ADVICE NO. 44

REQUEST FOR ADVICE - POTENTIAL CONFLICTS OF INTEREST

The committee seeks my views on whether it is appropriate for members of the committee to participate in an inquiry which was referred to it in the 42nd Parliament and which it is considering re-adopting, given the previous involvement of two members in events which were the subject of the precursor inquiry by another committee. In particular, the committee seeks my advice on whether these matters give rise to an application of standing order 27(5).

Standing order 27(5) provides as follows:

> A senator shall not sit on a committee if the Senator has a conflict of interest in relation to the inquiry of the committee.

This standing order is intended to address potential conflict between senators' private interests and their public duty. It was the subject of a statement by President Beahan on 24 February 1994 in response to a suggestion that a senator had a conflict of interest because he had written newspaper articles critical of a committee of which he was a member, without identifying himself as such. President Beahan indicated that the standing order applies to a situation in which a senator has a private interest in the subject of a committee's inquiry which conflicts with the duty of the senator to participate conscientiously in the conduct of the inquiry, an example being a senator holding shares in a company, the activities of which are under inquiry.

Relating as it does to a conflict between ***private*** interests and public duty, standing order 27(5) has no application to the present circumstances wherein members of the committee have previous ***professional*** involvement in circumstances preceding the reference of the matter to the Committee of Privileges. These circumstances raise a broader issue of conflict of interest than is contemplated by standing order 27(5).

This broader issue was the subject of detailed advice to the committee from my predecessor in 1989 and subsequently published by the committee. Copies (printed from the committee's website) are attached. Mr Evans' advice discusses specific circumstances and precedents but he also makes several significant points of principle. The most important of these is that it is always a matter for the good judgement of senators whether they should refrain from participating in particular inquiries because they might be regarded as not bringing a completely impartial mind to them. However, Mr Evans also points to the absence of any rule in this or any comparable jurisdiction against members with views about matters participating in inquiries into those matters. He distinguishes the practice of the legislature from the practice of the courts where conflict of interest rules apply more strictly in the interests of the proper administration of justice.

The absence of any such rule in the parliamentary context is consistent with the function of legislatures in free states to monitor and participate in discussion of matters of public interest

or controversy. If legislators with prior knowledge of, or views about, such matters excused themselves on this basis, then there would be few legislators left to participate in most inquiries.

Mr Evans also quoted from the report of the Select Committee on Allegations Concerning a Judge and a foreshadowed challenge to three members of that committee who had been members of the earlier Select Committee on the Conduct of a Judge. The members did not disqualify themselves, the challenge did not eventuate and the committee reported in the following terms:

> Whilst not conceding the validity of the submission foreshadowed by Mr Hughes, the three members concerned considered whether they should disqualify themselves from sitting on the Committee, and concluded that they should not do so. They considered that their service on the previous Committee did not preclude them from making a proper and unbiased judgement on the matters before this Committee on the basis of the evidence to be heard by it, or that they had any sense of vested interest in maintaining their earlier decision.

Mr Evans urged the then members of the Privileges Committee to be careful about not placing future committees and senators in a difficult position by providing a precedent which would encourage future challenges to the participation of senators in inquiries by too ready an acceptance of the misleading analogy with the rules and practices of the courts. He advised that a solution to perceived bias or conflict of interest was for those members who may have prior knowledge of matters to include a statement in the report indicating that they had come to their conclusions and recommendations on the basis of the evidence put before the committee and, in the words of the select committee, did not have a vested interest in maintaining an earlier position.

In the present circumstances I do not consider that even this precaution is warranted.

To explain this view, it may be useful for me to characterise the work of the committee as falling into three distinct types of inquiry: contempt matters, right of reply applications and general matters. It has certainly been the case that members of the committee who have had an involvement in matters giving rise to a contempt or right of reply inquiry have excused themselves from participation on the grounds of that involvement. For example, Senator Hurley, as chair of the Economics Legislation Committee which conducted the inquiry into the Car Dealership Financing Guarantee Appropriation Bill 2009 at which Mr Godwin Grech appeared, did not participate in the subsequent inquiries by the Privileges Committee. In the past, when the committee investigated numerous allegations of unauthorised disclosure of committee proceedings, it was standard practice for any members of the committee who were also members of the affected committee to excuse themselves from participation in those inquiries. Many members in the past have also excused themselves from consideration of applications under Privilege Resolution 5 on the grounds that it was they who made the remarks in the Senate at which the application was directed. These types of matters, however, can be distinguished from general inquiries where there is no issue of contempt

involved, no question of individual conduct under consideration and therefore no issue of possible bias.

The proposed inquiry falls clearly into the category of general matters. Its genesis was a recommendation by the Senate Foreign Affairs, Defence and Trade References Committee in a report on a privilege matter arising from an equity and diversity health check in the Royal Australian Navy – HMAS Success. While both Senator Faulkner and Senator Johnston had an involvement in the earlier inquiry in separate roles, the committee's proposed terms of reference need not involve any revisiting of those matters.

The terms of reference deal with the adequacy of the Government Guidelines for Official Witnesses appearing before Parliamentary Committees. Should it proceed with its inquiry, the committee can expect to receive evidence of instances where the guidelines have been less than adequate. The report of the Foreign Affairs, Defence and Trade References Committee on the privilege matter arising from its inquiry into the HMAS Success is one such instance. That committee inquired into the circumstances of the inadequacy and reported its concerns to the Senate. Those concerns are now a matter of record and do not require the Privileges Committee to revisit the particular facts. Even if the committee did so, however, it would be a simple matter for the affected members to state their previous involvement and indicate the basis on which they were participating in the current inquiry (that is, on the basis of the evidence submitted, not on their previous positions which were necessarily associated with earlier or particular roles).

The proposed terms of reference of the Privileges Committee require it to extrapolate from the HMAS Success episode and other instances that may be brought to its attention, and to consider the overall adequacy of the guidelines in the light of such instances. The committee may also wish to go further and suggest how the guidelines could be improved. None of this requires it to dwell on the circumstances of particular cases. They are only illustrative of the broader issue. The important role of the committee is to bring to bear on the terms of reference the collective judgement and experience of its membership.

For two such experienced and well-informed members as Senators Faulkner and Johnston not to participate would be to deny the committee, and ultimately the Senate, of the benefit of that experience. In my view, such an outcome would not only be unfortunate in itself but it would set an unfortunate precedent by suggesting that prior professional knowledge and interest in a subject necessarily amounts to conflict of interest. The work of the Senate and its committees could not proceed on this basis.

Note: at its meeting on 3 March 2011 the committee noted the Clerk’s advice.

Senator Faulkner advised the committee that he had determined to participate in the proposed inquiry only if it was the unanimous decision of the committee that his participation was appropriate. Senator Faulkner then absented himself from the meeting.

In his absence, the committee considered the Clerk's advice and Senator Faulkner's proposal and unanimously agreed that Senator Faulkner's participation was appropriate.

The committee agreed to publish the Clerk's advice and this resolution concerning Senator Faulkner's participation in the proposed inquiry.