Procedure Committee

Second report of 2015

The committee reports to the Senate on the following matters:

- the incorporation of temporary orders relating to the routine of business and consideration of private senators' bills into standing orders; and
- third party arbitration of public interest immunity claims.

Temporary orders relating to the routine of business and consideration of private senators' bills

Consideration of private senators' bills

In 2010, following a reference from the Senate, the committee considered the expansion of opportunities to consider private senators' bills. In its *Fourth report of 2010*, presented in November 2010, the committee recommended that the Senate adopt, from the beginning of 2011, a temporary order providing for general business orders of the day relating to private senators' bills to be considered for a period not exceeding 2 hours and 20 minutes on Thursday mornings and that, to compensate for this additional time, the Senate meet from 10 am on Mondays (rather than 12.30 pm) and consider government business only till 2 pm. Since its adoption on 22 November 2010, the temporary order has been in continuous operation, having been renewed on six separate occasions. The current temporary order is in operation until 30 June 2015.

The committee is of the view that the procedure has been thoroughly tested and that it continues to meet the requirements of senators. Consequently, the committee **recommends** that standing orders be amended in the terms of the temporary order with effect from the first sitting day in August 2015. As the committee has observed on numerous previous occasions, the standing orders are as readily amended as temporary orders, should a majority of the Senate desire changes in the future.

Recommendation 1

The committee recommends that the standing orders be amended in accordance Attachment 1, with effect from the first sitting day in August 2015.

Changes to the routine of business

The committee has had under consideration for some time changes to the routine of business. In its *Second report of 2014* the committee set out a number of proposals for

discussion and thereafter agreed to recommend for adoption as temporary orders, on a trial basis, changes to the routine of business in the following areas:

- the consolidation of opportunities for tabling and considering documents and committee reports;
- streamlining of procedures to manage routine extensions of time for standing committees and routine authorisation for committees of all kinds to meet while the Senate is sitting;
- removal of the standing order 75 opportunity on Thursdays;
- relocation of the open-ended adjournment debate with its three-level speaking time limits to Thursdays and extension of the adjournment debate on Tuesdays to a fixed time of 2 hours and 10 minutes with senators able to speak for 5 minutes (or 10 minutes when all 5 minute speakers have finished);
- the renaming of Matters of public interest at 12.45 pm on Wednesdays to "Senators' statements" and the imposition of a 10 minute speaking time limit to allow more senators to participate.

On 24 September 2014, the Senate adopted temporary orders to give effect to the changes. These temporary orders are in operation until 30 June 2015.

After consultation with senators, the committee is of the view that, with the exception of changes to the adjournment debate, the temporary orders have achieved the aims of simplifying business for senators, streamlining some routine procedures and providing enhanced opportunities to debate documents and committee reports. The committee also notes a preference among senators to return to previous arrangements for an open-ended adjournment debate on Tuesday evenings, with provision for tiered speaking time limits of 5, 10 and 20 minutes, as currently provided for in standing order 54(5) and (6).

The committee **recommends** that the temporary orders adopted on 24 September 2014, **with the exception of the temporary orders relating to the adjournment**, be incorporated in standing orders with effect from the first sitting day in August 2015.

Recommendation 2

The committee recommends that the standing orders be amended in accordance with Attachment 2, with effect from the first sitting day in August 2015.

Recommendation 3

The committee recommends that the temporary order adopted on 24 September 2014 relating to the adjournment NOT be extended or incorporated into the standing orders.

The effect of Recommendation 3 is that the Senate will revert to an open-ended adjournment debate on Tuesday evening as provided for by standing order 54(5), using the time limits for individual speakers provided for by standing order 54(6), and the adjournment debate on Thursday will revert to 40 minutes.

Presentation and consideration of ministerial statements

In the course of its review of the routine of business, the committee agreed that it would be useful to give further consideration to procedures for the receipt and consideration of ministerial statements. Accordingly, the committee sought from the President of the Senate a reference of this matter pursuant to standing order 17(3) and the President agreed to refer the matter to the committee.

The committee will report on this matter at a future date.

Third party arbitration of public interest immunity claims

Conduct of the inquiry

This matter was referred to the committee on 6 March 2014 on the adoption of a recommendation made by the Legal and Constitutional Affairs References Committee in its report on *A claim of public interest immunity raised over documents*.

