

DEPARTMENT OF THE SENATE PROCEDURAL INFORMATION BULLETIN

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for the estimates hearings 26 May – 5 June 2008

6 June 2008

The annual budget estimates hearings produced a great deal of material of interest.

The following procedural matters were raised (citations in brackets indicate the relevant committee and date, where appropriate).

- (1) The Privileges Committee report on evidence given in the Mamdouh Habib matter (see Bulletin No. 220, p. 2) was the subject of an extensive response by Commissioner Keelty of the Australian Federal Police, in which he attempted to defend his record of answering questions. He also attributed delays in answering questions on notice to the practice of clearing answers through ministerial offices. (L&CA 26/5)

- (2) There was a lengthy discussion with the Secretary of the Attorney-General's Department about the disclosure of advice to government. Reference was made to advice provided by the Clerk in February on the subject (see Bulletin no. 218, p. 5 and attachment). The Secretary produced a letter from the Secretary of the Department of Prime Minister and Cabinet, setting out "instructions" on the matter, which in effect simply indicated that advice is disclosed when government chooses to do so, and also a letter to him from the Clerk concerning the disclosure of advice to ministers. There was not a full realisation that the two advices from the Clerk dealt with different subjects, disclosure of legal advice and disclosure of advice of any sort provided to ministers. Departmental officers appear to be coming to a realisation that there is not an absolute ban on the provision of advice of any kind, and that claims of public interest immunity should be made by ministers. (LCA 27/5) The claim that advice is never disclosed, however, surfaced in other hearings. At one stage the advice circulated by the Clerk in 2005,

Grounds for Public Interest Immunity Claims, was quoted to a minister who simply persisted in the position that he would not disclose material on the basis that it was advice. (F&PA 28/5) A claim that advice between departments should not be disclosed was eventually referred to the Department of Prime Minister and Cabinet, and an answer was returned saying that the advice was part of Cabinet deliberations (protecting Cabinet deliberations being a public interest immunity ground usually regarded as having legitimacy). (CA 4/6)

- (3) Perhaps the prize for misconceived expenditure of public funds should be awarded to the officer of the Civil Aviation Safety Authority who indicated that he had sought internal and external legal advice on the question of whether his previous evidence was misleading. The question of whether his evidence was misleading is not a question of law and could be determined only by the Senate. This revelation came in the context of extensive questioning of the officer about the criticisms of the authority in the findings of coroners about aircraft accidents. The committee intends to pursue further inquiries into the authority under its general reference concerning the performance of departments and agencies. (RRAT 28/5)
- (4) During the hearing for the Senate Department, there was a discussion about bribery of senators, parliamentary privilege and criminal prosecutions. The Clerk indicated that, where criminal offences were involved, criminal prosecutions should precede Senate privilege inquiries. (F&PA 26/5)
- (5) A minister made a claim of public interest immunity in relation to discussions with Chinese officials about their role in the Olympic torch relay, the ground being potential damage to international relations from the disclosure of information. (L&CA 26/5)
- (6) A request for a report on the administration of funds for indigenous affairs was taken on notice on the basis that it related to potential criminal prosecutions. (CA 3/6)
- (7) A departmental secretary declined to answer questions on the basis that a ministerial statement on the subject was imminent; she stated that this decision had come from the responsible minister. (CA 5/6)
- (8) The new government adopted the position of its predecessor of not providing breakdowns of forward estimates. (EEWR 2/6)

- (9) Minister Conroy at first declined to answer any questions about the national broadband project on the basis of possible damage to the tendering process. The committee did not accept this blanket claim and eventually the questions were taken on notice for considered responses. (ECA 27/5)
- (10) The format and content of the Budget papers was raised on several occasions. The changes made by the Department of Finance and Deregulation were not entirely appreciated (see Bulletin no. 220, p. 2). In the Education, Employment and Workplace Relations Committee officials were questioned about the inclusion in the ordinary annual services bill of matters which are clearly not ordinary annual services; the government is yet to respond to the last Appropriations and Staffing Committee report on this subject (see Bulletin No. 219, p. 4).
- (11) The spread of related activities across several portfolios, particularly environment, climate change and water, and indigenous affairs, caused some difficulties. One agency, Medibank Private, appeared before two different committees, a situation which was regarded as unsatisfactory and which it is intended to resolve for the future. (CA 4/6)
- (12) The Chair of the Finance and Public Administration Committee ruled that the government's climate change consultant, Professor Garnaut, should not be questioned about his private dealings with a local council which occurred before he was engaged by the Commonwealth. (F&PA 29/5)
- (13) A minister asserted his right to determine which officers would answer questions, after Opposition senators attempted to nominate the officer from whom they sought answers. (Ec 5/6)
- (14) The injunction in standing order 25(13) on the standing committees inquiring into matters referred to select committees was potentially an issue in different committees. The Legal and Constitutional Affairs Committee sought advice on the matter; the advice was subsequently published by the committee and is attached to this Bulletin. Other committees did not find a problem with the questions that were asked.
- (15) Attempts to have senators indicate in advance the areas of their questioning were less than successful, with one officer appearing from interstate only to be asked no questions, and another agency asked no questions even though the appearance of its officers had been explicitly requested.

