



AUSTRALIAN SENATE

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Ms Sophie Dunstone
Secretary
Legal and Constitutional Affairs References Committee
Parliament House
Canberra ACT 2600

Dear Ms Dunstone

EVIDENCE FROM WITNESSES OVERSEAS

The committee has asked for advice about its terms of reference in the context of the non-application of parliamentary privilege extraterritorially. The terms of reference include, among other things, establishing the details of certain events on Manus Island in Papua New Guinea, including the cause of death of a person detained on Manus Island, and the involvement of contractors, subcontractors, service providers, the Papua New Guinean police, military and civilians in the incidents of 16-18 February 2014.

Parliamentary privilege is a collection of immunities and powers that support the ability of a House of Parliament, its committees and members to carry out their functions as such. It is important to note that neither the immunities nor the powers have any extra-territorial operation.

The committee's powers, conferred by standing order 25(14), are as follows:

A committee and any sub-committee shall have power to send for persons and documents, to move from place to place, and to meet and transact business in public or private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives.

These powers may not be exercised outside the territory of Australia, including the power to meet and transact business. In any case, the committee could not travel outside of Australia as a committee except with the approval of the President. While the committee may "send for" (in other words, summon) any persons and documents that are on Australian soil (regardless of whether they are Australian citizens), it may not exercise those powers in respect of foreigners and documents outside Australian territory. While it may be the case that a committee could summon an Australian citizen to give evidence from overseas (a question

never adjudicated), it would not be fair to do so because they cannot be protected by Australian law in that country

However, the committee may, by invitation, take evidence by teleconference or videoconference from persons in Papua New Guinea, provided, of course, that such facilities are available to them.

There are no major procedural or other problems arising in Australia in relation to evidence taken in this way. There are, however, potential problems which may arise outside Australia.

The committee could administer an oath to the witnesses, provided that there is nothing in the law of Papua New Guinea to prevent persons in that country taking such oaths.

The committee and the Senate would not be able to take any action against any witnesses if they committed any breach of the rules of the Senate. For example, if a witness were to give false evidence or threaten another witness, they would be beyond the reach of the Senate for any remedy, unless they subsequently come to Australia. Nor would the committee be able to protect witnesses outside Australia who suffered (or were threatened with) any penalty or injury in respect of evidence given, or who were subjected to any improper influence in respect of the evidence they were to give.

In Australia, the committee's proceedings, the evidence taken from the witnesses and the witnesses themselves would be fully protected by parliamentary privilege.

The protection afforded in Papua New Guinea and other countries, however, would depend on the law in those other countries. This does not create any difficulties for the Senate or the committee, but could cause difficulties for the witnesses.

The witnesses would rely on the law of Papua New Guinea to protect them against any adverse consequences of their giving evidence and of the content of their evidence. I am not aware if the law of Papua New Guinea gives any protection to persons in respect of evidence given to foreign parliamentary committees or whether it prohibits the communication of particular information. The committee could seek some assurance from the Papua New Guinea government that it would not treat any witnesses adversely in consequence of their evidence. Whether such an undertaking could effectively protect witnesses against any adverse action by other persons, for example, other detainees, contractors at the detention centre or local people, is another question.

Witnesses who subsequently return to countries of transit or to their countries of origin would rely on the laws of those countries to protect them against any adverse action arising from their evidence.

There is no failsafe way in which the committee could seek to overcome these potential problems for witnesses outside Australia. The committee could advise witnesses that their giving evidence is entirely voluntary and that they should not say anything which they think might cause them to be penalised by any person outside Australia or any other government.

Confidentiality clauses or secrecy provisions

The committee has also sought advice on the application of parliamentary privilege to documents subject to confidentiality clauses or secrecy provisions, and people with knowledge of those documents and their content.

With one exception, a confidentiality agreement presents no legal impediment to a witness giving evidence to a parliamentary committee. This is because a confidentiality agreement does not apply to proceedings in Parliament, such as the giving of evidence before committees. A witness who gives evidence to a parliamentary committee is protected by absolute privilege and no action can be taken against the person in relation to the giving of evidence or the evidence so given. For example, the person cannot be sued for breaching a confidentiality agreement in a contract, for example, because the only evidence of the breach would be the person's evidence to the committee. That evidence falls squarely within the meaning of "proceedings in Parliament" in the *Parliamentary Privileges Act 1987*. Its use in any proceedings before a court or tribunal is unlawful.

The exception is where parliamentary privilege does not apply. As discussed in the first part of this advice, overseas witnesses cannot be protected overseas by parliamentary privilege, although they are protected in respect of any legal proceedings in Australia. As has also been noted, it may be an offence in the relevant country to breach such an agreement.

Notwithstanding the Senate's contempt powers, witnesses may naturally feel uneasy about breaching a confidentiality agreement that has ostensibly been made voluntarily and in good faith between two parties. Committees may also feel reluctant to put witnesses in this position, particularly if there is any risk of detriment to a witness (because they are outside of Australia, for example).

Assuming, however, that the relevant witnesses are within Australia, there are two options for the committee to consider in order to maximise its access to relevant information while taking the greatest possible care to protect witnesses. The first is to summon the witness and require him or her to produce specified information or answer questions about a specified matter. It has certainly been the case in the past that committees have issued summonses out of a desire to protect a witness rather than to coerce him or her. For example, in its inquiry into Australian forest plantations in 2004, the former Rural and Regional Affairs and Transport Committee summoned a witness who had been an employee of Forestry Tasmania. The witness sought the committee's protection and provided a great deal of useful evidence to it.

The second option, also used in the Forestry Tasmania case, is to take the witness's evidence *in camera*. This can be a useful additional protection, provided that the committee is able to use the evidence, for example, by testing it with other witnesses and by referring to it in its report. Committees which have taken evidence *in camera* in the past for the comfort of witnesses at the time, have subsequently, with the witness's agreement, published the evidence in full or in part so that it can be used for these purposes.

A witness may be reluctant to agree to the publication of his or her evidence, even without his or her identity being made known, because the details of the particular evidence may be sufficient to identify him or her. Committees therefore need to take care in testing such evidence with other witnesses or referring to it in their reports. Standing order 37(2) contains procedures to be followed by senators who may wish to refer to *in camera* evidence or unpublished committee documents in dissenting reports. The procedures provide for witnesses to be informed in advance of the proposed disclosure (if practicable) and to have reasonable opportunity to object to the disclosure and ask that particular parts of the evidence not be disclosed. A committee must give careful consideration to any objections by witnesses and, should it decide to publish the evidence, must also consider disclosing the evidence in such a way as to conceal the identity of the witness. The same principles apply to majority reports.

If, because of these restrictions, a committee is unlikely to be able to use the *in camera* evidence because of the risk of disclosing the identity of the witness, and potential detriment to the witness as a result, then it should give consideration to whether it should take the evidence at all.

Please let me know if the committee would like to have any further assistance on this matter.

Yours sincerely

(Rosemary Laing)