

## **INQUIRY INTO PROCEDURAL FAIRNESS FOR INQUIRY PARTICIPANTS**

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**Submission by the Australian Senate**  
**New South Wales Legislative Council Privileges Committee**  
**Inquiry into Procedural Fairness for Inquiry Participants**

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This submission contrasts the protections available to all witnesses under Senate Privilege Resolution 1 with the enhanced protections which apply to participants in Privileges Committee inquiries under resolution 2. In so doing, this submission considers the following three areas from the discussion paper: (1) special protections for inquiries by the Privileges Committee concerning possible contempts; (2) recent cases that have challenged, or demonstrated the need for, particular procedural protections in committee proceedings and (3) other procedural protections not provided for in the Privilege Resolutions.

**General protections available to witnesses and other participants in inquiries**

In 1988, the Senate agreed to a series of resolutions, largely codifying existing practice, which declare the manner in which the Senate will observe its privileges and exercise its contempt powers, and provide mandatory procedural direction to its committees.

Privilege Resolution 1 sets out the general protections available to witnesses and other participants in Senate inquiries. As noted in the discussion paper, these are broadly similar to the informal procedures followed by Legislative Council committees. The key protections include:

- documents are normally requested and witnesses are normally invited to appear;
- evidence is compelled only where a committee makes a decision that the circumstances warrant this;
- witnesses must be given reasonable notice of a meeting at which they are to appear;
- witnesses are usually given an opportunity to make a submission in writing before appearing to give evidence, and they are offered the opportunity to give their evidence in camera;
- questions put to witnesses must be relevant to the committee's inquiry and the information sought must be necessary for the purpose of the inquiry;
- a witness may object to answering a question on any grounds;
- if evidence reflects adversely on a person, the person must be given reasonable opportunity to respond to that evidence; and
- committees are required to investigate, and report to the Senate on, any evidence that a witness may have been interfered with or penalised in respect of his or her evidence.

**Special protections for inquiries by the Privileges Committee concerning possible contempts**

Senate Privilege Resolution 2 concerns special procedures for the protection of witnesses before the Senate Committee of Privileges. The Privileges Committee has stated that it regards the protection of persons providing information to the Senate and, in particular, of witnesses before parliamentary

committees, as constituting the single most important duty of the Senate (and therefore of the committee as its delegate) in determining possible contempts.<sup>1</sup>

The Privileges Committee is the only committee to which the Senate has delegated the power to inquire into whether, and if so by whom, a contempt has been committed. A Privileges Committee inquiry 'combines the functions of a preliminary investigative agency and a court of first hearing in a criminal matter, so that a witness may, in the course of an inquiry, become the accused'. As it is 'not always clear what is the charge or who is the accused', the resolution adopts a commission of inquiry model and not a criminal trial model, with protections including the right of reply extended to all participants.<sup>2</sup>

The Senate's powers under section 7 of the *Parliamentary Privileges Act 1987* (Cth) to punish contempts by fines or imprisonment and the potential for damage to the reputation of persons subject to contempt findings<sup>3</sup> are also the rationale for providing special rights equivalent to those of persons involved in legal proceedings, and additional rights not available to such persons. For example, under Privilege Resolution 1(14), a witness appearing before a Senate committee would not normally be granted the right to be accompanied by counsel unless the inquiry involved 'contentious and complex matters in relation to which a witness might seriously prejudice their interests by ill-advised or hasty answers'.<sup>4</sup> The Privileges Committee, however, under Privilege Resolution 2(4), is required to extend to witnesses the right to be accompanied by counsel and to allow the witness reasonable opportunity to consult counsel.

The discussion paper (pp5-6) outlines the additional protections provided to witnesses involved in investigations by the Privileges Committee of allegations of contempt so those have not been repeated in this submission but I would be happy to provide any further detail the committee may require.

### **Recent cases that have challenged, or demonstrated the need for, particular procedural protections in committee proceedings**

#### ***Findings of the Committee of Privileges, 142nd report***

In 2009 the Privileges Committee conducted two inquiries into matters arising from a hearing on 19 June 2009 of the Economics Legislation Committee into the Car Dealership Financing Guaranteed Appropriation Bill 2009 (OzCar program).<sup>5</sup> The Privileges Committee primarily inquired into matters that occurred outside the Economics Legislation Committee inquiry (any adverse action taken against a witness and improper interference with the hearing) and witness obligations (any false or misleading evidence given). However, the committee also made comment on procedural issues

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<sup>1</sup> Senate Committee of Privileges, *125<sup>th</sup> report: Parliamentary privilege—Precedents, procedure and practice in the Australian Senate 1966–2005*, PP03/2006, p. 46; 142<sup>nd</sup> report: Matters arising from the Economics Legislation Committee Hearing on 19 June 2009 (referred 24 June and 12 August 2009), p. 29.

