



Procedural Information Bulletin

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The scope of estimates questioning

The rules about the scope of questioning at estimates are clear. Any questions going to the operations or financial positions of departments or agencies are relevant questions.

The occasional suggestion that the rules for Senate questions in standing order 73 apply to estimates hearings has no basis, so there are no grounds for a chair to rule on whether questions conform with those rules. In that regard, the Senate long ago adopted the following statements of the Procedure Committee, in its second report of 1999:

- any questions going to the operations or financial positions of the departments and agencies which are seeking funds in the estimates are relevant questions for the purpose of estimates hearings
- *provided that questions are asked in an orderly fashion and meet the test of relevance the questions are in order. [emphasis added]*

The only other rule going to the content of questions is the provision in privilege resolution 1(16) that officers “shall not be asked to give opinions on matters of policy...” These matters are identified in the chair’s opening statement recited at the start of each hearing.

It is unsurprising that the rules for Senate questions do not apply. Estimates hearings did not evolve from question time, but from the examination of appropriation bills in committee of the whole: see Laing, R.G, *Annotated Standing Orders of the Australian Senate*, [standing order 26](#). The original basis for their operation can be found in a paper circulated in 1970 which provided, among other things, that:

Committee of the Whole procedure should be followed whereby Senators, at any one time, should not exceed 15 minutes in asking questions and elaborating on any points involved. [Odgers, J.R., *Australian Senate Practice*, Sixth Edition, pp. 648–9.]

While no doubt a case may be made for importing additional requirements for estimates questions, such a significant change in practice would require a deliberate decision of the Senate.

Sub judice

Provided questions meet the above requirements, there is ordinarily no basis for chairs to rule them in or out of order. However, a chair may on occasion have cause to intervene under the sub judice convention. This became relevant during a spillover hearing of Environment and Communications estimates on 7 June.

Sub judice operates as a self-imposed restriction that may be invoked in proceedings of a House or a committee to constrain debate or questioning. It turns on a consideration whether such debate or questioning could involve “a substantial danger of prejudice to proceedings before a court” balanced against a consideration whether there is an overriding requirement for the Senate to discuss a matter of public interest. The applicable principles are discussed in *Odgers' Australian Senate Practice*: [14th ed., pp. 259–66](#).

It is for the chair in the first instance to determine whether questioning should be constrained on this basis. It is open to committee members to test the chair’s ruling through points of order, however, if a senator dissents from such a ruling the matter is determined at a private meeting. Ultimately the matter may be reported to the Senate for determination, but until that time the ruling of the chair or of the committee (as the case may be) stands.

In the hearing on 7 June questions were asked about the defamation matter brought by the former Attorney-General, Mr Porter, against the Australian Broadcasting Corporation (ABC). Although the matter had been discontinued, the court still had before it a request to have material that was suppressed under an interim order last month permanently removed from the court file.

Ordinarily, questioning in a committee on a matter before a judge of the Federal Court would be unlikely to attract the convention, as there is no substantial risk that the questioning would influence the court. However, a significant precedent suggests that sub judice may apply in another way. In particular, it might be apprehended that evidence going to the content of the suppressed material could present a risk of prejudice to the court’s proceedings, in the sense that the publication of some or all of that material could render those proceedings ineffectual. In this aspect, the matter had similarities to the *Westpac Letters* case: see *Odgers*, 14th ed., pp. 262–264.

The chair flagged this matter in his opening statement, and ruled a number of questions out of order during the hearing. Some of those rulings were clearly on the above point, while the basis for others – constraining what seemed to be general questions about the proceedings – was unclear. At one point a senator indicated her view that the chair was applying a narrow interpretation of what the convention would allow, however, no formal dissent was made. It may have been appropriate to allow the questions, but guard against answers going to the content of the contested material. This is particularly the case where senators and witnesses alike had indicated they had no intention of crossing that line.

As noted in relation to the *Westpac* case, any restriction on debate (or, as here, on questioning) under the sub judice principle could be temporary only: once the court proceedings are concluded there would no longer be an impediment to the disclosure in the Senate of the documents in question, even if the material were permanently suppressed by the court: see *Odgers*, 14th ed., p. 263.

Public interest immunity claims

Consistent with the previous two rounds of estimates hearings, there were relatively few disputes about public interest immunity (PII) claims, although several witnesses took questions on notice to determine whether to make such claims or refer these claims to the relevant Minister.

In Community Affairs estimates on 2 June officers from Sport Australia declined to answer questions about its position as to the decision-maker in the Community Sports Infrastructure program. The organisation's defence to a matter before the Federal Court reportedly recorded that it – rather than the then Minister for Sport – was the ultimate decision-maker; a position apparently at odds with the position it had previously put to the Australian National Audit Office and to the Senate committees examining the matter over the past 2 years. At first officers simply refused to comment as the matter was before the court, making no attempt to make a PII claim. In any case, it is difficult to see how a compelling claim to withhold information could be made, given that senators were seeking to examine an apparent contradiction contained in material that was all on the public record. In the end questions were taken on notice, although senators contested the basis for doing so.

