

SENIOR PUBLIC OFFICIALS' STUDY OF PARLIAMENTARY PROCESSES

REPORT ON COMPLIANCE WITH SENATE ORDER OF 1 DECEMBER 1998

Introduction

1. In the more than thirty years of its existence, the Committee of Privileges has considered nearly twenty matters of privilege raised against Commonwealth public officials, representing about 40% of all possible contempt matters referred to the committee. These have ranged from unauthorised disclosure and misrepresentation of parliamentary documents,¹ through false or misleading information provided to the Senate or parliamentary committees,² to what the Committee of Privileges has always regarded as the most serious of all possible contempts — improper interference with and punishment of persons providing information to the Senate and parliamentary committees.³ The first of these matters was referred to the committee in 1985, and reports on such matters have continued to the present day. Their regularity in coming before the committee has over the period caused it considerable disquiet.

The Senate's resolution

2. On 21 September 1993 the Senate adopted the following recommendation of the Committee of Privileges as a resolution of the Senate:

That the Senate is of the opinion that all heads of departments and other agencies, statutory office holders and Senior Executive Service [SES] officers should be required, as part of their duties, to undertake study of the principles governing the operation of Parliament, and the accountability of their departments, agencies and authorities to the Houses of Parliament and their committees, with particular reference to the rights and responsibilities of, and protection afforded to, witnesses before parliamentary committees.⁴

3. The resolution derived from a report of the committee into possible contempts by senior officers of a statutory authority under the umbrella of the Attorney-General's Department. What exasperated the committee at the time was that little more than two years earlier — and four months before the matter giving rise to the 42nd Report was referred to the Committee of Privileges — another statutory agency

1 Committee of Privileges Reports Nos 9, 22, 74(2), 78 and 84, PP Nos 506/1985, 45/1990, 180/1998(2), 183/1999 and 35/2000.

2 Reports Nos 14, 15, 26, 36, 46, 50 and 64, PP Nos 461/1989(2), 438/1990, 194/1992, 43/1994, 322/1994 and 40/1997.

3 Reports Nos 18, 21, 36, 42, 50 and 73, PP Nos 461/1989(2), 194/1992, 85/1993, 322/1994 and 118/1998.

4 Report No. 42, PP No. 85/1993, p. 45; *Standing and Other Orders of the Senate*, February 2000, p. 130.

within the same portfolio had also been the subject of a Committee of Privileges inquiry. In the report on the latter reference,⁵ the committee had specifically drawn attention to the lack of understanding by senior officials, who had a duty and responsibility to know better, of parliamentary procedures and processes. In the two relevant cases, the committee was particularly outraged because, not only were the responsible persons themselves senior officials of regulatory agencies, each organisation was directly responsible to its own joint statutory parliamentary committee.

4. As the introduction illustrates, even after the Senate's agreement to the resolution, the Committee of Privileges found itself frequently undertaking inquiries into matters concerning Commonwealth public servants at a senior level. In addition, all members of successive Privileges Committees, most of whom had vast experience in executive or committee positions, including as chairs or former chairs of various parliamentary committees,⁶ had encountered several instances of lack of responsiveness to parliamentary requirements.

5. To some extent, the number of matters involving public officials was not surprising. There is an ongoing and close relationship between the Houses of Parliament, their committees and members, and public officials. The public service is a prime repository of information, advice and assistance to both the parliament and the executive. Thus, the committee might expect that the sheer numbers involved in direct dealings with the parliament would necessarily entail occasional tensions and misunderstandings in the relationship between the two arms of governance.

6. Conversely, it is not unreasonable to expect that expertise within the public service, particularly among its senior officers, would suffice to ensure that difficulties arising from lack of knowledge of parliamentary procedures and processes would be less likely to occur. But this has not proved to be the case.