<sup>2</sup> *Odgers' Australian Senate Practice*, 14<sup>th</sup> edition, 2016, p. 98.

<sup>3</sup> *Odgers' Australian Senate Practice*, 14<sup>th</sup> edition, 2016, p. 552.

<sup>4</sup> *Odgers' Australian Senate Practice*, 14<sup>th</sup> edition, 2016, p. 559.

<sup>5</sup> Senate Committee of Privileges, *142<sup>nd</sup> report: Matters arising from the Economics Legislation Committee Hearing on 19 June 2009 (referred 24 June and 12 August 2009)*.

relating to the rights of the witness in the conduct of the Economics Committee hearing and matters relating to the Privileges Committee inquiry itself.

*Harassment by the media at the conclusion of the hearing*

During the evidence of a senior Treasury official, Mr Godwin Grech, to the Economics Legislation Committee on 19 June 2009, media were admitted and close-up television footage and stills photography was produced of Mr Grech giving evidence. At the conclusion of the hearing photographers and camera operators surrounded Mr Grech and followed him leaving the committee room, walking along the corridors, in a lift and leaving the building. The images were repeated many times in the media.

The Senate's Privilege Resolutions make no mention of broadcasting of committee hearings. Elements of the behaviour of the media on the day were, however, in breach of the Presiding Officers' guidelines on filming and photography in Parliament House and other Senate resolutions on the broadcasting of committee proceedings.<sup>6</sup>

The Privileges Committee noted that failure by committees to apply the Senate resolutions undermined 'the fundamental principle that the Senate and its committees control their own proceedings' and were also 'potentially detrimental to witnesses',<sup>7</sup> noting:

It could be argued that this type of harassment of a witness immediately after his testimony may not only be harmful to the wellbeing of a witness unused to such attention, but may also have a significant deterrent effect on the willingness of other prospective witnesses to expose themselves to the possibility of similar treatment.<sup>8</sup>

It also found that there should be 'formal, minuted decisions' permitting additional cameras into a hearing room and that witnesses should be consulted. The committee also considered whether providing a copy of the Broadcasting Resolutions to prospective witnesses should be standard practice.<sup>9</sup>

Both the Presiding Officers' guidelines and Senate resolutions on the broadcasting of committee proceedings have been updated since the Privilege Committee's 2009 inquiry. Protections for witnesses provided in the current Broadcasting Resolutions include:

3(5) Recording and broadcasting of proceedings of a committee shall not interfere with the conduct of those proceedings, shall not encroach into the committee's work area, or capture documents (either in hard copy or electronic form) in the possession of committee members, witnesses or committee staff.

3(7) Where a committee intends to permit the broadcasting of its proceedings, a witness who is to appear in those proceedings shall be given reasonable opportunity, before

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<sup>6</sup> Senate Committee of Privileges, *142<sup>nd</sup> report*, paragraph 3.22. The current guidelines are the *Rules for media related activity in Parliament House and its precincts*, issued by the Presiding Officers, 7 November 2016 and the Senate order, 'Broadcasting of Senate and committee proceedings', 11 December 2013 J.336.

<sup>7</sup> Senate Committee of Privileges, *142<sup>nd</sup> report*, paragraph 3.10.

<sup>8</sup> Senate Committee of Privileges, *142<sup>nd</sup> report*, paragraph 3.22.

<sup>9</sup> Senate Committee of Privileges, *142<sup>nd</sup> report*, paragraphs 3.10, 3.15.

appearing in the proceedings, to object to the broadcasting of the proceedings and to state the ground of the objection. The committee shall consider any such objection, having regard to the proper protection of the witness and the public interest in the proceedings, and if the committee decides to permit broadcasting of the proceedings notwithstanding the witness' objection, the witness shall be so informed before appearing in the proceedings.<sup>10</sup>

#### *Publication of material submitted to the committee*

The Senate Privilege Resolutions address the publication of material submitted to committees in Resolution 1(8) which deals with the publication of evidence given in private session and Resolution 1(12) on the publication of evidence containing adverse reflections.

The Privileges Committee inquiry into matters arising from the Economics Legislation Committee hearing received quantities of documents attached to submissions, most of which were not created for the purpose of submission to the inquiry. The committee formulated principles to be considered on whether it published individual documents. Material that would not be disclosed included:

- personal email addresses and private telephone numbers
- the identity of individuals to whom the witness send emails where there was no mutuality of correspondence with the witness
- the identity of persons not in the public realm
- any information required for possible criminal proceedings
- personal information relating medical conditions
- personal information relating to other identified people and,
- in this case, any request made by the commissioning agency not to publish the advice for reasons of legal professional privilege.<sup>11</sup>

The committee has similarly sought to protect witnesses by declining to publish:

- evidence provided to other committees in camera, respecting their right to control their own evidence, in respect of which undertakings to witnesses may have been made<sup>12</sup>
- allegations going to the reputation of parties, which did not advance the committee's investigations<sup>13</sup>
- evidence drawn from legal proceedings between parties<sup>14</sup> and
- evidence containing details of ongoing AFP investigations.<sup>15</sup>

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<sup>10</sup> 'Broadcasting of Senate and committee proceedings', 11 December 2013, *Standing orders and other orders of the Senate*, August 2015, p. 170.