There were significant disclosures of information about the following matters:

- the “rendition” of Mamdouh Habib: it was revealed that Australian officials urged US authorities not to send him to another country, but the Department of Foreign Affairs and Trade had no record of this
- the arrangements for the inquiry into the Haneef affair
- the government’s decision on outstanding applications for regional partnerships grants: the government announcement was made during the hearings after persistent questioning
- the Opposition sought lists of government election commitments and grants, but were not successful in obtaining what they regarded as comprehensive lists
- the funding of the 2020 Summit
- the recruitment of judges
- the effect of the immigration intake and 457 visas
- tax increases, particularly on luxury cars and mixed drinks
- the FuelWatch scheme
- compensation for citizens illegally detained by the Department of Immigration
- the previous government’s advertising of its WorkChoices legislation, said to amount to \$137 million
- the cost of the proposed broadband network, claimed to be much higher than the \$5 billion allocated by the government
- the effect of the new 2 per cent efficiency dividend on departments
- the Prime Minister’s staffing arrangements (a subject in which the new Opposition displayed the same degree of interest as their predecessors had shown in the arrangements of the previous Prime Minister).

A notable feature of the hearings was the outspokenness of several senior officers and their defence of their roles: the Secretary of the Treasury vigorously defended his right to speak on economic issues; the Auditor-General spoke very frankly about the effect of budget constraints on the ability of the Audit Office to perform its essential tasks; the Australian Competition and Consumer Commissioner vigorously defended his statements on the FuelWatch scheme; the Chief of the Defence Force was as frank as ever, stating that foreign forces would be required in Afghanistan for ten years.

RELATED RESOURCES

The *Dynamic Red* records proceedings in the Senate as they happen each day.

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, these documents may be reached through the Senate home page at www.aph.gov.au/senate

Inquiries: Clerk's Office
(02) 6277 3364



AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE
CANBERRA A.C.T. 2600
TEL: (02) 6277 3350
FAX: (02) 6277 3199
E-mail: clerk.sen@aph.gov.au

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28 May 2008

Mr Peter Hallahan
Secretary
Standing Committee on Legal and Constitutional Affairs
The Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

ESTIMATES HEARINGS AND STANDING ORDER 25(13)

You asked for a note on the effect of paragraph (13) of standing order 25 on questions that may be asked in estimates hearings.

That paragraph provides:

A committee shall take care not to inquire into any matters which are being examined by a select committee of the Senate appointed to inquire into such matters and any question arising in this connection may be referred to the Senate for determination.

This provision has been in the order of the Senate relating to the legislative and general purpose standing committees since those committees were established in 1970. The intention of the provision is to avoid duplication between the activities of any select committees and the standing committees. The rationale of the provision is that, if the Senate has appointed a select committee to inquire into a particular matter, this is an indication that the Senate intends that that select committee be the vehicle for the inquiry into that matter, and a standing committee should not duplicate that inquiry, subject to any positive direction by the Senate.

The provision to my knowledge has never been formally invoked, certainly not to the extent of the Senate being called upon to adjudicate on any problem as contemplated by the provision.

In relation to estimates hearings, the Senate has determined that any questions going to the operations or financial positions of departments and agencies are relevant questions for the purposes of estimates hearings. This gives those hearings an extremely wide scope.

If questions in an estimates hearing were to be clearly and unambiguously directed to matters specifically under inquiry by a select committee, this would constitute an occasion for the chair to remind committee members of the standing order and to suggest that the line of questioning not continue. It would be for the chair in the first instance, and ultimately the committee, to judge whether any questions were so clearly going to matters under investigation by a select committee that the standing order should be invoked.

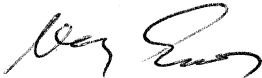
Certainly if a senator indicates that questions are being asked in estimates hearings as an alternative to, or as a supplement to, questions that have been asked, or that are to be asked, in a select committee, the senator should be asked not to persist but to save the questions for the select committee.

As indicated, however, a fairly clear-cut case is required for the chair or the committee to restrict questioning in an estimates hearing. The lack of precedents suggests that the standing order has been interpreted in this way in the past.

The foregoing is consistent with advice given on questions in estimates hearings about bills that have been referred to committees. The case for restriction is somewhat stronger in the current instance because there is a specific rule of the Senate and the specific inquiry is the responsibility of a different committee.

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

Yours sincerely



(Harry Evans)