Appendix 3

Clerk's Advice of 29 April 2004

Clerk's Advice of 18 May 2004

Clerk's Advice of 20 August 2004

AUSTRALIAN SENATE

CLERK OF THE SENATE

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29 April 2004

Mr Alistair Sands
Secretary
Select Committee on the
Lindeberg Grievance
The Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Sands

DOCUMENTS IN POSSESSION OF STATE AUTHORITIES

Thank you for your letter of 28 April 2004, which seeks advice on the power of the committee to gain access to, and order the production of, documents in the possession of the Queensland government and its departments.

The power to require the attendance of witnesses and the power to require the production or examination of documents are not separate powers, but the same power. Historically, orders to produce documents were invariably subsidiary parts of orders for witnesses to attend: witnesses were ordered to attend and to produce documents as part of their attendance. If witnesses are not required to give oral evidence they are ordered to produce documents without necessarily attending, as a concession to the convenience of the witnesses. Similarly, where the required documents are voluminous or difficult or inconvenient to transport, witnesses may be ordered to make them available for inspection as an alternative to producing them, again as a concession to the witnesses' convenience. The power is sometimes generically described as the power to compel evidence, to make it clear that it includes these two facets. Any limitation which applies to the power to summon witnesses, therefore, applies equally to the other aspect of the power, the power to compel the production or examination of documents.

As indicated in *Odgers' Australian Senate Practice* and in the advices provided to Senate committees referred to there, Senate committees have refrained from ordering state office-holders to attend and from requiring the production or examination of state documents, on the basis of a rule of comity between levels of government in a federal system. This acknowledged limitation of practice may have a legal basis, as was advised to the Select Committee on the Victorian Casino Inquiry in 1996; if the matter were ever adjudicated it might be held that the Constitution imposes an implied limitation on the powers of Senate committees to compel evidence from state authorities.

There is also the matter of applying an effective remedy in case of a refusal by a state authority to comply with a Senate committee subpoena. In practice, there is no effective remedy, other than to bring the matter by one means or another before the High Court for adjudication, which would be a lengthy process unlikely to facilitate the particular inquiry in question. A state government contesting the power of the Senate to require the attendance of state office-holders or the production or examination of state documents would be likely to raise also the question of possible limitation of the inquiry power to matters within the legislative competence of the Commonwealth, which would greatly complicate and extend the litigation.

Generally speaking, state statutory authorities are not an exception to the rule; although they may have some measure of independence from the state executive government, they are still part of the apparatus of the state as a polity.

For these reasons, Senate committees have always been advised to proceed by way of invitation when seeking state office-holders as witnesses or state documents, and committees have always followed that advice. I would give the same advice to this committee.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

(Harry Evans)

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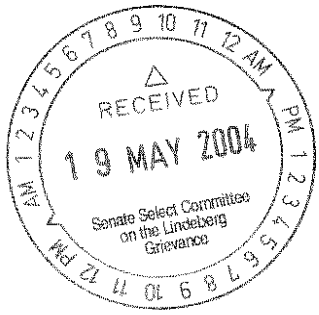

18 May 2004

Mr Alistair Sands
Secretary
Select Committee on the
Lindeberg Grievance
The Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Sands

TREATMENT OF COMMITTEE DOCUMENTS

Thank you for your letter of 13 May 2004, in which the committee seeks advice on the treatment of documents which have been provided to the committee. I hope that the following observations will be of some help to the committee.

The terms of reference provided by the Senate to the committee on 1 April 2004 require the committee to determine whether any false or misleading evidence was given to various Senate committees, having regard to specified matters, including three of the documents provided to the committee. The committee is also required, having determined that question, to report on any implications for measures which should be taken in relation to the destruction or concealment by government of information, and the protection of children and whistleblowers. The committee is not required to determine whether statements made in the documents are true, or to make findings about the principal subject matter of the documents, the conduct of staff of the John Oxley Youth Centre. Essentially, the committee is to determine whether, in the light of the existence of those documents and the state of knowledge of relevant persons of the existence of those documents, false or misleading evidence was given.

That being the responsibility of the committee, there would seem to be little or no justification for the publication of the three documents in question. The publication of evidence which is submitted to a Senate committee has two purposes: to allow the public to see the evidence available to the committee on the basis of which the committee made its conclusions and recommendations; and to allow persons who may have other relevant evidence to respond to matters contained in the original evidence. Neither of those purposes would seem to be served by the publication of the documents in question. Such publication would communicate to the public allegations which were made in the documents about the conduct of staff at the John Oxley Youth Centre. The truth of those allegations would be the

focus of responses, not the questions of who knew of the existence of the documents and how this should have affected evidence given to other Senate committees.

It is just possible that publication of the documents might result in some relevant evidence being discovered. For example, some former officer of a Queensland government department, knowing, because of their publication, of the contents of the documents, might be able to provide evidence that the contents of the documents were made known to other relevant office-holders. This would appear to be fairly unlikely.

The publication of the documents might be thought to have greater justification in the context of the three matters in respect of which the committee is to consider appropriate measures. In particular, paragraph (1)(b)(ii) requires the committee to consider measures for the protection of children from abuse, and that might at first sight seem to require a finding of whether abuse occurred in the John Oxley Youth Centre and who was responsible for it. An appropriate reading of that part of the terms of reference, however, would seem to require the committee to draw its recommendations from the treatment of the documents by government agencies rather than the truth of the allegations. To inquire into the truth of the allegations and to receive evidence about them in that context would also appear to be a diversion of the committee's inquiry.

