Australian Greens and Senator Xenophon's Dissenting Report

The Australian Greens and Independent Senator Nick Xenophon strongly disagree with the findings of government and opposition Senators expressed in the majority report. The conclusions drawn in the majority report do not properly reflect the evidence taken by the committee and fail to utilise the constructive suggestions of expert witnesses to improve the proposed Senate resolution.

The need for an independent arbitration process

At paragraph 3.3 of the majority report, the government and opposition members of the committee note that '[a]ll witnesses were ultimately positive about the benefits of an independent arbitration process for public interest immunity claims…'[1] The witnesses who gave evidence to this inquiry included the longest-serving Clerk of the Senate, Mr Harry Evans, and the Clerk of the only Australian Parliament to have introduced a successfully operating independent arbitration scheme, Ms Lynn Lovelock, Clerk of the Parliaments, NSW. Both of those highly-regarded officers spoke strongly of the need for an independent arbitration process in order to improve government accountability, and fill the existing gap in the Senate's scrutiny role.

Furthermore, notwithstanding the fact that the attempt to introduce independent arbitration into the Victorian Legislative Council has been vexed with problems, the Clerk, Mr Wayne Tunnecliffe remained enthusiastic about the benefits independent arbitration can deliver. Even Associate Professor Twomey, who has been the most ardent critic of the NSW scheme, was ultimately supportive of the Senate adopting an independent arbitration process:

> **Senator LUDLAM**—…Your main concern is narrowing the range of discretion, but on balance are you in favour of an instrument like this operating?
>
> **Prof. Twomey**—Yes, on balance I think it is actually a good idea. Despite all my complaints about the New South Wales system, I think overall in principle it is a good idea; it just has not operated terribly well in New South Wales. I think it could operate better in the Senate.[2]

The Australian Greens and Senator Xenophon see no valid justification for the majority of the committee ignoring these expert views in favour of their own preferences, which are unsupported by the evidence.

---

1 Senate Finance and Public Administration References Committee, *Inquiry into Independent Arbitration of Public Interest Immunity Claims*, p. 21.

2 Senator Ludlam and Associate Professor Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 43.

Evidence presented to the committee highlighted the importance of developing a mechanism to resolve disputes over public interest immunity between executive government and the Senate.[3] As outlined in chapter 2 of the majority report, the current lack of such a mechanism amounts to a significant gap in the Senate's ability to hold government to account. Mr Evans described this gap as 'one of the biggest problems of legislatures around the world.'[4]

Given that holding government to account through examination of its administrative actions is a key aspect of the Senate's constitutional role it essential that this gap be addressed.

Dissenting Senators do not accept the majority of the committee's conclusion that the hypothetical potential for an independent arbitration process to be misused or circumvented is sufficient reason to ignore the overwhelming evidence in support of the independent arbitration to substantially improve government accountability.

The majority's arguments against independent arbitration

The majority of the committee's primary argument against the adoption of an independent arbitration process is based on the hypothetical possibility of executive government being uncooperative with such a scheme. This argument fails to take into account the expert opinions of witnesses, most of whom were optimistic about the Senate's ability to develop a fair, cooperative scheme which has the support of government. The argument also fails to recognise key differences between the proposed Senate model and the Victorian model, which make the former more likely to succeed.

The importance of cooperation

Witnesses before the committee emphasised the importance of cooperation between the executive and the Senate for an independent arbitration model to succeed. Chapter 3 of the majority report outlines the consequences of non-cooperation by both the legislature and the executive, which have the potential to undermine and circumvent an independent arbitration process. Based on this potential for misuse, the majority report concludes that an independent arbitration model in the Senate risks being costly and failing.

However, the majority report fails to take account of the expert views of witnesses which, although noting the possible pitfalls of independent arbitration, also argued that there is a high likelihood of the Senate and Commonwealth Government being able to achieve the requisite cooperation. For example, Associate Professor Twomey

---

3 See Mr Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, pp 47–8; Mr Tunnecliffe, Clerk of the Legislative Council, Victoria, *Committee Hansard*, 7 December 2009, p. 13; Ms Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard*, 7 December 2009, p. 28.

