



**Australian Government**

**Department of the Prime Minister and Cabinet**

**ONE NATIONAL CIRCUIT  
BARTON**

Reference:

Mr Richard Pye  
Secretary  
Senate Standing Committee of Privileges  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Mr Pye

**SENATE PRIVILEGES COMMITTEE INQUIRY**

On 2 June 2011, the Department of the Prime Minister and Cabinet provided a submission to the Committee which foreshadowed a review of the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (the Guidelines).

I am pleased to provide the Committee with a copy of the revised Guidelines.

Officials from this Department are available to assist the Committee with its inquiry, if necessary.

Yours sincerely

A handwritten signature in black ink that reads "Renee Leon". The signature is fluid and cursive, with the first name "Renee" being larger and more prominent than the last name "Leon".

Renee Leon  
Deputy Secretary  
Governance

8 February 2012

**GOVERNMENT GUIDELINES FOR OFFICIAL WITNESSES  
BEFORE PARLIAMENTARY COMMITTEES AND  
RELATED MATTERS – FEBRUARY 2012**

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## **1. INTRODUCTION**

### **1.1. Application and scope of the *Guidelines***

1.1.1. The *Guidelines* are designed to assist departmental and agency officials, statutory office holders and the staff of statutory authorities in their dealings with the parliament. The term 'official' is used throughout the *Guidelines*; it includes all persons employed by the Commonwealth who are undertaking duties within a Commonwealth department or agency (whether employed under the *Public Service Act 1999* or other legislation) and those in government business enterprises, corporations and companies. It is recognised, however, that the role and nature of some statutory office holders and their staff will require the selective application of these *Guidelines*, depending on the individual office holder's particular statutory functions and responsibilities (see paragraph 2.9).

1.1.2. Contractors and consultants to departments and agencies and other individuals who are invited to give evidence to a parliamentary committee will also find these *Guidelines* useful.

1.1.3. While the *Guidelines* apply primarily to the preparation of submissions and the giving of oral evidence, parts 7 to 11 cover certain other matters related to the parliament. The *Guidelines* should also generally apply to submissions to and appearances before other public inquiries, such as royal commissions, and to the preparation and presentation of speeches by officials in their official capacity (for further information on the involvement of APS employees in public information initiatives, see *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads* (section 1: Relationship with the Government and the Parliament), published by the Australian Public Service Commission.

### **1.2. Powers of the parliament**

1.2.1. There are obligations and protections that govern anyone who volunteers or is required to provide information to the parliament. These obligations and protections flow primarily from the Constitution and the *Parliamentary Privileges Act 1987*, supplemented by privilege resolutions adopted by both the Senate and the House of Representatives and by the Standing Orders of both houses. While very rarely called upon, the parliament has the power to impose penalties for contempt (see sections 5.1. and 5.2 on parliamentary privilege and contempt of parliament below).

1.2.2. The *Guidelines* detail obligations and protections, providing references and links to primary documents.

### **1.3. Accountability**

1.3.1. A fundamental element of Australia's system of parliamentary government is the accountability of the executive government to the parliament. Ministers are accountable to the parliament for the exercise of their ministerial authority and are responsible for the public advocacy and defence of government policy. Officials are accountable to ministers for the administration of government policy and programs. Officials' accountability regularly takes the form of a requirement for them to provide full and accurate information to the parliament about the factual and technical background to policies and their administration.

1.3.2. The most common ways that officials will be required to answer directly to the parliament is through submissions to and appearances before committees. They may also be required to support ministers' accountability by, for example, drafting answers to parliamentary questions, advising a minister during the debate on legislation in the parliament or assisting a minister in responding to an order by one of the houses to produce documents.

1.3.3. The Guidelines are intended to assist in the freest possible flow of information to the parliament.

### **1.4. Types and powers of committees**

1.4.1. Parliamentary committees may be established by the Senate, the House of Representatives, jointly by the two houses or by legislation. They have either an ongoing role (statutory and standing committees) or are established for a specific purpose (select committees).

1.4.2. Appearance as a witness before a Senate legislation committee conducting hearings into the Appropriation Bills (i.e. Senate estimates hearings) is the most common situation in which officials will appear before a parliamentary committee.

1.4.3. The functions and powers of parliamentary committees derive from enabling statutes, resolutions or the standing orders of the houses. Committees are generally established and empowered, among other things, to:

(a) seek submissions and documents and invite persons to give evidence in relation to matters under consideration

(b) summon witnesses and require the production of documents in relation to those matters.

1.4.4. The operations of joint statutory committees are governed by the relevant legislation (e.g. the *Public Accounts and Audit Committee Act 1951*, the *Public Works*

*Committee Act 1969* and the *Australian Security Intelligence Organisation Act 1979*). Select committees are governed by the resolutions which establish them.

## **1.5. Types of witnesses**

1.5.1. Officials can make submissions and appear as witnesses in an official capacity or in a personal capacity. Within these two broad categories there are distinctions that affect the clearance of submissions, selection of witnesses and preparation for appearances before committees. Depending on the nature of the inquiry that the committee is undertaking, the same officials can fall into either or both of these categories.

### *Official witnesses*

1.5.2. Most often, officials will make submissions or appear before committees as representatives of their departments or agencies to explain the administration and implementation of government policies and programs. For those witnesses, the Guidelines provide details of procedures for the clearance of submissions, choice of witnesses and consultation ahead of committee hearings.

1.5.3. There are circumstances, however, where those procedures would not be appropriate. On occasion witnesses may choose or be required to give personal accounts of events or conduct that they have witnessed. This situation can arise in the course of any committee hearing but will most often arise when a committee is inquiring into a particular event and the accounts of individuals witnesses are required to allow the committee to ascertain the facts surrounding the event. In such cases, witnesses must not have requirements placed upon them that might deter them from giving evidence or cause them to feel constrained about the nature or content of their evidence. Part 3 of the *Guidelines* provides information about the approach to be adopted in cases where witnesses have had direct involvement in or have direct knowledge of events under inquiry.

1.5.4. It is, of course, possible that the same person may appear to explain the way that a particular program is administered and to provide an account of an event that may have occurred in the administration of the program.

### *Personal witnesses*

1.5.5. Officials may also make submissions and appear as witnesses in a personal capacity. Guidance on contributions by officials appearing in a personal capacity is in Part 6.

## **2. PRELIMINARIES TO A COMMITTEE INQUIRY**

### **2.1. Requests for written material and attendance**

2.1.1. Without providing an exhaustive list, requests for submissions to or for the attendance of an official at a committee hearing in an official capacity may be made to one of the following:

- (a) the relevant minister
- (b) the relevant departmental secretary or agency head
- (c) an official who previously appeared before the committee in relation to the matter being considered
- (d) an official who has been identified by a committee as a person who could assist the committee in establishing facts about a particular event

2.1.2. There are exceptions to these formal requests e.g. for Senate estimates committees hearings.

2.1.3. Committees often advertise publicly for written submissions from interested persons and organisations.

2.1.4. A witness may first be invited to give evidence or produce documents, but a committee has the power to summon a witness if it considers circumstances warrant such an order. This is a rare occurrence, however, and departments are requested to bring any cases of an official receiving a summons to the attention of the Department of the Prime Minister and Cabinet (see Part 11 for contacts).

