Chapter 4

Senate practice and procedure

Introduction

4.1 Compared with the 1989 version, the proposed revised guidelines greatly expand the advice available to officers about relevant Senate resolutions and the committee welcomes this development. For the most part, the committee considers that the advice is appropriate.

4.2 The committee endorses the advice at paragraph 2.11.1 of the revised guidelines that officials should familiarise themselves with relevant Privileges Resolutions. The committee would go further and recommend that officials ensure they have a reasonable understanding of all resolutions which might apply to their interactions with the Senate and its committees. This is a matter which has been the subject of repeated Senate resolutions.[30]

4.3 In this chapter, the committee makes some observations about the revised guidelines' treatment of the following:

- Public interest immunity claims
- Legal professional privilege and the provision of legal advice
- Commercial-in-confidence material
- Freedom of information legislation
- Statutory secrecy provisions
- Right of reply
- Application of the guidelines to independent statutory officers.

Public interest immunity claims

4.4 On 13 May 2009 the Senate passed a resolution setting out procedures for dealing with claims to withhold information on the basis of 'public interest immunity'. The Procedure Committee has considered the operation of the order and found 'anomalies which indicate that ministers and officers need further to familiarise themselves with the order.'[31] As the Clerk of the Senate has noted:

> Too many public servants are still not providing proper reasons for declining to answer questions and several very senior public servants seem to think that there exists an independent discretion to withhold information from the Parliament and its committees independently of public interest immunity... The guidelines would have more practical value if they

30 The committee comments on this matter further in chapter 5.

31 Senate Procedure Committee, *Fourth report of 2009*, November 2009, p. 1. See also *Third report of 2009*, August 2009.

> explained how to raise a public interest immunity claim and what the next steps are.[32]

4.5 In September 2009, the Department of the Prime Minister and Cabinet (PM&C) provided written advice to all secretaries on the Senate order of 13 May 2009.[33] This advice has also been incorporated as Attachment A to the revised guidelines. Sections 4.4–4.6 of the revised guidelines also address public interest immunity claims, providing further practical advice on the operation of the order.

4.6 This part of the revised guidelines is introduced as follows:

> **4.4 Public interest immunity**
>
> 4.4.1 While the parliament has the power to require the giving of evidence and the production of documents, it has been acknowledged by the parliament that the government holds some information which, in the public interest, should not be disclosed.

4.7 While technically correct, the reader may be left with the impression that there are settled categories of information which the government has an independent discretion to withhold. As noted above,[34] the Senate has never accepted the existence of 'Crown' or 'Executive' privilege, in the sense that there exists any category of documents or information held by the executive government which is beyond the reach of the Senate's inquiry power. Rather, the Senate has always insisted on its right to determine what information it requires to undertake its work and, accordingly, to determine for itself any claim from the executive government that information should be withheld.[35]

4.8 The guidelines go on to outline the operation of the 2009 order, which provides the mechanism by which such claims are properly to be made and determined.

4.9 The committee notes the description in paragraph 4.6 of 'generally accepted grounds' for public interest immunity claims. The committee emphasises that any such claims must be raised in the manner described by the 2009 order, including by indicating not only the ground under which a claim is made but also the harm that might be occasioned should the information be provided.

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32 Dr Rosemary Laing, Clerk of the Senate, Submission to 2010 inquiry, p. 11.

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

34 *See* paragraphs 2.4 – 2.5.

35 This flows from the powers inherited by the Senate from the House of Commons, by way of section 49 of the Constitution, and from the accountability of the executive government to the Parliament under the Constitution. *See also* the revised guidelines at 1.3.1:

> **1.3. Accountability**
>
> 1.3.1 A fundamental element of Australia's system of parliamentary government is the accountability of the executive government to the parliament. Ministers are accountable to the parliament for the exercise of their ministerial authority and are responsible for the public advocacy and defence of government policy...

4.10 In many ways the resolution arose because of claims made upon 'generally-accepted' grounds (such as reliance on blanket 'commercial-in-confidence' clauses) which, upon closer examination, provided no sound basis for withholding information as it could not reasonably be held that there would be any harm to the public interest in the particular circumstances of the case. The advice in paragraph 4.6.2 on this point is sound:

> 4.6.2 The Senate Order of 13 May 2009 made it clear that committees will not accept a claim for public interest immunity based only on the ground that the document in question has not been published, is confidential, or is advice to or internal deliberations of government; a minister must also specify the harm to the public interest that may result from the disclosure of the information or document that has been requested.[36]

4.11 Senators are all too familiar with misconceived claims that information cannot be provided merely because it is confidential, is advice to government or forms part of internal government deliberations. It is to be hoped that this revised guidance will promote adherence to the 2009 order and the freer flow of relevant information in this area.

