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By: Senator Cormann

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OCCASIONAL NOTE

ORDERS FOR THE PRODUCTION OF DOCUMENTS: ORIGINS AND DEVELOPMENT OF THE POWER

Questions have been raised about the power of the Senate to order the production of documents. Such questions are perhaps more accurately characterised as questions about possible constraints or limitations on the exercise of the power, because it cannot seriously be proposed that a house of parliament in a constitutional system of parliamentary government in which the executive is responsible to the parliament does not have the power to exercise that necessary supervision of the executive. It cannot be reasonably argued that the supervised body is able to set the terms of the supervision or that the supervising body must accept those terms. This is a distortion of the principles of parliamentary government, no doubt brought about over time by the characteristic numerical domination of lower houses of parliament by governing parties.

The power to order the production of documents, both in existence and created for the purpose, has deep historical roots and has also evolved with use. Its evolution includes a presumption that the creation of a document to satisfy an order may involve analysis as well as collation of information. Both houses of the Australian Parliament were given the powers, privileges and immunities of the House of Commons in the United Kingdom at the date of the Constitution. The Parliament was also given the power to declare its powers, privileges and immunities by legislation. The starting point in any assessment of these powers is therefore the powers exercised by the House of Commons in 1901. There is, of course, no exhaustive or authoritative list of the powers, privileges and immunities of the House of Commons which have evolved over centuries through a combination of custom, practice and statutory law. The extent of these powers, privileges and immunities must be established by consulting the authorities and the practices of the House itself as recorded in the House of Commons Journals. General statements in the authorities are based on the practices and precedents of the House.

The foremost authority on House of Commons practice is *Erskine May's Treatise of the Law, Privileges, Proceedings and Usages of Parliament*. The edition available in 1901 was the 10th edition, published in 1893 and edited by R. F. D. Palgrave and Alfred Bonham-Carter. Chapter XXI, dealing with "Accounts, Papers, and Records Presented to Parliament", starts with this statement:

Parliament is invested with the power of ordering all documents to be laid before it, which are necessary for its information. (p. 507)

The chapter then goes on to describe the two methods of obtaining documents: by direct order in respect of certain matters and by address to the Crown in matters connected with the

exercise of the royal prerogative or where the relevant agency was under the control of a secretary of state.¹ On page 509, Erskine May goes on to say:

Returns may be moved for, either by order or address, relating to any public matter, in which the house or the Crown has jurisdiction. They may be obtained from all public offices, and from corporations, bodies, or officers constituted for public purposes, by Acts of Parliament or otherwise: but not from private associations, such as Lloyds, for example, nor from individuals not exercising public functions.

In the article cited in note 1, Greg Taylor disputes the validity of this supposed limitation on obtaining documents from private parties and observes, first, that the limitation is not recognised in Australian practice or law and, secondly, that it has not subsequently been adhered to in House of Commons practice either.²

Other contemporary references and authorities that were certainly available to, and consulted by, early Senate Clerks (because we still have their copies of them) are a *Manual of Procedure in the Public Business of the House of Commons, prepared by the Clerk of the House for the use of Members and laid on the table by Mr Speaker*, dated 1904, and Josef Redlich's *Procedure of the House of Commons: A Study of its History and Present Form*, translated from the German with an introduction by the then Clerk of the House of Commons, Sir Courtenay Ilbert, dated 1908.³ While the *Manual* simply restates the House's practice ("the House, by means of orders, or of addresses to the Crown, obtains returns supplying information on matters of public interest"), Redlich's commentary is rather more expansive:

The House of Commons has long maintained as a principle of its customary law that it is entitled to demand the use of every means of information which may seem needful, and, therefore, to call for documents which it requires. This claim may be enforced without restriction. In its most general form it is displayed in the right of the House to summon any subject of the state as a witness, to put questions to him and to examine any memoranda in his possession. Practically speaking, in its constant thirst for information upon the course of administration and social conditions, the House generally turns to the Government departments as being the organs of the state which are best, in many cases exclusively, able to give particulars as to the actual conditions of the life of the nation and as to administrative action and its results from time to time.

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¹ The historical evolution of these practices and their inapplicability to any Australian jurisdiction is well covered in an article by Greg Taylor, "Parliament's Power to Require the Production of Documents — a Recent Victorian Case", *Deakin Law Review*, Vol 13, No 2, pp. 17-48 at pp. 22-37.