### **2.2. Preparation of submissions**

2.2.1. If appropriate, departments and agencies making formal submissions should provide them in a written form; subsequent oral evidence would, if required, be based on the written submission but could also encompass other matters.

### **2.3. Matters of policy in submissions**

2.3.1. Submissions:

- (a) should not advocate, defend or canvass the merits of government policies (including policies of previous Commonwealth governments or state or foreign governments)
- (b) may describe those policies and the administrative arrangements and procedures involved in implementing them



- (c) should not identify considerations leading to government decisions or possible decisions unless those considerations have already been made public or the minister authorises the department to identify them
- (d) may, after consultation with the minister, and especially when the government is encouraging public discussion of issues, set out policy options and list the main advantages and disadvantages, but should not reflect on the merits of any judgement the government may have made on those options or otherwise promote a particular policy viewpoint.

## **2.4. Clearance of submissions by minister**

2.4.1. Submissions should be cleared to appropriate levels within the department or agency, and normally with the minister, in accordance with arrangements approved by the minister concerned.

2.4.2. Where a committee seeks comments on the merits of government policies, it is for ministers to respond by making written submissions, by appearing personally or arranging for ministers representing them to appear personally, or by inviting committees to submit questions on policy issues in writing.

2.4.3. Part 3 provides guidance in relation to officials giving evidence of personal knowledge of or involvement in events. Part 6 covers evidence given in a personal capacity.

## **2.5. Declining to make a submission**

2.5.1. There may be occasions where a department is requested by a committee to make a submission and considers it inappropriate to do so e.g. where the issue being examined is administered by another department. In such cases it would be appropriate for the departmental secretary or agency head, or the official to whom a request was addressed, to write to the committee advising that the department does not intend to make a submission. If a committee persists with its request for a written submission, the department or agency may wish to seek the minister's views.

## **2.6. Requests for more time to prepare evidence**

2.6.1. If the notice is considered insufficient, the minister (or the department on the minister's behalf) may ask a committee for more time to prepare evidence. The Senate resolutions provide for a witness to be given reasonable notice and an indication of the matters expected to be dealt with (Senate resolution 1.3).

## **2.7. Confidentiality of submissions and draft reports of committees**

2.7.1. The release of submissions and the receipt of draft committee reports without the authority of a committee is prohibited by the *Parliamentary Privileges Act 1987* and may be judged as a contempt of the parliament. (See sections 5.1 and 5.2.)

2.7.2. It is sometimes necessary for the executive government to draw on contributions from various departments and agencies in order to provide accurate and comprehensive information. In such cases, draft submissions must be circulated between relevant agencies. The final submission may be made available to contributing departments and agencies at the time the submission is sent to the committee. Once forwarded to a committee, however, written submissions are confidential until the committee authorises their release or publication (see Senate Standing Order 37, House of Representatives Standing Order 242). Material in submissions may be used for other purposes, but the actual submission must not be published without the committee's approval.

2.7.3. Similarly, a draft report of a committee prepared for its own consideration is the property of the committee and must not be received or dealt with except with the committee's authority. If an official receives a draft report, it should be returned promptly to the committee through the committee secretary, either directly or by returning it to the individual who provided it, who should be informed of the requirement to return it.

## **2.8. Choice of witnesses**

2.8.1. A minister may delegate to a departmental secretary or agency head the responsibility for deciding the officials most appropriate to provide the information sought by a committee. It is essential that the officials selected have sufficient knowledge and authority to be able to satisfy the committee's requirements. Where the matter before the committee involves the interests of several departments or agencies, it would be appropriate to inform the committee secretary (after consulting the other departments or agencies) so the committee can arrange for other witnesses to appear if required.

2.8.2. Where a committee specifically requests an official to appear and the official is unavailable or the department considers it more appropriate that another official appear, it is desirable to advise the committee in advance and indicate the reason e.g. that another official or another department is now responsible for the matter in question. That course is likely to be inappropriate if the specified official has direct knowledge of an event under inquiry (see paragraph 1.5.3 and Part 3).

## **2.9. Official witnesses from statutory authorities**

2.9.1. Both Houses regard statutory office holders and the staff of statutory authorities as accountable to the parliament, regardless of the level of ministerial control of the authority.

Most of them should comply with the usual rules about canvassing the merits or otherwise of policies. However, a number of statutory office holders and authorities, particularly those with statutory responsibilities for promoting good practice in particular fields or protecting the interests of individuals or groups, may provide comment to committees on policies relevant to their areas of responsibility to the extent that the functions of their office properly permit that role. In doing so, they should take care to avoid taking partisan positions.

## **2.10. How to prepare as a witness**

2.10.1. All witnesses should be thoroughly prepared for hearings. Preparation should include ensuring familiarity with probable lines of questioning by discussion with the committee secretariat or by examining Hansard (for parliamentary questions and previous, related inquiries) and other sources, including the media. Officials who have not previously attended committee hearings should be briefed on the requirements and should consider training offered by the Australian Public Service Commission and by the Departments of the Senate and the House of Representatives. Senior officials should satisfy themselves, as far as possible, that all witnesses are capable of giving evidence in a professional manner.

## **2.11. Senate and House of Representative resolutions**

2.11.1. All officials appearing before Senate committees should also make themselves aware of the Senate resolutions relating to the rights of witnesses (Senate resolutions 1.1-1.18) and matters which may be treated as a contempt of the Parliament (Senate resolutions 3 and 6.1- 6.16). Officials appearing before the House of Representatives Committee of Privileges should be aware of the resolution adopted by the House on 25 November 2009 in relation to the protection of witnesses (available at: <http://www.aph.gov.au/house/pubs/standos/pdf/resolutions.pdf>).

## **2.12. Consultation with ministers ahead of hearings**

2.12.1. The extent of consultation with ministers when preparing for hearings may vary depending on the committee and capacity in which a witness is appearing. For Senate estimates committee hearings, it is usual for officials to provide the minister, or the minister's representative in the Senate, with a list of significant matters on which the department or agency is likely to be questioned and with copies of briefing if the minister wishes. Regardless of the type of committee, witnesses should alert the minister before a hearing if it is likely that a claim of public interest immunity (PII) will be required (see sections 4.4 to 4.11). In most cases, ministers should also be given advance notice by officials of likely requests for the hearing of evidence *in camera* (see section 4.12), although official witnesses who will give personal accounts of an event (see Part 3) are under no obligation to indicate that they intend to request an *in camera* hearing.

### **3. OFFICIALS GIVING EVIDENCE OF EVENTS OR CONDUCT**

3.1.1. Parliamentary committees are occasionally established to inquire into particular events. Officials whose personal accounts of events or conduct are relevant to the inquiry should prepare themselves for the hearing in much the same way as officials appearing in a representative capacity (see paragraph 2.10) by, for example, considering what questions might be asked, reviewing files and contemporaneous notes about the event and attempting to recall their experiences as exactly as possible. While these witnesses may choose to advise the minister or the departmental or agency executive before making a submission or attending a hearing, they should not be required to do so, nor should they be required to clear the content of their submissions or intended evidence.

3.1.2. An official who is appearing in relation to a particular event should, like all official witnesses, be aware that they might need to restrict the evidence they give (see paragraph 4.2). It is possible, for example, that certain information relevant to an inquiry should properly remain confidential (see sections 4.4 to 4.11). In this situation, the official should discuss the proposed evidence with senior officials familiar with the subject matter so as to ascertain whether the minister should be given an opportunity to consider making a PII claim in respect of the information.

