House of Representatives

Committee of Privileges

Report concerning proposal to transfer to the Federal Court certain responsibilities in relation to disputed claims for public interest immunity

NOVEMBER 1994

MEMBERS OF THE COMMITTEE

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HON L B McLEAY, MP

HON A S PEACOCK, MP[2]

HON D W SIMMONS, MP

MR A M SOMLYAY, MP[3]

1. Nominee of the Leader of the House
2. Resigned 17 September 1994
3. Nominee of the Deputy Leader of the Opposition from 24 February 1994

The reference

1. On 27 June 1994 the House agreed to the following resolution:

> That the House refers to the Committee of Privileges for inquiry and report the appropriateness of legislation to provide for:
> (a) the enforcement by the Federal Court of lawful orders of the House and its committees, and in particular orders for the production of information and documents;
> (b) the avoidance of the imposition of penalties on public servants acting under the directions of ministers in these matters; and
> (c) the adjudication and determination by the Court of any claim of executive privilege or public interest immunity made in relation to information or documents lawfully ordered to be produced by the House or its committees through examination of that information or those documents.

2. This reference followed the introduction in the Senate of a private Senator's bill by Senator Kernot, which had in turn followed the dispute that had arisen between the Senate Select Committee on Foreign Ownership Decisions in Relation to the Print Media and the Government over the production of documents concerning Foreign Investment Review Board decisions. In brief, Senator Kernot's bill - the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994* - sought to have the Federal Court determine whether documents in dispute in such circumstances could be withheld from a House or a committee on public interest grounds. A copy of Senator Kernot's bill is at Attachment A, and her second reading speech is at Attachment B. The Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill was referred to the Senate Committee of Privileges. On 19 September 1994 that committee reported on the bill and recommended that it should not be proceeded with.

Conduct of the inquiry

3. The Committee invited submissions from members of the public, from Members of the House, and from persons who had made submissions to the Senate Committee of Privileges. Written submissions were received from Mr Beazley on behalf of the Government, from the Administrative Law Section of the Law Institute of Victoria and from Dr Ken Coghill MP, a Member of the Legislative Assembly of Victoria and a former Speaker. In addition the Committee had available to it submissions made to the Senate Committee of Privileges, and other expressions of view on the issues.[1]

The present law

4. It is well established that each House of the Commonwealth Parliament has the power to order the production of documents[2]. In addition, it is normal for parliamentary committees to be given the power to send for "persons, papers and records"[3], and certain committees have specific legislative provisions in this regard[4]. The issues arising in respect of claims of crown privilege or public interest immunity have been canvassed on a number of occasions. In their 1972 paper "Parliamentary committees - Powers over and protection afforded to witnesses" Attorney-General Greenwood and Solicitor General Ellicott[5] gave support to the treatment of Ministers' certificates claiming Crown privilege as conclusive. Senator Greenwood later modified his views, stating that a Minister's certificate was not necessarily conclusive. Conflict arose in 1975 between the Senate and the executive in respect of the investigation of overseas loan raising activities : certain officers refused, at the direction of Ministers, to answer questions when called before the Senate. The matter was referred to the Senate Committee of Privileges: the majority of the Committee found the Ministers' directions valid and lawful, the minority found the claims were not conclusive but were for the Senate to determine[6]. Neither the Joint Committee on the Parliamentary Committee System nor the Joint Select Committee on Parliamentary Privilege was able to propose a satisfactory means of resolving conflicts in this area. The Joint Select Committee on Parliamentary Privilege, after referring to mechanisms available in other jurisdictions and to the value of guidelines as to the conduct of inquiries, concluded:

> However ingenious, guidelines can only reduce the areas of contention: they can never be eliminated. This follows from the different functions, the inherent characteristics, and the differing interests of Parliament and the Executive. In the nature of things it is impossible to devise any means of eliminating contention between the two without one making major and unacceptable concessions to the other. It is theoretically possible that some third body could be appointed to adjudicate between the two. But the political reality is that neither would find this acceptable. We therefore think that the wiser course is to leave to Parliament and the Executive the resolution of clashes in this quintessentially political field.[7]

The committee has taken the Government's *Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (most recently issued in 1989) as being a valid statement of the general attitude of the executive in these matters. Among other things, the guidelines describe the relevant categories of documents in respect of which claims of public interest immunity may be made. They also offer advice to public servants as to the appropriate responses by officers when such issues arise (see Attachment C).

