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Senator Louise Pratt  
Chair  
Finance and Public Administration Legislation Committee  
Suite SG.60  
Parliament House

*By email: [fpa.sen@aph.gov.au](mailto:fpa.sen@aph.gov.au)*

Dear Senator Pratt

**PwC matter – Proposed tabling of names**

On Friday, 26 May 2023, during an estimates hearing of the Finance and Public Administration Legislation Committee, Senate Barbara Pocock sought leave to table a list of ‘those involved in those recent events in PwC’.

The events referred to – involving the reported misuse of confidential government information by partners at PwC – are of significant public interest; not least in the context of the accountability role of estimates committees. Much of what has been revealed to date has flowed from the work of Senate committees, including the publication by the Economics Legislation Committee of extensive, redacted PwC emails provided by the Taxation Practitioners Board in response to questions asked by Senator O’Neill in a previous round of estimates. The matter also received attention in the first hearing of the Finance and Public Administration References Committee inquiry into Consultancy Services.

The matter was the subject of multiple lines of inquiry across estimates hearings last week. Relevantly, committees heard that Treasury had referred the matter to the Australian Federal Police (AFP), which has commenced a criminal investigation into alleged misuse of confidential government information. The Secretary of Department of Finance gave evidence that ‘PwC did not indicate to my department that the issue was broader than what was being published in media reports at that time’, and that additional information about the number of staff reported to have knowledge of confidential tax information ‘raised serious concerns about the broader culture within PwC and undermined our confidence in their earlier engagements with Finance around this matter.’ The department had subsequently directed PwC to remove staff involved in the matter from work for the government, leading some senators to question how departments could be assured that this direction had been met, if the identities of those involved were not known.

### **Request for advice**

Against this background, the legislation committee resolved on Friday to defer the tabling of the list and to seek my advice on, but not limited to, the following matters:

- the potential adverse impact of tabling the list of names;
- instances in which committees have previously accepted or rejected requests to table and publish unverified documents in a public forum.

In doing so, the committee noted that Senator Pocock: proposed that the committee accept as a tabled document a list of names on an otherwise blank sheet of paper; asserted that the list named PwC partners involved in the above matter; and stated that the list of names was not in the public arena.

I am advised that committee members noted that there was no documentation to verify the identity of the persons on the list and raised concerns about due process with respect to the tabling of an unverified list of names.

In essence, it is a matter for the committee to determine, in all the circumstances, whether to receive and publish the list; a decision that should be informed by committee members' assessment of the competing public interests involved. Before addressing that question, it is worth making the following points about the capacity of the committee to receive information of this nature.

### **Receipt of information by committees hearing estimates**

Although estimates is not primarily intended as a forum for committee members to provide evidence, there is a well-established practice of senators tabling documents that provide a foundation for a particular line of questions.

It is clearly within the power of a committee hearing estimates to receive and publish the information, subject only to a determination (by the chair, in the first instance) that the document is relevant to the matter before the committee. There is no doubt that the information was relevant to the matters before the legislation committee last Friday, and I expect that it will be relevant to matters to be examined during further estimates hearings this week.

Committees must hear evidence on estimates in public session: standing order 26(2). A decision of a committee to receive a document during proceedings on estimates necessitates the publication of that document. That same restriction does not apply to committees meeting in other configurations. For instance, the FPA References Committee could receive and examine the document in confidence as part of its inquiry into Consultancy Services. That process would provide an avenue for the committee to test the veracity of the document, and to seek the views of other parties about its publication.

Finally, even if the FPA Legislation Committee declined to receive the document, there would be nothing to prevent a senator reading from the document during the committee's proceedings (or during the proceedings of other committees in which it was relevant), or publishing the information it contains as part of a written question on notice.

This advice now turns to the possible impact of the tabling of the list, including some procedural considerations, and questions asked by the committee about determining the veracity of the list.

## **Competing public interests**

When a committee is considering where the public interest lies in relation to the pursuit of questions or the provision of information, this usually occurs in the context of a witness seeking to withhold information. For instance, Privilege Resolution 1 provides a process by which committees may determine whether to press for information where a witness objects to answering questions. Similarly, a government witness seeking to withhold information must follow the process for raising and determining public interest immunity claims, set out in [Senate continuing order no. 10](#), of 13 May 2009. All senators are familiar with this process, which requires ministers to state the grounds on which it is claimed the information should be withheld and the apprehended harm that may arise from disclosing it.

In 2014 my predecessor, Dr Rosemary Laing, explained to the Legal and Constitutional Affairs References Committee that the process established by the 2009 resolution is:

...a means to balance competing public interest claims by government on the one hand, that certain information should not be disclosed because disclosure would harm the public interest in some way, and by parliament's claim, as a representative body in a democratic polity, to know particular things about government administration, so that the parliament can perform its proper function of scrutinising and ensuring accountability for expenditure and administration of government programs.