3.1.3. Officials giving evidence about particular events are entitled to request that their submissions and oral evidence remain confidential. This may be appropriate if the subject matter of the inquiry or the proposed evidence is inherently confidential (e.g. if it is related to defence capabilities and a PII claim is not being made), if the evidence would be damaging to personal reputations, or if the witness does not wish his or her identity to be made public.

3.1.4. Officials who intend to give evidence about their personal experiences or observations should be careful, if they discuss their intended evidence with other officials or potential witnesses, to avoid creating the perception that they are trying to influence those other witnesses or being influenced by them.

3.1.5. As indicated in paragraph 1.54, it is possible for the same official to be required to give evidence to the same inquiry both to explain the way a program is administered and to provide an account of an event that might have occurred in the administration of the program. In such cases, the witness needs to follow the appropriate clearance procedures for evidence relating to his or her evidence as a representative of the department or agency, while at the same time avoiding inappropriate processes in preparing to give evidence about his or her personal knowledge of the event or conduct in question.

## **4. CONDUCT OF HEARINGS BY COMMITTEES**

### **4.1. General Principles**

4.1.1. As indicated above (paragraph 1.3.3), it is intended, subject to the application of certain necessary principles, that there be the freest flow of information between the public sector and the parliament. To that end, officials should be open with committees and if unable or unwilling to answer questions or provide information should say so and give reasons. It is also incumbent upon officials to treat parliamentary committee members with respect and courtesy. Officials who consider that a question or statement made by a committee member reflects unfairly on them can seek assistance from either the minister or the committee chair. (See also section 5.7 on Right of Reply.)

### **4.2. Limitations on officials' evidence**

4.2.1. There are three main areas in which officials need to be alert to the possibility that they may not be able to provide committees with all the information sought or may need to request restrictions on the provision of such information. These are:

- (a) matters of policy
- (b) material that may be the subject of a PII claim
- (c) information where in camera evidence is desirable.

### **4.3. Matters of policy in oral evidence**

4.3.1. It is not the role of an official witness to give opinions on matters of policy. It is the role of an official witness to speak to any written submission provided to the committee and to provide, in answer to questions, factual and background material to assist the understanding of the issues involved. The detailed rules applying to written submissions also apply to oral evidence. Not all restrictions necessarily apply to statutory officers (see paragraph 2.9).

4.3.2. The Senate resolutions (see paragraph 2.11) provide that, "an officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister" (resolution 1.16).

4.3.3. Senate resolutions also prescribe the procedure by which a witness may object to answering "any question put to the witness" on "any ground" (resolution 1.10). This would include the ground that the question requires the witness to give an opinion on a matter of policy contrary to Senate resolution 1.16. In such a situation an official may ask the person

chairing the committee to consider whether questions which fall within the parameters of policy positions are in order.

4.3.4. If an official witness is directed to answer a question that goes to the merits of government policy and has not previously cleared the matter with the minister, the official should ask to be allowed to defer the answer until such clearance is obtained. Alternatively, it may be appropriate for the witness to refer to the written material provided to the committee and offer, if the committee wishes, to seek elaboration from the minister or to request that the answer to a particular question be reserved for submission in writing.

#### **4.4. Public interest immunity**

4.4.1. While the parliament has the power to require the giving of evidence and the production of documents, it has been acknowledged by the parliament that the government holds some information which, in the public interest, should not be disclosed.

#### **4.5. Claims to be made by ministers**

4.5.1. Only ministers, or in limited circumstances statutory office holders, can claim that information should be withheld from disclosure on grounds of PII. However, committees, and especially Senate estimates committees, receive most of their evidence from officials, and it is officials who are most likely in the first instance to be asked to provide information or documents that might be the subject of a PII claim. Officials need in particular to be familiar with the Senate Order of 13 May 2009 on PII claims (see Attachment A).

4.5.2. It is important that the public interest is not inadvertently damaged as a result of information or documents being released without a proper assessment of the possible consequences. Officials who consider that they have been asked to provide information or a document (either by way of a submission or in a hearing) that might properly be the subject of a PII claim should either:

- (a) advise the committee of the grounds for that belief and specify the damage that might be done to the public interest if the information or document were disclosed;  
or
- (b) ask to take the question on notice to allow discussion with the minister.  
A committee would be expected to allow an official or minister at the table to ascertain the portfolio minister's views on the possible release of the information or document or seek further advice on whether a PII claim was warranted.

4.5.3. If a minister concludes that it would not be in the public interest to disclose the information or document, a statement should be provided to the committee setting out the

ground for that conclusion and specifying the harm to the public interest that could result from the disclosure of the information or document.

4.5.4. Where practicable, decisions to claim PII should take place before hearings, so that the necessary documentation can be produced at the time. The normal means of claiming PII is by way of a letter from the minister to the committee chair. The Department of the Prime Minister and Cabinet should be consulted on the appropriateness of the claim in the particular circumstances and the method of making the claim.

4.5.5. Before making a claim of PII, a minister or, in appropriate circumstances, a statutory office holder, might explore with a committee the possibility of providing the information in a form or under conditions which would not give rise to a need for the claim (including *in camera*, see section 4.12).

#### **4.6. Grounds for a PII claim**

4.6.1. There are several generally accepted grounds on which a minister or, in appropriate circumstances, a statutory office holder, may rely when claiming PII. For example, PII claims may be made in relation to information and documents the disclosure of which would, or might reasonably be expected to:

- (a) damage Australia's national security, defence or international relations
- (b) damage relations between the Commonwealth and the States
- (c) disclose the deliberations of Cabinet (other than a decision that has been officially published)
- (d) prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance
- (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source or information, in relation to the enforcement or administration of the law
- (f) endanger the life or physical safety of any person
- (g) prejudice the fair trial of a person or the impartial adjudication of a particular case
- (h) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures
- (i) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

4.6.2. The Senate Order of 13 May 2009 made it clear that committees will not accept a claim for public interest immunity based only on the ground that the document in question has not been published, is confidential, or is advice to or internal deliberations of government; a minister must also specify the harm to the public interest that may result from the disclosure of the information or document that has been requested. Further advice on the Senate Order and PII claims is at Attachment A.

4.6.3. If a minister concludes that a PII claim would more appropriately be made by a statutory office holder because of the independence of that office from ministerial direction or control, the minister should inform the committee of that conclusion. A statutory office holder might, for example, consider the disclosure of particular information would be likely to have such a substantial adverse effect on the proper and efficient conduct of the operations of his or her agency that it would be contrary to the public interest to disclose that information.

#### **4.7. Classified documents**

4.7.1. Documents, and oral information relating to documents, having a national security classification of 'confidential', 'secret' or 'top secret' would normally be within one of the categories in paragraph 4.6.1, particularly sub-paragraph 4.6.1(a). If, however, a document bearing such a classification is to be provided to a committee, an official should seek declassification of the document in accordance with relevant government policies. (Note that it does not follow that documents without a security classification may not be the subject of a PII claim. Nor does it follow that classified documents may not in any circumstances be produced. Each document should be considered on its merits and, where classified, in consultation with the originator.)