Views expressed on this matter

5. The Government's submission argued that Senator Kernot's proposals should not be supported and that neither should any legislative provision which would remove from the Parliament the power to determine issues which, it said, went to the heart of its own powers and its relationship with the Executive. It made the point that the relationship was a political one and that disputes were not amenable to arbitration by courts or tribunals. It argued that a transfer of responsibility to the Federal Court would alter that relationship and the role of the Parliament and that it would involve the courts in political judgments.

6. The submission argued that most of the activities of the executive were undertaken in "the full glare" of public and parliamentary scrutiny, that it provided a vast range of information and documents to the Parliament and its committees and that it was subject to the Freedom of Information legislation and other relevant legislation, but that from time to time Governments felt they had a duty not to reveal certain information on the grounds that this would, in all the circumstances, harm the public interest. It argued that, subject to certain statutory secrecy provisions, there were no fixed rules about what could or could not be disclosed and that each case had to be looked at on its merits, having regard to the nature of the information, community attitudes and the circumstances surrounding the request. It said that the Government made judgments to withhold information only after serious reflection. It argued that the Government's judgment was not necessarily the end of the matter but the appropriate forum in which to test such claims was the Parliament. The submission acknowledged that in our system it was inevitable that from time to time there would be disagreements between the Senate or a committee and the Executive. It claimed that where there was a dispute, generally speaking, the Parliament had been able to obtain the material by

political means - the accountability mechanisms, media scrutiny and comment and so on. The submission noted that neither House had been prepared, when a dispute had not been resolved, to use its ultimate sanctions of a fine or imprisonment (available under the Parliamentary Privileges Act). It argued that the very magnitude of the powers of the Houses and the seriousness with which these responsibilities must be exercised imposed a discipline which would not be there if a court were substituted. It expressed the view that there could be a succession of cases, instituted for political reasons, and aimed at testing the limits of public interest immunity in the name of greater accountability, without the countervailing sanctions and pressures which presently operate. The submission also referred to the role of the courts and the fact that the Parliamentary Privileges Act does not disturb the historical balance between the Parliament, the courts and the Executive, save for section 9 (which permits a limited judicial review of a decision by a House to commit a person to prison). The submission went on to say that the courts are not equipped to handle disputes between the Parliament and the Executive in relation to documents or information.

7. The essence of the submission from the Administrative Law Section of the Law Institute of Victoria was that a legislative mechanism such as that proposed was unnecessary. It argued that if public servants were commanded by a Minister not to release papers it was clear that the public servant should obey the relevant House, not the Minister, making the point that in our system of government Ministers were subordinate to Parliament: if a public servant were penalised by his or her superiors for obeying a valid order, the superiors would be in contempt of the Senate and could be punished accordingly. It argued that the procedures set out in Senator Kernot's bill would weaken the Senate's existing substantive powers and make them more difficult to use as a matter of practice. Consequently, it argued, this would make it more difficult for Senate committees to inquire into matters which the Government did not want investigated. It concluded by saying that instead of codifying and limiting its existing powers, the Senate should simply resolve to use them where appropriate.

8. Dr Coghill commented on the historical relationship between the Crown and the Parliament in parliaments in the Westminster system, noted the conflict between the Senate Committee on print media issues and the Government in relation to Foreign

Investment Review Board matters, and quoted from authorities on the relationship between the Parliament and the Executive. He said that the proposal that the Federal Court should determine matters challenged the separation of the legislative and the judicial functions - which he described as one of the most fundamental principles of Australia's constitutional structure. Dr Coghill also said that the case of a committee of one House in a bi-cameral Parliament seeking information held by a Minister in the other House highlighted the advantages to accountability which would arise from a unicameral Parliament structured so as to deny the Government a guaranteed majority.

9. Dr Coghill recommended that there should a presumption of disclosure of information held by the Executive so that all information was to be available unless it was in the public interest that it not be disclosed. He felt that the respective House of Parliament, or the two Houses in the case of a Joint Committee, should determine whether it was in the public interest that certain information should not be disclosed by the Executive, or alternatively that it should be disclosed on a confidential basis. He also said that any further publication of evidence received in confidence should be a matter for the House, or the two Houses in the case of a Joint Committee. Finally, he said that the Parliament should establish the right of each House, or the two Houses, to authorise and direct officers to search for and seize documents held by the Executive.