Action following the resolution

7. What concerned the Committee of Privileges, following the Senate's agreement to the resolution, was both the continuation of privilege matters involving public officials and executive tardiness in giving effect to the terms of the resolution. The Department of the Senate was immediately responsive to the committee's recommendations, publishing widely the resolution of the Senate and establishing a series of seminars pitched at SES level and above for all Commonwealth departments and agencies. Some departments and agencies, notably the agency the subject of the 42nd Report, participated in these seminars. However, despite sporadic efforts to create courses through the then Public Service Commission (PSC), which resulted in a small segment on parliamentary process being included regularly in SES entry-level PSC

5 Report No. 36, PP No. 194/1992.

6 For list of committee membership since its establishment in 1966 see Report No. 76, PP No. 126/1999, which also separately lists chairs and deputy chairs of the Committee of Privileges.

courses, there was no concerted executive attempt to fulfil the terms of the resolution until the committee produced its 73rd Report, tabled in June 1998.⁷

8. Coincidentally, this report, which recommended that the Senate reaffirm the 1993 resolution, again involved another agency associated with the Attorney-General's Department, as well as the department itself. In making a finding that no contempt of the Senate was involved the Committee of Privileges observed:

One significant aspect of this reference, which in fact has influenced the committee's finding that no contempt has been committed, is the presumed failure by all persons involved to take account of the rights, obligations and protections of witnesses before parliamentary committees.⁸

Further developments

9. The committee's consideration of this matter led it to recommend, not merely the reaffirmation of the 1993 Senate resolution, but also:

...that the Senate seek a specific report, in a year's time, from each Commonwealth department, on behalf of that department and its agencies, on how the terms of the resolution have been complied with.⁹

The Senate adopted both recommendations on 1 December 1998.

10. At the same time as the committee was finalising the 73rd Report, it was also completing its consideration of six matters relating to unauthorised disclosure of committee documents. Because of the number of matters, the committee decided to produce a general report on principles governing unauthorised disclosure. Two of the six matters involved public servants. This 74th Report, involving findings of contempt thereby necessitating consultation with persons the subject of the findings, was finally tabled on 9 December 1998. The report drew attention to the recommendations in the 73rd Report, noting their adoption by the Senate on 1 December 1998 and also noting, approvingly, that:

Even before the Senate had considered the recommendations, steps had been taken to meet the requirements of the resolution. In addition to an existing program for SES Band 1 officers, the Public Service and Merit Protection Commission [PSMPC] has, in consultation with officers of both Houses of the Parliament, the Department of the Prime Minister and Cabinet, and the Attorney-General's Department, created a specialised course dealing with matters covered by the resolution. Furthermore, the PSMPC invited the secretary to the committee to write an article in the widely-circulated *SES News*, drawing attention to the committee's concerns.¹⁰

7 Report No. 73, PP No. 118/1998

8 *ibid.*, p. 32.

9 *ibid.*, p. 33.

10 Report No. 74, PP No. 180/1998, p. 9.

11. The committee itself felt some obligation to draw attention in a consistent way to its concerns. As a consequence, on 22 June 1999 it tabled in the Senate a report entitled *Parliamentary Privilege – Precedents, Procedures and Practice in the Australian Senate 1966-1999*. Included in the report was a thematic discussion of all matters which had come before the committee, including summaries of each report to that time, and drawing specific attention to the relationship between public officials and parliament.¹¹ This report has been distributed at every SES seminar conducted by the Department of the Senate and PSMPC since its publication, and has been posted on the internet for ready access. The committee understands that some departments have placed it on their intranets.¹²

12. Unfortunately, despite the passage of the resolution and the order requiring a response on compliance, and also the committee's drawing particular attention to the 74th Report relating to unauthorised disclosure, the committee's workload relating to the public service did not conclude. Since the Senate's acceptance of the two recommendations in the 73rd Report, the Committee of Privileges has dealt with a further two cases involving Commonwealth public servants. Nonetheless, as a result of its efforts and those of the PSMPC, it entertains the perhaps forlorn hope that privilege matters involving public servants at senior levels of the Commonwealth should diminish, if not disappear entirely.