#### **4.8. Legal professional privilege and legal advice**

4.8.1. Legal advisers owe a duty to their clients not to disclose the existence or content of any advice. It would therefore be inappropriate for any official who has provided legal advice to government, who has obtained advice from an external lawyer or who possesses legal advice provided to another agency, to disclose that advice. All decisions about disclosure of legal advice resides with the minister or agency who sought and received that advice. The Attorney-General or the Attorney-General's Department must always be consulted about disclosure of constitutional, international and national security legal advice.

4.8.2. If asked by a committee, it will generally be appropriate for an official to disclose whether legal advice had been sought and obtained on a particular issue and, if asked, who provided the advice and when it was provided, unless there are compelling reasons to keep that information confidential. The content of the advice, however, should not be disclosed without the agreement of the minister.



4.8.3. While it has not been the practice for the government's legal advisers to provide advice to parliamentary committees, situations may arise during a hearing where a committee asks an official a question which amounts, in effect, to a request for legal advice. Officials should provide committees with such information as they consider appropriate, consistent with the general understanding that the Government's legal advisers do not provide or disclose legal advice to the parliament, and consistent more generally with these Guidelines. (It may be, for example, that officials are in a position to explain in general terms the intended operation of provisions of Acts or legal processes, particularly where this reflects the settled government view on the matter.)

#### **4.9. Freedom of information (FOI) legislation**

4.9.1. The *Freedom of Information Act 1982* (FOI Act) establishes minimum standards of disclosure of documents held by the Commonwealth. The FOI Act has no application as such to parliamentary inquiries, but it may be considered a general guide to the grounds on which a parliamentary inquiry may reasonably be asked not to press for particular information. The converse also applies. Any material which would be released under the FOI Act should (with the knowledge of the minister in sensitive cases or where the minister has a particular interest or has been involved) be produced or given to a parliamentary committee, on request. However, officials should bear in mind that, because of the Executive's primary accountability to the parliament, the public interest in providing information to a parliamentary inquiry may be greater than the public interest in releasing information under the FOI Act. In addition, the ability to provide information and documents to the parliament on a confidential basis might provide scope to release information that would not be appropriate for release under the FOI Act (see section 4.12). For a more detailed understanding of the exemption provisions, refer to the FOI Act and separate guidelines on its operation issued by the Australian Information Commissioner and the FOI Guidance Notes issued by PM&C (references and links to these documents are in Part 12).

#### **4.10. Commercial-in-confidence material**

4.10.1. There is no general basis to refuse disclosure of commercial information to the parliament, even if it has been marked 'commercial-in-confidence'. The appropriate balance between the interests of accountability (i.e. the public interest in disclosing the information) and appropriate protection of commercial interests (i.e. the public interest in the information remaining confidential) should be assessed in each case.

4.10.2. A Senate order, adopted on 30 October 2003, states that, 'the Senate and Senate committees shall not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is made by a

minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of the information.’

4.10.3. As a general guide, it is inappropriate to disclose information which could disadvantage a contractor and advantage competitors in their business operations. Further information about the circumstances in which a PII claim based on commercial-in-confidence information might legitimately be made, and about information that would normally be disclosed, is at Attachment B.

4.10.4. A department or agency receiving commercial information on the basis of undertakings of confidentiality does not automatically preclude release of that information to the parliament. Agencies should consider where, on balance, the public interest lies as part of their advice to the minister and may wish to seek the views of any person or organisation to whom undertakings were given about the possible release of the document.

4.10.5. In most cases, the sensitivity of commercial-in-confidence material diminishes with time and this should be taken into account when assessing the public interest balance.

4.10.6. As with any other PII claim, a claim around commercial-in-confidence information should be supported by reference to the particular detriment that could flow from release of the information.

#### **4.11. Secrecy provisions in legislation**

4.11.1. Some Commonwealth legislation contains secrecy provisions that protect certain information from disclosure except to specified persons or in specified situations. Examples include s.37(1) of the *Inspector-General of Taxation Act 2003*, which protects information relating to a taxpayer’s affairs; s.86-2 of the *Aged Care Act 1997* which protects information obtained under or for the purposes of that Act; and s.187(1) of the *Gene Technology Act 2000* which limits the provision of commercial-in-confidence information.

4.11.2. The existence of secrecy provisions in legislation does not provide an automatic exemption from providing information to the parliament unless it is clear from the provision that a restriction has been placed on providing information to a committee or a House of the parliament (section 37 of the *Auditor-General Act 1997* is an example). The fact that the parliament has included secrecy provisions in legislation suggests, however, that an official may be able to put to a committee a satisfactory case for not providing requested information, at least in public hearings. If the official’s case is not accepted by the committee and the official remains concerned about providing the information, it would be open to the responsible minister to make a PII claim in the manner outlined in sections 4.4 to 4.10.

4.11.3. In some instances it might be possible to meet a committee's request by removing information that identifies individuals.

4.11.4. Officials may wish to seek legal advice when a request for information covered by secrecy provisions is pressed by a committee.

#### **4.12. *In camera* evidence**

4.12.1. Witnesses may seek a committee's agreement to give evidence in a private session (i.e. *in camera*). Senate estimates committees, however, must conduct hearings in public.

4.12.2. It would be unusual for an official witness to seek to give evidence *in camera*, but it may be necessary in situations where:

- (a) a case could be made for a PII claim but the minister considers, on balance, that the public interest lies in making information available to the committee;
- (b) similar or identical evidence has previously been given *in camera* to other hearings of the committee or other committees of the parliament and has not been made public.

4.12.3. Requests for an *in camera* hearing would normally be made by the minister or by a witness after consultation with the minister and departmental secretary or agency head. Such consultation might not be appropriate, however, in the case of officials giving evidence of events or conduct, as described in Part 3.

4.12.4. It is important to be aware that committees (or the Senate or House or Representatives) are able to decide that evidence taken *in camera* or provided in confidential submissions should be published. Committees would usually inform a witness before publication, and possibly seek concurrence, but there is no requirement for that to occur.

4.12.5. If a committee seeks an official witness's concurrence to publish *in camera* evidence, the witness should ask the committee for time to allow him or her to consult the minister or the departmental secretary or agency head (noting that this may not be necessary if the witness is appearing in a personal capacity – see Section 6).

#### **4.13. Requests for evidence 'off the record'**

4.13.1. There is no category of 'off the record' provision of information to a committee and officials should not offer to brief committees or members in this way. In the event that an official is asked to provide information to members of a committee 'off the record' or in any manner that would not appear to be covered by parliamentary privilege, the official should request a postponement until the minister can be consulted, unless the possibility has been

clearly foreshadowed with the minister and the official has been authorised to provide the information.

4.13.2. Some committees, such as the Joint Committee on Public Accounts and Audit, frequently hold relatively informal, or roundtable, committee hearings. These hearings are usually recorded by Hansard and are in all cases covered by parliamentary privilege.

#### **4.14. Qualifying evidence**

4.14.1. During hearings, committees may seek information which could properly be given, but where officials are unsure of the facts or do not have the information to hand. In such cases, witnesses, if they choose not to take the question on notice, should qualify their answers as necessary so as to avoid misleading the committee and, if appropriate, undertake to provide additional or clarifying information. It is particularly important to submit such further material promptly.

#### **4.15. Taking questions on notice**

4.15.1. While it is appropriate to take questions on notice if the information sought is not available or incomplete, officials should not take questions on notice as a way of avoiding further questions during the hearing. If officials have the information, but consider it necessary to consult the minister before providing it, they should state that as a reason for not answering rather than creating the impression that the information is not available.