Changes in attitudes by Courts

10. As the committee understands it, there has been a substantial development in the attitudes taken by courts to claims of public interest immunity. Until the 1968 case of Conway v. Rimmer[8] it seems that a Minister's certification that it would be contrary to the public interest for certain information to be disclosed would have been accepted. In Conway v. Rimmer the view was taken that the courts had a duty in respect of the balance between the public interest in the non-disclosure of documents and the public interest in the administration of justice. It was accepted that a court would be justified in certain circumstances in examining documents so as to form its own view, but it was also held that there was a class of documents in respect of which a claim for Crown privilege would be accepted, regardless of their contents - that is the matter would turn on the category into which a particular document fell. In Sankey v. Whitlam and others[9] the High Court held that claims of Crown privilege had no automatic

application, it would always be for the courts to make a determination in respect of such a claim - that is the mere fact that a disputed document fell into a particular category of documents would not be accepted as justifying non-disclosure. In the 1993 Northern Land Council case the High Court was required to review a Federal Court decision to the effect that Cabinet notebooks should be produced in the course of proceedings. This case dealt with documents concerning Cabinet deliberations - documents which therefore recorded the processes of executive government at the highest and most sensitive level. The High Court found that the notebooks should not have been ordered to be produced. It was however of the view that documents recording Cabinet deliberations were not necessarily exempt from an order for production, but it stated that such orders should only be made in exceptional circumstances - perhaps in criminal proceedings where the information might be critical to either the prosecution or the defence; and in such exceptional circumstances the judge should inspect the documents so as to decide whether the relevance of the document was sufficient to warrant disclosure - the material should only be disclosed where it was crucial to the determination of the case.[10]. The committee notes the approach taken by courts to claims of Crown privilege or public interest immunity not because it wishes to suggest they have any direct application in respect of the parliament, but merely to demonstrate the development in the attitudes taken by the courts to such claims.

Issues involved

11. The committee acknowledges that the concept of a mechanism which would enable disputes between committees (especially) and the executive in relation to the production of documents or information certainly has an appeal. Such a mechanism would enable an independent "third party" to assess the competing claims and make a determination which would be binding on all parties.

12. The experience of members of the Committee suggests that the great majority of committee inquiries are characterised by good relations between the committees in question and the Executive, and substantial conflict is comparatively rare. Where difficulties do arise in respect of documents or other information often a compromise is able to be reached - for example, that evidence will be taken in camera or that documents will be provided on a confidential basis, or a confidential briefing arranged. Certainly

an area of dispute remains - the view of committees being, on occasion, that they cannot deal with a matter to their satisfaction without access to some key document or other, the view of the Executive being that there will be certain documents or information which it believes it would be against the public interest to disclose.

13. The committee is inclined to support the comments of the Joint Select Committee on Parliamentary Privilege: while various mechanisms can be envisaged it is difficult to see adjudication by a third party as fully satisfactory. These concerns can be expressed at an in-principle level and at a practical level: in principle because of the transfer of authority from the Houses this would involve, and in practice because of the difficulties such responsibilities would bring to the person or institution required to resolve the problem because of the nature of such disputes. The suggestion to transfer responsibility for the determination of disputes in this area to the Federal Court raises concerns because it would amount to a concession neither House has ever made as to its powers, because the Court may not find itself well equipped to adjudicate in such matters, and because such action could see the Court drawn into what are often sensitive and political disputes.

14. While the committee does not dismiss the possibility of an acceptable and effective process or mechanism being devised, it believes that in present circumstances the most satisfactory results are likely to be obtained by Members of Committees and representatives of the executive seeking to reduce the possibility of unresolved conflict by adopting practical and constructive attitudes, attitudes which show a recognition of the competing interests always involved in these matters. In many cases it should be possible for some accommodation to be made - for example by the production of documents or information on a confidential basis, by confidential briefings, by granting access on a read only (or similar) basis or by the provision of information to, for instance, the Chair and Deputy Chair of a Committee (if this is acceptable to other Committee members). In this regard, the House could well turn its attention again to the recommendations of the Joint Select Committee on Parliamentary Privilege on the conduct of committee inquiries, and to the work of the Procedure Committee in this area - neither of these statements dealt with public interest immunity in any detail, but members could find it useful to expand the detailed guidelines concerning witnesses' rights and so on to include provisions on the treatment of claims