The inappropriateness of publishing the documents is well demonstrated by the obligation under the rules of the Senate which would then be created, for the committee to allow responses to the allegations contained in the documents. Committees have followed the interpretation that they are not obliged to seek responses to allegations in evidence unless the allegations are to be considered as central to their inquiries. Even in that circumstance, however, publication of such evidence (by the committees, rather than by other persons) greatly strengthens the moral obligation to seek responses. If the committee published the documents in question it would therefore be proper for the committee to write to each person adversely reflected on in the documents and invite their responses. That process would not be relevant to the committee's task, which is to determine whether misleading evidence was given. Responses to the allegations contained in the documents would not throw any light on relevant persons' knowledge of their existence.

Against the minimal likely assistance to the committee's inquiry arising from the publication of the documents, there is the harm which would be done to persons referred to in the documents, and the diversion of the committee's inquiry by probable consequent disputes about the truth of those allegations.

In this situation, it would appear that the advisable course for the committee is not to publish the documents but to receive and consider them for the purposes of the committee's inquiry, that is, to consider them so far as they are relevant to the question of whether misleading evidence was given. It should be possible for the committee to convey in its report the relevance of the documents to its inquiry without disclosing the contents of the documents.

The foregoing relates mainly to the documents known as the Dutney memorandum, and the two memoranda signed by Mr Peter Coyne, known as exhibits 20 and 31 to the Forde Commission. One of the other documents is a press item which has already been published, and the remaining document is the letter dated 9 May 2001 to the then President of the Senate by Mr R.F. Greenwood QC. In so far as the latter document discloses the contents of the three crucial documents, it should similarly not be published, and there would appear to be no

advantage to the committee's inquiry in publishing the remainder of it, as it consists only of Mr Greenwood's advice and opinions.

The interpretation of the committee's inquiry offered here is necessarily based on an incomplete knowledge of any other evidence available to the committee. I would be pleased to discuss these observations if that would assist the committee.

Yours sincerely

(Harry Evans)

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20 August 2004

Mr Alistair Sands
Secretary
Senate Select Committee on the Lindeberg Grievance
The Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Sands

COMMITTEE'S TERMS OF REFERENCE AND QUEENSLAND CRIMINAL CODE, SECTION 129

Thank you for your letter of 19 August 2004, in which the committee seeks advice on how section 129 of the Queensland Criminal Code relates to its terms of reference, and, in particular, the question of whether misleading evidence was given to Senate committees.

The committee's terms of reference require the committee to determine whether any false or misleading evidence was given to Senate committees in relation to what has become known as the Heiner documents matter, and whether any contempt was committed in that regard.

In several reports on cases of alleged misleading evidence, the Senate Privileges Committee has taken the view that a contempt should not be found unless it is established that the witnesses concerned intended to mislead by their evidence. In other words, giving false or misleading evidence is not a strict liability offence, and a culpable intention is necessary to constitute the offence. The Senate, by endorsing the findings of the Privileges Committee, has supported this view. The most recent report of the Privileges Committee on a case of alleged misleading evidence was the committee's 119th report, presented on 3 August 2004. The Privileges Committee found that there was no evidence that Telstra officers, in providing apparently contradictory information, had intended to mislead, and therefore that no contempt should be found. The Senate endorsed the findings of the committee on 5 August 2004.

The allegation of misleading evidence, as made in the submission to the committee by Mr Lindeberg, is, in essence, that Queensland state officials put to Senate committees an interpretation of the law of Queensland, as contained in Section 129 of the Queensland Criminal Code, which was untenable and which they knew to be incorrect, and thereby they misled the Senate committees.

In the light of the Senate's and the Privileges Committee's findings in past cases of alleged misleading evidence, for a contempt to be found it would have to be established that:

- the particular interpretation of the law was put to the committees
- that interpretation was clearly incorrect and untenable
- the witnesses concerned knew that the interpretation was incorrect and untenable
- they put that interpretation to the committees with the intention to mislead.

In the terminology of the law, the first two elements are the *actus reus*, the facts constituting the offence, and the last two elements are the *mens rea*, the culpable state of mind necessary to constitute the offence.

If all four elements were proved, the offence which could be held to be a contempt would be established. The committee would have to be satisfied that all four elements had been established before finding that a contempt had been committed.

There are some additional points which should be mentioned.

The act of giving misleading evidence to a Senate committee may be a contempt of the Senate, but it is not a criminal offence which can be prosecuted in the courts. The point that a breach of Section 129 of the Queensland Criminal Code is a criminal offence under the law of that state does not alter that situation. Any contempt of the Senate would still be a contempt of the Senate only, and would not have any additional element because the subject matter of the misleading evidence happened to relate to a criminal statute.

The advices of 29 April and 7 June 2004 referred to the question of whether state officials are compellable witnesses in a Senate inquiry. A closely related question is whether any finding of contempt may be made against state officials. On one view, the rule of comity between jurisdictions in the federation, which is the basis of the practical, if not legal, immunity of state office holders from compulsion, would also entail that findings of contempt may not be made against them.

Regardless of the answer to that question, any attempt to impose any sanction on state office holders for any contempt which is found would fall squarely into the area covered by the rule of comity and possible legal immunity. The committee would readily appreciate the practical difficulties of enforcing any sanction against state office holders.

I hope that these observations may be of some use to the committee. Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

(Harry Evans)