DEPARTMENT
OF THE SENATE

Procedural Information Bulletin

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For the sitting period 22 November to 2 December 2021

The Senate and senators

On 29 November the Leader of the Opposition in the Senate moved a condolence motion for the late Senator Alex Gallacher, a senator for South Australia since 2010.The then President informed the Senate of Senator Gallacher's passing in August, however, the condolence was deferred until more senators could attend, given recent public health restrictions. After senators supported the condolence, the Senate adjourned as a mark of respect.

On 1 December the Senate agreed to the government's proposed calendar of sittings and estimates hearings for 2022; much of it speculative as the timing of the federal election is unknown. The program incorporates the earliest ever Budget day – 29 March – before which the Senate will only meet for 3 days plus a week of estimates hearings. A proposal from the Australian Greens to add two sitting weeks in early March was not supported.

On 2 December Greg Mirabella was chosen by a joint sitting of the Houses of the Victorian Parliament to fill the casual vacancy caused by the resignation of Senator the Hon. Scott Ryan. The timing did not allow the new senator to be sworn in, however, he was appointed to several committees.

Setting the standard

The report of the Human Rights Commission Review of Commonwealth Parliamentary Workplaces (the Jenkins Review) was tabled on 30 November. The report records the shocking incidence of bullying, harassment, sexual harassment and alleged sexual assault across political offices and parliamentary workplaces. The Review was asked to make recommendations to ensure that Commonwealth parliamentary workplaces are safe and respectful and that the nation's Parliament reflects best practice in preventing and responding to such conduct. Its 28 recommendations range across measures to:

- advance gender equality, diversity and inclusion
- develop and implement codes of conduct where they do not already exist
- expand and embed the parliament's nascent independent complaints mechanism
- create new services to advise on parliamentarian staffing and culture, and to underpin safety, health and wellbeing in parliamentary workplaces
- professionalise management practices for parliamentarians' staff and review the legislation under which they are employed to reflect modern employment frameworks
- review other elements of the parliamentary landscape, including parliamentary procedures, to promote inclusion and improve safety and respect.

Above all, the report calls for the leadership necessary to prevent and respond effectively to bullying, sexual harassment and sexual assault. It recommends a framework for action and a timeframe for the implementation of different measures, stretching across the next 18 months.

Pairing and transparency

'Pairing' is an informal arrangement:

> whereby a senator who is absent and who is expected to vote on one side in a particular question is "paired" with a senator who is expected to vote on the other side and who is either also absent or who deliberately does not vote in order to cancel out the effect of the other senator's absence. [*Odgers' Australian Senate Practice*, 14th ed., p. 293]

The rationale is that decisions of the Senate should not be determined by misadventure or by the fortuitous absence of a senator, but should reflect the composition of the Senate as elected. Extended pairing arrangements have been in place during the pandemic, as the rules adopted to allow senators to participate by video link do not allow them to vote. Those rules were adopted again this fortnight.

On 1 September last year, the Leaders of the Government and Opposition in the Senate made statements affirming the desirability of maintaining pairs and indicating their agreement on steps to ensure the transparency of pairing arrangements, particularly where all members of one party were participating remotely. The agreement rested on senators seeking a pair providing written instructions to that effect.

Further questions about transparency in pairs arose during the fortnight when two government senators indicated they would not vote with the government. At first the scope of their intentions was not clear, but each later provided statements indicating they would withhold their votes on legislative, but not procedural, matters. Those statements were tabled on 24 November. Crossbench senators later initiated a Procedure Committee reference into pairing arrangements, which is slated to report in February.

Legislation

During the consideration of private senators' bills on 22 November, five government senators crossed the floor to support a bill from Pauline Hanson's One Nation (PHON) to prohibit what its explanatory memorandum describes as 'discrimination on the basis of whether a person has received a COVID-19 vaccination'. Although the second reading was defeated 5 votes to 44, the bill was later 'restored to the *Notice Paper*' (effectively, reintroduced). Multiple attempts to have it referred for committee examination were defeated on equally-divided votes.

