

Chapter 3

Requirements for clearance of witnesses and evidence

Introduction

3.1 The government guidelines sit at the intersection of two of the Senate's core roles: its role in holding governments to account and the exercise of its inquiry power. It is important that the guidelines assist officials in supporting the accountability of ministers to the parliament, particularly in providing evidence on matters of policy and administration for which those ministers are responsible.

3.2 It must be recognised, however, that the role of officials in providing information to committees will often be broader than that. Committees frequently investigate matters which require the independent accounts of witnesses, including the personal accounts of officials.

3.3 This chapter is about the potential for government advice to its officials to interfere with the Senate's inquiry processes by imposing improper clearance requirements upon officials as witnesses.

Deficiencies in the 1989 guidelines

3.4 Much of the advice in the guidelines concerns processes for approving officials as witnesses before parliamentary committees and clearing the evidence they might give. The current guidelines have been criticised as not distinguishing – or not distinguishing well – between those matters on which it is appropriate to require officials to seek departmental or ministerial clearance and those matters on which it is *not* appropriate to do so.

3.5 For example, the current guidelines, at paragraph 2.4, leave it to the discretion of the departmental secretary (with the minister's 'general consent') to determine the extent to which aspects of the guidelines themselves are to be followed. This makes it difficult to assess what requirements agencies have placed on officials in relation to their interactions with parliamentary committees and, in turn, to assess whether those requirements are appropriate.

3.6 The current guidelines continue:

Committees dealing with individual conduct

2.5 Where a committee is inquiring into the personal actions of a Minister (or official) and seeks information from officials, there may be circumstances where it is not appropriate for the requirements set out in para 2.14 for clearance of evidence to be followed...

3.7 This provision draws quite narrowly the circumstances in which, according to the guidelines, it might not be appropriate to require departmental clearance of information. Further, it is not clear when this provision might be triggered, nor to what degree the stated requirements might be set aside.

3.8 For his part, the Public Service Commissioner notes that the provision is of some assistance:

...but in its current form indicates that while the usual clearance processes may not apply, it does not set out alternative arrangements or give any guidance about appropriate behaviour.¹⁵

3.9 These matters have been the subject of recent criticism by Senate committees.

The HMAS Success inquiry

3.10 In March 2010 the Senate Foreign Affairs, Defence and Trade References Committee tabled a report on questions of privilege arising from its inquiry into events on HMAS *Success*. That committee reported concerns that directives ('DEFGRAMS') issued by the Department of Defence 'effectively deterred' ADF personnel from contacting it about matters relating to its inquiry.¹⁶

3.11 The first DEFGRAM purported to remind Defence personnel of a requirement for ministerial approval of their involvement with parliamentary committees and ministerial clearance of all Defence material to be provided to such committees.¹⁷ A later DEFGRAM conceded the right of Defence personnel to participate in a private capacity but, according to the committee, it did little to undo the damage caused by the first:

The new directive neither withdrew nor contradicted the contents of [the first DEFGRAM] and sent a rather confused message about the distinction between professional and private roles.¹⁸

3.12 What the references committee was seeking in that inquiry was the accounts of people who had witnessed relevant events. The committee drew the distinction between an inquiry 'attempting to ascertain facts that transpired in the workplace and an inquiry into government policy or departmental engagement in, or contribution to, implementing policy.' The committee went on to observe:

In this case, any individual who has relevant information would be entitled to communicate with the committee directly and freely as an ADF member and without any influence from the department. In these instances, however, the individual is only representing his or her personal view or offering his or her particular interpretation of events.¹⁹

15 Mr Stephen Sedgwick, Public Service Commission, Submission 3, p. 3.

16 Senate Foreign Affairs, Defence and Trade References Committee, *Report on Parliamentary Privilege—possible interference in the work of the committee: Inquiry into matters relating to events on HMAS Success*, March 2010, p. 3.