for public interest immunity[11]. It is recognised that such guidelines will not remove the area of conflict, but properly based and practical guidelines should narrow the area of disputation. Another possibility, and one proposed in respect of a dispute which arose in the Senate in 1982, would be for an independent and suitably qualified person to be asked to advise in relation to disputed information or documents. Such a person would not be given the responsibility of determining the issue, but his or her opinion could be very valuable. Members may also find it useful to analyse the government's own published guidelines for official witnesses, and, if they think it necessary or desirable to do so, to make representations for changes in those guidelines.

Conclusion

15. The committee has concluded that the evidence available to it does not establish that it would be desirable for legislation to be enacted to transfer to the Federal Court responsibility to adjudicate in respect of claims for public interest immunity made in response to orders of a House or a parliamentary committee for the production of information or documents. The committee has not been convinced that any benefits that might result from such a transfer would outweigh the widespread concerns felt about the proposal.

R W SAWFORD
Chairman

6 December 1994

NOTES

1. See, for example, comments by Mr Williams, House of Representatives *Hansard*, 3 March 1994, pp 1723-5.

2. *House of Representatives Practice*, ed A R Browning (2nd edition), AGPS, 1989, p. 581

3. See standing order 28B, for example.

4. See, for example, *Public Accounts Committee Act*, s.13,17.

5. Parliamentary Paper 168, 1972.

6. Parliamentary Paper 215, 1975.

7. Parliamentary Paper 219, 1984.

8. Conway v. Rimmer (1968) AC 910.

9. Sankey v. Whitlam and others (1978) 142CLR 62-64.

10. Commonwealth v. Northern Land Council and another (1992-93) H.C. 604-5.

11. Parliamentary Paper 219, 1984; Parliamentary Paper 100, 1989.

Attachment A

1993-94

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

Presented and read a first time

(SENATOR KERNOT)

A BILL

FOR

An Act to amend the *Parliamentary Privileges Act 1987* to provide for enforcement through legal process, as an alternative to the penal powers of the Houses of the Parliament, of lawful orders of the Houses and their committees

The Parliament of Australia enacts:

Short title etc.

1.(1) This Act may be cited as the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Act 1994*.

(2) In this Act, **"Principal Act"** means the *Parliamentary Privileges Act 1987*[1].

2. After section 11 of the Principal Act of the following section is inserted:

9405121—1,350/8.4.1994—(51/94) Cat. No. 94 4343 4

Orders of Houses and committees

"11A.(1) In this section, 'the Court' means the Federal Court of Australia.

"(2) The Court has jurisdiction, exclusive of the jurisdiction of all other courts except the High Court, with respect to matters arising under this section.

"(3) The jurisdiction of the Court under this section may be exercised by a single Judge, who may refer a question of law for the opinion of a Full Court, and may, on the Judge's own initiative or on the application of a party, refer a matter to a Full Court to be heard and determined.

"(4) A person shall not, without reasonable excuse, fail to comply with a lawful order of a House or a committee.

Penalty: (a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

"(5) When an offence against subsection (4) is proved the Court shall make such orders as are necessary to prevent a continuation or recurrence of the offence and to ensure compliance with the lawful order of the House or committee in respect of which the offence was committed.

"(6) If an offence against subsection (4) is committed by an officer or employee of the Commonwealth because of a direction by a minister, on proof of the offence the Court shall find the offence proved and make orders in accordance with subsection (5), but shall not convict the officer or employee of the offence, and shall not impose any penalty for the offence.

"(7) It is a defence to a prosecution for an offence against subsection (4) in relation to an order of a House or a committee that requires the giving of evidence or the disclosure of a document if the defendant proves that:

(a) the giving of the evidence or the disclosure of the document would be substantially prejudicial to the public interest; and

(b) the prejudice to the public interest would not be outweighed by the public interest in ensuring that a House and its committees can conduct inquiries freely.

"(8) In deciding whether a defence under subsection (7) has been established, the Court shall hear the evidence or examine the document in camera.

"(9) A person shall not disclose evidence heard or a document examined under subsection (8) except in accordance with an order of the Court.

Penalty: (a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

"(10) Subsection (9) does not prevent the giving of evidence or the presentation of a document to a House or a committee.