In the first sitting week, the government had moved for the PHON bill to be considered, rather than a bill introduced by government backbencher Senator McMahon. The Opposition returned the favour in the second week, giving its own time to Senator McMahon's bill, which seeks to restore the capacity of the Northern Territory Parliament to debate and pass assisted-dying laws. The Opposition also circulated amendments to extend the bill to the Australian Capital Territory, although further debate was adjourned until next year. The Parliament last debated a bill on these matters in 2018: see Bulletins 326 and 327.

The loss of two government votes on legislative matters (see above) made it all but impossible for the government to pass legislation without the support of the Opposition or the Australian Greens, so the government's program largely comprised its less controversial bills. Some 25 bills were passed by the Senate, with government, opposition and crossbench amendments here and there.

Opposition amendments to a Treasury bill removed provisions that would have reduced eligibility for certain taxation offsets for local screen industry productions. The government opposed the amendments in the Senate, but accepted them in the House, reportedly out of concern it might lose the vote to reject them.

The Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021 was agreed to with opposition and Australian Greens amendments, including a change in title to reflect its inspiration by similar legislative schemes internationally. Like those schemes, the bill provides for the imposition of sanctions and travel bans on individuals including for serious human rights violations or corruption. The government's bill responded to recommendations of an unanimous report of the Joint Standing Committee of Foreign Affairs Defence and Trade on its inquiry into the use of sanctions to target human rights abuses as well as an earlier private senator's bill proposing a stand-alone scheme. Debate on the bill revealed the broad cross party support this proposal had received.

Four bills were passed under a guillotine on 1 December, including one – the Electoral Laws Amendment (Political Campaigners) Bill 2021 – without debate. Wide-ranging government amendments were agreed to with opposition support, despite criticism that they essentially passed without scrutiny. Amendments from the crossbench were unsuccessful. Some of those amendments raised some interesting questions about the requirement for relevance.

Relevance of amendments

The standing orders require that amendments be 'relevant to the subject matter of the bill': so 118(1). Odgers notes that the requirement 'is interpreted liberally, so that senators have the maximum scope to move amendments' and that '[t]he long title of a bill can be taken as an indication of its subject matter, but does not conclusively determine that question': 14th ed., p. 331.

The political campaigners bill was one in a recent run of electoral amendment bills that appear to have been crafted to limit the scope of amendments that might be proposed in the Senate by confining the subject matter of the bill. The bill had the long title 'A Bill for an Act to amend the law relating to elections in respect of political campaigners and to provide for application of the amendments.' The provisions of the bill as introduced dealt specifically with those matters, and only those matters. The test of relevance would seem to require that amendments fall within the narrow scope indicated by the long title and the provisions of the bill as introduced. By contrast, earlier electoral bills – like the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 – have carried the long title 'A Bill for an Act to amend the *Commonwealth Electoral Act 1918*, and for related purposes'. The scope for amendments is clearly much wider, in that any amendment connected to that Act might be deemed relevant.

In the Senate, the requirement for relevance may be relaxed to a degree by an instruction to a committee (that is, a committee of the whole) 'to consider amendments which are not relevant to the subject matter of the bill but are relevant to the subject matter of the Act it is proposed to amend': so 150(2). An instruction requires notice (so 151) and may be moved after the bill is read a second time: so 115(2)(b). The practice has arisen of listing such notices on the *Notice Paper* as 'contingent notices of motion' although, for purists, contingent notices deal only with proposals to suspend standing orders. One practical difference is that the time limits that apply to motions to suspend standing orders do not apply to motions proposing instructions.

Senator Patrick had circulated amendments that appeared not to be relevant to the subject matter of the political campaigners bill as introduced and gave notice of a motion to instruct the committee to consider them. His notice was in order, as the circulated amendments were relevant to the

Commonwealth Electoral Act; the Act the bill proposed to amend. However, prior to the consideration of the bill under the guillotine, Senator Patrick withdrew the notice.

A possible explanation for this is that that the bill had been amended in the House to add provisions that appeared to be not directly connected to political campaigners, although the long title was not amended to reflect that. This effectively turned the bill into a more generic electoral amendment bill. Senator Patrick may have been relying on an argument that his amendments were relevant to the subject matter of the bill as amended.