Specifically, the committee recommended that the following matters be referred to the Procedure Committee for inquiry and report:

(a) the process for independent arbitration in the NSW Legislative Council, including that House's standing order 52;

(b) the applicability of the NSW Legislative Council's model of independent arbitration to the Senate; (c) any adaptations or amendments needed to the NSW Legislative Council's model in order to implement a similar model of independent arbitration in the Senate;

(c) any amendments to Senate practice and procedure required to implement a model of independent arbitration;

(d) suitable candidates for and/or qualifications required of an independent arbiter; and

(e) in respect of accessing and inspecting documents subject to a disputed claim for public interest immunity, the proposal in the 52nd Report of the Committee of Privileges whereby disputed documents are provided directly to an independent arbiter for evaluation; and

in respect of any such inquiry, the Procedure Committee have power to send for persons and documents, to move from place to place, and to meet and transact business in public or private session.

The Legal and Constitutional Affairs References Committee inquiry was prompted by a stand-off between the Senate and the then Minister for Immigration and Border Protection, the Hon Scott Morrison, about access to information about the conduct of the Government's Operation Sovereign Borders. In response to repeated orders for the production of documents directed at the Minister representing the Minister for Immigration and Border Protection (Senator the Hon Michaelia Cash), only publicly available media statements and press conference transcripts were produced. It was claimed that provision of other documents requested would not be in the public interest because of possible damage to national security, defence or international relations, and possible prejudice to law enforcement or protection of public safety.

The references committee noted various procedural remedies that had been used in relation to disputed public interest immunity claims in the past and took evidence from the NSW Clerk of the Parliaments[1] about the procedure for third party arbitration of disputed claims that was instituted after a series of court decisions in the 1990s confirmed the Legislative Council's power to require the production of documents from the executive government. The references committee also sought the advice of the Clerk of the Senate on the powers of the Senate to order production of documents and the determination of public interest immunity claims made to resist such orders.

In conducting its inquiry, the committee was of the view that it should not re-traverse well-trodden ground but should focus specifically on the terms of reference. Noting the evidence given to the Legal and Constitutional References Committee and earlier inquiries by parliamentary clerks, the committee considered that it was important also to seek the views of executive governments on the procedure. It therefore resolved to seek submissions from the following:

The Hon Barry O'Farrell, then Premier of NSW

The Leader of the Government in the Senate (Senator the Hon Eric Abetz)

The Secretary, Department of the Prime Minister and Cabinet

The Secretary, Attorney-General's Department

The committee received a submission from the Leader of the Government in the Senate (Senator the Hon Eric Abetz) and correspondence from Ms E Kelly, Deputy Secretary of the Department of the Prime Minister and Cabinet indicating that the Department would not be making a submission. After a change of Premier in NSW, the committee wrote to the new Premier, the Hon Mike Baird, and received a submission from the NSW Department of the Premier and Cabinet (DPC). The committee resolved to publish both this submission and the submission from Senator Abetz.

The committee decided to conduct the inquiry on the information before it.

The committee thanks all those who assisted it with its inquiry.

Third party arbitration in the Senate – background and previous inquiries

From Federation, the Senate employed orders for production of documents as a routine procedure, until governments began to make the detailed information sought in such orders available in regular government publications. Following a period of disuse, the

1 'Clerk of the Parliaments' is the name of the office occupied by the Clerk of the NSW Legislative Council.

procedure was revived from the 1960s onwards.[2] With greater use came the beginnings of government resistance to such orders through claims of crown or executive privilege, now known as public interest immunity.

In 1975, the Senate Privileges Committee inquired into directions by ministers that officials claim crown privilege when called to the bar of the Senate to answer questions and produce documents in relation to the Iraqi Loans Affair and, on the Senate's rejection of the claim, further directions that officials refuse to answer questions or produce documents. At the height of the controversy came a resolution of the Senate declaring that:

> (1) The Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.
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> (2) Subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.
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> (3) The fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.
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> (4) Upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim.[3]

The matter was effectively resolved by a change of government at the following election.

In asserting the right to determine claims of crown privilege or public interest immunity, the Senate, by analogy, was following developments in the courts where ministers' claims had once been regarded as conclusive but, in the wake of such cases as *Conway v Rimmer* [1968] AC 910, a minister's certificate was now regarded as not conclusive in all cases and that it was for the court to decide whether immunity should be granted.

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2 For the history and background to the procedure, see *Odgers' Australian Senate Practice*, 13th edition, Chapter 19, Relations with the executive government, pp 595-626; Paula Waring, "'This Is a Procedure on Which We Should Not Lightly Embark': Orders for the Production of Documents in the Australian Senate, 1901 to 1988", *Papers on Parliament*, No. 58, August 2012, pp 89-105.