² Greg Taylor, *ibid*, pp. 38-43.

³ The *Manual of Procedure* belonged to E. G. Blackmore, first Clerk of the Senate, while Redlich's work was purchased for the Senate chamber.

Let us remark in passing, that in the unlimited character of the claim for information, which may in principle be made at any time, there lies a fundamental parliamentary right of the highest importance; it is a right which, both constitutionally and practically, is a condition precedent to all English and parliamentary government. (pp. 39-40)

Redlich then goes on to explain the difference between orders and addresses and concludes:

For this reason the distinction between different kinds of parliamentary papers on the score of the legal nature of their contents, some being claimed and some prayed for, though still formally maintained, is devoid of any great political importance. (p. 41)

His conclusion on executive refusal of some addresses has a surprisingly contemporary ring to it:

The exercise of the prerogative, in the present case a refusal of information [in response to an address], no longer points to a right of the Crown as against Parliament, but is a device, supported by a technically impregnable title [secretary of state], by which the Ministry can baffle the Opposition or, under certain circumstances, even a section of its own supporters. (p. 41)

The Journals of the House of Commons from the period contain numerous examples of orders or addresses for returns, and both *Erskine May* and Redlich contain discussions of the types of information governments were reluctant to provide. Then, as now, the House did not generally exercise its formal powers to obtain the information but a political solution was invariably reached. Interestingly, for present purposes, there are also examples of orders to non-departmental bodies to provide returns⁴ on various matters. These include:

- an order to the Corporation of Trinity House of Deptford Strond (a "fraternity of mariners", independent of government which, from 1604 to 1987, had the exclusive right to license River Thames pilots) to prepare a return of certain income from the pilots, separately identifying poundage paid on the pilots' earnings (House of Commons Journals, vol. 85, 23 March 1830, pp. 216-223)
- an order to the Irish Land Commission for detailed information about land sales following foreclosures (House of Commons Journals, vol. 146, 4 December 1890, p. 29)
- an order to each savings bank in England, Wales, Scotland and Ireland for the creation of a document containing a wide variety of information (House of Commons Journals, vol. 146, 17 February 1891, p. 95)

⁴ A "return" is distinguishable from "documents" or "papers". The latter are in existence already while the former is created in response to the order or address.

- a further order to the Irish Land Commission for the creation of a document providing details of the Commissioners (House of Commons Journals, vol. 146, 23 February 1891, p. 104).

Early Senate practice was to make regular use of orders for production of documents, both in existence and created for the purpose. For example, in the first three sessions of the Commonwealth Parliament (1901-03), the Senate agreed to 54 orders, the majority of them being satisfied by the tabling of documents.⁵ The power to order the production of any documents was exercised by the Senate, as it had been exercised by the House of Commons, and access disputes were resolved, not by testing the limits of the power in the courts (assuming any aspects of an access dispute were justiciable), but by political settlement and the exercise of self-restraint on the part of the Houses.

One modification of the doctrine of exclusive cognizance that occurred in the 19th century was the acceptance of the principle that it was for the courts to establish the existence of a power but for the parliament to determine its application. A leading case was *Stockdale v Hansard*⁶ which concerned the right to publish reports of parliamentary proceedings. Another was *Kielley v Carson*⁷ in which the Privy Council found that the House of Assembly of the Island of Newfoundland did not possess the power to arrest a person in pursuance of an investigation for contempt, but possessed only such powers as were reasonably necessary for the proper exercise of its functions and duties as a local legislature. It was in the wake of *Kielley v Carson* that the legislatures of self-governing colonies began to be given statutory grants of power, commonly by reference to the powers of the House of Commons. While it was too late for New South Wales which continues to operate on the basis of reasonably necessary powers (as confirmed by the High Court in *Egan v Willis*⁸), later Australian colonial legislatures, and the Commonwealth itself, were endowed in their foundation statutes with House of Commons powers at particular dates (for example, 1855 for Victoria, 1901 for the Commonwealth).

In the Senate, reliance on orders for production of documents waned after the first decade or so, and their use was not revived till the 1960s. Reasons for this are many and varied. For the more routine information sought from the executive, questions on notice were an alternative mechanism and one which could be used by individual senators without the need for a resolution of the Senate. For possible reasons of a more complex social and political character, see Harry Evans' introduction to Volumes 1 and 2 of the *Biographical Dictionary of the Australian Senate*.