Responses

13. The reason for its slight sense of optimism lies with the returns to order on behalf of all Commonwealth departments and agencies, all of which, including a return from one of the three parliamentary departments to which the order applies, were tabled or received by the due date of 30 November 1999.¹³ The committee deliberately refrained from recommending a format for the responses, and it understands that, in accordance with the principles of devolved accountability, no central direction was given for a common format. As a result, there is no readily collated statistical outline of public service compliance with the order. There is much, however, that may be drawn from the responses.

14. What the committee has found of most interest is that on the whole those departments and agencies which have either been the subject of committee reports, or have enjoyed a positive relationship with parliamentary institutions, have provided the most useful information. Conversely, those who have caused and continue to cause difficulties for the Senate and its committees have been the least responsive.

15. The committee was particularly gratified that the then relatively new but very experienced secretary¹⁴ to the Attorney-General's Department — the subject of the

11 See Report No. 76, PP No. 126/1999, pp. 48-49.

12 For example, the Department of Employment, Workplace Relations and Small Business.

13 See para. 9 above.

14 Who has since retired from the Commonwealth public service.

committee's 73rd Report, compiled before he was appointed to the position — had responded so constructively to the Senate's order. In a covering letter to a comprehensive and assimilated list of responses on behalf of his department and the authorities within the portfolio, he gave details of his actions following the tabling of the report:

In September 1998, following the tabling of the 73rd Report of the Senate Committee of Privileges which also drew attention to the resolution of 21 October 1993, I wrote to the Secretary of the Department of the Prime Minister and Cabinet, Mr Max Moore-Wilton, and the Public Service Commissioner, Ms Helen Williams AO, suggesting that further training in this area for senior public servants would be desirable. In those letters I noted that existing educational programs for senior officers did not touch on these issues but that it would be appropriate to develop a special program for new and existing senior officers which dealt with the issues in more detail.

In response, the Public Service & Merit Protection Commission (PSMPC), working with this Department, the Department of the Prime Minister and Cabinet, the Department of the Senate and the Department of the House of Representatives developed a seminar presentation called *Public Servants' Accountability, Rights and Responsibilities*. The seminar was targeted at senior executive service officers and was designed to address all the issues identified in the Senate resolution in some detail. The half day seminar, as finally presented, involved presentations by senior officers from the Departments involved in its development, including this Department, and an open forum session chaired by an agency head in which participants were given the opportunity to raise issues for discussion.

In my view, it has proved particularly useful to have both the parliamentary perspective, represented by the Department of the Senate and the Department of the House of Representatives, and the executive perspective, represented by the Department of the Prime Minister and Cabinet and the Attorney-General's Department together on the same panel. I have chaired a number of the open forum sessions and I believe this configuration brings an invaluable balance to the discussion and highlights the more difficult and complex issues in a realistic way.

I understand that the feedback on the seminar has been extremely favourable. Over 700 participants have attended the seminar which has been presented seventeen times in the last twelve months, including once in Sydney and once in Melbourne.¹⁵

16. In his concluding paragraph he comments:

Although the seminar series had been quite resource intensive for those Departments involved in presenting the seminars and for the PSMPC, I believe that it has been a valuable exercise. There is no doubt that the

15 Appendix B, pp. 19-20.

seminar series has helped to raise awareness about the accountability, rights and responsibilities of public servants among senior public servants. I trust that it will contribute to a better working relationship between public servants and the Parliament in the future.¹⁶

17. The vast majority of officers of the Attorney-General's Department had, by the time of compliance with the order, completed programs conducted either by the Department of the Senate or by the PSMPC, and the Secretary advised that it was intended that the remaining officers attend programs to be conducted in 2000. With the exception of agencies discussed at paragraph 20 below, most other organisations within the department's purview had attended the relevant courses, or intended to do so.