3 *Journals of the Senate*, 16 July 1975, p. 831.

The Senate has not conceded that a minister's claims for public interest immunity are anything more than claims. It has not usually sought to enforce its demands against ministerial refusals to provide evidence or documents but has adopted other remedies.

Some of these remedies were described in paragraphs 2.13 to 2.17 of the Legal and Constitutional Affairs References Committee report. Another possible remedy is the adjudication of the claim by an independent third party.

This idea gained some currency from its use by the Privileges Committee in different circumstances[4]. That committee had recently rejected an idea embodied in a private senator's bill introduced by Senator Kernot, that the power to determine disputes should be ceded to the courts. The committee's conclusion was that ceding jurisdiction to the courts was both undesirable and unnecessary, given that the Houses possessed the necessary powers to protect their rights and force governments to comply with their orders should they choose to enforce them.

In 2009, the various practices relating to the provision of information to the Senate, including practices drawn from the *Government Guidelines for official witnesses appearing before parliamentary committees*, were consolidated in the order of the Senate of 13 May 2009. This resolution sets out the Senate's requirements and the process for making public interest immunity claims. It does not set out recognised grounds for making such claims because whether any of the grounds are justified in a particular case depends entirely on the circumstances of the case.

In the aftermath of the order of 13 May 2009, the Senate referred to the Finance and Public Administration References Committee a process for determining public interest immunity claims. That committee took evidence at a public hearing from the former Clerk of the Senate, the late Mr Harry Evans, the then Clerk of the Victorian Legislative Council and the then NSW Clerk of the Parliaments, as well as from officers of the Department of the Prime Minister and Cabinet, the Auditor-General, Sir Lawrence Street (former independent arbiter for the NSW Council) and constitutional law expert, Professor Anne Twomey.

In a report presented in early 2010[5], the committee did not take account of earlier endorsements of third party arbitration by the Privileges Committee, and did not support such a mechanism at that time. Subsequently, the agreements for parliamentary reform entered into at the beginning of the 43rd Parliament after the 2010 election gave renewed support for such a mechanism, using the Australian

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4 See, for example the 52nd Report of the Committee of Privileges on disputed documents regarding Commonwealth leases in Casselden Place, Melbourne.

5 Finance and Public Administration References Committee, *Independent Arbitration of Public Interest Immunity Claims*, 2 February 2010.

Information Commissioner as arbiter, but no action was taken to implement this aspect of the proposals.

The NSW procedure for independent arbitration

A series of court decisions in the late 1990s confirmed that the NSW Legislative Council has a common law power to order the production of State Papers because it is 'reasonably necessary' for the proper exercise of its functions, namely to 'to scrutinise the workings of the executive government'.[6]

Adopted in 2004, standing order 52 (reproduced in **Attachment 3**) regulates the procedures of the Council in exercising this power. Documents returned to the Council under standing order 52 are automatically made public. The Executive, which is legally required to produce all documents demanded by the Council, may make a claim of privilege (a term left undefined) over a document such that it can be viewed only by Members and published or copied only by order of the Council. A Member may dispute a claim of privilege by writing to the Clerk. In these circumstances, an independent legal arbiter is appointed by the President to evaluate the document and report back to the Council on the validity of the claim. The decision to publish a document claimed to be privileged remains one to be made by order of the Council. In practice, recommendations of the report are adopted.

Significant use is made of standing order 52 procedures. In 2014, for example, 30 orders for documents were agreed to. By the end of the year 24 returns had been received and claims of privilege made in relation to 20 of those. Four claims of privilege were disputed and an independent arbiter appointed to report on the claims. In 2013, 20 orders for documents were agreed to and claims of privilege were made in relation to 13 orders. None of these were disputed in 2013 but one of the four disputes initiated in 2014 related to a 2013 order.[7]

The independent legal arbiter appointed by the President must be a retired Supreme Court Judge, a Queen's Counsel or a Senior Counsel. Their role is to evaluate and report to the House on the validity of the claim of privilege but different views of the task have emerged. Some argue that the arbiter should be confined to determining whether a document falls into a technical legal category of privilege, leaving it to the Council to balance competing public interests. Others suggest that it is a two-step process, with the arbiter subsequently balancing competing public interests to recommend whether a document be published or not, regardless of the technical validity of the privilege claim.

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6 See *Egan v Willis & Cahill* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.

