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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SENATE DEPARTMENT BUDGET — APPROPRIATIONS AND STAFFING COMMITTEE REPORT

When the Senate Department estimates were considered at the opening of the estimates hearings on 24 May, the Appropriations and Staffing Committee had just presented (out of sittings) its report on the Senate Department budget. In spite of statements by the President and the Clerk at the last estimates hearings that any savings attributable to the amalgamation of the three joint departments should be found in the new Department of Parliamentary Services, the government attempted to impose a cut in the Senate Department's budget to reflect the supposed savings of the amalgamation. The Appropriations and Staffing Committee, however, has recommended to the Senate a scheme for the rearrangement of funding, adopted by the President on the recommendation of the Senate Department, whereby the cuts will be transferred to the joint department and the Senate Department's budget will not be affected. This arrangement involves the transfer of funds for security formerly held by the Senate Department and paid to the joint department under a purchaser-provider system. The Appropriations and Staffing Committee recommended that additional steps be taken to ensure that this does not reduce the ability of the Senate and senators to oversight the security system. The committee suggested to the Senate that its terms of reference be amended to provide it with the explicit capacity to scrutinise security funding and administration, and that the interdepartmental Security Management Board be put on a statutory basis. It is expected that these recommendations will be considered by the Senate early in the next sittings starting on 15 June. If the recommendations are carried out, this action by the Appropriations and Staffing Committee and the President will also prevent the budget of the House of Representatives Department being cut. Later in the estimates hearing it was discovered that the savings from the amalgamation of the joint departments will not remotely approach the figure claimed by the Podger review which recommended the amalgamation and adopted by the government.

PROCEDURAL MATTERS

Several procedural matters were raised during the estimates hearings. The following summarises the advice given on those matters.

The basis on which questions may be ruled on by chairs arose on several occasions. Questions to witnesses may not be ruled out of order unless they are contrary to some definite rule of the Senate.

There are only two rules of the Senate under which questions to witnesses may be ruled out of order:

- Questions must be relevant to the matters under inquiry (Privilege Resolution 1(9)). The Senate resolved on 22 November 1999 that, in estimates hearings, any questions going to the financial positions and operations of departments and agencies are relevant questions. It is therefore rare for a question at an estimates hearing to be out of order.
- Officers may not be asked to *give opinions on* matters of policy (Privilege Resolution 1(16), emphasis added). This does not preclude officers expounding or explaining policy.

If a minister or an officer declines to answer a question, the minister takes responsibility for that decision. The fact that a minister has declined to answer a question does not make the question out of order under the rules of the Senate.

There are no rules of the Senate which make out of order questions asking for advices, internal working documents or any other category of information.

If a minister or an officer declines to answer a question, and states a ground for that refusal, the committee should determine whether the question should be pressed (Privilege Resolution 1(10)). This requires a statement of a coherent ground for the refusal and a formal and definite decision by a quorum of the committee as a whole, not a ruling by the chair. If a minister or an officer persists in declining to answer a question after a committee has decided that the question should be pressed, the only recourse for the committee is to report the matter to the Senate. A decision by a committee that a question should not be pressed does not make the question out of order, and this procedure does not authorise a committee chair to rule a question out of order.

These matters have previously been pointed out to committees by Presidents of the Senate and Deputy Presidents in their capacity as Chairs of the Chairs' Committee. In a letter to chairs in 1988 the then President also reminded chairs to ensure that questioning of witnesses

is conducted in an orderly fashion and that witnesses are not interrupted when they are attempting to answer questions.

The Senate's Resolution of 30 October 2003 concerning claims of commercial confidentiality also required clarification. That resolution is a declaration that the Senate and its committees shall not entertain a claim of commercial confidentiality unless the claim is made by a minister and accompanied by a statement as set out in the resolution. In other words, the resolution specifies preconditions for a committee to consider a claim. It is for the committee to determine whether those preconditions have been met. If the preconditions have been met, the committee may then consider the claim in accordance with Privilege Resolution 1(10). It is open to a committee to reject a claim of commercial confidentiality even if the preconditions for consideration of the claim have been met. Again, it is for the committee to determine whether the claim should be accepted and whether a question should be pressed. There is nothing under the resolution for the chair to make rulings on. The application of the resolution is entirely a matter for a committee.

A question also arose in relation to the application of this order to statutory bodies or companies which have such a degree of independence from ministerial control that it would be inappropriate for claims by such bodies to be made by ministers. It was suggested that if a committee is satisfied that there is such a degree of independence from ministerial control that involvement of a minister would not be appropriate, the requirement for a minister to make the claim may be regarded as inoperative, but that the other requirement of the order, that a claim be supported by a statement of the kind specified, remain operative. This interpretation preserves the intention of the Senate in the application of the order to such bodies.