18. Other departments also responded in accordance with the order, with numbers or percentages ranging from no attendees within some agencies through to 100% in others. As at 30 November 1999, attendance within the majority of departments hovered somewhere around the 50% mark. The record of the departments in complying with the resolution was generally rather better than the agencies for which they have portfolio responsibilities, although this was not universally true. The committee had cause to observe in its 84th Report relating to the Department of Employment, Workplace Relations, and Small Business, tabled some months after the deadlines for responses to the Senate's order, that, at the time the department complied with the order, relatively few senior officers had attended courses.¹⁷ However, by the time the committee tabled its report, this had been remedied to the extent that most of the department's centrally-located SES officers had attended a specialised course conducted by the Department of the Senate.¹⁸

19. The record of agencies was patchy, although again ranging from 0% to 100%. The committee was wryly amused to discover that Telstra, which has expressed some degree of reluctance to attend Senate committee hearings, had sent no senior officers at all to either PSMPC or Senate courses; this was also true of the ABC, which has experienced difficulties with Senate committees in the past.¹⁹ However, the responsible department, Communications, Information Technology and the Arts, has advised in its response to the Senate order that:

A commitment has been obtained from those agencies unable to undertake the training to attend workshops during the first half of 2000.²⁰

An honourable exception to agencies' poor attendance was provided by the portfolio agencies of the Department of the Prime Minister and Cabinet. In particular, the

16 *ibid.*, p. 21.

17 Report No. 84, PP No. 35/2000, p. 6.

18 *ibid.*

19 Appendix B, p. 28.

20 *ibid.*, p. 27.

PSMPC has appropriately led by example, with 100% of its SES officers having attended courses related to parliament.²¹

20. One matter which bemused the committee somewhat was the narrow approach taken by some organisations to their responsibility to abide by the terms of the resolution. Some agencies — for example, the High Court of Australia and the Family Court of Australia²² — interpreted the resolution narrowly, assuming that only those officers with responsibility for attending parliamentary committee hearings were ‘caught’ by the terms of the resolution. As the resolution makes clear, the core duty of all senior Commonwealth officials is ‘to undertake study of the principles governing the operation of Parliament’.²³ Their duty to understand the rights and responsibilities of and protection afforded to witnesses before parliamentary committees is a subset of their accountability requirements to the Houses of the Parliament and parliamentary committees.

21. The courses conducted by the Department of the Senate and the PSMPC are much more broadly-based than their applicability to officers before parliamentary committees, as typical programs for both seminars attached to this report indicate.²⁴ The committee has some concern that organisations such as these have focussed far too narrowly on the committee element of their responsibilities. It emphasises that its commitment to improving public service performance encompasses the relationship between the public service and the Parliament as a whole, not only the rights and obligations and protection of witnesses.

Conclusion

22. The committee has decided to include all the responses to the Senate’s order of 1 December 1998 as an appendix to this report.²⁵ The report itself will be placed on the internet, although the responses will not be included on the internet. However, the committee will make the printed report available on request and will send it to all secretaries of Commonwealth departments. In general, it is satisfied with the attitudes of the majority of Commonwealth departments and agencies to the order.

23. The committee is particularly pleased that the PSMPC, as the coordinator of courses providing public service training for senior executives, now includes the seminar on public servants’ accountability, rights and responsibilities, as one of its core SES expertise development programs. Furthermore, it noted with appreciation the emphasis given in the PSMPC’s State of the Service Report 1998-99²⁶ to accountability of public servants to Parliament, with particular reference to the

21 *ibid.*, p. 46.

22 *ibid.*, p. 24.

23 *Standing and Other Orders of the Senate*, February 2000, p. 130.

24 Appendix A.

25 Appendix B.

26 PSMPC State of the Service Report 1998-99, pp. 60-61.

committee's 42nd and 73rd Reports. Given the PSMPC's recent record, the committee has every reason to expect the PSMPC to continue to take its responsibilities seriously, so that continuous training in this area will be the norm rather than a one-off addendum to a senior management course.

24. The committee does not propose at this stage to recommend a reinstatement of the order that departments report on their compliance with the 1993 resolution. It will, however, monitor progress by departments and agencies in fulfilling the requirements of the resolution, to ensure that understanding of duties to the Parliament will be part of the basic responsibilities of all public officials throughout the Commonwealth.

Robert Ray
Chair