⁵ Orders covering the first three Parliaments from 1901-10 are listed in *Business of the Senate 1901-1906*, Department of the Senate, 1999, and *Business of the Senate for the Third Parliament 12 December 1906-19 February 1910*, Department of the Senate, n.d.

⁶ (1839) 9 Ad & El 1.

⁷ (1842) 4 Moo PCC 63; 13 ER 225.

⁸ (1998) 195 CLR 424.

In 1967, the Senate agreed to an order for production of documents about the use of the Royal Australian Air Force's VIP Flight by ministers and other members of parliament (and, it transpired, by others including family members).⁹ The Opposition sought to use the full range of Senate powers and procedures to hold the government to account over this matter, including giving notice of a motion for the Secretary of the Department of Air to be called to the bar of the Senate to answer questions about the affair. This became unnecessary when the documents were produced.

Another scandal in 1975, in relation to the government's attempt to secure alternative funding from Iraq through a shadowy intermediary, led to a stand-off between the government and the Senate, resulting in a declaration by the Senate of the basis on which it would consider claims of public interest immunity. This was the occasion when public servants were summoned before the bar of the Senate to answer questions about the loans affair. They duly appeared and were sworn but, on instruction from their various ministers, claimed Crown privilege (now known as public interest immunity) in respect of the evidence to be sought from them. The Senate's resolution, agreed to on 16 July 1975, affirmed its possession of the powers and privileges of the House of Commons, as conferred by section 49 of the Constitution, including the power to summon persons to answer questions and produce documents, files and papers. The resolution went on to declare that it was the obligation of all such persons to answer questions and produce documents and that, upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate would consider and determine each such claim. That remains the position and further resolutions of the Senate have elaborated on the procedures to be followed by ministers and public servants in seeking to advance claims of public interest immunity. The most recent resolution was agreed to on 13 May 2009. The position has also been reiterated in orders to the Australian Information Commissioner and the Productivity Commissioner.¹⁰

In 1987, the Parliament used the power given to it under section 49 of the Constitution to make a partial declaration of its powers, privileges and immunities in the *Parliamentary Privileges Act 1987*. One catalyst for the enactment of this legislation was provided by certain decisions of the New South Wales Supreme Court, whose effect was to permit the use in court proceedings of evidence, including *in camera* evidence, given to the Senate select committees inquiring into the conduct of Mr Justice Murphy. The Act, in section 16, reiterated the application of article 9 of the Bill of Rights 1688 to proceedings of the Commonwealth Parliament and went on to provide a definition of proceedings in parliament. Under paragraph 16(2)(d), proceedings in parliament include the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published. The power of the Houses to

⁹ For accounts, see Ian Hancock, "The VIP Affair 1966–67: The Causes, Course and Consequences of a Ministerial and Public Service Cover-Up", *Australasian Parliamentary Review*, Vol. 18, No. 2, Spring, 2003; and Tom Frame, *The Life and Death of Harold Holt*, Allen & Unwin, 2005, pp.226–34.

¹⁰ Order to the Australian Information Commissioner, 22 November 2010, *Journals of the Senate*, p. 367; to the Productivity Commissioner, 10 February 2011, *Journals of the Senate*, p. 572.

order the production of documents thus has explicit statutory recognition, although this, of course, is not a source of the power.

Just as reference to practice and precedent was instrumental in understanding the nature and extent of the powers of the House of Commons in 1901, so usage continues to inform the scope of those powers today. From time to time, questions have been raised about whether the Senate has the power to order the creation of a particular document. The most cursory reference to House of Commons practice before 1901, and to Senate practice in the years after Federation and since the late 1960s, indicates that this is a power that has been used on countless occasions. More recently, the question has been asked whether the Senate can require inquiries to be undertaken for the purpose of creating a document for presentation to the Senate. Again, reference to practice and precedent confirms that this is indeed the case. A document tabled by Senator Cormann on 9 February 2011 lists numerous occasions since the early 1990s on which statutory bodies have responded to Senate orders for documents recording the outcome of particular research, analysis or inquiries.¹¹

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¹¹ The document is available on the Senate website, in Statsnet, under "Documents" at the following url: <http://www.aph.gov.au/Senate/work/statsnet/documents/opds/OPD.pdf>.