"(11) A penalty shall not be imposed under section 7 for an offence in respect of which a prosecution under subsection (4) has been commenced.

"(12) A prosecution for an offence against subsection (4) shall be commenced and conducted only by a person so authorised by resolution of:

(a) the Senate, for an offence in respect of an order of the Senate or of a committee of the Senate; or

(b) the House of Representatives, for an offence in respect of an order of that House or of a committee of that House; or

(c) each House, for an offence in respect of an order of each House or of a committee of both Houses.".

NOTE

1. Act No. 21, 1987, as amended. For previous amendments, see No. 9, 1988.

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Attachment B

Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994

Second reading

Senator Kernot

23 March 1994

This Bill provides for the Federal Court to enforce lawful orders made by Parliament, and to allow the Court to determine claims that disclosure of information to Parliament would contravene the public interest.

The catalyst for the Bill is the conflict between the Senate print media committee and the Treasurer over the committee's request for Foreign Investment Review Board documents.

But I have not put this legislation forward just to solve an immediate problem. That Parliament lacks a satisfactory mechanism to enforce its own orders has been obvious for years, particularly where it is the government which refuses to comply. There has been no satisfactory way of resolving Government claims that disclosure of information is not in the public interest.

When the Coalition tried to obtain evidence about the Whitlam Government's attempt to raise loans through Tirath Khemlani and others, it failed. When Labor tried to obtain documents revealing the Fraser Government's failure to tackle bottom-of-the-harbour tax avoidance, it also failed.

The Bill is drafted to allow Parliament to ask the courts to enforce any lawful order made against any person or organisation. But the principal aim is to deal with disputes which arise when Parliament orders a government to disclose information, and the government refuses.

This is not to suggest that Parliament is powerless in the face of non-compliance of this kind. It is just that its powers, while extensive, are widely seen as inappropriate for use in such a situation.

As we know, section 7 of the *Parliamentary Privileges Act 1987* gives each House the power to impose a fine or prison sentence for an offence against it. This is Parliament's sanction of last resort, but it is clearly undesirable when a public servant is caught between two orders -- Parliament's order to divulge information, and a minister's instruction not to.

In the case now before the Senate print media committee, the House of Representatives would no doubt protect the Treasurer from any action taken against him by the Senate. This would leave the Senate with the option of taking action against the public servant at the helm of the Foreign Investment Review Board, who is

acting on the Treasurer's instructions. That is clearly unsatisfactory.

In fact, I believe there is a general view in the community that it is the role of the courts, and not the Parliament, to impose prison sentences or fines. Although there is a school of thought that the courts have no role in determining disputes of a political nature, to leave matters as they are would continue the decades-long uncertainty over the relative powers of Parliament. It is time this matter was resolved, and the only realistic way of doing so is by resort to the courts.

The Senate also has the option of taking political action to get its way. That could include filibustering, or even blocking key bills in protest. But again, I do not believe it is appropriate for Parliament to engage in obstruction to enforce accountability. This is a more civilised alternative which will avoid further erosion of Parliament's standing, and we should use it.

The Bill inserts a new section 11A into the *Parliamentary Privileges Act*.

The new section makes it an offence not to comply with a lawful order of a House or committee and requires the courts to make orders to remedy the offence.

For example, failure to comply with a lawful order to produce documents would be an offence, and the courts would order that the documents be produced.

If an offence is proved, the standard penalties in the Act apply unless the offence has been committed by a public servant acting under a minister's instructions. In that case, the public servant is not convicted of an offence, and no penalty is imposed.

There may be cases where someone other than a minister (perhaps a departmental secretary or company executive) instructs an employee not to comply with an order of Parliament. It could be argued that the employee should be protected from prosecution in those cases.

However in such a case, the secretary or executive would lack the protection of parliamentary privilege -- unlike the minister -- and would then be open to enforcement action instead of the employee. I have therefore decided to limit the protection of this provision to public servants acting under a minister's instructions.

It has been suggested to me that there should be no penalty for non-compliance with an order of Parliament, and that penalties should only be imposed for contempt of court, in the event that a court orders compliance but the defendant still refuses.

My concern about this proposal is that it makes non-compliance with an order of Parliament cost-free. Anyone could refuse a committee's request for information in the secure knowledge that the relevant House would have to take them to court to get it, and that they would be immune from any penalty.