4 Mr Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 47.

argued that the Senate had a greater chance of developing a cooperative model than NSW and Victoria because:

> I think the Senate does show cooperation and has not taken things to an extreme, and that is probably one of the virtues of the Senate...If, for example, the Senate does not receive the documents that it wants and it is unhappy about it, the strongest action it seems to have taken in the past is things like extending question time or making it difficult for governments to get their bills through on time. But it has not gone to the extent of suspending ministers and the like. And I think it is probably right in doing that. The Senate has always behaved in a more temperate way.[5]

Former Clerk of the Senate, Mr Evans was also confident that the requisite cooperation between the executive and the Senate could be achieved, and discussed the incentives for the executive to cooperate with the proposed scheme:

> I suppose the incentive for the executive government to agree to this sort of proposal is that it will avoid those constantly recurring cases in the future, which end up with the government being accused of engaging in a cover-up and the public not knowing whether it is a cover-up or whether it is not. It will avoid some really serious problems in the future, like the 1982 case in which the government could very well have borne a heavy political penalty for not having a process in place to determine these things. It depends on the cooperation of both parties.[6]

Furthermore, there are a number of specific aspects of the proposed Senate model which overcome the concerns of the Victorian government, and accordingly make the former more likely to achieve cooperation between the executive and the legislature.

Key differences between the Senate and Victorian Legislative Council models

The majority report argues that without the certainty of precedent, such as the Egan decisions in NSW, executive government has no definitive legal obligation to supply privileged documents to the Senate, and accordingly, that the government will be unlikely to comply with any independent arbitration model. The majority report further argues that it is undesirable for the Senate to seek clarification of its powers because 'the balance between the Senate and the executive's respective powers is an issue better resolved by those two arms of government'.[7]

Firstly, while the Australian Greens and Senator Xenophon agree that it is inappropriate for the courts to determine disputes between executive government and the parliament generally, it is not necessarily inappropriate for the courts to make a determination as to the constitutional powers of each arm of government in a general sense, as occurred in the Egan cases.

---

5 Associate Professor Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 39.

6 Mr Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, pp 50-51.

7 Senate Finance and Public Administration References Committee, *Inquiry into Independent Arbitration of Public Interest Immunity Claims*, p. 20.

As noted in the report of the Senate Privileges Committee on the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, the court should not be asked to adjudicate individual claims of privilege because that question is ultimately political.[8] However, the question of the extent of the Senate's powers to perform its scrutiny role, is less a political question than a constitutional one. Accordingly, it may be appropriate for the High Court, which is the final arbiter of constitutional law, to clarify the Senate's position. Therefore, the Australian Greens and Senator Xenophon do not accept the government and opposition committee members' argument that the court should not be asked to determine the extent of the Senate's powers to order documents.

Secondly, the majority of the committee's argument that that executive government is unlikely to comply with an independent arbitration process in the absence of a legal requirement to do so ignores the fact that, unlike the Victorian and NSW processes, the proposed Senate resolution does not require executive government to produce privileged documents to the Senate. The majority's argument relies on the Victorian Legislative Council's experience where the Victorian Government has circumvented the independent arbitration process by refusing to comply with orders for production of documents in respect of which public interest immunity is claimed.

The Victorian government's arguments against the arbitration process, as distilled in the Victorian Legislative Council's submission, are that:

- it breaches the principle of Cabinet confidentiality and enhances the possibility of Cabinet documents being leaked;
- the House is delegating its capacity to resolve a dispute to a third person;
- the Victorian Legislative Council does not have the capacity to call for privileged documents; and
- the Egan decisions are irrelevant to Victoria.[9]

However, three of these four arguments are dispelled by the differences between the proposed Senate resolution and the Victorian model. The fourth, relating to delegation, is discussed below, and argued to be a positive and indeed necessary aspect of the Senate's model.

The Victorian Government's concerns regarding the risk of cabinet, and other privilege breaches, is mitigated by the fact that the Senate model does not propose that documents be produced to the Senate, and then referred to an arbitrator who advises whether or not those documents are made public, as in Victoria. Instead, the Senate model proposes that the independent arbitrator decides whether or not the documents are subject to public interest immunity, and if the arbitrator finds that documents are

8 Senate Committee on Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, 49th Report*, September 1994, p. 8.

9 Legislative Council of Victoria, *Submission 5*, p. 2.

not privileged *only then* are they made available to Senators (depending on the original order of the Senate). Hence the risk of leaks is nullified.

The proposed Senate resolution also avoids the question of whether or not the Senate has the power to receive privileged documents, which is the basis of the third and fourth arguments of the Victorian government set out above. As documents subject to a disputed claim of public interest immunity are produced not to the Senate, but to an arbitrator, the Senate never receives documents found to be subject to a valid public interest immunity claim under the proposed Senate model.

Therefore, by avoiding the major reasons for the Victorian government's refusal to comply with the Legislative Council's arbitration process, the Australian Greens and Senator Xenophon consider that the prospects of the proposed Senate's model succeeding are far higher than the majority report has recognised. The fact that under the proposed Senate's model no privileged documents are produced to Senators at any time means that the process carries far less risk for government and would accordingly be substantially less objectionable to government than the Victorian model.