QUESTIONS OTHERWISE UNDER INQUIRY

One group of witnesses appeared to believe that they could not be asked questions relating to matters under inquiry in another Senate committee inquiry. There is nothing to prevent matters under inquiry in another Senate committee inquiry being the subject of questions in estimates hearings, and such questions have frequently been asked and answered. Some famous subjects of inquiry, such as the children overboard affair, have been explored at both estimates hearings and other hearings.

INVESTIGATIONS BY OTHER BODIES

Coincidentally with the estimates hearings, a related question arose for advice when it appeared that an investigatory body was under the misapprehension that it could not investigate a matter also under investigation by a Senate committee, because of parliamentary privilege. The law of parliamentary privilege prevents such an investigatory body

investigating any evidence given to a Senate committee or action taken by the committee, but does not prevent it investigating matters which are not proceedings before the committee but which are also under investigation by the committee. Thus, a person can complain to a Senate committee about, and also ask an external investigatory body to investigate, some action by a government department affecting the person, and there is nothing to prevent both the committee and that body investigating that action.

APPEARANCE OF NON-GOVERNMENT BODY

Estimates hearings are theoretically limited to public bodies and office-holders, on the basis that standing order 26(5) refers to questioning of ministers or “officers”. Non-government bodies in receipt of public funds, however, have appeared by agreement to answer questions. In this round of hearings, representatives of Meat and Livestock Australia appeared and gave evidence on that basis.

SUB JUDICE PRINCIPLE

One of the grounds on which witnesses in estimates hearings may be excused from answering questions is the sub judice principle, that committees should not pursue lines of questioning involving a danger of prejudice to legal proceedings. There is a separate but related principle that persons who may be actually involved in legal proceedings should not be asked to give evidence if the consequent creation of material protected by parliamentary privilege could cause difficulties in legal proceedings (see *Odgers*, 10th ed, pp 224-229, 422-3).

During this round of hearings, the Supervising Scientist expressed some unease about answering questions about the spill at the Ranger uranium mine which may be raised in legal proceedings to which he may be a party or a witness, but the committee agreed not to press any questions which he thought raised the apprehended difficulty.

EXPUNGMENT OF EVIDENCE

During one hearing a witness mentioned the name of a person accidentally and indicated that the name should have been withheld for security reasons. The committee agreed to expunge the name from the transcript, but this could not avoid any disclosure of the name arising from the public hearing. The committee could have made an order forbidding the publication of the name, but such an order is difficult to enforce, and presumably the committee felt that this step was unnecessary.

MINISTER ASKING QUESTIONS

At one hearing the minister on duty asked some questions of one group of witnesses. There is nothing to prevent a minister asking questions, as the minister is a senator entitled to participate in the proceedings under standing order 26(8). In the past it was quite common for the minister on duty to ask questions to clarify answers or when he or she thought that the witnesses had not adequately answered questions. Any extensive questioning by ministers, however, would no doubt offend other senators.

PRIME MINISTER'S "REFORM" PROPOSALS

Officers were again questioned about the prime minister's proposals to "reform" the Senate, which appeared to have disappeared from sight and were the subject of questioning at previous hearings. Subsequent to the relevant hearing, the report of the consultative group was released, indicating that the proposals would not be accepted by the electors in a referendum, and the prime minister also indicated that he was not pursuing the proposals.

GOVERNMENT ACTIVITIES CONSIDERED

Amongst the many government activities explored at the hearings were the following:

- the government's knowledge of the abuse of Iraqi prisoners (the extensive hearing on this matter disclosed that misleading answers and statements had previously been given on the subject, and inaccurate answers had been given earlier in the hearing itself)
- treatment of Australian detainees by the United States and any consequent action by the Australian government
- the activities of Telstra, particularly its maintenance of the telecommunications network and its services and charges
- proposed election-related advertising by departments and agencies and the Senate's order on that subject
- alleged political interference with the advertising campaign on violence against women and consequent waste of funds
- the proposed free trade agreement with the United States
- the Keelty affair, and the review of his clarificatory statement by others
- the conduct of Professor Flint as chair of the Australian Broadcasting Authority

- scrutiny by the Australian Securities and Investment Commission of “get rich quick” schemes
- the apparent new policy of keeping at least some forward estimates of expenditure secret, and not providing any figures which are not already in the budget papers.

SENATE DAILY SUMMARY

This bulletin provides Senate staff and others with a summary of procedurally significant occurrences in the Senate. The *Senate Daily Summary* provides more detailed information on Senate proceedings, including progress of legislation, committee reports and other documents tabled and major actions by the Senate. Like this bulletin, *Senate Daily Summary* may be reached through the Senate home page at www.aph.gov.au/senate

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