Occasionally chairs will state that they are ruling questions out of order, when in fact what they are doing is indicating that the committee has accepted a public interest immunity claim in respect of a particular matter. While this may seem to be an economical shorthand, it can give the impression that chairs have a broader latitude to make rulings than is the case. This was perhaps the basis for several statements that questions about an alleged sexual assault in the ministerial wing of Parliament House had been ruled out of order, being the subject of law enforcement investigations. Similar questions were allowed in other committees, with witnesses properly carrying the responsibility of raising possible prejudice to such investigations as the grounds for a PII claim in appropriate circumstances.

The Streisand effect

Odgers notes that committees considering estimates usually leave it to the minister to determine which witnesses attend, although they have the power to call particular witnesses if they so choose: [14th ed., p. 482](#). In practice, the process of finalising witness lists is frequently a matter for negotiation behind the scenes and rarely a matter that commends attention.

In the second week of hearings non-government senators requested that a particular officer from the Department of Defence attend the Foreign Affairs, Defence and Trade Legislation Committee to answer questions related to submarine capability enhancement review. The Secretary of Defence advised the committee that it was not the convention of the department to have one-star officers (the level of the requested officer) attend estimates. After some debate on 1 June it was nevertheless agreed that the officer would attend the following day's hearing.

The Secretary made a statement to the effect that it is normally for Defence to decide the officials most appropriate to answer questions at estimates, but that the department would accede to the request on this occasion. Formally, of course, the question who shall attend to give evidence is a matter for the committee concerned. Odgers records the handful of occasions on which the Senate has intervened to direct that particular ministers and officers appear: [14th ed., p. 482](#).

As has previously been seen, requiring the attendance of a particular witness can be something of a Pyrrhic victory, as [Privilege resolution 1\(16\)](#) allows them to refer questions to superior officers: see [Bulletin 348](#).

Accountability

As expected, the Commonwealth's response to the COVID-19 pandemic dominated a significant portion of the 2021-22 Budget estimates hearings, particularly in the Community Affairs Legislation Committee's hearings related to health and aged care. Quarantine arrangements, the supply of vaccinations, and vaccination of residents and workers in aged care and disability residential facilities were a specific focus.

The Finance and Public Administration Legislation Committee again took evidence from the President of the Senate and parliamentary officials in relation to recent sexual assault allegations. The Secretary of the Department of Prime Minister and Cabinet also gave evidence on matters related to this issue, in his second consecutive appearance at estimates.

Executive bonuses and other non-salary payments to executives and employees came under scrutiny during the Environment and Communications Legislation Committee's examination of NBN Co., Australia Post and the Australian Broadcasting Corporation. During the Budget estimates period, the References Committee [report](#) into Australia Post was tabled, with two of the committee's [25 recommendations](#) directed towards reforming the way that Commonwealth entities use "incentive payments, rewards, gifts and other discretionary expenditure, including short and long term incentives and other payments to highly paid staff".

Other areas of expenditure of public funds which received examination over the Budget estimates fortnight included:

- development of a national labour hire registration scheme
- the impact of assumptions in Treasury modelling related to Australia's COVID-19 vaccination program
- the Reserve Bank of Australia's recommended approach to monetary policy and the impact on income and wealth inequality, wage growth, and house prices
- management and results of the National Assessment Program – Literacy and Numeracy (NAPLAN)
- the risk of ransomware attacks and a possible mandatory reporting regime for businesses that pay ransoms to cyber criminals
- development of appropriate baiting and control programs in response to the current mouse plague affecting large parts of rural and regional Australia.

Australian National Audit Office

The Auditor-General is an independent statutory officer with responsibility for auditing Commonwealth entities and reporting to the Australian Parliament. As an officer of the Parliament, the Auditor-General also considers audit requests from members and senators, as well as from parliamentary committees.

While the Auditor-General and officials from the Australian National Audit Office (ANAO) routinely appear before the Finance and Public Administration Legislation Committee during estimates hearings, ANAO officials also appeared before the Environment and Communications Legislation Committee on two separate occasions and answered questions related to:

- a request for an audit of a \$40 million grant to Fox Sports for the purpose of broadcasting women's sport

- a request for an audit of the federal government’s spending on offsets for the Western Sydney airport
- NBN Co.’s Annual Report
- the performance audit report on referrals, assessments and approvals of controlled actions under the *Environment Protection and Biodiversity Conservation Act 1999*
- a report on implementation of the Great Barrier Reef Foundation Partnership.

While the last-mentioned report concerned a Commonwealth grant to a non-government entity, the *Auditor-General Act 1997* empowers the Auditor-General to conduct a performance audit of a “Commonwealth partner”, that is, an entity which receives Commonwealth money for a particular purpose.

RELATED RESOURCES

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[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.aph.gov.au/senate

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