

Submission – Australian Senate

Tasmanian Legislative Council Select Committee on the Production of Documents

Thank you for the invitation to make a submission to the committee's inquiry into options for an agreed process to resolve disputes that arise between the government and the Legislative Council regarding the production of documents.

Background

The Senate possesses the power to require the production of information through section 49 of the Commonwealth Constitution which provides that the powers of the Houses of the Commonwealth Parliament are, until declared by the Parliament, the powers of the UK House of Commons at the time of the establishment of the Commonwealth in 1901. Those powers included the power to call for documents.¹

While the Senate undoubtedly possesses this power,² it acknowledges that there is some information held by government that it would not be in the public interest to disclose. However, the Senate has not conceded that there are particular categories of documents that are immune from disclosure or beyond the reach of the Senate's inquiry powers. Therefore there are no automatic exemptions to disclosure for cabinet submissions or national security documents or other classes of documents for which governments have frequently claimed public interest immunity. The Senate has instead set out a process that applies to all categories of documents in which the government, or other recipient of an order for documents, is able to advance public interest immunity claims, but it is ultimately for the Senate to determine whether the claim is accepted.

The Senate has thus dealt with claims of public interest immunity on a case by case basis, building up a body of precedent and practice but refraining from conceding any ground on its right to determine such claims. Over the years the Senate has also considered whether the courts or third parties should play a role in resolving disputes between the Senate and the executive government; however, as outlined below, it has not been persuaded that a single agreed process applicable to all cases is necessary or appropriate.

Adjudication by the courts

In 1994 the Senate Committee of Privileges considered a private senator's bill which would have significantly amended the law of parliamentary privilege by allowing the courts to adjudicate disputes between the Parliament and executive regarding the giving of information or the production of documents. The Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 provided that failure to comply with a lawful order of either House or a committee would be a criminal offence prosecuted in the Federal Court. If an offence were proved, the Court would

¹ In 1987, the Commonwealth Parliament declared its powers through the *Parliamentary Privileges Act 1987*. Section 5 of that Act provided for the continuation of those powers in force under section 49 of the Constitution (except to the extent varied by that Act).

² The Senate reasserted its inquiry powers in 1975, see [Journals of the Senate](#), 16 July 1975, p. 831; [Odgers' Australian Senate Practice](#), 14th edition, 2016, pp. 643-4.

make orders to ensure future compliance with the order. The bill provided that, where the government raised a claim of executive privilege or public interest immunity during proceedings on a prosecution, the court would be able to examine the disputed evidence or documents in camera prior to determining whether the claim was sustained.

The Privileges Committee recommended that the bill not proceed, citing evidence by virtually all witnesses that it would be unwise for the Parliament to allow the courts to adjudicate claims of executive privilege or public interest immunity for a House or its committees. The committee considered that such claims should continue to be dealt with by the House concerned, noting that the Houses possessed the necessary powers to protect their rights.³

Arbitration by a third party

The idea of independent arbitration of executive claims of public interest immunity has surfaced from time to time. In 1995 the Privileges Committee commended the use of an independent arbiter to evaluate claims of executive privilege against public interest criteria. It noted that in the particular case of refusal to provide the Senate with documents about government property leases on commercial confidentiality grounds, the dispute had been appropriately adjudicated by the Acting Auditor-General.⁴

In 2001 the Senate agreed to an order of continuing effect for the production of information about contracts entered into by government agencies and whether they contained inappropriate confidentiality provisions, with the Auditor-General to review a selection of such contracts at regular intervals to assess progress in reducing the number of inappropriate claims of confidentiality. While there is often initial resistance from the executive to such orders of continuing effect, they have generally been accepted over time. In this case, the government claimed that the order for entity contracts was beyond the power of the Senate; however this claim was later tacitly abandoned.⁵ The order, as amended, remains in place with the Auditor-General now producing biennial reports.⁶

In 2010 the Finance and Public Administration References Committee recommended against the Senate adopting a process of independent arbitration over public interest immunity claims.⁷ However, later that year the agreements for parliamentary reform entered into at the beginning of the 43rd Parliament indicated renewed support for such a mechanism, using the Australian Information Commissioner as arbiter, but no action was taken to implement this proposal.

The idea of independent arbitration was again canvassed in 2014 by the Legal and Constitutional Affairs References Committee, with the committee recommending that the Procedure Committee

³ Senate Committee of Privileges, [*49th Report: Parliamentary Privileges Amendment \(Enforcement of Lawful Orders\) Bill 1994*](#), September 1994.

⁴ Senate Committee of Privileges, [*52nd Report: Parliamentary Privileges Amendment \(Enforcement of Lawful Orders\) Bill 1994 - Casselden Place Reference*](#), March 1995.

⁵ [*Odgers' Australian Senate Practice*](#), 14th edition, 2016, p. 587.

⁶ See, for example, Australian National Audit Office, [*Senate Order for Departmental and Entity Contracts \(Financial Year 2016–17 Compliance\)*](#), 25 June 2018.

