ADVICE NO. 47

REQUEST FOR ADVICE - CONSIDERATION OF SUBMISSIONS BY COMMITTEES

The committee has asked for my advice on whether it should accept two documents sent as submissions to its current inquiry on guidance for officers giving evidence to Senate committees and providing information to the Senate and senators. As the committee appreciates, the decision is one for it to make but, in this advice, I shall set out what I believe are the relevant considerations for the committee to take into account.

Terms of reference

The first consideration is the terms of reference which provide the basis for the committee to examine the extent to which the documents address those terms of reference.

As subsidiary bodies, committees undertake inquiries as instructed by the Senate either in standing orders or individual resolutions, using powers delegated to them by the parent body for the purpose. Some terms of reference are designed with deliberate flexibility by including the phrase "and any related matters" or similar terms. Such terms allow committees to inquire more broadly than the specific terms of reference might otherwise indicate, including to pursue related issues that may be raised in submissions. Committees may also seek variations to their terms of reference from the Senate.

In the case of the committee's current inquiry, the terms of reference are as follows:

> The adequacy and appropriateness of current guidance and advice available to officers giving evidence to Senate committees and when providing information to the Senate and to senators, including:
>
> (a) the adequacy and applicability of government guidelines and instructions;
>
> (b) the procedural and legal protections afforded to those officers;
>
> (c) the awareness among agencies and officers of the extent of the Senate's power to require the production of information and documents; and
>
> (d) the awareness among agencies and officers of the nature of relevant advice and protections.

They are fully defined, without the catch-all "and any related matters".

As the committee knows, the genesis of the inquiry was a report in the previous Parliament by the Senate Foreign Affairs, Defence and Trade References Committee entitled, *Report on parliamentary privilege – Possible interference with the work of the committee* (Parliamentary Paper No. 69/2010). The possible interference was in relation to that committee's inquiry concerning events on HMAS Success, and involved departmental instructions to staff about their participation in the inquiry which the committee saw as obstructive to its work. The departmental instructions, which drew problematic distinctions

between the participation of officers in a professional as opposed to personal or private capacities, had the potential to deter officers from assisting the committee with its inquiry. The committee was highly critical of the department in failing to exercise its responsibilities and obligations to the committee. It also noted potential deficiencies in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* and, in particular, their failure to make clear what was meant by the term "private capacity". It recommended that the adequacy of these guidelines be referred to the Privileges Committee for inquiry and report.

On 23 June 2010, the Senate referred to the Privileges Committee the following matter:

> The adequacy of advice contained in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* for officials considering participating in a parliamentary committee whether in a personal capacity or otherwise.

Before the committee could consider the matter thoroughly, the Parliament was prorogued for the 2010 general election and the committee presented a brief report on 2 September 2010 indicating that the matter may be referred again in the new Parliament. At that stage, only one submission had been received (from me, as it happens).

The current inquiry is the result of the committee's reconsideration of the original terms of reference and its decision to expand and clarify them. Although I had no involvement in advising the committee on the expansion of its terms of reference, it is clear to me that the revised terms of reference incorporate long-running concerns of the committee with the preparedness of officers to interact with the Parliament (see 125th report, pp 46-56) and more recent developments involving the querying by statutory officers of the Senate's powers to order the production of documents (not forgetting the matters covered in the committee's 144th report on statutory secrecy provisions).

The kernel of the terms of reference is therefore the extent to which current information about the rights and obligations of officers as witnesses serves the needs of the Senate, as a House of the Commonwealth Parliament, and its committees, and what might be done to improve it. The inquiry is somewhat inward-looking in its focus, being designed to lift the performance of Commonwealth officers in particular, for the benefit of parliamentary committees. The evidence that such improvements are necessary has confronted the Senate and its committees over a considerable period of time and particular problems have been experienced with Commonwealth officers who might have been expected to know better (see, for example, the committee's 36th and 42nd reports). Notwithstanding numerous examples of poor performance in the past, the inquiry is not specifically addressing cases of individual conduct, except, I imagine, insofar as individual examples might illuminate ways of addressing any inadequacies in the guidance currently provided to officers.

Finally, in the context of the committee's overall work, the inquiry is not an exercise of its contempt jurisdiction, but a general inquiry into a matter of parliamentary law and policy.

Whether submissions are relevant to the terms of reference

The second major consideration is whether a submission is relevant to the terms of reference.

In considering whether submissions lodged are relevant to their terms of reference, committees are guided by the judgement of their members. If a submission casts light on the terms of reference, provides information or illustrations in relation to the terms of reference or draws the committee's attention to documents already in existence that might inform the committee about its terms of reference, then the submission is a relevant one. It is also relevant if it provides ideas about directions a committee might pursue in its recommendations or if it provides comparative information from other jurisdictions that illustrates a way forward (or not, as the case may be). Submissions that the committee will refer to in the course of the analysis, conclusions and recommendations in its report are clearly relevant submissions, as are those which prompt the committee to "think outside the square" about solutions which may be unorthodox. Evidence concerning another jurisdiction may be relevant to an inquiry in some circumstances. The fact that a committee may possibly not be able to compel such evidence from some State or Territory sources does not prevent a committee receiving it.

