

The Senate

Procedure Committee

Confidential review of documents subject
to PII claims

First report of 2023

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- 1.1 On 22 November 2022, on the motion of Senator Roberts, the Senate referred the following matter to the committee for inquiry and report by 31 March 2023:
 - (1) The appropriate terms to establish a procedure in the standing orders through which:
 - (a) senators can confidentially and privately review documents subject to an order for production that a Minister believes would be against the public interest to table; and
 - (b) after the documents have been made available for review, the Senate can reject a Minister's public interest claim against disclosure and order the tabling of the documents.
 - (2) Whether the procedure in paragraph (1) is appropriate having regard to the balance between the Senate's constitutional power as the house of review, the necessity of senators to be properly informed of sensitive issues to make informed decisions and the protection of the public interest from public disclosure of sensitive information.
- 1.2 In essence, Senator Roberts has proposed that a minister making a public interest immunity (PII) claim in relation to an order for the production of documents (OPDs) must give the contested documents to a committee for confidential viewing by senators, to enable senators to make an informed decision about whether to accept or reject the claim. The committee thanks Senator Roberts for providing a submission, which will be tabled in connection with a future report of the committee.
- 1.3 Various committees have recommended that the Senate develop a process to resolve disputed PII claims, but none has yet found favour. The Procedure Committee's second report of 2015 on [Third party arbitration of PII claims](#) published guidance on the processes for responding to OPDs and for making PII claims, but took the view that the Senate should continue to determine disputes on a case-by-case basis.
- 1.4 The current approach reflects the view 'that the struggle between the two principles involved, the executive's claim for confidentiality and the Parliament's right to know, must be resolved politically': *Odgers' Australian Senate Practice, 14th ed.*, p.645. Where ministers do not comply with orders, senators will often draw on remedies to resolve disputes such as censure; refusal to consider government legislation; requiring and debating ministerial explanations; and referring non-compliance to committees for further examination.

- 1.5 Although the proposal set out in Senator Roberts' submission is feasible, it suffers the same deficiency as proposals for third party arbitration of disputed PII claims, namely, that a requirement to produce documents on a confidential basis to a committee is no more enforceable than the requirement to provide them to the Senate in the first place.
- 1.6 The committee continues to hold the view expressed in its 2015 report that it is for the Senate to determine how to resolve disputes on a case-by-case basis. While elements of Senator Roberts' proposal may be relevant to resolving particular disputes, the committee does not support its application across-the-board and therefore does not agree to the suggestion that standing orders should be amended in this regard.
- 1.7 However, the reference has provided the committee with an opportunity to consider some of the current challenges and constraints in the processes for ordering the production of documents and raising PII claims, both in the Senate and in parliamentary committees. Some of these factors include: the volume, scope and timeframes involved in OPDs raised in the Senate; misalignment with Freedom of Information (FOI) Act principles; and framing of PII claims.
- 1.8 The committee has previously noted the value of the 2009 'Cormann order', which provides the process for raising and determining PII claims before committees. That order encourages negotiated responses where ministers seek to withhold material sought by committees. This includes consideration whether the material may be provided on a confidential basis.
- 1.9 While the principles underpinning the 2009 order also apply in relation to orders made by the Senate, they are not specified in Senate procedure. The committee sees value in considering whether a similar resolution should apply to orders made by the Senate. The order should encourage negotiated approaches to the scope of material sought; the timeframes involved; and better developed PII claims. In this vein, the committee has resolved to develop a process to better manage the ways in which orders for documents are made and responded to, in order to address current challenges and constraints. The committee intends to report to the Senate on this matter later in the year.

Senator Andrew McLachlan
Chair