Furthermore, the courts' power to order compliance provides scope for leniency in imposing penalties, for example by suspending a fine or prison term.

The Bill explicitly recognises that a defence against Parliament's order to produce

documents or give evidence is that disclosure would be contrary to the public interest. In considering such a claim, the court must hear the evidence or view the document *in camera*. Disclosure of those proceedings would be an offence unless subsequently ordered by the court, but Parliament would be free to hear the same evidence or receive the documents.

The effect of this provision is to require executive claims of public interest immunity to be determined by the courts. The Bill makes it clear that determining such a claim is a balancing act, which requires any prejudice to the public interest which disclosure might cause to be weighed against the public interest in the free conduct of inquiries by Parliament.

In recognition of the significance of the matters at stake, a case under this legislation would be heard in the Federal Court, with any appeal going to the High Court.

And the Bill prevents Parliament from having a bet each way. Once a prosecution has been commenced, Parliament would be prevented from imposing its own penalties using section 7 of the Act.

Finally, a prosecution under this Bill can only be made by a person authorised by a resolution of the House whose order -- or whose committee's order -- has not been complied with.

This Bill is a constructive attempt to break a deadlock which has existed for far too long. It is a step towards more open government, but one which allows government claims of public interest immunity to be heard and determined impartially.

The Government has given no clear indication of its position on this Bill. I would point out to them that failure to support it would look distinctly hypocritical, given the vehement attacks on me for leaving open the use of the penalty provisions of the Act to obtain Foreign Investment Review Board documents from the Board's Executive Member.

The Bill provides an alternative process which would allow the Federal Court to resolve the dispute without any threat of a penalty against any public servant. It depoliticises the competing claims of the committee and the Treasurer as to whether disclosure is in the public interest. If it doesn't become law, then we will be thrown back on the inappropriate provisions of the *Parliamentary Privileges Act*.

This Bill is a fair and reasonable alternative, and I commend it to the Senate.

GOVERNMENT GUIDELINES FOR OFFICIAL WITNESSES BEFORE PARLIAMENTARY COMMITTEES AND RELATED MATTERS

(Extract)

Limitations upon officials' evidence

2.22 There are three main areas in which officials need to be alert to the possibility that they may not be able to provide committees with all the information they seek, or may need to request restrictions on the provision of such information. These are:

(a) matters of policy;

(b) public interest immunity; and

(c) confidential material where in camera evidence is desirable.

The conduct of official witnesses in relation to these areas is described in detail below (paras 2.25-2.38).

Clarification or amplification of evidence

2.23 In addition, committees may occasionally seek information which may properly be given, but where officials are unsure of the facts, or do not have the information to hand. In such cases witnesses should qualify their answers as necessary so as to avoid misleading the committee, and, if appropriate, should give undertakings to provide further clarifying information. It is particularly important to submit such further material without delay.

Questions about other departments' responsibilities

2.24 It is also important that witnesses should take care not to intrude into responsibilities of other departments and agencies (see also para 2.13). Where a question falls within the administration of another department or agency, an official witness may request that it be directed to that department or agency or be deferred until that department or agency is consulted.

Matters of policy

2.25 The role of an official witness is not to comment on policy but to speak to any statement provided to the committee and to provide factual and background material to assist understanding of the issues involved. The detailed rules applying to written submissions (para 2.15) also apply to oral evidence. Note, however, that such restrictions do not necessarily apply to statutory officers (see para 2.49).

2.26 The Senate resolutions provide that "An officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister" (r.1.16). The resolutions also prescribe the procedure by which a witness may object to answering "any question put to the witness" on "any ground" (r.1.10). This would include the ground that the question requires the witness to give an opinion on a matter of policy contrary to r.1.16. In such a situation an officer may ask the person chairing the committee to consider whether questions which fall within the parameters of policy positions (outlined in para 2.15) are in order. Moreover, the resolutions provide scope for a witness to make a statement about matters of concern to the witness in pre-hearing discussions before appearing at the committee hearing (r.1.5).

2.27 If an official witness is directed to answer a "policy" question, and has not (in line with para 2.17) previously cleared the matter with the Minister, the officer should ask to be allowed to defer the answer until such clearance is obtained. Alternatively, it may be appropriate for the witness to refer to the written material provided to the committee and offer, if the committee wishes, to seek elaboration from the Minister; or to request that the answer to a particular question be reserved for submission in writing.