⁷ Senate Finance and Public Administration References Committee, [*Independent Arbitration of Public Interest Immunity Claims*](#), February 2010.

again examine the issue.⁸ The Procedure Committee reported that it had considered the independent arbitration mechanism utilised in the New South Wales Legislative Council, but had concluded that the mechanism was not readily adaptable to the Senate and that the Senate's current procedures which involve a range of solutions were preferable.⁹

Current Senate practice

Procedures for orders for the production of documents in the Senate are set out in standing order 164.¹⁰ Orders for documents are usually directed at ministers, but may also be directed at other persons or entities, including statutory bodies. Orders may require the production of documents in the possession of a person or body, or the creation and production of documents by the person or body having the information to compile the documents. Some orders are ongoing, requiring periodical productions of documents for an indefinite period.¹¹

As noted above, while it is acknowledged that there is some information held by government that it would not be in the public interest to disclose, the Senate has not conceded that there are particular categories of documents that are immune from disclosure and asserts its right to determine public interest immunity claims. The persistence of ministers and officers in declining to answer questions or produce documents at estimates hearings, without properly raising recognised public interest grounds, led to a resolution on 13 May 2009 prescribing the process to be followed for making and determining public interest immunity claims.¹²

The order provides that an officer who considers that information should be withheld from a committee should state the harm to the public interest that could result from the disclosure of the information, and should refer the matter to a responsible minister if requested by the committee or a senator. On receipt of such a reference, the responsible minister is required to consider the matter and state whether, and on what ground, the information should not be provided because of possible harm to the public interest. The committee or a senator, if not satisfied with the minister's statement, may refer the question to the Senate. The order does not specify the public interest grounds on which information might be withheld, as the categories of such grounds, while well known, are not closed.¹³ The order also does not prejudge any particular circumstance in which a

⁸ Legal and Constitutional Affairs References Committee, [A Claim of Public Interest Immunity Raised over Documents](#), March 2014.

⁹ The committee did not reject the possibility of third party arbitration in the right circumstances, but considered that such a procedure should not be a remedy of first resort: Senate Procedure Committee, [Second report of 2015: Third party arbitration of public interest immunity claims](#), June 2015, pp. 12–15.

¹⁰ [Senate standing order 164](#).

¹¹ For a list of orders of continuing effect see [Odgers' Australian Senate Practice](#), 14th edition, 2016, pp. 582–3 and [orders for documents](#). Following a [recommendation of the Procedure Committee](#), on 7 December 2017 the Senate adopted an [order of continuing effect](#) requiring the Leader of the Government in the Senate to table, every six months, 'a list showing details of all orders for the production of documents made during the current Parliament which have not been complied with in full, together with a statement indicating whether resistance to them is maintained and why, and detailing any changing circumstances that might allow reconsideration of earlier refusals'. The [most recent list](#) was tabled in the Senate on 2 April 2019.

¹² Senate Procedure Committee, [Third report of 2009: Committee proceedings and public interest immunity claims](#), August 2009. See also Senate Procedure Committee, [Fourth report of 2009: Public interest immunity claims](#), November 2009.

¹³ [Odgers' Australian Senate Practice](#), 14th edition, 2016, pp. 662–70.

claim may be raised, but leaves the determination of any particular claim to the future judgment of the Senate.

Although it took some time for the 2009 order to be consistently observed, it is now referred to in the government guidelines for official witnesses appearing before parliamentary committees,¹⁴ is quoted in chairs' opening statements at each round of estimates hearings, and is regularly, although not consistently, applied by ministers and senior public servants who wish to resist disclosure of information or documents.¹⁵

While the order of 13 May 2009 relates to public interest immunity claims in committee proceedings, the Committee of Privileges has recognised that the same principles apply to Senate orders.¹⁶ The Procedure Committee has also issued guidance for ministers in responding to Senate orders for the production of documents. This guidance similarly specifies that any claim that it would not be in the public interest to comply with a Senate order must be accompanied by a statement of the ground for that conclusion which specifies the harm to the public interest that could result from the production of the document.¹⁷ If the Senate is not satisfied with the explanation provided by a minister there are many remedies available to senators to further pursue the information.

Remedies available to senators where the executive refuses to comply with an order for documents

It is open to the Senate to treat a refusal to produce documents as a contempt of the Senate and therefore to impose a penalty of imprisonment or a fine. However, the Senate has invariably preferred political or procedural remedies. There are practical difficulties involved in the use of the contempt power, including the probable inability of the Senate to punish a minister who is a member of the House of Representatives, and the unfairness of imposing a penalty on a public servant who acts on the direction of a minister. A penalty imposed for contempt may be contested in the courts under the *Parliamentary Privileges Act 1987*, and it is possible that the courts in such a challenge could determine a claim of public interest immunity. As noted above, it has long been the view of the Privileges Committee that it would be unwise for the Parliament to allow the courts to adjudicate claims of public interest immunity.

As an alternative to relying on its contempt jurisdiction, the Senate has imposed a range of procedural and political penalties, ranging from a motion to censure a minister to refusal to pass government legislation. These remedies broadly fall into two categories: punitive remedies and coercive remedies.