The proposed Senate resolution

The committee was fortunate to receive the considered views of numerous experts on its proposed resolution. As outlined in the majority report, a number of aspects of the proposed resolution attracted criticism and concern from those experts. However, the Australian Greens and Senator Xenophon see no reason why those views cannot be taken on board to improve the resolution, and develop a workable independent arbitration model. The Senate has the benefit of the Victorian, NSW and ACT parliaments' experiences, and is in the fortunate position of being able to take these experiences on board and address problems experienced in those jurisdictions.

However, the majority has failed to take this next step of proposing an improved model using the thoughtful contributions provided by witnesses and in submissions. Instead, the majority has simply focussed on the few negative aspects of the specifics of the proposed model in order to reject the concept of independent arbitration in its entirety.

Delegation

As discussed in chapter 4 of the majority report, a number of witnesses raised the issue of whether the appointment of an independent arbitrator would be an inappropriate delegation of the Senate's power. While acknowledging the concerns of the majority regarding the appointment of an unelected official to make political decisions about whether the release of particular documents is in the public interest, the dissenting Senators accept the comments of Mr Evans that the delegation of some

of the Senate's power is necessary in order to make an independent arbitration process work.[10]

As discussed above, the fact that the proposed resolution does not require the government to produce privileged documents to the Senate is a key aspect of its likely success. In order for an independent arbitration process to work effectively in the Senate, it is therefore necessary for the Senate to delegate its power to decide whether a document attracts public interest immunity to an independent, unelected person.

Furthermore, the dissenting Senators emphasise that the delegation of the Senate's power to an independent arbiter under the proposed model does not mean that the arbiter is finally determining political decisions. While the Senate would delegate its powers to decide whether or not a document in fact attracts privilege to the arbiter, it is not delegating its power to decide whether or not the document ought to be made public. It is foreseeable that while it may be useful for the Senate to consider a particular document in order to fulfil its scrutiny role, the public interest in not making the document publicly available may be an overriding consideration. This is why, for example, Senate committees often take evidence *in camera*. Under the proposed model the Senate would retain its powers to make decisions about the public release of documents as it currently does with evidence taken *in camera*.

Therefore, the Australian Greens and Senator Xenophon do not consider that the proposed independent arbitration model would be an inappropriate delegation of the Senate's powers.

Annual reporting

However, should the Senate consider it more appropriate for elected Senators to make decisions about whether documents attract public interest immunity, this does not mean that the notion of independent arbitration should be abandoned. There is a range of other ways in which independent arbitration could effectively assist in resolving disputes over public interest immunity which do not involve any delegation of power, including that suggested by the Commonwealth Ombudsman.

The majority report gives little consideration to the very constructive and sensible suggestion by the Commonwealth Ombudsman of using the proposed Information Commissioner to act as an independent adviser to the President of Senate on public interest immunity matters. The proposed Information Commissioner might usefully advise the Senate in a similar way to the way the Auditor-General currently advises the Senate with respect to the Murray Motion (Senate order for departmental and agency contracts). The Commissioner could examine the documents over which the government has claimed public interest immunity and refused to produce to the Senate and comment on the veracity of those claims. This proposal has numerous benefits, including:

10 Mr Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 50.

- avoiding any delegation of the Senate's power; and
- only requiring government to produce documents over which privilege is claimed to the Information Commissioner (which, if the Information Commissioner Bill 2009 and amendments to the *Freedom of Information Act 1982* are passed, it would have to anyway).

The Information Commissioner could then prepare an annual report to the President of the Senate outlining the government's compliance with the Senate's various orders for production of documents.

In essence this would simply mirror the role of the Auditor-General under the existing Murray Motion, discussed at paragraph 2.47 of the report. The Murray Motion has been enormously successful in decreasing the government's use on confidentiality clauses in contracts, and accordingly increasing accountability in government contracts. In the ANAO's first report on the use of confidentiality provisions in government contracts in 2000–01, it found that, of the sample of contracts examined, 89 per cent contained confidentiality clauses.[11] In its report on compliance in the 2008 calendar year, the ANAO found that only nine per cent of Commonwealth contracts contain confidentiality provisions.[12]

However, the annual compliance audits conducted by the ANAO illustrate the continuing tendency of government departments to overuse privilege (in this case contractual confidentiality provisions), demonstrating that there remains significant room for improvement in the government's use of privilege. Of the sample of government contracts reviewed in the ANAO's report on 2008 contracts, the ANAO found that 92 of the 115 contracts (80 per cent) were incorrectly listed as containing confidentiality provisions, leading to the observation that:

> Incorrectly including confidentiality provisions, or incorrectly listing contracts as containing confidentiality provisions, potentially precludes or restricts the Parliament and the public from accessing information about these contracts.[13]

The report also found that only 26 (7 per cent), of the total of 186 confidentiality provisions contained in the audited contracts, met the test for confidentiality set out in the Finance Department's publication *Guidance on Confidentiality in Procurement*.[14]

---

11 ANAO, *Audit Report No.38 2000-01, The Use of Confidentiality Provisions in Commonwealth Contracts*, May 2001, p. 47.

12 ANAO, *Audit Report No.6 2009–10, Confidentiality in Government Contracts - Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*, September 2009, p. 15.