#### **4.16. Written questions and questions taken on notice**

4.16.1. Where a committee asks written questions, written replies should be provided through the committee secretary. It is common practice at Senate estimates committee hearings for questions to be taken on notice. Responses should be provided promptly to the minister for clearance so that answers can be lodged with the committee by its deadline. Where answers cannot be provided by the deadline, the committee should be advised when responses are expected to be available.

4.16.2. When the interests of several departments are involved, adequate consultation should take place in preparing material.

#### **4.17. Questions about other departments' responsibilities**

4.17.1. It is important that witnesses take care not to intrude on responsibilities of other departments and agencies (see also paragraph 2.7.2). Where a question falls within the administration of another department or agency, an official may request that it be directed to that department or agency or be deferred until that department or agency is consulted.

## **5. PROTECTION OF SUBMISSIONS AND WITNESSES**

### **5.1. Parliamentary privilege**

5.1.1. The act of submitting a document to a parliamentary committee is protected by parliamentary privilege (subsection 16(2)(b) of the *Parliamentary Privileges Act 1987*). Any publication of the submission other than to the committee, however, is protected by parliamentary privilege only if that publication takes place by or pursuant to the order of the committee, in which case the content of the document is also protected (subsection 16(2)(d) of the Act). The unauthorised disclosure of a document or evidence submitted to a parliamentary committee (that is, a disclosure not authorised by the committee or the House concerned) may be treated as a criminal offence under section 13 of the Act or as a contempt (Senate resolution 6.16.). (See also section 2.7.)

5.1.2. The protection of parliamentary privilege means that a person cannot be sued or prosecuted in respect of the act or the material protected, nor can that act or material be used against a person in legal proceedings.

### **5.2. Contempt of the parliament**

5.2.1. Officials need to be aware that the *Parliamentary Privileges Act 1987* and Senate Resolutions have defined offences against a House. Each House has the power to declare an act to be a contempt of the House and to punish such an act.

5.2.2. The *Parliamentary Privileges Act 1987* creates the following offences in relation to attempts to improperly influence a person about evidence given or to be given:

- (a) a person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence (subsection 12(1));
- (b) a person shall not inflict any penalty or injury upon any person, or deprive any person of any benefit, on account of the giving or proposed giving of any evidence, or any evidence given or to be given, before a House or a committee (subsection 12(2)).

5.2.3. As indicated in 5.1.1 above, section 13 of the *Parliamentary Privileges Act 1987* creates an offence in relation to the disclosure of submissions or evidence without the authority of the parliament or a committee.

5.2.4. The giving of any evidence that a witness knows to be false or misleading is also a contempt (see Senate resolution 6(12)).

### **5.3. Self incrimination**

5.3.1. In general, a witness cannot refuse to answer a question or produce documents on the ground that the answer to the question or the production of documents might incriminate the witness. The exceptions to this are witnesses appearing before the Joint Committee of Public Accounts and Audit or the Parliamentary Standing Committee on Public Works, who are permitted to refuse to give evidence on grounds on which a witness in court is able, including self incrimination.

5.3.2. If concerned about self incrimination, a witness may request that the committee take the evidence *in camera* (see section 4.12).

### **5.4. Access to counsel**

5.4.1. A witness may apply to have assistance from counsel in the course of a hearing. In considering such an application, a committee shall have regard to the need for the witness to be accompanied by counsel to ensure the proper protection of the witness. If an application is not granted, the witness shall be notified of reasons for that decision (see Senate resolution 1.14). If an application is granted, the witness shall be given reasonable opportunity to consult counsel during a committee hearing (see Senate resolution 1.15 and p 671 of *House of Representatives Practice* – references and links in Part 12).

5.4.2. In normal circumstances officials should not need counsel when appearing before parliamentary committees. Should the need arise, however, the Attorney-General's Department should be consulted.

### **5.5. Publication of evidence**

5.5.1. Evidence provided to committees in a public hearing is normally published in the form of a Hansard record.

5.5.2. Authority for the publication of evidence is vested in committees by virtue of ss.2(2) of the *Parliamentary Papers Act 1908*. Evidence taken *in camera* is confidential and its publication without a committee's consent constitutes a contempt (see s.13 of the *Parliamentary Privileges Act 1987* and Senate resolution 6.16.).

### **5.6. Correction or clarification of evidence**

5.6.1. Witnesses will receive transcripts of their evidence in the days following their appearance. The transcript should be examined promptly to establish whether any evidence needs to be corrected or clarified. On occasions, a witness may become aware of the need for correction or clarification before the receipt of the transcript or, in the case of a written submission, before the commencement of hearings.

5.6.2. Once the need to provide a committee with revised information has been established, it is most important that the committee receive that revised information at the earliest opportunity. In the case of officials who made submissions or appeared as witnesses in relation to the administration and implementation of government policy (but not necessarily those covered by Part 3), the departmental secretary or agency head (or senior official who represented the secretary at the hearing) should be informed that revised information is to be provided. Depending on the nature of the correction, it may also be appropriate to inform the minister. Officials need to keep in mind that, while their evidence remains uncorrected or unclarified they are vulnerable to allegations that they have misled a committee.

5.6.3. Supplementary information for a committee should be forwarded to the committee secretary. If uncertain of the most appropriate way to provide a committee with additional or corrected information, officials should seek the guidance of the committee secretary.

## **5.7. Right of reply**

5.7.1. Where evidence taken by a committee reflects adversely on an official, the committee shall provide reasonable opportunity for the official to have access to that evidence and to respond to that evidence by written submission and appearance before the committee (Senate resolution 1(13)).

5.7.2. Officials have the same right as other citizens who have been adversely referred to in a House of the parliament (see Senate resolution 5 and House of Representatives resolution adopted on 27 August 1997 – pp 751-3 of *House of Representatives Practice*). They may make a submission to the President of the Senate or to the Speaker of the House of Representatives requesting that a response be published, and the relevant presiding officer may refer such a submission to the Privileges Committee. The procedures of each House then provide for scrutiny of the submission and for the possibility of it being incorporated in Hansard or ordered to be published.

5.7.3. Officials proposing to exercise their right of reply should inform their departmental secretary or agency head.

## 6. APPEARANCE IN A PERSONAL CAPACITY

6.1.1. Nothing in these guidelines prevents officials from making submissions or appearing before parliamentary committees in their personal capacity, and the *Parliamentary Privileges Act 1987* makes it clear that an agency has no power to prevent an official from doing so. An official proposing to give evidence in a personal capacity should consult the *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads* (section 1: Relationship with the Government and the Parliament), published by the Australian Public Service Commission. Individual agencies may also have developed advice for their own staff on these matters.

6.1.2. An official giving evidence in a personal capacity might do so in relation to matters entirely unrelated to his or her current or recent responsibilities e.g. an official in the Attorney-General's Department putting forward personal observations or suggestions on aged care accommodation. It would be a matter completely for that official to decide whether to inform either a senior official in his or her own department or anyone in the department responsible for aged care policy. The official should, of course, seek leave to attend the hearing, if necessary.