17 Senate Foreign Affairs, Defence and Trade References Committee, *Report*, pp 3–4.

18 Senate Foreign Affairs, Defence and Trade References Committee, *Report*, pp 7–8.

19 Senate Foreign Affairs, Defence and Trade References Committee, *Report*, pp 3.

3.13 The committee concluded that, by interfering with this communication, the DEFGRAMS:

...had the potential to interfere with the work of the committee to the extent that the publication of these documents constituted a possible contempt of the Senate.²⁰

3.14 The references committee noted that, although the DEFGRAMS referred to and relied on the current guidelines, the advice they contained was inconsistent with the requirements of the Parliamentary Privileges Act and the Senate's Privilege Resolutions, notwithstanding that the guidelines state that they should be read in conjunction with those resolutions.

3.15 The impression left by the current guidelines, and apparently relied on in developing the DEFGRAMS, is that officials must in all cases clear their appearances and evidence with their agencies; that their role in appearing before committees is confined to assisting ministers in discharging their accountability obligations to the parliament; and that the only alternative is for the official instead to give evidence in a personal (rather than official) capacity.

The 142nd report of the Privileges Committee

3.16 Similar concerns were raised in this committee's 142nd Report relating to the appearance of a former Treasury official before the Senate Economics Legislation Committee. It came to light during the inquiry that the Secretary to the Treasury had provided his submission to the offices of the Prime Minister and the Treasurer at the same time as it was provided to the committee, without the committee's authorisation. In this context, the committee noted that:

There are circumstances in which it will be appropriate to keep ministers' offices informed of departmental interaction with parliamentary committees. This ground is well covered in the *Government guidelines for official witnesses before Parliamentary committees and related matters* (November 1989).²¹

3.17 The committee went on to identify a distinction between an inquiry into matters of policy or administration and an inquiry into individual conduct:

The Government guidelines are generally directed to the former and acknowledge that there may be special circumstances and procedures applying to committee inquiries dealing with individual conduct. For this kind of inquiry, it is the committee's advice to departments and agencies that they should pay particular attention to any instructions given by the committee regarding submissions, and should not regard themselves merely as an extension of the relevant minister's office (let alone the Prime

20 Senate Foreign Affairs, Defence and Trade References Committee, *Report*, p. 11.

21 Senate Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing in 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, p. 90.

Minister's office), and therefore free to share all relevant information about the inquiry, including submissions, with that entity.²²

3.18 When the committee raised this matter with the Secretary he acknowledged that the guidelines were not particularly clear on the crucial distinction between inquiries into matters of policy and administration and inquiries into individual conduct.²³

Officials giving independent accounts of events

3.19 Where committees are seeking accounts of events from individuals it is important that such accounts are not subject to supervision or influence. As noted by the Clerk of the Senate:

Anything other than an individual's own account has the potential to mislead the committee and may therefore constitute a possible improper interference with the committee's ability to carry out its functions and, therefore, a potential matter of privilege.²⁴

3.20 It is clear that the deficiencies identified by the Senate in the course of these inquiries have influenced the formulation of the revised guidelines. In its first submission to the inquiry, the Department of the Prime Minister and Cabinet accepted (in the context of the HMAS *Success* inquiry) that the 1989 guidelines were deficient in that they did not adequately address situations where an officer gives evidence in relation to particular events or conduct.

3.21 The submission stated that:

...where a committee is inquiring into a particular event, it would be appropriate for any submission explaining relevant departmental policies or practices to be cleared in the usual way through the minister and departmental executive, and for the secretary to determine which employees should attend and give evidence in relation to those matters. However, employees whose involvement in the inquiry is a result of them being witnesses to the event in question should be able to explain their version of the event to the committee without clearing their evidence with the minister or departmental executive, or seeking their permission to attend.²⁵

3.22 This position is now reflected in part 1.5 of the revised guidelines. That part first recognises the different capacities in which officials might appear:

1.5 Types of witnesses

1.5.1 Officials can make submissions and appear as witnesses in an official capacity or in a personal capacity. Within these two broad categories there

22 Senate Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing in 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, p. 90.

23 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, p. 6.

24 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, p. 6.

25 Department of the Prime Minister and Cabinet, Submission 4, p. 2.

are distinctions that affect the clearance of submissions, selection of witnesses and preparation for appearances before committees. Depending on the nature of the inquiry that the committee is undertaking, the same officials can fall into either or both of these categories.