7 Source: NSW Legislative Council, *House in Review*, vol. 55/82 (2014 Summary) and vol. 55/63 (2013 Summary).

The term 'privilege', as used in standing order 52, raises some problems of interpretation. This is because the term has a technical legal meaning as well as one used in a parliamentary context, particularly by previous arbiters. The material provided to the committee by the NSW DPC[8] argued that a claim of privilege, in the context of standing order 52, is 'a claim by the Executive that the documents it was legally compelled to produce to the House (there being no claim of privilege from production available) not, on balance, be made public'. As part of this public interest balancing test, a link between the publication of the document and the fulfilment of a function of the Council should be demonstrated.

An alternative view is that 'privilege' means 'privileges "known to law" which are, at least, equivalent to those which would be recognised by a court in a claim of privilege against production or admission into evidence'. Further, some reject the importance of a link between the publication of the document and the fulfilment of a specific function of the Council.

The NSW DPC submitted there are 'significant difficulties in transposing categories of technical legal privilege' to standing order 52, although the principles underlying them could offer guidance to the arbiter. Strictly relying on technical legal privilege could have the consequence of 'significantly restricting' the documents which would be subject to consideration prior to publication and result in the 'automatic publication of many documents in respect of which legitimate interests against disclosure may exist'. Further, this interpretation would mean that the arbiter would only be required to judge the validity of the claim for technical legal privilege and not engage in a weighing of the public interest for and against the release of the document.

The NSW Clerk of Parliaments, drawing on the analysis of Mr Harry Evans, former Clerk of the Senate, noted that use of the term 'privilege' in standing order 52 is misleading and that alternative phrases, such as 'claim for confidentiality', might be more appropriate.

Although there has been over a decade of practice under standing order 52 in NSW, the process continues to evolve, including as a consequence of different approaches taken by different independent arbiters. It is also evident from the material provided to the committee by the NSW DPC that the executive government would like to see amendments to standing order 52 and to Legislative Council practices. Unsurprisingly,

8 This material comprised the following three submissions made on its behalf: Submission to the inquiry of the NSW Legislative Council Privileges Committee into the 2009 Mt Penny return to order, July 2013; Submission on the role of the independent legal arbiter under Standing Order 52 to the Hon Keith Mason AC QC, 21 July 2014; Submission in reply on the role of the independent legal arbiter under Standing Order 52 to the Hon Keith Mason AC QC, 1 August 2014; together with a report authored by an independent arbiter – The Hon Keith Mason AC QC, Report under Standing Order 52 on disputed claim of privilege in relation to the Westconnex business case, 8 August 2014.

the proposed changes appear likely to have the effect of restricting the rights of members of the NSW Legislative Council and subordinating the interests of the legislature to those of the executive arm of government. Suggested 'improvements' include the following:

- Require a Member moving a motion for an order under standing order 52 to 'satisfy the Council that the order is genuinely necessary for the scrutiny function of the Legislative Council'. State Papers ordered for a particular purpose should only be made available exclusively for that purpose (for example, a committee inquiry).
- Allow the executive to, in the first instance, return an index of State Papers over which privilege is claimed, rather than the documents themselves. A further resolution could be passed identifying papers from the index sought, subsequently triggering the standing order 52 process.
- Allow for affected executive agencies and third parties to make a further submission to the independent arbiter where privilege is challenged.
- Specify that only documents in existence at the date of the order are required to be returned, to avoid imposing a continuous obligation on the Executive to produce documents as they are created in the future.
- Clarify that the Executive may make supplementary returns where additional documents are subsequently identified.
- Amend standing order 52 to define 'Cabinet documents' and clarify that they do not need to be produced in response to an order.
- Encourage orders to be drafted with greater clarity and specificity, following consultation with the affected agencies, in order to facilitate the effective use of resources required to respond to orders.
- Clarify that standing order 52 is not a procedure to be used solely to facilitate the release of documents to the public and media.
- Harmonise concepts and terminology in standing order 52 with the *Government Information (Public Access) Act 2009* (NSW) (a freedom of information scheme).
- Prescribe 28 days as the default period within which documents must be returned (the current timeframe is 14 days).
- Develop a whole-of-government policy and training for responding to orders.

These, of course, are matters for the NSW Legislative Council and the NSW Government.

Are the NSW procedures transferable to the Senate?

The committee acknowledges that there is a great deal of borrowing between jurisdictions and that procedures from one jurisdiction can be successfully applied in another jurisdiction with appropriate adaptations. The key to successful adaptation, however, is the extent to which the adapted procedure sits comfortably with the culture and practices of the receiving institution.