4.12 The committee also notes the advice in the revised guidelines about the opportunities for taking questions on notice:

> 4.15.1 While it is appropriate to take questions on notice if the information sought is not available or incomplete, officials should not take questions on notice as a way of avoiding further questions during the hearing. If officials have the information, but consider it necessary to consult the minister before providing it, they should state that as a reason for not answering rather than creating the impression that the information is not available.

4.13 It is entirely proper in relevant circumstances for an official to take a question on notice in order to allow the minister to determine whether to make a public interest immunity claim. As noted by the Procedure Committee:

> 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.[37]

4.14 The committee agrees that it is proper in such circumstances that the official inform the committee of the reason for taking the question on notice.

Legal professional privilege and legal advice

4.15 The committee notes the advice in Part 4.8 of the revised guidelines on legal professional privilege and legal advice.

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36 Department of the Prime Minister and Cabinet, Submission 7, pp 10–12.

37 Senate Procedure Committee, *Third report of 2009*, August 2009, p. 1.

4.16 In 4.8.1, the guidelines suggest that it would be inappropriate for legal advisers, owing a duty to their clients, to disclose legal advice. The advice indicates that 'All decisions about disclosure of legal advice resides with the minister or agency who sought and received that advice.' In 4.8.2, the guidelines advise that it will 'generally be appropriate' to provide information about the provision of advice, but that decisions about disclosing the content of advice are decisions for the minister.

4.17 While legal professional privilege has no status in the proceedings of parliament, the revised guidelines appropriately provide a mechanism to ensure that decisions about the disclosure of legal advice may be made the relevant minister.

4.18 Paragraph 4.8.3 on the provision of legal advice states, in part, that:

> …Officials should provide committees with such information as they consider appropriate, ***consistent with the general understanding that the government's legal advisers do not provide or disclose legal advice to the parliament…*** [***emphasis added***]

4.19 The Senate has never accepted the supposed convention that legal advice is not provided to the Senate and its committees, possibly because of the many occasions when such advice has been provided. This committee's advice, and the advice of the Procedure Committee, is that claims to resist the disclosure of legal advice ought be raised in accordance with the Senate order of 13 May 2009 on public interest immunity claims. The Procedure Committee has identified possible grounds on which such claims might appropriately be made.[38]

4.20 The committee considers that it would be appropriate for the revised guidelines to adopt that approach.

Commercial-in-confidence material

4.21 In February 2004, PM&C provided advice to departmental secretaries in relation to the Senate order of 30 October 2003 relating to claims to withhold information from the Senate on the ground that it is commercial-in-confidence.[39] That advice has largely been incorporated as Attachment B to the revised guidelines. Section 4.10 of the revised guidelines also provides guidance to officers on commercial-in-confidence material.

4.22 The advice recognises:

> 4.10.1 There is no general basis to refuse disclosure of commercial information to the parliament, even if it has been marked 'commercial-in-confidence'. The appropriate balance between the interests of accountability (i.e. the public interest in disclosing the information) and the appropriate protection of commercial interests (i.e. the public interest in the information remaining confidential) should be assessed in each case.

38 *See* Senate Procedure Committee, *Third report of 2009*, August 2009, p. 2.

39 Department of the Prime Minister and Cabinet, Submission 4, pp 2–3.

4.23 The revised guidelines set out the process required by the 2003 order, and suggest some factors that officers and agencies might appropriately take into account in making decisions about the provision of such information.

4.24 The committee considers this advice to be generally appropriate. In particular the committee notes the sound advice in paragraph 4.10.6:

> As with any other public interest immunity claim, a claim around commercial-in-confidence information should be supported by reference to the particular detriment that could flow from release of the information.[40]

Freedom of information (FOI) legislation

4.25 Part 4.9 of the revised guidelines deals with the application of the *Freedom of Information Act 1982* and, in the committee's view, deals with that matter well. It is clear to the committee that officials well-versed in freedom of information procedures will often – inappropriately – seek to apply these same procedures to decisions about disclosure of information to the parliament and to its committees. As the revised guidelines make clear,[41] the FOI Act establishes only minimum standards for the disclosure of documents and, in any case, has no application to parliamentary inquiries.

4.26 Paragraph 4.9.1 suggests that the FOI Act may be considered 'a general guide to the grounds on which a parliamentary inquiry may reasonably be asked not to press for particular information.' The committee considers that to be a reasonable approach, provided officers subsequently follow the proper process for making public interest immunity claims.

4.27 That paragraph goes on to observe that 'any material which would be released under the FOI Act should…be produced or given to a parliamentary committee, on request. It might be added that information which actually *has* been released under the Act should similarly be produced.