These characterisations are not intended to limit the ways in which submissions might be relevant to terms of reference. In proceedings in the Senate, a wide view of relevance has been taken but committees are entitled to form their own judgements on these matters.

Legal consequences of receiving and publishing submissions

A third consideration is that by receiving a submission and authorising it for publication, a committee confers parliamentary privilege on a document and its publication.

The actions of a person in preparing a document for submission to a committee and presenting it to the committee come within the definition of "proceedings in Parliament" in subsection 16(3) of the *Parliamentary Privileges Act 1987* and are therefore protected by parliamentary privilege. The document itself is not so protected unless it is ordered to be published and/or it is accepted as evidence by the committee. If neither of these two conditions applies, then publication of the document, for example, by its author, is not protected by parliamentary privilege.

Adverse reflections

Finally, a submission containing adverse reflections on a person may attract the provisions of paragraphs (11) to (13) of Privilege Resolution 1 and require the committee to take one or more actions in relation to the adverse reflections. A committee can decide not to receive such evidence, particularly if it is of limited or no relevance to the terms of reference. If the committee does receive the evidence, it can decide not to publish it. If the committee receives the evidence and wishes to publish it (because, for example, it is highly pertinent to the terms of reference), then it must give the person concerned reasonable opportunity to respond.

The documents

Given the foregoing, the two documents on which the committee has sought my advice relate to matters in Queensland which have previously been brought before various committees going back to the Senate Select Committee on Public Interest Whistleblowing in 1994.

The first document, from Mr Gordon Harris, President of the Whistleblowers Action Group Qld, is largely a rebuttal of a study undertaken by Griffith University on public interest disclosures and the treatment of those who make them, provided to the committee under cover of an email urging the Senate to appreciate certain claims by the author. The submission makes no attempt to address the committee's terms of reference. If the committee is satisfied that there is nothing in the document or covering letter that could inform its consideration of the terms of reference then there would be no reason to accept the document as a submission.

It is not apparent that the document attached to Mr Harris's email has previously been published and the committee should not overlook the possibility that the Whistleblowers Action Group Qld is seeking to have it published under parliamentary privilege.

The second document, submitted by Mr Kevin Lindeberg, is more problematic because it purports to address the terms of reference. It is entitled "Protection of Whistleblowers Appearing before Senate Committees". On first impressions, this is not the subject of the committee's inquiry which is about the adequacy and appropriateness of guidance and advice available to officers giving evidence to Senate committees and providing information to the Senate and senators. It may be, however, that the committee considers that the treatment of whistleblowers should be dealt with as part of any relevant guidance and advice. (As an aside, the Public Interest Disclosure Bill 2011, a response to the Dreyfus committee's report on whistleblower protection, to establish a framework for reporting and investigation of alleged wrongdoing in the Commonwealth public sector, is scheduled for introduction during the current winter sitting period.)

Mr Lindeberg's submission is accompanied by a 9 volume audit of the Heiner affair by David Rofe QC. At the risk of oversimplifying it, Mr Lindeberg's submission is that, since Federation, the Commonwealth has acquired sufficient extra powers (through numerous High Court judgments and accession to international treaties protecting civil and political rights) to enable it to exercise them in the oversight of any action by state officials that is contrary to the particular features of the rule of law that Mr Lindeberg argues the Commonwealth Constitution guarantees. It is an argument for extended jurisdiction of the Commonwealth Parliament over state matters to support Mr Lindeberg's contention that the committee should revisit the Heiner affair. Mr Lindeberg does not claim to have new evidence but he proposes that further facts that he has become aware of since the various committee inquiries concerning the matter, including the Senate Select Committee on the Lindeberg Grievance (2004), have led him to fresh insights into new ramifications about the illegality of the original acts and the validity of the testimony given by various parties to various committee inquiries (paragraph 2.4 and following). It is a complex and difficult submission, citing many High Court judgments and other sources (not always accurately) but also involving expressions of opinion, assertions and circular arguments. There is no doubt that the subject matter is very serious. The question is whether any of the documentation is likely to assist the committee to consider and come to conclusions on its current terms of reference.

Apart from the possibility noted above, it is difficult to see how the document does bear on the terms of reference. It does, however, present the committee with another issue to

consider; namely, whether the document discloses any evidence of contempt that has not previously been dealt with by the committee (in its 57th, 63rd and 71st reports) and that may warrant inquiry now. To satisfy itself on this front, the committee may wish to commission a research paper from its secretariat that identifies any such matters. Should there be matters which the committee considers warrant investigation as possible contempts, then it should raise them in accordance with standing order 81.