There are several significant differences between the practices of the Senate and the NSW Legislative Council that warrant careful consideration in any examination of the transferability of this particular procedure. Importantly, the legal obligation of the NSW Government to produce information to the Legislative Council has been declared in the *Egan* cases of the 1990s[9] and underpins the efficacy of standing order 52. While the inquiry powers of the Senate are clearly conferred by section 49 of the Constitution, aspects of the enforcement of those powers against refusals by the executive remain contestable and unlikely to come before the courts for determination as the *Egan* cases did. In these circumstances, as Senator Abetz's submission affirms in supporting the status quo, the executive is unlikely to concede ground. An arbitration process can succeed only if it is mutually accepted by all parties and only if it includes making the disputed information available to the arbiter. Absent these two pre-conditions and it is unenforceable in practice. This crucial difference suggests that the procedure could not be transferred successfully to the Senate.

Working without a conclusive determination by the courts of the relative positions of the legislature and the executive, the Senate and senators have devised numerous creative approaches to executive refusal of information that vary according to the circumstances of each case. Except for the capacity of individual senators to ask questions or follow up unanswered questions, the approaches depend on decisions of the Senate to agree, for example, to specific committee inquiries, orders for witnesses to appear, further or modified orders for documents, orders for explanations, declaratory or process resolutions, censure motions, or procedural penalties designed to encourage further negotiation. Disputes are invariably addressed by political means according to the circumstances of each case. Many matters remain unresolved,

9 *Egan v Willis & Cahill* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.

although clear decisions not to pursue a matter are rare.[10] There is no 'one-size-fits-all' remedy.

In this context, the legalistic approach taken by the Legislative Council is not an approach that the Senate has favoured in the past despite its occasional resort to third party assistance. The committee also notes that in NSW the engagement of an arbiter, once a claim of privilege is made, can be activated at the request of a single member. Whether this would be practicable in a larger House like the Senate, with a large number of orders for documents agreed to, has not been actively investigated but it is an idea at odds with the Senate practice of invoking its powers by deliberate decision of the majority. If a standing order 52-style procedure were seen as a remedy of first resort, the financial implications of an individual senator initiating a process that could be a considerable charge on the Senate's budget would also require careful examination.

Current Senate practice

The submission from Senator Abetz effectively argues for the status quo. Senator Abetz observed that the order of 13 May 2009, initiated on the motion of Senator Cormann, had 'significantly improved' practices by providing a structured process for managing public interest immunity claims.

The committee agrees that there have been some improvements in responses to orders for production of documents and in the articulation of public interest immunity claims, particularly from Senator Cormann himself in respect of his own ministerial responsibilities and in respect of the portfolios he represents. However, the improvements have not been consistent across the board. Statistics are also inconclusive. Of 18 orders for the production of documents agreed to in 2013, 13 remained on the Notice Paper as not having been complied with in full (4 out of 8 for the 43rd Parliament and 9 out of 10 for the 44th Parliament). For 2014, 53 orders were agreed to and 43 remain on the Notice Paper as not having been complied with in full. Statistics do not reflect the quality or adequacy of ministers' public interest immunity

10 An example was the decision by the 2002 Select Committee on a Certain Maritime Incident not to issue summonses to ministerial advisers and former Members of the House of Representatives who had been ministers at the time of the relevant events. As recorded in the Executive summary to the report, "Faced with the continued refusal of prospective witnesses to respond to invitations to appear, and with correspondence from ministers indicating that advisers and certain officials would not appear, the Committee decided not to seek to compel their attendance, and thereby expose the advisers and officials to the risk of being in contempt of the Senate should they not respond to the summons. Part of its reason not to summon was based on the Senate resolution that it would be unjust for the Senate to impose a penalty on a person who declines to provide evidence on the direction of a minister. The penalties for contempt include a gaol term and/or a heavy fine." The committee chose to appoint an independent assessor to help it address the role played by such persons.

claims, a matter which is left to the judgement of the initiating senator or to the Senate as a whole if further action is proposed.

The way forward

The committee is in no doubt that there remains considerable scope for improvement in responsiveness to orders and requests for information. This includes improvements in responsiveness to committees, as well as to orders of the Senate. The question for the committee is whether a NSW-style standing arrangement for arbitration would best serve the Senate's interests.