6.1.3. There is no intention for there to be any restriction arising from these Guidelines on officials appearing before parliamentary committees in their 'personal' capacity. An official so called, however, should pay heed to the guidelines relating to public comment contained in the *APS Values and Code of Conduct in Practice*. As those guidelines emphasise, it is particularly important for senior officials to give careful consideration to the impact, by virtue of their positions, of any comment they might make. Indeed heads of agencies and other very senior officials need to consider carefully whether, in particular cases, it is possible for them realistically to claim to appear in a 'personal' rather than an 'official' capacity, particularly if they are likely to be asked to comment on matters which fall within or impinge on their area of responsibility. An official who is appearing before a committee in a personal capacity should make it clear to the committee that the officer's appearance is not in an official capacity.

6.1.4. An official contemplating giving evidence in a personal capacity in these circumstances might consider discussing his or her intentions with the departmental executive or agency head or other senior officials, as the views that he or she wishes to put forward might be covered in the agency's submission or the evidence of official witnesses. There is, however, no obligation on the official to do so.

6.1.5. An official who gives evidence in his or her personal capacity is protected by parliamentary privilege and must not be penalised for giving that evidence (see section 5.1).



## **7. PARTY COMMITTEES**

### **7.1. General issues**

7.1.1. Officials may be invited to attend party committees, both government and non-government to, for instance, explain proposed legislation.

7.1.2. Requests for briefing from any party committee should be directed to the minister concerned. It is also open to a minister to initiate proposals for briefing of committees where the minister considers that to be desirable.

7.1.3. Officials will not be expected or authorised to express opinions on matters of a policy or party political nature.

7.1.4. Unlike committees of the parliament, party committees do not have the powers or privileges of parliamentary committees, so officials appearing before them do not have the protection afforded to witnesses appearing before parliamentary committees. Party committee hearings are generally held in private.

7.1.5. Where the minister does not attend the committee proceedings, officials should keep the minister informed of the nature of the discussions and of any matters the officials could not resolve to the committee's satisfaction.

## **8. REQUESTS FOR INFORMATION FROM NON-GOVERNMENT PARTIES AND MEMBERS OF PARLIAMENT**

### **8.1. Rules at times other than during the caretaker period**

8.1.1. Requests for information from members of parliament are usually made to the minister, but direct approaches to officials for routine factual information, particularly on constituency matters, are also traditional and appropriate.

8.1.2. Depending on the nature or significance of a request, an official may judge it appropriate to inform the minister and departmental secretary or agency head of the request and response. Ministers should be informed of any matter which is likely to involve them.

8.1.3. A request should also be referred to the minister if it seeks an expression of opinion on government policy or alternative policies, or would raise other issues of a sensitive nature, or where answering would necessitate the use of substantial resources of the department or agency.

8.1.4. When a request is for readily available factual information, the information should be provided.

8.1.5. Care should be taken to avoid unlawful disclosure of information, for example, unauthorised disclosure of information that is classified or otherwise confidential information such as where a breach of personal privacy or commercial confidentiality could be involved.

### **8.2. Requests from shadow ministers**

8.2.1. Requests from shadow ministers for briefing by officials would normally be made through the appropriate minister and, where this is not the case, the minister should be informed. If the minister agrees to the briefing, it would be normal for him or her to set conditions on the briefing, such as the officials to attend, matters to be covered and whether a ministerial adviser should also be present. These conditions are matters for negotiation between the minister and shadow minister or their offices.

8.2.2. With regard to the substance of such a briefing, officials will not be authorised to discuss advice given to government, such as in Cabinet documents, or the rationale for government policies, or to give opinions on matters of a party political nature. Officials should limit discussions to administrative and operational matters and observe the general restrictions relating to classified or PII material. If these latter matters arise, officials should suggest that they be raised with the minister.

8.2.3. Where a ministerial adviser is not present, it would be usual for officials to advise the minister of the nature of matters discussed with the shadow minister.

### **8.3. Special rules for pre-election consultation with officials during the caretaker period prior to an election**

8.3.1. On 5 June 1987 the government tabled in the parliament specific guidelines relating to consultation by the Opposition with officials during the pre-election period. These guidelines, which are almost identical to the guidelines first tabled on 9 December 1976, are as follows:

- (a) The pre-election period is to date from three months prior to the expiry of the House of Representatives or the date of announcement of the House of Representatives election, whichever date comes first. It does not apply in respect of Senate only elections.
- (b) Under the special arrangement, shadow ministers may be given approval to have discussions with appropriate officials of government departments. Party leaders may have other members of parliament or their staff members present. A departmental secretary may have other officials present.
- (c) The procedure will be initiated by the relevant Opposition spokesperson making a request of the minister concerned, who is to notify the Prime Minister of the request and whether it has been agreed.
- (d) The discussions will be at the initiative of the non-government parties, not officials. Officials will inform their ministers when the discussions are taking place.
- (e) Officials will not be authorised to discuss government policies or to give opinions on matters of a party political nature. The subject matter of the discussions would relate to the machinery of government and administration. The discussions may include the administrative and technical practicalities and procedures involved in implementation of policies proposed by the non-government parties. If the Opposition representatives raise matters which, in the judgement of the officials, call for comment on government policies or expressions of opinion on alternative policies, the officials should suggest that the matter be raised with the minister.
- (f) The detailed substance of the discussions will be confidential but ministers will be entitled to seek from officials general information on whether the discussions kept within the agreed purposes.

## **9. APPEARANCES BEFORE THE BAR OF A HOUSE OF PARLIAMENT**

9.1.1. Only in exceptional circumstances would an official be summoned to the bar of a House of the parliament and each case would need individual consideration.

9.1.2. As a general rule, it would be appropriate for these guidelines to be followed insofar as they apply to the particular circumstances.

## **10. REQUESTS RELATING TO INQUIRIES OF STATE AND TERRITORY PARLIAMENTS**

10.1.1. Commonwealth officials may receive a request to appear before or make a submission to a state or territory parliamentary inquiry. In considering the appropriate response, officials should be aware that it would be rare for Commonwealth officials to participate in such inquiries.

10.1.2. However, there may be cases where, after consulting the minister about the request, it is considered to be in the Commonwealth's interests to participate. Officials should not participate in any state or territory parliamentary inquiry without consulting the minister.

10.1.3. Where additional guidance is required regarding appearances before state or territory inquiries or if an official is summoned to appear at such an inquiry, advice should be sought from the Department of the Prime Minister and Cabinet, the Attorney-General's Department, and the Australian Government Solicitor or the agency's legal service provider<sup>1</sup>.

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<sup>1</sup> Use of a legal service provider must be consistent with the Legal Service Directions issued by the Attorney-General under the *Judiciary Act 1903*.