As the bill was considered in the Senate under a guillotine (rather than in committee of the whole), it may be that an instruction to the committee was no longer considered necessary or appropriate. The chair is required to put the question on any amendment circulated more than two hours before the time for debate expired: so 142(4). Senator Patrick may have been relying on the chair putting the question simply on the basis that the amendments had been circulated well in advance of the deadline. A senator concerned about the relevance of the amendments could have raised the matter as a point of order at that time. Had the amendments been accepted, that could have been taken as an indication that the Senate considered they were in order.

Privilege and investigative powers

On 24 November 2021 the Presiding Officers tabled a new memorandum of understanding struck with the Attorney-General and Minister for Home Affairs dealing with the execution of search warrants where parliamentary privilege is involved. The MOU and an associated AFP guideline are designed to ensure that law enforcement investigations are conducted without improperly interfering with the functioning of parliament, its committees and its members. They also ensure that parliamentarians and their staff are given a proper opportunity to raise claims of parliamentary privilege in relation to material that is obtained through the execution of a warrant.

The need to update the MOU and guideline had been identified in reports of the Senate Privileges Committee, and in recommendations and declaratory resolutions adopted by the Senate: see Bulletins 313 and 331. The President noted in a statement that more work was required to extend the approach of the MOU to the exercise of covert powers, particularly in relation to telecommunications data and the quarantining of material, while at the same time ensuring that agreed procedures do not unduly hamper investigations. The President said that negotiations on these procedures would be conducted in the next parliament.

Accountability orders and ‘National Cabinet’

The Senate takes the view that there is no category of documents that is immune from production and insists that it is for the Senate (and not the government) to determine claims to withhold documents in the public interest. In other words, witnesses do not have an independent discretion to withhold information. A series of resolutions beginning in 1975 emphasise this (see *Odgers’ Australian Senate Practice*, Chapter 19, under Orders to ministers and public interest immunity claims), including the order of continuing effect of 13 May 2009. That order provides that claims to withhold information or documents from a committee may only be raised on public interest grounds and must be supported by a statement specifying the harm to the public interest that could result from the disclosure of the information. The Procedure Committee has observed that the same principles apply in relation to Senate orders for the production of documents: Odgers 14th ed, Updates to 30 June 2021, Chapter 18, under Guidance on responding to orders.

On 23 November the Senate resolved that it 'will not countenance' public interest immunity (PII) claims made on the grounds that the provision of information related to the National Cabinet would reveal cabinet deliberations. The resolution also prevents committees accepting PII claims made on this ground. It was prompted by evidence at estimates that government decision-makers were disregarding an Administrative Appeals Tribunal finding that National Cabinet was not a committee of Cabinet for the purposes of the Freedom of Information Act (see Bulletin 357), and by ministers continuing to assert PII claims on this ground after they had been rejected by the Senate.

On 24 November the Senate made a further order requiring the production of documents in respect of which a PII claim had previously been made on the now 'unacceptable' national cabinet ground. However, in a statement by leave, the duty minister reiterated the government's view that national cabinet was established as a committee of cabinet and that its documents and deliberations should remain confidential. The statement identified cabinet confidentiality as 'a longstanding principle of the Westminster system of government and a well-established ground for a claim of public interest immunity with respect to orders by the Senate, both of which are correct. However, it went on to say:

> The release of documents required by any Senate order, committee resolution or question on notice to which a public interest immunity claim has been made on the grounds of their being related to deliberations of national cabinet would unacceptably breach the convention of cabinet confidentiality, which ought to be respected by the Senate.

The statement reflects the 'bad old days' of Crown Privilege, when a minister's claim that a document ought not be provided was considered to be conclusive. The Senate has repudiated that approach in the series of resolutions mentioned above, and particularly in the 2009 order, initiated by the Coalition parties while in opposition.

So far as the Senate is concerned, a public interest immunity claim does not have the status of a conclusive certificate. It is not a get out of jail free card. Rather, it provides vehicle for seeking to persuade the Senate that the balance of the public interest in a particular matter lies with the government's claim for confidentiality rather than with the Parliament's right to know. For that reason, a PII claim should contain sufficient information to enable the Senate to determine the claim.