4.28 The most cogent advice provided in the paragraph is as follows:

> …officials should bear in mind that, because of the Executive's primary accountability to the parliament, the public interest in providing information to a parliamentary committee may be greater than the public interest in releasing information under the FOI Act.

4.29 If the committee were to make any suggestion here it would be that the guidelines again make clear that any proposal to withhold information from the Senate or a Senate committee must be made in accordance with the 2009 order on public interest immunity claims.

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40 Department of the Prime Minister and Cabinet, Submission 7, pp 13–14.

41 Paragraph 4.9.1.

Statutory secrecy provisions

4.30 This committee's 144th Report addressed the interaction between statutory secrecy provisions and parliamentary privilege in some detail in the context of a bill which sought to place conditions on the access by parliamentary committees to certain taxpayer information. In that report, the committee referred to its 36th Report where it found that:

> ...there is a widespread perception throughout the public service that statutory secrecy provisions limit the information that public servants can provide to parliament and its committees.[42]

4.31 As the committee noted, this is clearly incorrect, but the pervasiveness of this view can frustrate legitimate attempts by parliamentary committees to obtain the information they require to conduct their inquiries.[43]

4.32 In its first submission to the committee, PM&C indicated that it intended to expand on the guidance to officials relating to secrecy provisions in legislation.[44] The revised guidelines now provide the following guidance:

> 4.11.2 The existence of secrecy provisions in legislation does not provide an automatic exemption from providing information to the parliament unless it is clear from the provision that a restriction has been placed on providing information to a committee or a House of the parliament (section 37 of the *Auditor-General Act 1997* is an example)…

4.33 The committee notes that there are, in fact, very few statutory provisions which explicitly restrict the parliament's access to information. The committee considers that the further advice in paragraph 4.11.2 is appropriate:

> 4.11.2 The fact that the parliament has included secrecy provisions in legislation suggests, however, that an official may be able to put to a committee a satisfactory case for not providing requested information, at least in public hearings. If the official's case is not accepted by the committee and the official remains concerned about providing the information, it would be open to the responsible minister to make a public interest immunity claim...

4.34 The committee recommends that officials familiarise themselves with the advice in its 144th Report before seeking to rely on a statutory provision to justify a claim to withhold information from a parliamentary committee.

4.35 The committee makes further comments about officers' awareness of the extent of the parliament's power to require information in chapter 5.

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42 Senate Committee of Privileges, 144th Report, *Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009*, June 2010, p. 7.

43 Senate Committee of Privileges, 144th Report, p. 7.

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

Right of reply

4.36 The revised guidelines now also provide guidance about adverse comment which might be made about officials in evidence before committees, and about the right of reply procedure, relating to persons referred to in the Senate. This advice indicates that an official has the same rights as any other person as are provided for by Privilege Resolution 1(13) (general referred to as the *adverse comment* process) and Privilege Resolution 5 (*Person referred to in the Senate*). The committee considers it appropriate that officials are given this advice.

4.37 The committee notes the advice in paragraph 5.7.3 that 'Officials proposing to exercise their right of reply should inform their departmental secretary or agency head.' Presumably that advice is intended to be subject to the same sort of caveats as were dealt with at paragraph 3.35, above. From the committee's perspective, officials may exercise their rights under these resolutions whether or not they advise their agencies. In some cases it would be inappropriate to impose such a requirement.

Independent statutory officers

4.38 The introduction to the revised guidelines states that they are 'designed to assist departmental and agency officials, statutory office holders and the staff of statutory authorities in their dealings with the parliament.' The guidelines go on to state:

> 1.1.1 …It is recognised, however, that the role and nature of some statutory office holders and their staff will require the selective application of these *Guidelines*, depending on the individual office holder's particular statutory functions and responsibilities...
>
> 2.9.1 Both Houses regard statutory office holders and the staff of statutory authorities as accountable to the parliament, regardless of the level of ministerial control of the authority.

4.39 That position is consistent with a resolution of the Senate relating to the accountability of statutory office holders, adopted in 1971, which is in the following terms:

> (1) That whilst it may be argued that statutory authorities are not accountable through the responsible minister of state to parliament for day-to-day operations, they may be called to account by parliament itself at any time and that there are no areas of expenditure of public funds where these corporations have a discretion to withhold details or explanations from Parliament or its committees unless the Parliament has expressly provided otherwise.

4.40 The resolution was reaffirmed in 1974, 1980, 1984 and 1997. This last reaffirmation was as a result of the 64th report of the Committee of Privileges. [45]

45 *See* Committee of Privileges, 125th report; paragraph 5.28.

Conclusion

4.41 The committee again thanks PM&C for providing an opportunity to comment on the proposed revised guidelines. The committee trusts that its comments will be of assistance to the government in finalising the guidelines and looks forward to their implementation.