## **11. USEFUL CONTACT NUMBERS**

11.1.1. The following contact numbers are provided for use where these guidelines suggest consultation with the Department of the Prime Minister and Cabinet, the Attorney-General's Department or the Australian Government Solicitor:

(a) Department of the Prime Minister and Cabinet:

Assistant Secretary	phone: (02) 6271 5761
Parliamentary and Government Branch	fax: (02) 6271 5776

First Assistant Secretary	phone: (02) 6271 5786
Government Division	fax: (02) 6271 5776

(b) Attorney-General's Department:

Assistant Secretary	phone: (02) 6250 3650
Constitutional Policy Unit	fax: (02) 6250 3674

(c) Australian Government Solicitor:

Australian Government Solicitor	phone: (02) 6253 7000
Office of General Counsel	fax: (02) 6253 7307

## 12. REFERENCES

12.1.1. The following material is available to assist officials in their contact with parliament:

- (a) *Odgers' Australian Senate Practice*, 12th Edition, Canberra, 2008.  
[www.aph.gov.au/senate/pubs](http://www.aph.gov.au/senate/pubs)
- (b) *House of Representatives Practice*, Fifth Edition, Canberra, 2005.  
[www.aph.gov.au/house/pubs](http://www.aph.gov.au/house/pubs).
- (c) *Procedures to be Observed by Senate Committees for the Protection of Witnesses*.  
Department of the Senate.  
[www.aph.gov.au/senate/committee/wit\\_sub/bro\\_thr.htm](http://www.aph.gov.au/senate/committee/wit_sub/bro_thr.htm)
- (d) *Senate Standing Orders and Resolutions*.  
[www.aph.gov.au/senate/pubs/standing\\_orders](http://www.aph.gov.au/senate/pubs/standing_orders)
- (e) *House of Representatives Standing and Sessional Orders (and Resolutions)*  
[www.aph.gov.au/house/pubs/standos](http://www.aph.gov.au/house/pubs/standos)
- (f) *Appearing Before Parliamentary Committees*, Legal Practice Briefing No. 29,  
Australian Government Solicitor.  
[www.ags.gov.au/publications/agspubs/legalpubs/legalbriefings](http://www.ags.gov.au/publications/agspubs/legalpubs/legalbriefings)
- (g) *How to make a submission to a Senate or Joint Committee inquiry*. Department of  
the Senate.  
[www.aph.gov.au/senate/committee/wit\\_sub/bro\\_one.pdf](http://www.aph.gov.au/senate/committee/wit_sub/bro_one.pdf)
- (h) *Preparing a submission to a Parliamentary Committee Inquiry*. Department of the  
House of Representatives.  
[www.aph.gov.au/house/committee/documnts/howsub.htm](http://www.aph.gov.au/house/committee/documnts/howsub.htm)
- (i) *Notes for the Guidance of Witnesses Appearing before Senate Committees*.  
Department of the Senate.  
[www.aph.gov.au/senate/committee/wit\\_sub/bro\\_two.htm](http://www.aph.gov.au/senate/committee/wit_sub/bro_two.htm)
- (j) *Appearing as a witness at a Parliamentary committee hearing*. Department of the  
House of Representatives.  
[www.aph.gov.au/house/committee/documnts/witadv.htm](http://www.aph.gov.au/house/committee/documnts/witadv.htm)
- (k) *Outline of the Inquiry Process*. Department of the House of Representatives.  
[www.aph.gov.au/house/committee/documnts/howsub.htm](http://www.aph.gov.au/house/committee/documnts/howsub.htm)
- (l) *Parliamentary Privileges Act 1987*

- (m) *Public Accounts and Audit Committee Act 1951*
- (n) *Public Works Committee Act 1969*
- (o) *APS Values and Code of Conduct in practice*. Australian Public Service Commission 2009.  
[www.apsc.gov.au/values/conductguidelines.htm](http://www.apsc.gov.au/values/conductguidelines.htm)
- (p) Reports of the Senate Committee of Privileges, including the Committee of Privileges 1966-96 *History, Practice and Procedures (76<sup>th</sup> Report)*.  
[www.aph.gov.au/senate/committee/priv\\_ctte](http://www.aph.gov.au/senate/committee/priv_ctte)
- (q) Reports of the House of Representatives Committee of Privileges  
[www.aph.gov.au/house/committee/priv\\_ctte](http://www.aph.gov.au/house/committee/priv_ctte)
- (r) Guidelines on exemption provisions of the *Freedom of Information Act 1982*. Australian Information Commissioner 2011  
[www.oaic.gov.au/publications/guidelines/guidelines-s93a-foi-act\\_part5\\_exemptions.html](http://www.oaic.gov.au/publications/guidelines/guidelines-s93a-foi-act_part5_exemptions.html)
- (s) FOI Guidance Notes. Department of the Prime Minister and Cabinet.  
[http://www.dpmc.gov.au/foi/docs/foi\\_guidance\\_notes/foi\\_guidance\\_notes.pdf](http://www.dpmc.gov.au/foi/docs/foi_guidance_notes/foi_guidance_notes.pdf)



## ATTACHMENT A

### Claims of public interest immunity

See also sections 4.4 to 4.11 in the *Guidelines*

On 13 May 2009, the Senate passed an Order setting out the process for making claims of public interest immunity (PII) in committee proceedings. A copy of the order is attached (Attachment A1).

2. The Senate Procedure Committee reviewed the operation of the Order in August 2009. A copy of the Procedure Committee's report can be downloaded from [http://www.aph.gov.au/Senate/committee/proc\\_ctte/reports/2009/report3/index.htm](http://www.aph.gov.au/Senate/committee/proc_ctte/reports/2009/report3/index.htm).
3. Officials who are expected to appear at estimates and other parliamentary committee hearings need to be familiar with the requirements of the Order and the grounds for claiming public interest immunity as set out in the Guidelines.
4. The process for claiming public interest immunity described in the Order is largely consistent with the process that is set out in sections 4.4 to 4.11 of the *Government Guidelines for Official Witness before Parliamentary Committees* (the Guidelines) published by the Department of the Prime Minister and Cabinet at [http://www.dpmc.gov.au/guidelines/docs/guidelines\\_govt\\_docs.pdf](http://www.dpmc.gov.au/guidelines/docs/guidelines_govt_docs.pdf). While the Guidelines explain the process for making public interest immunity claims to protect against the disclosure of information or documents at committee hearings, it has been relatively uncommon in practice for officials appearing as witnesses at committee hearings, particularly estimates hearings, to be asked to provide copies, for example of departmental briefs to ministers. The Order of 13 May 2009 makes it seem more likely that officials and ministers will be asked to provide information or documents of this kind at Senate committee hearings, including estimates hearings, than has been the case in the past.

### Summary of advice

5. It is important that the public interest is not inadvertently damaged as a result of information or documents being released without a proper assessment of the possible consequences. Accordingly, if an official is asked to provide information or documents to a Senate committee:
  - if the official is satisfied that its disclosure would not harm the public interest, he or she should advise the minister that the material can be provided;
  - if the official is satisfied that the disclosure of the material would damage the public interest, he or she should advise the committee that the material cannot be provided and explain how its disclosure would damage the public interest; and

- if the official is uncertain whether the disclosure of the material would damage the public interest, he or she should take the question on notice.

The grounds for claiming public interest immunity and the process for making such a claim at estimates hearings are set out below.

### **Grounds for a public interest immunity claim**

6. While the parliament has the power to require the production of documents, it is acknowledged that the Government holds some information the disclosure of which would be contrary to the public interest. Where the public interest in the information remaining confidential outweighs the public interest in its disclosure, the Government would normally make a public interest immunity claim.

7. There are several recognised and accepted grounds on which ministers may rely when claiming public interest immunity in relation to information or documents requested by the Senate or a Senate committee. These are set out at section 4.6 of the Guidelines. As the Procedure Committee notes in its report, however, it is conceivable that new grounds could arise.