Public interest immunity

Claims to be made by Ministers

2.28 Claims that information should be withheld from disclosure on grounds of public interest (public interest immunity) should only be made by Ministers (normally the responsible Minister in consultation with the Attorney-General and the Prime Minister).

2.29 As far as practicable, decisions to claim public interest immunity should take place before hearings, so that the necessary documentation can be produced at the time. The normal means of claiming public interest immunity is by way of a letter from the Minister to the committee chairman. The Attorney-General's Department should be consulted on appropriateness of the claim in the particular circumstances and the method of making the claim.

2.30 As a matter of practice, before making a claim of public interest immunity, a Minister might explore with a committee the possibility of providing the information in a form or under conditions which would not give rise to a need for the claim (including on a confidential basis or in camera, see paras 2.35-2.36).

Matters arising during hearing

2.31 If an official witness, when giving evidence to a committee, believes that circumstances have arisen to justify a claim of public interest immunity, the official should request a postponement of the evidence, or of the relevant part of the evidence, until the Minister can be consulted.

Scope of public interest immunity

2.32 Documents - or oral evidence - which could form the basis of a claim of public interest immunity may include matters falling into the following categories that coincide with some exemption provisions of the FOI Act:

(a) material the disclosure of which could reasonably be expected to cause damage to:

    (i) national security, defence, or international relations; or

    (ii) relations with the States;

    including disclosure of documents or information obtained in confidence from other governments;

(b) material disclosing any deliberation or decision of the Cabinet, other than a decision that has been officially published, or purely factual material the disclosure of which would not reveal a decision or deliberation not officially published;

(c) material disclosing any deliberation of or advice to the Executive Council, other than a document by which an act of the Governor-General in Council was officially published;

(d) material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government where disclosure would be contrary to the public interest;

(e) material relating to law enforcement or protection of public safety which would, or could reasonably be expected to:

(i) prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance;

(ii) disclose, or enable a person to ascertain the existence or identity of a confidential source or information, in relation to the enforcement or administration of the law;

(iii) endanger the life or physical safety of any person;

(iv) prejudice the fair trial of a person or the impartial adjudication of a particular case;

(v) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

(vi) prejudice the maintenance or enforcement of lawful methods for the protection of public safety; and

(f) material subject to legal professional privilege.

It must be emphasised that the provisions of the FOI Act have no actual application as such to parliamentary inquiries, but are merely a general guide to the grounds on which a parliamentary inquiry may be asked not to press for particular information, and that the public interest in providing information to a parliamentary inquiry may override any particular ground for not disclosing information. For a more detailed understanding of the above exemption provisions, reference should be made to the FOI Act and to separate guidelines on its operation issued by the

Attorney-General's Department.

2.33 In addition the following considerations may affect a decision whether to make documents or information available:

(a) secrecy provisions of Acts: Attorney-General's Department should be consulted when occasions involving such provisions arise; and

(b) court orders or subjudice issues : where the provision of information would appear to be restricted by a court order, or where the question of possible prejudice to court proceedings could arise, the Attorney-General's Department should be consulted although decisions on the application of the subjudice rule are for the committee to determine, not witnesses.

Classified documents

2.34 Documents, and oral information relating to documents, having a national security classification of 'confidential', 'secret' or 'top secret' would normally be within one of the categories in para 2.32, particularly para 2.32(a). Before producing a document bearing such a classification, an official witness should seek declassification of the document. (Note that it does not follow that documents without a formal security classification may not be the subject of a claim of immunity. Nor does it follow that classified documents may not in any circumstances be produced. Each document should be considered on its merits and, where classified, in consultation with the originator.)

In camera evidence

2.35 There may be occasions when a Minister (or, on his or her behalf, the departmental Secretary) would wish, on balancing the public interests involved, to raise with the committee the possibility of an official producing documents or giving oral evidence in camera, and on the basis that the information be not disclosed or published except with the Minister's consent (see r.1.7, r.1.8 and r.2.7). It should be noted that Estimates Committees have no power to take evidence in camera or to treat documents submitted to them as in camera evidence.

