



Procedural Information Bulletin

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For Budget estimates hearings, 21 May to 5 June 2018

Motion to vary hours

The 2018 Budget Estimates fortnight was the first to include the new ACT public holiday, Reconciliation Day, which fell on the Monday of the second week. The original motion establishing the Budget Estimates hearings provided that the relevant committees meet from Tuesday to Friday, rather than the usual Monday to Thursday. A somewhat convoluted amendment was made on 10 May swapping the Friday for the following Tuesday, but allowing committees to stick with the Friday, if convenient. Two committees took each option.

Public interest immunity

Regular readers will be familiar with the Senate's view that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Senate or its committees unless expressly provided otherwise. However, while asserting its inquiry powers, and the breadth of questioning at estimates, the Senate has always acknowledged that there is information that it would not be in the public interest to disclose.

It is clear the [2009 order](#) setting out the process for making a public interest immunity claim has become firmly embedded in committee processes, so much so that 'PII', as an acronym, is frequently used in place of the phrase. This tendency to abbreviation has also become apparent in the way ministers and officers make claims to withhold information. There are a number of grounds for public interest immunity claims that have achieved some measure of acceptance by the Senate and its committees. These are outlined in detail in [chapter 19 of Odgers](#). These grounds are increasingly cited as ends in themselves by those making claims rather than establishing precisely what harm would be occasioned to the public interest by disclosing the information.

For example, while potential prejudice to legal proceedings has been accepted as a ground for withholding information in the past, it does not follow that any discussion of legal proceedings currently on foot would harm the public interest. It is possible that some information could prejudice a trial by influencing magistrates, jurors or witnesses. However, a case involving only questions of law before superior court judges is not likely to be influenced, and a committee is unlikely to find bare claims to the contrary persuasive.

A fully developed claim to withhold information should go beyond simply citing the ground. Committees should be similarly willing to explore the claim in some detail rather than accepting that previously accepted grounds means some category of information is off limits.

Specific public interest immunity claims

Specific discussions over what information should be provided and what would not be in the public interest to disclose occurred in a number of committees.

A claim to withhold information (originating in October 2017) because of possible prejudice to law enforcement investigations by the AFP into raids on the offices of the AWU was again cited, this time by Minister Cash in response to questions in the Education and Employment Legislation Committee. The Fair Work Ombudsman and the Registered Organisations Commission made reference to the same claim and, while tested, it was generally accepted by the committee.

A separate claim for public interest immunity by Minister Cash in February, to withhold information in response to questions on notice about the Australian Building and Construction Commission citing legal professional privilege (a ground that has not been accepted by the Senate), had been accepted by the Education and Employment Legislation Committee during Additional Estimates in February. Subsequent to that, a motion was agreed to in the Senate that the minister's claim was not accepted and that the required information should be provided. Minister Cash responded in writing to the President of the Senate reiterating her claim. This was not further tested during Budget estimates.

Public interest immunity and statutory officers

Discussions about public interest immunity accompanied the appearance of the Australian Public Service Commissioner, who is also the Australian Parliamentary Service Commissioner, at the Finance and Public Administration Legislation Committee hearings on 21 May.

The Commissioner is a statutory officer who appears alongside the President of the Senate in relation to his responsibilities to the parliamentary service, and alongside a minister in relation to his role as Public Service Commissioner.

The Commissioner was asked whether there was an investigation into possible code of conduct breaches by him being conducted by the Merit Protection Commissioner. The Commissioner took the question on notice, flagging the possibility of a claim of public interest immunity.

The question of who ought to make PII claims in relation to statutory officers turns on the autonomy of the office. In this case, neither the President nor the minister made a claim in relation to the question about the possible investigation. In declining to make a claim, the President told the committee:

However, it is not simply for the minister, to whom I am analogous in this circumstance, to make such a claim. In this instance I refer to chapter 19 of Odgers and the section entitled [‘Statutory authorities and public interest immunity’](#). In my view it is within the purview of the commissioner—a statutory officer not subject to general direction—to make such a claim. Paragraph 8 of the Senate order of 13 May 2009 contemplates this approach. Such a claim eventually, of course, is a matter for the Senate itself.

Here the President was applying the principle referred to in Odgers that statutory officers may make such claims directly where it would not be appropriate for a minister to do so because of the relationship (or lack thereof) between the officer and the minister.

