



AUSTRALIAN SENATE

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3 March 2017

Senator Louise Pratt
Parliament House
Canberra ACT 2600

By email:

Dear Senator Pratt

PUBLIC INTEREST IMMUNITY AND ESTIMATES

You have asked for advice regarding the responsibilities of officials to provide evidence to Senate committees, with particular regard to matters canvassed in the estimates hearing of the Legal and Constitutional Legislation Committee on 28 February 2017.

I have now had the opportunity to review relevant parts of the transcript of that hearing. The context of your request includes the consideration during estimates of matters raised at hearings of another committee, the current Legal and Constitutional Affairs References Committee inquiry into the liquidation of the Bell Group of Companies.

Matters being examined by other committees

A witness from the Attorney-General's Department, Deputy Secretary Ian Anderson, expressed reluctance at Tuesday's hearing to 'traverse matters that are the subject of inquiry by another committee'. There is no rule of the Senate that prevents senators seeking explanations on such matters at an estimates hearing.

There is a narrower rule, in standing order 25(13), restraining legislative and general purpose standing committees from inquiring into matters being examined by *select* committees, although even that rule has minimal application during estimates hearings. As noted in *Odgers' Australian Senate Practice*:

...standing order 25(13) which discourages legislative and general purpose standing committees from inquiring into matters being examined by select committees cannot prevent questions being asked at estimates hearings about such matters because such questions are not, in themselves, inquiries and the estimates hearings are intended to

cover “particulars of proposed expenditure”, subject only to the test of relevance.
[14th edition, p 481]

In any case, the rule does not apply in a matter involving a legislation committee and a references committees.

In relation to estimates hearings, the Senate has determined that any questions going to the operations or financial positions of departments and agencies are relevant questions for the purposes of estimates hearings. This gives those hearings an extremely wide scope. While the estimates hearing on 28 February 2017 touched on matters related to the references committee inquiry, it was nonetheless dealing with the administration and operations of the Attorney-General’s department and the portfolio responsibilities of the Attorney-General; matters squarely within the ambit of estimates.

Questions taken on notice in another committee

The estimates hearing also involved discussion of questions taken on notice in the references committee hearing on 17 February 2017. In keeping with the advice above, there is no rule of the Senate which would prevent senators asking for explanations about the matters canvassed in those questions (with the same proviso that the matters meet the test of relevance). In particular, there is nothing to prevent senators seeking to ascertain what progress has been made in developing answers to those questions. Equally, of course, there is nothing to prevent officials taking on notice any further questions on these matters, should that be necessary to ensure that considered responses are provided.

Senators asked about questions that had been taken on notice during the references committee hearing for the purpose of determining whether public interest immunity claims ought be made. Again, there is nothing to prevent senators seeking further information on such matters, including to determine (as in this case) whether an official or a minister intended to persist with a public interest immunity claim first raised 10 days earlier. Mr Anderson indicated ‘that where questions were taken on notice on the ground that we needed to refer the questions to the Attorney-General for consideration as to whether a public interest immunity claim should be made, that remains the case for those questions.’ [proof transcript, p. 98]

The Senate has previously recognised that a minister to whom a matter is referred may need to take advice and to consider whether a public interest immunity claim is to be made or sustained. The practice of taking such questions on notice is consistent with Senate practice, provided that the purpose of doing so is to ensure that the committee is provided with a considered and well-founded explanation for any claim that may be made.

Claims of public interest immunity, legal professional privilege

You have also asked about the validity of raising legal professional privilege as a ground for withholding information sought at an estimates hearing.

In relation to legislation committees considering estimates, the Senate has resolved there are no areas in connection with the expenditure of public funds where any person has a discretion

to withhold details or explanations from the Senate or its committees unless expressly provided otherwise. The underlying principle is that the Senate has an overarching right to obtain information, a right supported by the inquiry powers it possesses under section 49 of the Constitution. The Senate has always acknowledged, however, that there is information that it would not be in the public interest to disclose. In respect of such information, however, the Senate requires that a public interest claim should be made on a recognised ground and that it is for the Senate to determine whether that ground is acceptable.

The [2009 order of the Senate concerning public interest immunity claims](#) provides, in essence, that any refusal to provide a committee with information must be made by a minister and must include a statement by the minister that it would not be in the public interest to disclose the requested information. The minister is required to 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.

The process for raising and determining public interest immunity claims is increasingly well understood. Material that has been routinely provided to senators and officials about potentially acceptable and unacceptable grounds for raising claims is now consolidated in the 14th edition of Odgers, from p. 662.

It appears, from pages 98 and 99 of the proof transcript, that a public interest immunity claim is being contemplated in relation to the question whether an officer of the Australian Government Solicitor attended a particular meeting. Until the government responds to the questions taken on notice regarding this matter, it is difficult to assess any possible claim. Certainly, however, a claim that this information should be withheld merely on the basis of the existence of a lawyer-client relationship would not appear to meet the requirements of the 2009 order.

In relation to claims of legal professional privilege, Odgers states:

It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides grounds for a refusal of information in a parliamentary forum. [p. 668]

You made this point yourself in the hearing:

But legal professional privilege is not an accepted ground. You need to state the public interest immunity ground; legal professional privilege, in [and of] itself is not. So what is the damage to the public interest that is caused by the disclosure of this information? [proof transcript, p. 99]

The existence of legal professional privilege may lend weight to a public interest immunity claim, but any such claim must nonetheless be raised on an accepted ground and accompanied by a statement of the harm to be apprehended from the disclosure of the information sought.

As you know, a committee which concludes that a public interest immunity claim does not justify the withholding of information is required under the 2009 order to report that fact to the Senate, which may seek the information itself. In the absence of such a report, there is nothing to prevent an individual senator raising the matter in the Senate themselves.

If you would like advice on any of the other matters raised in these hearings, please let me know.

Yours sincerely

(Richard Pye)
Acting Clerk