13 ANAO, *Audit Report No.6 2009–10, Confidentiality in Government Contracts - Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*, September 2009, p. 15.

14 ANAO, *Audit Report No.6 2009–10, Confidentiality in Government Contracts - Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*, September 2009, p. 36.

This clearly demonstrates that government agencies continue to have a propensity to claim privilege when none in actual fact exists.

The Australian Greens and Senator Xenophon are of the view that a similar report of public interest immunity claims may strengthen government accountability.

Recommendation 1

The Australian Greens and Senator Xenophon recommend that, if the Information Commissioner Bill 2009 and Freedom of Information Amendment (Reform) Bill 2009 are passed, the Information Commissioner be required to report annually to the Senate on the veracity of government claims of public interest immunity.

The arbitrator's access to documents

A second concern with the proposed Senate resolution raised by a number of witnesses was whether the arbitrator would have access to the documents subject to a claim of public interest immunity. The issue is considered in chapter 4 of the majority report.

The majority report notes the problems with this aspect of the proposed resolution, but fails to provide any solution. The dissenting Senators note that solving this problem would require a simple amendment to the proposed resolution to the effect that documents subject to an order of the Senate over which the government claims privilege should be made available to the arbiter on request.

Recommendation 2

The Australian Greens and Senator Xenophon recommend that paragraph (2) of the proposed Senate resolution be amended to provide that the independent arbitrator be provided with documents subject to a disputed claim of public interest immunity, on request.

The role of the Auditor-General

The dissenting Senators take on board witnesses' concerns regarding the role of the Auditor-General in the proposed resolution. However, again, solving this problem would require a simple amendment to the proposed Senate resolution and is not justification for dismissing the entire arbitration process.

Given the ANAO's expertise in commercial-in-confidence issues, the Auditor-General could be given an advisory role within the resolution, rather than treating commercial-in-confidence claims as a separate category of privilege. The resolution could provide that, where the arbiter thinks appropriate, the Auditor-General would be asked to provide advice and assistance on commercial-in-confidence claims. This would provide a simple solution to the problems identified by witnesses with this aspect of the proposal.

Recommendation 3

The Australian Greens and Senator Xenophon recommend that paragraph (3) of the proposed Senate resolution be amended to provide that the independent arbitrator may request the independent advice of the Auditor-General if a claim involves commercial-in-confidence matters.

Functions and qualifications of the arbiter

Associate Professor Twomey helpfully pointed out that the Senate's arbitration process may benefit from providing guidance to the arbiter.[15] She suggested that this would solve a number of the problems encountered in NSW. The Australian Greens and Senator Xenophon accept this suggestion, and recommend that the proposed Senate resolution be amended to allow the President of the Senate to set out guidelines for the way in which the arbiter should exercise his or her discretion.

Recommendation 4

The Australian Greens and Senator Xenophon recommend that an additional paragraph be inserted after paragraph (4) of the proposed resolution to provide that the President of the Senate may issue guidelines to the independent arbitrator setting out the manner in which the arbitrator's discretion ought to be exercised.

Conclusion

The Australian Greens and Senator Xenophon are committed to improving the accountability of government, through the development of a process for independent arbitration of public interest immunity claims in the Senate. Dissenting Senators are convinced by witnesses and submitters that such a process would significantly improve government accountability, and fill the existing gap in the Senate's scrutiny role.

Unlike the majority of the committee, dissenting Senators have taken on board the considered comments and suggestions of experts, and made recommendations for improving the proposed Senate resolution. As amended, the proposed Senate resolution would provide an excellent prospect of successfully encouraging cooperation between the Senate and executive government to resolve disputes over public interest immunity. In the view of the Australian Greens and Senator Xenophon, this is far preferable to the majority's recommendation of doing nothing to address a problem 'which has vexed legislatures over many years all around the world'.[16]

15 Associate Professor Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 41.

16 Mr Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 47.

Recommendation 5

The Australian Greens and Senator Xenophon recommend that the Senate adopt the proposed resolution, as amended, and implement an independent arbitration process for resolving executive claims of public interest immunity with respect to Senate orders for documents.

Senator Scott Ludlam **Senator Nick Xenophon**