The Commissioner later wrote to the committee answering the question to say that there was no investigation currently underway. Correspondence from the Acting Merit Protection Commissioner to the President, tabled before the committee on 23 May, indicated he had not yet formed a view on whether to commence such an inquiry.

Sub judice

Questioning in the Education and Employment Legislation Committee revealed there is confusion in the minds of some officers about what is sometimes referred to as the ‘sub judice convention’.

As noted in Odgers, ‘the sub judice convention is a restriction on debate which the Senate imposes on itself, whereby debate is avoided which could involve a substantial danger of prejudice to proceedings before a court...’ [[14th edition, p. 259](#)]. The concern is that debate in the Senate or information provided to Senate inquiries might cause civil or criminal proceedings to miscarry or reach conclusions other than on the evidence presented in the case, for instance by influencing jurors or witnesses in such proceedings. In determining whether to invoke the convention in a committee setting the chair, and the committee ultimately, weighs the risk of possible prejudice to court proceedings against the public interest in the inquiry, and determines whether the questioning should proceed. As discussed above, the risk is much less where matters of law only are in issue before superior court judges.

It is not open to officers and ministers as witnesses to invoke the convention as a reason not to provide information. Rather, they should follow the 2009 resolution and make a properly formed public interest immunity claim, presumably on the ground of possible prejudice to legal proceedings, and state the apprehended harm to the public interest that would occur in providing the information.

Independence of each House of Parliament

An interesting coincidence saw the date for five by-elections announced by the Speaker of the House of Representatives half an hour ahead of the appearance of the Australian Electoral Commissioner before the Finance and Public Administration Legislation Committee. The commissioner was questioned closely by senators about the advice he provided to the Speaker, with some of those questions touching specifically on the role of the Speaker.

The minister appearing with the Electoral Commissioner intervened at this point reminding senators that the principle of independence of each House of the Australian Parliament asserts that each functions as a distinct, independent unit within the framework of the Constitution.

As a consequence, Senate committees, as a matter of comity between the Houses and out of respect for the equality of their powers, do not: inquire into the conduct of members of the House; seek to compel members of the House to give evidence about any matter; or inquire into the proceedings in the House. (As a corollary, the department supporting the House of Representatives does not appear before Senate estimates.)

Senators modified their approach in response to the minister’s intervention.

Participation of a senator prior to swearing in

Section 42 of the Constitution requires that a senator make and subscribe the oath or affirmation before taking their seat in the Senate. However, there is nothing to prevent a senator performing other official functions before taking the oath or affirmation, such as participating in the proceedings of committees. Such was the case when Senator David Smith, declared elected by the High Court on 23 May following the disqualification of Katy Gallagher, attended the estimates hearings of the Environment and Communications Legislation Committee the following day. Any senator may participate in estimates hearings without being appointed as a member of the relevant committee (standing order 26(8)).

Accountability

The Senate has passed resolutions over 30 years affirming and reaffirming its right to inquire into the expenditure of all public funds. The most recent [resolution](#), passed in 2014, declares that:

‘...there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Parliament or its committees unless the Parliament has expressly provided otherwise.’

Areas of expenditure of public funds which received close examination by senators included:

- implementation of the Government’s Guidelines on the Recognition of Sex and Gender across departments
- correspondence by the Governor-General in relation to the 65th Anniversary of the Coronation of Queen Elizabeth II
- the proposal to enable Australian Federal Police officers to request identification from members of the public at airports
- the size of Australia’s cattle herd and future projections regarding a rebuilt herd size
- ageing and aged care, including staff to patient ratios in residential aged care facilities, and circumstances in which home care packages are utilised
- the Banking Executive Accountability Regime
- trials of post-traumatic stress disorder assistance dogs for veterans
- the Pharmaceutical Benefits Scheme
- the impact of US tariffs on Australia’s steel and aluminium trade
- progress on the negotiations for a code of conduct for the South China Sea.

RELATED RESOURCES

[Dynamic Red](#) – updated continuously during the sitting day, the Dynamic Red displays the results of proceedings as they happen.

[Senate Daily Summary](#) – a convenient summary of each day’s proceedings in the Senate, with links to source documents.

Like this bulletin, these documents can be found on the Senate website: www.senate.gov.au

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