Although the committee does not have a public interest immunity claim before it, committee members may consider it useful to have regard to the principles identified in *Odgers' Australian Senate Practice* in relation to relevant public interest grounds. The ground that is most immediately relevant involves possible prejudice to law enforcement investigations. Odgers says:

For this ground to be invoked it should be established that there are investigations in progress by a law enforcement agency, such as the police, and the provision of the information sought could interfere with those investigations. As this is a matter for the law enforcement agency concerned to assess, this ground should normally be raised directly by the law enforcement agency, not by some other official who can merely speculate about the relationship of the information to the investigation. [14<sup>th</sup> ed., p.663]

While it is apparent that an investigation is in progress, the committee has limited information about the scope of the investigation. In addition, at this stage, the committee could only speculate as to whether the provision of a list of names of those allegedly involved would in fact interfere with the investigation. The committee could seek information from the investigators to help committee members assess whether any possible prejudice to investigations outweighs the public interest in receiving and disclosing the list.

## **Adverse comment**

In considering whether to receive (and publish) the information, the committee must have regard to the 'adverse evidence' provisions in Privilege Resolution 1(11) to (13). Odgers notes:

Evidence which reflects adversely on another person, including a person who is not a witness, must be made known to that person and reasonable opportunity to respond given. The committee must consider whether to hear the evidence, publish it, and seek a response to it from another person. [14<sup>th</sup> ed., p. 553]

The rationale for this requirement is found in natural justice. A corollary is that, if adverse evidence is published, the committee should publish any response it receives in a similar manner.

In requesting this advice, the committee noted that Senator Pocock had asserted that the list named PwC partners 'involved' in the matter. The committee will need to consider whether evidence identifying a person as being involved in the matter amounts to adverse evidence and, if so, will need to apply the provisions identified above. This will particularly be the case where the extent of a person's involvement is unclear to the committee.

I note that, earlier today, PwC announced that it is standing down nine partners and would, in time, publish full details of an internal review. It has also been reported that PwC Australia's Acting Chief Executive challenged the assumption that all those whose names had been redacted from the emails referred to above were necessarily involved in any wrongdoing. While that comment has been reported in the media, the committee has no means of testing it without further information.

### **Veracity of the document**

In the time available to provide this advice I can give little information in relation to instances in which committees have accepted or rejected requests to publish unverified documents. It is open to the committee to seek information and assurances from Senator Pocock as to the veracity of the document in determining whether to receive it. Of course, as with all senators, it is entirely a matter for Senator Pocock to decide what information to provide about its provenance.

The Privileges Committee has emphasised the duties and responsibilities of individual senators in receiving and releasing any information given to them. In doing so it has emphasised 'the gravity of senators' actions in placing on the public record, under parliamentary privilege, documents on behalf of or authored by other people': 72<sup>nd</sup> report, pp. 15, 16. The Senate has also resolved, in [Privilege Resolution 9](#), the need for senators 'to exercise their valuable right of freedom of speech in a responsible manner', particularly given the limited opportunities for those outside of the Parliament to respond to allegations.

These principles guide senators in deciding whether to put material to the Senate and its committees.

### **Privilege of committee proceedings**

The committee also asked me to comment on advice given in another setting that committees should avoid creating evidence in relation to likely legal proceedings that is unable to be examined in the courts. Under the law of privilege, committee evidence cannot be used for most forensic purposes before the courts. Odgers notes that:

Committees may...indirectly cause difficulties in legal proceedings by generating evidence which, because of parliamentary privilege, cannot be used in any substantive way in the legal proceedings. For example, if a party to legal proceedings makes statements before a committee relevant to those proceedings, the other party may claim that the inability to examine those statements leads to unfairness in the proceedings, perhaps even justifying their termination. Particularly in criminal proceedings, there may be a danger of defendants deliberately placing material before a parliamentary committee in the hope of aborting or disrupting the court proceedings. Committees should therefore be wary of taking evidence relevant to legal proceedings. [14<sup>th</sup> ed., p. 536]

As the Senate Privileges Committee has noted, that concern principally arises when primary documents are put before the parliament which do not exist in any other form: 67<sup>th</sup> report, p. 17.

It is difficult to see how that would apply in the case of a list of names that is presumably derived from some external source.

### **Conclusion**

As has been noted above, the fact that these matters are being considered in the context of Senate estimates limits the committee's options, in that proceedings are required to be held in public. Receipt of information necessitates its publication.

Those constraints do not apply in the proceedings of the Finance and Public Administration References Committee, which has a relevant inquiry on foot. It would be open to that committee to receive the list in camera and seek submissions from the government, AFP investigators and PwC about its veracity and any concerns that disclosing names from the list might interfere with ongoing investigations. This would give the committee a firmer basis for deciding whether and how to publish the information. A possible advantage of such an approach would be that it would provide PwC a clear avenue for identifying which of its staff have been involved, and in what manner, rather than leaving those matters to further speculation. If that approach is adopted then, given the significant public interest involved, it would be appropriate for the committee to be clear about its approach and the timeframes it intends to apply.

Let me know if I can be of any further assistance.

Yours sincerely,

(Richard Pye)