Despite the recourse to language of conventions or long-standing practice, the processes for seeking to withhold documents on the basis they would reveal the deliberations of cabinet are the same processes that apply in respect of other documents. If the Senate (or a committee) is not persuaded that the claimed public interest ground applies (for instance, because the connection to cabinet deliberations has not been demonstrated), it may reject the claim. If the Senate (or a committee) finds that the apprehended harm to the public interest stated in the PII claim does not justify the document being withheld, it may reject the claim. If the Senate (or a committee) is not provided with enough information to determine where the public interest lies, it may reject the claim.

In any case, the government's statement, and its failure to comply with the order of 24 November, prompted Senator Patrick to give notice of a motion to reject that response, again require compliance, and propose procedural restrictions on the relevant ministers. That motion was not reached on the final sitting day. On four occasions during the fortnight Senator Patrick also asked the Leader of the Government in the Senate to explain why questions on related matters had gone unanswered, debating each time the minister's responses.

Other accountability orders

The well-trod path of meeting ministers' refusal to comply with Senate orders for documents with a requirement to attend the Senate to explain why was trod again three times during the fortnight, in

relation to Centrelink's income compliance program (through recommendations in its fifth interim report), the urban infrastructure fund and documents sought by the COVID-19 Select Committee (see third interim report). The explanations – which were vigorously debated – invariably repeated public interest immunity claims implicitly or explicitly rejected by the Senate or Senate committees, to the consternation of the proponents of the orders.

The cumulative list of orders and responses can be found on the Senate's business pages.

Privilege matters

On 30 November the President made a statement granting precedence to a matter of privilege raised by the Chair of the Community Affairs References Committee, connected to that committee's long-running inquiry into Centrelink's income compliance program. The matter involves the failure of the government to provide information sought by the committee and orders by the Senate to be produced, relying on public interest immunity claims that have been explicitly rejected by the committee and by the Senate. The chair gave a notice of motion seeking to have the matter referred to the Privileges Committee for investigation as a possible contempt, which is listed for the first sitting day next year.

Two similar matters have been referred to the Privileges Committee this year: see Bulletins 354, 356 and 358. The committee reported on one of those matters in its 181st report, tabled on 30 November, relating to Senate orders requiring the Tax Commissioner to publish information about entities in receipt of JobKeeper payments. In a nuanced report, the committee accepted that the public interest immunity grounds put forward by the commissioner reflected genuine concerns related to the administration of the taxation system, while suggesting that the Treasurer's intervention had 'served to delay an acceptable resolution.' The committee went on to say:

> A sounder approach, in circumstances where an order is directed at an independent statutory officer, would have been to allow time for that officer to engage in negotiations with the proponents of the Senate order to provide the information in a manner which addresses any legitimate public interest concerns.

Acknowledging the commissioner's submission that an acceptable compromise might be possible, the committee said that it was reluctant to recommend a contempt where there was a genuine prospect of resolving the matter through negotiation. The committee left it open to the Senate to refer the matter again if the commissioner does not provide the information in a manner acceptable to the Senate.

Motions

On 2 December, the recent temporary orders restricting the kinds of matters that may be dealt with as formal business were made permanent, with minor changes to clarify their application.

On several occasions senators sought to suspend standing orders to allow debate and a vote on procedural and policy matters, including on climate change, violent protests, and progressing legislation for a federal integrity commission. Two suspension motions were proposed at the commencement of business on 30 November. The President reminded senators of the rule against the use of repeated suspension motions to frustrate Senate business, exercised his discretion to allow the second motion, but indicated that a third suspension motion would not be entertained.

Disallowance

If a disallowance motion is not dealt with within the period prescribed by the *Legislation Act 2003*, section 42(2) of that Act provides that the instrument in question is deemed to be disallowed.

The Senate has consistently indicated a preference for having such matters determined by a vote, rather than by default, and it is now routine for the government to move to bring on disallowance motions for a limited debate on the final day for them to be resolved. Three such motions were agreed to during the period. Debate on a motion to disallow the Industry Research and Development (Beetaloo Cooperative Drilling Program) Instrument 2021 began on 24 November without a time limit. However, on the final day for the motion to be determined, the Senate agreed to limit the remaining debate and the disallowance motion was defeated.