3.23 In relation to officials giving evidence in an ‘official capacity’, the revised guidelines then make distinctions on the basis of the character of matters on which evidence is being given. Evidence by officials ‘as representatives of their departments or agencies to explain the administration and implementation of government policies and programs’ is stated to be subject to various clearance requirements, which take account of the interests of agencies in exercising a level of control over information. On the other hand, evidence by officials in relation to particular events or conduct they have witnessed is specifically excluded from such requirements:

1.5.3 ...On occasion witnesses may choose or be required to give personal accounts of events or conducts that they have witnessed. This situation can arise in the course of any committee hearing but will most often arise when a committee is inquiring into a particular event and the accounts of individual witnesses are required to allow the committee to ascertain the facts surrounding the event. In such cases, *witnesses must not have requirements placed upon them that might deter them from giving evidence or cause them to feel constrained about the nature or content of their evidence.* [emphasis added]

Committee comment

3.24 The committee agrees strongly with that guidance. Witnesses in those circumstances (including people contemplating giving evidence to a committee) must not have such requirements placed upon them and, equally, must not apprehend that that such requirements exist.

3.25 The explicit recognition that there are circumstances in which it is appropriate that officials – giving evidence in an official capacity – must be free to do so unencumbered by clearance requirements is a significant advance and represents a substantial improvement on the existing guidelines. The committee considers that this approach in large part answers its concerns arising from the DEFGRAMS matter.

3.26 From the committee’s perspective, and from the perspective of the protections embodied in privilege law and practice, the same principle applies regardless of the nature of the matter on which evidence is given. While the character of a matter may justify an agency’s seeking to discuss with an officer the evidence to be given, in no circumstances should a department interfere with a witness contrary to the relevant privilege resolutions.

3.27 It is that risk – the potential to interfere with the rights of witnesses and with the work of committees – which must be borne in mind when determining what requirements might appropriately be placed upon witnesses, rather than any particular categorisation of the character of evidence or any artificial distinction as to the capacity in which a witness appears.

Officials giving evidence in a personal capacity

3.28 As has been noted, the current guidelines and related advice have been criticised for requiring officials to choose between giving evidence in an official capacity, subject to clearance requirements, or in a personal capacity. In this context, the Clerk of the Senate notes that the requirement to make such a choice is potentially harmful:

...because it invites public service managers to exert pressure on potential witnesses in respect of their evidence and therefore to influence that evidence or the giving of it.²⁶

3.29 The Clerk's submission goes on to identify other problematic aspects which can arise when officials are required to make this choice.²⁷ The committee concurs with these criticisms of the current guidelines. It is inappropriate to require officials to make such choices, and the potential for interference with witnesses and potential witnesses (contrary to the Privilege Resolutions) is clear.

3.30 Regardless of the capacity in which officials provide information, agencies must respect their rights to communicate with the parliament. This principle has often been referred to by the committee, most recently in its 151st report, which stated that:

...there is an untrammelled right for witnesses to communicate with parliamentary committees. This right adheres in whatever capacity a person gives evidence, whether professional or personal.²⁸

The revised guidelines

3.31 As has been noted above, these difficulties are largely dealt with in the revised guidelines by explicitly providing that officials may – in an official capacity – give accounts of matters independently of their agencies.

3.32 Part 6 of the revised guidelines goes on to deal with the appearance of officials 'in a personal capacity'. It acknowledges the right of officials to appear in that capacity. This is distinct from the situation in which, under the current guidelines, officers are effectively forced to choose between clearing evidence with their agencies or appearing in a personal capacity.

3.33 The rights of officials are emphasised throughout the Part 6:

6.1.1 Nothing in these guidelines prevents officials from making submissions or appearing before parliamentary committees in their personal capacity, and the *Parliamentary Privileges Act 1987* makes it clear that an agency has no power to prevent an official from doing so...

6.1.3 There is no intention for there to be any restriction arising from these guidelines on officials appearing before parliamentary committees in their 'personal' capacity...

26 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, p. 9.

27 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, pp. 9–10.

