

**PUBLIC INTEREST IMMUNITY CLAIMS
ORDER OF THE SENATE, 13 MAY 2009**

- (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).

**PUBLIC INTEREST IMMUNITY CLAIMS: OPERATION OF THE ORDER
OF THE SENATE OF 13 MAY 2009**

In accordance with the undertaking given in its Third Report of 2009, the committee has further reviewed the operation of the order of the Senate of 13 May 2009 governing the making of public interest immunity claims in Senate committee hearings.

The committee considers that the supplementary estimates hearings of 19 to 23 October 2009 indicated a greater appreciation of the intention and effect of the order and a better adherence to it. There were, however, a few anomalies which indicated that ministers and officers need further to familiarise themselves with the order.

The hearings began with a statement by the Special Minister of State and Manager of Government Business, Senator Ludwig, in the Finance and Public Administration Committee, to the effect that the government would fully comply with the order. The committee welcomes this statement. Following his statement there were questions about whether there would be a practice of taking questions on notice so as to consider whether public interest immunity claims could be raised, without articulating the grounds of those claims at the hearings as contemplated by the Senate's order. This point was discussed by senators but not fully resolved. The committee trusts that appropriate judgment will be exercised by ministers and officers in taking questions on notice.

In the same committee there was a repetition of the claim that advice to government is never disclosed, which is not correct (a formal written advice to the government was released on 29 October in connection with the debate in the Senate on the medical services table), and is explicitly stated by the Senate's order not to be a reason in itself for refusing information. When pressed on this point, the minister took the question on notice. The claim that advice to government is never disclosed was repeated in at least one other committee.

An occasion on which the order might properly have been applied was somewhat confused: a senator asked about the existence of an Australian Federal Police brief while disclaiming any intention of asking about its content. This led to a dispute about whether his questions were about the content, and the chair ruling questions out of order without any procedural ground for doing so. The legitimate public interest grounds that could have been raised, relating to law enforcement investigations and national security, were not articulated.

One exchange raised the question of whether there is yet a full understanding of the Senate's order. The Secretary of the Department of Education, Employment and Workplace Relations refused to answer questions about priority employment areas, and when asked for a public interest ground, stated that her refusal was not a public interest immunity claim. This resembles similar answers given in the previous estimates hearings. Some information was provided and questions taken on notice, to the satisfaction of the questioning senator, so the issue was unresolved.

That committee obtained from another Department of Education, Employment and Workplace Relations officer the proper acknowledgement that he could not claim legal professional privilege as a reason for not answering questions about legal advice. This is a point that has caused some difficulties in the past.

Failure to articulate an appropriate public interest immunity ground for not answering questions also occurred in other hearings. The Official Secretary to the Governor-General declined to reveal communications within Government House without invoking the legitimate ground of freedom of communication between executive officers and their personal staff. In the Foreign Affairs, Defence and Trade Committee hearing, "sensitivities" were raised on several occasions as reasons for not answering questions, with a failure to articulate the appropriate public interest grounds of prejudice to foreign relations and national security.

The Australian Broadcasting Commission refused to disclose the salaries of its leading television personalities, a matter which has a long history, and which led to Senate resolutions from 1971 declaring that statutory bodies do not have a general discretion to withhold information about public expenditure. On this occasion the exchange was inconclusive.

The committee reiterates that the Senate order requires that the withholding from committees of advice to government requires some public interest ground, and that there is not a general discretion to withhold information without a statement of a public interest ground. Any claim by officers to withhold information on public interest grounds must on request by a senator or a committee be referred to a responsible minister, as required by the order.

The committee will review the operation of the order again after the next round of estimates hearings.

In the meantime, the Senate Department will continue to acquaint departments and agencies with the order in the seminars on Senate procedures which are held for public officers. Secretaries of departments will again be reminded of the order at the appropriate time.