¹⁴ Department of the Prime Minister and Cabinet, [Government guidelines for official witnesses appearing before parliamentary committees and related matters](#), February 2015, pp. 10–12, 29–35. It is important to note that while input from the Privileges Committee informed the development of these guidelines, they remain a statement of the executive's view on this topic and have not been endorsed by either House (see Senate Committee of Privileges, [153rd Report: Guidance for officers giving evidence and providing information](#), June 2013).

¹⁵ The Clerk is also required to draw the resolution, and a subsequent 2014 resolution, to the attention of all agency heads before each round of estimates: [Journals of the Senate](#), 25 June 2014, pp. 1005–6.

¹⁶ Senate Committee of Privileges, [153rd Report: Guidance for officers giving evidence and providing information](#), June 2013), p. 35.

¹⁷ Senate Procedure Committee, [Second report of 2015: Third party arbitration of public interest immunity claims](#), June 2015, pp. 15–16.

Punitive remedies generally make it more difficult for ministers to operate in the Senate and for a government's legislative program to be achieved. Examples include:

- declining to further consider particular bills until after the requested information relating to the bills has been produced;¹⁸
- censure motions;¹⁹
- motions restricting the ability of ministers to handle government business;
- motions depriving ministers of procedural advantages they enjoy under the standing orders, such as the ability to rearrange business on any day or determine the order of government business on the *Notice Paper*; and
- motions to extend question time or other elements in the routine of business.

Coercive remedies are those which use alternative means of obtaining all or part of the information to which access has been refused. Committees often play a major role in such remedies because of the ability of committee members to question ministers and officials directly, and because they can take evidence in camera. Examples include:

- orders for the information or documents to be produced to a specified committee, including instructions to the committee about how the information is to be handled (received in camera, not published for a specified period etc);²⁰
- orders requiring particular committees to hold hearings and particular witnesses to attend for the purpose of answering questions about the information or documents;
- further orders for production of the documents, perhaps refining the scope of the demand or excluding certain kinds of information to encourage compliance;
- motions requiring ministers to explain to the Senate the reasons for non-compliance with a previous order and providing for motions to be moved, without notice, to take note of such explanations;²¹ and

¹⁸ For example, on 13 May 2009 the [Senate resolved](#) to postpone legislation establishing the National Broadband Network until after the government produced information required by an order of the Senate.

¹⁹ For example, on 30 March 2004 the [Senate censured](#) the Leader of the Government in the Senate for failing to comply with an order for the production of documents relating to a 'clarifying statement' issued by the Commissioner of the Australian Federal Police.

²⁰ For example, on 5 December 2018 the [Senate ordered](#) the Commissioner of Taxation to provide documents to the Economics Legislation Committee. The [government responded](#) to the order on 6 December 2018. The Chair of the Economics Legislation Committee also [reported](#) that the Commissioner of Taxation had undertaken to provide the documents to the committee on the basis that the committee treated the documents and information in question as confidential. The Commissioner also agreed to appear before the committee to provide in camera evidence in relation to the information.

²¹ For example, on 4 December 2018 the [Senate ordered](#) the Minister for Trade, Tourism and Investment to attend the Senate to explain why the minister had not complied with an order of continuing effect which requires the full text of proposed bilateral and multilateral agreements be tabled at least 14 days before signing.

- motions requesting the Auditor-General, or requiring another third party, to examine the contentious material and report to the Senate on the validity of the grounds claimed by the minister for non-production.²²

All of the above remedies require the support of a majority of the Senate to implement.²³ One formal remedy that can be pursued by a single senator is set out in standing order 164(3). This provides that a senator may seek an explanation of, and initiate debate on, any failure by a minister to respond to an order for documents within 30 days after the documents are due. The order thus providing a mechanism for senators to draw attention to any reluctance to produce documents, while taking time out of the sitting day that could otherwise have be utilised to progress government business.

Conclusion

The main idea to be drawn from Senate practice in responding to executive refusals to provide information is that the most appropriate process to resolve disputes is likely to depend on the circumstances of the case—a “one-size fits all” approach may not be appropriate in all circumstances. Senate practice demonstrates that there are numerous options available that can be adapted to the circumstances in each case.

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Clerk of the Senate

²² In addition to the examples discussed above under ‘Arbitration by a third party’, in 1982 the Senate ordered the production of documents relating to the ‘bottom of the harbour’ tax evasion affair and [requested](#) that Sir John Minogue QC edit the papers ‘to ensure the deletion therefrom of any material the publication of which would in his opinion prejudice the outcome of legal proceedings’. While Sir John agreed to the request to edit the papers, further government resistance and a subsequent dissolution of the Parliament intervened and he never commenced work. For a full account of this case see *Odgers’ Australian Senate Practice*, 6th edition, 1991, pp. 908–11.

²³ For further detail about remedies against executive refusal of information, see [Odgers’ Australian Senate Practice](#), 14th edition, 2016, pp. 672–5.