28 See Committee of Privileges, 151st report, pp. 9–10.

6.1.5 An official who gives evidence in his or her personal capacity is protected by parliamentary privilege and must not be penalised for giving that evidence.

3.34 The committee welcomes these clear statements about the rights of witnesses, and the prohibition on penalising officials for giving evidence in this capacity.

3.35 Much of the rest of this part of the revised guidelines contains advice on matters officials might consider in deciding whether to give evidence in a personal capacity and in determining the content of the evidence they might give. These considerations include: whether, and when, to advise their agencies [6.1.2]; the APS Values and Code of Conduct; and considerations about making comment on ‘matters which fall within or impinge on their areas of responsibility’ [6.1.3]. On this last matter the revised guidelines add:

6.1.4 An official contemplating giving evidence in a personal capacity in these circumstances might consider discussing his or her intentions with the departmental executive or agency head or other senior officials, as the views that he or she wishes to put forward might be covered in the agency’s submission or the evidence of official witnesses. There is, however, no obligation on the official to do so.

3.36 In short, the guidelines give primacy to the rights of officials and the protections which must be afforded them, but set out a range of practical matters for them to consider. This is a sound approach, provided that the exhortation to consider various matters does not amount in any particular instance to improper influence of a witness.

Other advice and guidance

3.37 Paragraph 6.1.1 of the revised guidelines, in relation to appearances in a personal capacity, notes that ‘Individual agencies may also have developed advice for their own staff on these matters.’

3.38 The committee has no evidence about the extent of other advice given by agencies to officials which cover similar ground or overlap with the guidelines in other areas. The Clerk of the Senate refers to this matter in her first submission, commenting that:

The nature, extent and accuracy of such material are unknown. If examples come to notice, it tends to be because they are problematic...²⁹

3.39 The committee considers it would be useful for the government to provide an assurance that no agency will give instructions or provide advice that is inconsistent with the guidelines themselves and with the requirements of privilege. The committee also considers that, wherever possible, any such supplementary advice to officials about their interactions with the parliament and its committees should be publicly available.

29 Dr Rosemary Laing, Clerk of the Senate, Submission 1, p. 2

Conclusions

3.40 In formulating guidance for officers, agencies must be wary of exerting inappropriate pressure on them. They must ensure that the provision of guidelines and the giving of advice does not amount to an improper interference with witnesses or potential witnesses.

3.41 Agencies must be wary of anything which may invite (or may be interpreted as inviting) public sector managers to exert such pressure. Agencies must also be wary of communicating or implementing such guidelines in a manner which amounts to – or is apprehended by officers as amounting to – an improper interference.

3.42 As has been noted in this chapter, the committee is pleased that the guidelines are being revised and welcomes the fact that they have been extended to cover many of the deficiencies which prompted this inquiry.

3.43 The committee notes, however, that the potential remains for the advice in contained in the guidelines to come into conflict with the privileges which properly attach to the work of the parliament.

3.44 The guidelines make much of the role of officials in assisting ministers to meet their accountability obligations and also deal with the circumstances in which officials might be called upon to give evidence of matters personally within their knowledge without supervening constraints (in essence, the DEFGRAM problem). This acknowledgement that, at least in defined circumstances, officials essentially have a direct accountability obligation to the parliament and its committees is also welcome. The committee emphasises the need for agencies to recognise that officials may also, in other circumstances, be called upon – or may choose – to give evidence without the sanction of their agencies and that, in those circumstances, officials receive the protection of privilege.

3.45 The guidelines provide sound, practical advice about requirements which ought (or ought not) apply in a range of circumstances. However, no set of guidelines can adequately deal with all eventualities, and the committee considers it important to remind agencies and officials of the underlying principles:

- the untrammelled right of persons to communicate with parliamentary committees
- the need for agencies to refrain from interference with witnesses, including potential witnesses, and with their evidence
- that the proper remedial action where disputed evidence is given is for agencies to take the opportunity to provide committees with supplementary evidence
- the need for witnesses and those submitting evidence to committees to follow the instructions of those committees in relation to publication of that evidence.

3.46 Agencies and officials should look to those principles and to the resolutions of the Senate where there is any doubt about the application of privilege to officials in their interactions with Senate committees.