Senate practice demonstrates that resort to third party arbitration or assessment is but one option out of many to address executive refusals to provide evidence or documents. The most appropriate option will depend on the circumstances of a particular case. The appeal of third party arbitration is evident and experience in NSW suggests that it serves the needs of the Legislative Council. Several parliamentary clerks have commended it to previous inquiries, but it is equally clear that the availability of such a process as a general remedy, without the type of backing that the *Egan* decisions provide in NSW, is only possible if all players consent to adopt it.

The better view is that independent arbitration or assessment might be appropriate in particular circumstances, but that it should be considered as only one possibility out of numerous options available for any specific set of circumstances.

The committee endorses the views expressed by the Committee of Privileges in its 153rd report on *Guidance for officers giving evidence and providing information*. The comments (on p. 35) were in relation to orders directed to the Australian Information Commissioner for an assessment of the adequacy of the then Government's reasons for not complying with orders for information about the proposed mining tax, among other things, but have general relevance in this context, particularly paragraph 5.30:

> **Resolution of disputes**
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> 5.29 If officers to whom orders for documents are directed are unable or unwilling to comply with a requirement to produce information, they should report that fact to the Senate, providing reasons, and allow the Senate to determine for itself how to respond. This is consistent with the Senate resolution on public interest immunity claims and the principles which support that process. This is also no different in principle than the response expected of a witness before a Senate committee who is unable or unwilling to answer a question.
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> 5.30 It is for the Senate then to determine how it will respond to a refusal to meet such an order, and that determination necessarily depends on the circumstances of the particular matter. As senators would be aware, the resolution of such disputes is invariably political (rather than judicial), often

entailing negotiations about what information may be provided, even if the original order is resisted.

Conclusion

The committee does not reject the possibility of third party arbitration or assessment in the right circumstances, but does not agree that the NSW Legislative Council's procedures could successfully be adapted to suit the Senate's requirements. It agrees that a standard process for raising claims of public interest immunity, as embodied in the order of 13 May 2009, has been beneficial in encouraging greater awareness among officers appearing before committees and in improving the responsiveness of ministers, although there is much room for further improvement. In addition, the committee encourages the Government to make every effort to ensure that senior public servants are familiar with and comply with the *Government Guidelines for official witnesses appearing before parliamentary committees and related matters*, issued in February 2015.

While the order of 13 May 2009 applies specifically to committees, expectations of ministers in responding to orders of the Senate are either explicit or implicit in other orders and practices of the Senate. For example, the order of 30 October 2003 requires a minister to include in any claim to withhold information on the ground that it is commercial-in-confidence, a statement setting out the basis for that claim, including a statement of any commercial harm that may result from the disclosure of the information.

The committee agrees that there is value in consolidating guidance for responses by ministers to orders for documents and commends the following, drawn from existing practices, to the Senate for endorsement:

- Under standing order 164, orders for production of documents are transmitted by the Clerk to the Leader of the Government in the Senate. A copy is provided to the Senate minister representing the relevant minister.
- Ministerial responsibility to the Senate is reflected in arrangements for Senate ministers to represent portfolios of House ministers, as well as having direct responsibility for their own portfolios.
- Responses to orders for documents are therefore provided to the Senate in the name of the Leader or the responsible Senate minister.
- Returns – meaning documents provided in full compliance with an order – may be provided to the Clerk for tabling.
- Any other response, including responses seeking more time to comply or claiming that it would not be in the public interest to produce all or some of the documents sought, should be presented to the Senate either by the Leader or the Senate minister responsible for the matter. This can take the form of a letter to

the President from the Leader or relevant Senate minister for tabling by a Senate minister, or a statement to the Senate by the Leader or relevant Senate minister for tabling or oral presentation.

- Subject to the determination of any proper claim that it would not be in the public interest to comply in part or in full with the order, ministers are obliged to produce documents to the Senate.
- Any claim that it would not be in the public interest to comply in part or in full with an order must be accompanied by a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the production of the document to the Senate.
- The provisions in standing order 164(3) giving senators procedural rights to seek explanations for non-compliance with orders once 30 days have passed after the deadline, and to take other action subsequently, do not amount to an implied extension of time for compliance.
- Further action on any claim that it would not be in the public interest to comply in part or in full with an order is a matter for the Senate, on the initiative of any senator.

With greater adherence to this guidance by ministers, the committee believes that some of the dissatisfaction of senators with responses to orders for documents may be addressed without resorting to a general remedy that does not have all-party support.

The committee proposes to monitor responses to orders for the production of documents over the next 12 months and to report to the Senate thereafter.

Senator Gavin Marshall
(Chair)