8. By way of example, public interest immunity claims may be made in relation to information or documents whose disclosure would, or might reasonably be expected to:

- damage Australia's national security, defence or international relations;
- damage relations between the Commonwealth and the States;
- disclose the deliberations of Cabinet; and
- prejudice the investigation of a criminal offence, disclose the identity of a confidential source or methods of preventing, detecting or investigating breaches of the law, prejudice a fair trial or endanger the life or safety of any person.

9. It is, of course, possible for more than one ground to apply to the same document, in which case all relevant grounds should be specified.

### **Public interest conditional exemption – deliberative processes**

10. A public interest immunity claim may also be made in relation to material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government *where disclosure at that time would, on balance, be contrary to the public interest* [emphasis added – see paragraph 4.6.2 of the Guidelines]. Because the Senate Order requires ministers to specify the harm that could result from disclosure of information or a document of this kind, claims for public interest immunity on this ground will involve a greater degree of judgment and subjectivity, and may therefore be less readily accepted, than claims based on the various grounds described in paragraph 8 above.

11. Information and documents whose disclosure would not damage the public interest should be provided to parliamentary committees as soon as possible. It is important, however, that officials and ministers do not inadvertently damage the public interest by disclosing information that ought to remain confidential. Officials and ministers therefore need to consider carefully whether particular documents should be the subject of a public interest immunity claim before they are released. This will frequently not be possible in the relatively short timeframe available for estimates hearings, particularly as the responsible minister and relevant officials may need to devote their time to the hearings. If the request relates to a small number of documents, it may be possible to respond before the committee completes its hearings. If a large number of documents have been sought, or if the issues involved are complex, the minister may need to advise the committee that it will not be possible to respond until a later date (although it may be possible to provide some documents, or parts of some documents, while the committee is sitting).

12. In briefing ministers on the question whether it is appropriate to disclose information or documents to a committee, officials must assess and balance the public interest in disclosure of the information or document against the public interest, if any, in maintaining its confidentiality. This is a similar process to that which is undertaken when officials provide advice to ministers in relation to a Senate order to produce documents, or in deciding whether to provide access to documents under section 47C of the *Freedom of Information Act 1982* (although it should be noted that the provisions of the FOI Act have no direct application to questions about the provision of information to a Senate committee), or in response to an order to discover documents that are relevant to litigation involving the Commonwealth.

13. It may also be appropriate to decline to provide information or documents if to do so would unreasonably disclose personal information or disclose material that could be the subject of a claim for legal professional privilege.

#### **Process for claiming public interest immunity**

14. Public interest immunity claims must be made by ministers. However, Senate committees, particularly estimates committees, receive most of their evidence from officials, and it is they who are most likely in the first instance to be asked to provide information or documents that might be the subject of a public interest immunity claim.

15. The Senate Order describes in some detail the process leading up to a claim for public interest immunity. An official who considers that he or she has been asked to provide information or a document that might properly be the subject of a public interest immunity claim could either:

- advise the committee of the ground for that belief and specify the damage that might be done to the public interest if the information or document were disclosed (paragraph 1 of the Order); or
- take the question on notice.

The official could also refer the question to the minister at the table, but it is unlikely that the minister would be well-placed to make a considered decision on the question at that time.

16. The public interest in not disclosing information or documents on any of the grounds described in paragraph 8 above is self-evident and in many cases the need for such a claim would be readily apparent to officials at the hearing. If it is not, the official should ask if the question can be taken on notice so that it can be properly considered and the minister briefed.

17. It would be reasonable to expect that an official's evidence that a document is a Cabinet document or that, in his or her view, disclosure of the information or document in question might damage Australia's national security, for example, would be accepted by individual senators and committees with the result that the matter would not be taken further.

18. If that is not the case, however, the committee or the senator may request the official to refer the matter to the responsible minister (paragraph 2 of the Order). This would frequently mean that the question would need to be taken on notice. It is possible that the minister at the table, if he or she is not the relevant portfolio minister, may wish to ascertain the portfolio minister's views on the possible release of the information or document.

19. If the minister concludes that it would not be in the public interest to disclose the information or document, he or she "shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document" (paragraph 3 of the Order).

20. Paragraph 4 of the Order is not relevant for the purposes of estimates committees, which cannot take evidence in camera, but needs to be considered in the context of other committee hearings.

21. If a committee considers that a minister's statement in support of a public interest immunity claim does not justify the withholding of the information or document, it can report the matter to the Senate (paragraph 5 of the Order). In that event, the Senate would probably consider whether to order that the documents be produced. If the committee decides not to report the matter to the Senate, the senator who sought the information or document may do so (paragraph 6 of the Order).

22. In recent years, officials and ministers have not normally been pressed for copies of deliberative documents, particularly during Estimates hearings, with questions being limited to whether ministers have been briefed on particular issues and, if so, when that occurred. Paragraph 7 of the Order makes it clear, however, that committees will not accept a claim for public interest immunity based only on the ground that the document in question is a deliberative document: a minister must also specify the harm to the public interest that may result from the disclosure of the information or document that has been requested. Again, the need to give careful consideration to the issues involved will frequently mean that the matter has to be taken on notice.

23. Finally, the Order recognises that there may be occasions when it would be more appropriate for the head of an agency, rather than the minister, to make a claim for public interest immunity (paragraph 8 of the Order). This might occur, for example, in relation to information or documents held by agencies that have a significant degree of independence from Government, such as law enforcement agencies, courts and tribunals, the Auditor-General, Commonwealth Ombudsman and some regulatory agencies.

**Order of the Senate, 13 May 2009****Public interest immunity claims**

That the Senate—

(a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;

(b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;

(c) orders that the following operate as an order of continuing effect:

(1) If:

(a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and

(b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee,

the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

(2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.

(3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground

for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.

(4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.

(5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.

(6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

(7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).

(8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

(d) requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.

*(13 May 2009)*

## **ATTACHMENT B**

### **Provision of commercial-in-confidence material to the Senate**

**See also section 4.10 in the *Guidelines***

On 30 October 2003 the Senate agreed to the following motion on commercial-in-confidence material:

That the Senate and Senate committees shall not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is made by a minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of the information.

Senate committees have not always pressed a request for material when officials have stated the grounds on which they considering material to be confidential-in-confidence. The Senate order set out above does not mean that officials should no longer indicate that they consider that material might appropriately be withheld. However, if the Committee presses its request, officials should refer it to the relevant minister. If the minister determines that a claim of public interest immunity should be made, the procedures set out at sections 4.4 to 4.11 should be followed.

As a general guide, it would be inappropriate to disclose information that could disadvantage a contractor and advantage their competitors in future tender processes, for example:

- (a) details of commercial strategies or fee/price structures (where this would reveal information about the contractor's cost structure or whether the contractor was making a profit or loss on the supply of a particular good or service);
- (b) details of intellectual property and other information which would be of significant commercial value; or
- (c) special terms which are unique to a particular contract, the disclosure of which may, or could reasonably be expected to, prejudice the contractor's ability to negotiate contracts with other customers or adversely affect the future supply of information or services to the Commonwealth.



The following information would normally be disclosed:

- (a) details of contracting processes including tender specifications, criteria for evaluating tenders, and criteria for measuring performance of the successful tenderer (but not information about the content or assessment of individual tenders);
- (b) a description of total amounts payable under a contract (i.e., as a minimum the information that would be reported in the Commonwealth Gazette or, for consultants, the information that would be reported in an agency's annual report);
- (c) an account of the performance measures to be applied; and
- (d) factual information about outcomes.