<sup>11</sup> Senate Committee of Privileges, *142<sup>nd</sup> report*, paragraph 5.28.

<sup>12</sup> Senate Committee of Privileges, *151st report*, paragraph 1.70; *161st report*, paragraph 1.48.

<sup>13</sup> Senate Committee of Privileges, *151st report*, paragraph 1.69.

<sup>14</sup> Senate Committee of Privileges, *161st report*, paragraph 1.48.

<sup>15</sup> Senate Committee of Privileges, *164th report*, paragraphs 1.7, 2.16.

### ***Findings of the Committee of Privileges, 150<sup>th</sup> report***

In 2011–12 the Privileges Committee inquired into whether Senator Bob Brown and other senators, through a political donation by Mr Graeme Wood to the Australian Greens, received any benefit on the understanding that it would control or limit their actions as senators. In its 150th report,<sup>16</sup> the Privileges Committee responded to criticisms by submitters of the role of the President and the Senate in referring the matter for inquiry and aspects of the conduct of the inquiry.

#### ***Contempt jurisdiction***

Submissions on behalf of Senators Brown and Milne argued that the committee is exercising judicial powers which arise from the statutory definition of contempt contained in section 4 of the *Parliamentary Privileges Act 1987* and that the committee must have regard to the ‘criminal nature of the power and jurisdiction it is exercising under that Act’<sup>17</sup> and must apply the criminal standard of proof to its deliberations. The submissions further suggested that the High Court supervise the Senate’s processes investigating contempt matters, including whether individual members of the committee should deliberate on matters.

In rejecting those propositions, the committee affirmed its view that the exercise of the Senate’s contempt jurisdiction is not quasi-judicial, but incidental to its legislative function. The committee also concluded that having regard to the possibility of judicial review need not entail:

... the committee and the Senate applying the particular ***practices*** of courts in relation to natural justice, nor the criminal standard of proof, to its determinations. Rather, the committee should apply the essential ***principles*** of natural justice in a manner appropriate to its inquisitorial role. The committee and the Senate should explain their recommendations and decisions in a manner that meets the requirements of the limited judicial review provided for by the Parliamentary Privileges Act. The committee considers that the flexibility of its method of operation and the protections contained in the Privilege Resolutions are sufficient to this task.<sup>18</sup>

#### ***Political matters***

In the conduct of the inquiry the Privileges Committee observed the particular challenges of inquiring into partisan matters such as allegations of improper conduct by one parliamentarian against another.

In its 125<sup>th</sup> report, the Privileges Committee noted that the ‘procedures adopted in 1988 for dealing with privilege matters were designed to take such matters out of partisan controversy’.<sup>19</sup> In the 150<sup>th</sup> report the committee observed:

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<sup>16</sup> Senate Committee of Privileges, *150th report: Whether there was any improper influence in relation to political donations made by Mr Graeme Wood and questions without notice asked by Senator Bob Brown and Senator Milne*, March 2012, PP69/2012.

<sup>17</sup> Second submission on behalf of Senators Brown and Milne in relation to Senator Kroger’s allegations, 27 February 2012, paragraph 4.4.

<sup>18</sup> Senate Committee of Privileges, *150th report*, paragraph 2.41.

<sup>19</sup> Senate Committee of Privileges, *125th report*, PP03/2006, paragraph 4.116, footnote 102.

It is probable that no set of principles or resolutions can entirely assist where matters involve highly political considerations. Questions of a political character are, however, properly determined by the Senate itself and not by the President. The committee considers, however, that the Senate should—so far as is possible—ensure that it has the relevant facts before it prior to deciding whether to refer a matter to this committee, including by ensuring the opportunity to debate these matters is always available.<sup>20</sup>

### *Matters involving senators*

Privilege Resolution 2(1) states:

A person shall, as soon as practicable, be informed, in writing, of the nature of any allegations, known to the Committee and relevant to the Committee's inquiry, against the person, and of the particulars of any evidence which has been given in respect of the person.

In the inquiry into matters concerning Mr Graeme Wood, parliamentarians raised concerns that they were not forewarned when privilege matters which concerned them were to be raised in the Senate. Specifically, Senator Bob Brown objected that at the time the matter was referred to the committee, journalists were present in the gallery, giving rise to a concern that the journalists had prior knowledge, while Australian Greens senators had not been notified that the President would make a statement to the Senate.