The fortnight saw some interplay between disallowance notices proposed by the Scrutiny of Delegated Legislation Committee and those proposed by senators.

The chair of the committee had given notice of a motion to disallow the Industry Research and Development (Carbon Capture, Use and Storage Development Program) Instrument 2021 and, on 22 November, gave notice of her intention to the withdraw it the following day. The next morning, Senator Waters objected to the withdrawal and took over the committee's notice. This process, which is in standing order 78, preserves the rights of senators to move a disallowance motion where the 15-day time limit for giving a new disallowance notice has expired. In the end, the disallowance was negatived.

On 25 November, on the motion of Senator Patrick, the Senate disallowed the Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021, which sought to alter the governance standards applying to charities. The chair of the committee had also given notice of a motion to disallow the regulations, because of concerns about the conferral of broad discretionary powers and the possible impact of the regulations on the implied freedom of political communication: see *Delegated Legislation Monitor 14 of 2021*. After the regulations were disallowed the committee's notice was removed from the *Notice Paper*, as it could serve no further purpose. This can be distinguished from the situation in which a Senate disallowance notice remains to be resolved in respect of an instrument that has been repealed or disallowed in the House of Representatives. In that case the notice remains on the Senate Notice Paper until determined or withdrawn: see *Odgers'*, 14th edition, p. 447.

Amendments to bills are usually circulated by senators in their own capacity or on behalf of their party. On 2 December the Chair of the Delegated Legislation Committee circulated amendments to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 on behalf of the committee. The amendments would make future legislative instruments made under the *Biosecurity Act 2015* subject to disallowance. This would include, for example, instruments such as those which imposed the overseas travel ban on Australian citizens and permanent residents during the COVID-19 pandemic. The bill remains on the Notice Paper for consideration next year.

Direction to a committee

The Senate agreed to a motion that directed the Environment and Communications Legislation Committee to suspend an inquiry into complaints handling arrangements of the Australian Broadcasting Corporation and the Special Broadcasting Service that the committee had established under standing order 25(2)(a)(v). The motion had the effect of pausing the committee's inquiry until the independent review of the ABC's complaints system has been completed.

Inquiries

Seven bills and two bills packages were referred to legislation committees as a result of Reports 13 and 14 of 2021 of the Selection of Bills Committee. A stalemate arose over proposals to refer a package of religious discrimination bills to the Legal and Constitutional Affairs Legislation Committee.

On 25 November the government's proposal failed on an equally divided vote, because opposition and crossbench proposals to extend the reporting date did not find support. On 2 December the bills were referred, with the government's original reporting date. In the meantime they had also been referred by the Attorney-General to the Joint Parliamentary Committee on Human Rights. Both committees are to report on 4 February 2022.

The matter of missing and murdered First Nations women and children was referred to the Legal and Constitutional Affairs References Committee for inquiry and report by 30 June 2022.

Reports

The Finance and Public Affairs References Committee tabled a report on lessons to be learned in relation to the Australian bushfire season 2019-20, and a report on the administration and expenditure of funding under the Urban Congestion Fund. This committee also tabled a report on the current capability of the Australian Public Service. The Parliamentary Joint Committee on Corporations and Financial Services tabled three reports—including a report on the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 which was referred the following week to the Economics Legislation Committee for a subsequent inquiry and report.

The Joint Select Committee on Australia's Family Law System tabled a third interim and a final report. The third interim report focused on the child support system, while the final report made recommendations directed towards expanding two Family Court trial programs; one that addresses family violence, and the other dealing with certain property disputes. The recommendations also encouraged the government to ensure that appropriate resources are provided to the Federal Circuit and Family Court of Australia.

The Select Committee on Job Security tabled its third interim report on labour hire and contracting, and the Joint Standing Committee on the National Disability Insurance Scheme tabled reports on general issues, and on the NDIS Quality and Safeguards Commission.

Four bill reports were tabled, and the Rural and Regional Affairs and Transport References Committee tabled a report on the *Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Act 2021.*

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.aph.gov.au/senate

Inquiries: **Clerk's Office (02) 6277 3364**