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Senator S Ryan
Chair
Finance and Public Administration References Committee
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Ryan

Congratulations on being elected as chair of the Finance and Public Administration References Committee whose forerunners laid the foundations for many important developments in accountability. The scrutiny of statutory authorities and the reinforcement of their accountability to parliament, the identification of the vast number of government bodies, the relevance and detail of budget documentation, the timeliness and quality of annual reports and the accountability of government companies were all the subject of influential reports by previous committees in this field.

It is with regret, therefore, that I draw to your attention some errors in the committee's recent report on *Independent Arbitration of Public Interest Immunity Claims*, errors which go to the research and analysis in the report, not to its conclusions and recommendation. I do so on the basis that parts of the report misdescribe the Senate's powers and suggest on multiple occasions that the Senate's powers in some respects are shrouded in doubt when, in fact, this is not the case, as all the relevant authorities will confirm.

The following are examples of statements that concern me:

- A description of the Senate's powers as 'extensive' (para. 2.2) is followed by examples from standing and other orders, but without reference to the source of the power, principally in section 49 of the Constitution but also the recognised inherent powers of a legislature. Section 49 is not mentioned until paragraph 2.75. It should have been the starting point for any discussion of this issue.
- 'The types of information which are immune from disclosure by the executive to the Senate ... (para. 2.4) (*No such types have been conclusively established; on the*

contrary, information of all types is regularly disclosed to the Senate and its committees.)

- 'In most instances, the Senate has either accepted that privilege applies, or the government has ultimately responded to an order' (para. 2.12) (*There are no resolutions of the Senate identifying particular grounds as acceptable but there are many resolutions asserting the Senate's right to information, resolutions which have been complied with by successive governments.*)
- Repeated use of phrases referring to a legislature's 'power to receive privileged documents' (for example, paras. 2.58. 2.62, 2.73) (*the power is not to* ***receive*** *but to* ***demand or obtain*** *such documents, a fundamental misunderstanding of the concept, and the documents are not privileged. At most they are subject to a* ***claim*** *of privilege. There is no limit to the classes of documents that can be presented to the Senate or its committees.*)
- '...there remain conflicting views regarding whether the Senate or executive government is the ultimate judge of the extent and application of public interest immunity, and accordingly whether the Senate has the power to receive privileged documents' (para. 2.62) (*See the submission of the former Clerk which points out that there is no known basis for the executive government being a judge in its own cause in determining what information should be made available to the legislature. While there* ***may*** *be possible sources of legal limitations on the Senate's power to demand documents, there are no* ***known*** *limitations to this power in law because these questions have never been tested in the courts in relation to the Senate. They have been tested in NSW in the Egan cases which the report wrongly characterises as having no application outside NSW (para. 2.75). See Enid Campbell,* Parliamentary Privilege, *2003, p. 161: 'The subsequent judicial rulings in the cases of* Egan *have gone some distance towards establishment of a principle that the investigatory powers of houses of a legislature, at least in relation to activities of the executive branch of government, are not constrained by the public interest immunity doctrine which courts are obliged to apply in proceedings before them'.*)
- 'In the Commonwealth context, in 1901 the powers of the House of Commons to call for documents were restricted by a convention that it was not in the public interest to require the production of documents in all cases, including on most of the grounds listed as paragraph 2.9' (para. 2.77) (*If this is so, why is no authority cited for this extraordinary claim? Conventions do not in themselves limit powers. What may be intended here is reference to the adoption of a self-denying ordinance by which the Commons declined to press its powers in particular circumstances. This is what the Senate continues to do by not pressing its powers in some circumstances. It does not mean that the powers themselves are limited.*)

I am concerned that the basis of the analysis, and chapter 2 of the report in particular, will be seen to be flawed and, furthermore, that the report may be used as a precedent to undermine the work of the Senate and its committees in this very important area in the future.

In 2003, for the purpose of the committee's inquiry into staff employed under the Members of Parliament (Staff) Act, the former Clerk provided, at its request, a brief paper on the relationship between the formal power of the Senate to obtain evidence and the limitations on that power which have gained some recognition but not legal status. The committee published the paper. Mr Evans updated the paper in November 2008 and I attach a copy.

I request that the committee publish the updated paper, together with my correspondence, on its website alongside the report.

I am sorry to bring these matters to the committee's attention after the event, and regret that better quality controls were not in place.

Yours sincerely

(Rosemary Laing)