Matters of privilege are referred to the committee in accordance with standing order 81. Under this standing order, the President informs the senator who initially raised a matter of privilege of his or her decision whether a motion relating to the matter should have precedence in the Senate, but not a senator who is the subject of a privilege matter.

The committee recommended that:

... where the President makes a statement in the Senate in relation to a matter of privilege which names, or appears to involve, senators, for the President to inform those senators that such a statement will be made, and when that will occur.<sup>21</sup>

### *Participation by committee members*

Submissions on behalf of Senators Brown and Milne argued that a committee member, Senator George Brandis, should remove himself from the committee's inquiry on the basis that he had prejudged the matters before the committee. The committee noted that:

It is well established that the question whether senators should participate in an inquiry in which they may have a real or apparent conflict of interest, or where there might be an apprehension of bias, is a matter for the senators concerned, having regard to the particular circumstances of the inquiry.<sup>22</sup>

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<sup>20</sup> Senate Committee of Privileges, *150th report*, paragraph 2.22.

<sup>21</sup> Senate Committee of Privileges, *150th report*, paragraph 2.27.

<sup>22</sup> Senate Committee of Privileges, *150th report*, paragraph 2.44.

The committee observed that in the Senate context there is ‘no general rule or convention on this’.<sup>23</sup> In this case, Senator Brandis determined (independently of the submission put by Senator Brown and Milne’s lawyers) to recuse himself from the inquiry to avoid any perception of bias.

## **Other procedural protections not provided for in the Privilege Resolutions**

### ***Treatment of witnesses***

While there may be an assumption that witnesses should be treated by chairs of Senate committees ‘fairly and with courtesy’,<sup>24</sup> this has not been codified in the Privilege Resolutions. Arguably the proposition is so axiomatic as to go without saying. Nevertheless, successive Presidents and Deputy Presidents have corresponded with senators on the treatment of witnesses at Senate committee hearings. On the most recent occasion the then Deputy President of the Senate affirmed the ‘important underlying principle that witnesses who are assisting committees should be treated equitably’ and sounded a note of caution that if ‘witnesses are deterred from assisting committees by widely publicised examples of witnesses being harassed by a senator or senators, there are serious consequences for the value and credibility of committee inquiries’.<sup>25</sup>

In 1999 the following notice of motion was given in the Senate:

That Resolution 1 of the Privilege Resolutions of 25 February 1988, relating to the protection of witnesses, be amended by adding the following paragraph:

(19) Without limiting the right of members of committees to ask any relevant questions of witnesses in accordance with the rules of the Senate, committees and their members shall conduct all their dealings with witnesses with courtesy.<sup>26</sup>

Reasons for the motion not being proceeded with included ‘the expectation that chairs should maintain order and protect witnesses from badgering, and the practicality that the boundary between rigorous questioning and harassment was not always clear and should be left to common sense’.<sup>27</sup>

### ***Assistance for submitters***

Like the Legislative Council, Senate committees are able to assist submission authors who are unable to write a submission, such as by transcribing a submission received in audio. This assistance is entirely informal and uncommon.

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<sup>23</sup> Relevant advices from Senate Clerks on conflicts of interest are published on the Privilege Committee’s web pages. See Advice No. 2, *Participation of members of Committee of Privileges in certain inquiries*, 18 January 1989. Advice No. 44, *Potential conflicts of interest*, 20 October 2010. The participation of members of the committee in certain inquiries is also address in the Senate Committee of Privileges 35<sup>th</sup> report PP467/1991 and 125th report, paragraphs 5.23–5.24.

<sup>24</sup> *Guide to committee procedure and practice*, 2nd edition, Department of the Senate, 2014, p. 83.

<sup>25</sup> Gavin Marshall, Deputy President of the Senate, ‘Treatment of witnesses at Senate committee hearings’, 18 March 2015.

<sup>26</sup> *Journals of the Senate*, 10 March 1999, p. 534.

<sup>27</sup> Gavin Marshall, Deputy President of the Senate, ‘Treatment of witnesses at Senate committee hearings’, 18 March 2015.

## **Conclusion**

The main points to be drawn from the examples discussed in this submission are that the protection of witnesses is a key responsibility of parliamentary committees and is of crucial importance where the parliament has delegated functions related to its powers to punish contempts to a committee. However, ensuring an inquiry process is fair to witnesses, even in the context of Privilege Committee inquiries, does not require mimicry of the rules and procedures applied by courts but rests on procedures which provide substantive natural justice to witnesses including by:

- putting adverse material to witnesses with sufficient time for a response;
- allowing witnesses access to a legal advisor, where the circumstances warrant this; and
- setting out the evidence relied on by the committee and the rationale for its findings.