Matters arising during hearing

2.36 If, when giving evidence to a committee, an official witness believes that circumstances have arisen to justify requesting that evidence be heard in camera, the official should make such a request if the possibility has been foreshadowed with the Minister or should ask for the postponement of the evidence or the relevant part of the evidence until the Minister can be

consulted. (The Senate resolutions provide that "A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in private session, and shall be invited to give reasons for any such application. If the application is not granted, the witness shall be notified of reasons for the decision." (See r.1.7 and also r.1.8 relating to the publication of evidence given in camera.)

2.37 These circumstances might include cases where:

(a) although a claim of public interest immunity could be justified, the Minister considers that the balance of public interest lies in making information available to the committee;

(b) while a claim of immunity may not be appropriate, other social considerations justify the committee being asked to take evidence privately. Examples, which parallel other exemption provisions in Part IV of the FOI Act, are evidence the public disclosure of which would:

(i) affect law enforcement or protection of public safety;

(ii) have a substantial adverse effect on financial or property interests of the Commonwealth;

(iii) prejudice the attainment of the objects or effectiveness of procedures or methods for the conduct of tests, examinations or audits of a Commonwealth agency;

(iv) have a substantial adverse effect on the management or assessment of personnel, or on the proper and efficient conduct of the operations of a Commonwealth agency including the conduct by the Commonwealth of industrial relations;

(v) unreasonably disclose information relating to the personal affairs of any person. Note also that the Senate resolutions provide that a committee may consider taking in camera evidence reflecting adversely on a person (see r.1.11-r.1.13, r.2.1-r.2.3). The Privacy Act 1988, in particular Part III which explains Information Privacy Principles, is also relevant;

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

Parliament House – Canberra
Monday, 27 June 1994

PRESENT: Mr Sawford (Chairman), Mr Andrews, Mr Brown, Mr Cleeland, Mr Holding, Mr Lieberman, Mr McGauran, Mr McLeay, Mr Peacock, Mr Simmons, Mr Somlyay

The meeting opened at 11.33am.

Minutes

The minutes of the meeting held on 9 June 1994 were amended and confirmed.

Reference concerning alleged discrimination against Mr Pool

The Chairman presented a draft report.

Paragraphs 1 to 8 agreed to.
Paragraph 9 amended and agreed to.
Paragraph 10 agreed to.
Report agreed to.

Resolved (on the motion of Mr Holding) – That the report be presented to the House.

Reference concerning complaint raised by Mr Katter

Extracts from Votes and Proceedings No. 9 of Thursday 9 June 1994.

The Committee deliberated.

Resolved (on the motion of Mr Cleeland) – (1) That the Committee invite Mr Katter to make a written submission on the matter and (2) That the Committee further invites Mr Laurance, if he so chooses at this stage, to also lodge a written submission.

The Committee deliberated.

Prospective reference concerning public interest immunity

The Committee deliberated.

Resolved (on the motion of Mr Cleeland) – That should the House make the expected reference to the Committee on this matter the Committee authorise the Chairman and the Deputy Chairman to approve an advertisement to invite submissions concerning the inquiry.

The Committee deliberated.

At 12.11pm the Committee adjourned until 11.30am on Thursday 25 August 1994.

Confirmed.

CHAIRMAN

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

Parliament House – Canberra
Wednesday, 24 August 1994

PRESENT: Mr Sawford (Chairman), Mr Andrews, Mr Brown, Mr Cleeland, Mr Lieberman, Mr McLeay, Mr Peacock, Mr Somlyay

The meeting opened at 5.09pm.

Minutes

The minutes of the meeting held on 27 June 1994 were confirmed.

Reference concerning complaint raised by Mr Katter

The Chairman presented:

- a letter from Mr Peter Laurance dated 29 July 1994;
- a submission from Hon. R.C. Katter, MP, dated 23 August 1994.

Resolved (on the motion of Mr Somlyay) – That the letter from Mr Laurance and the submission from Mr Katter be received as evidence.

The Committee deliberated.

Resolved (on the motion of Mr Cleeland) – That Mr Katter be invited to give oral evidence at approximately 11.30am on Thursday, 1 September 1994.

Reference concerning public interest immunity

The Chairman presented:

- an extract from the *Votes and Proceedings* No. 80 dated 27 June 1994 concerning the reference;
- a submission dated 28 July 1994 from Dr Ken Coghill, MP.

Resolved (on the motion of Mr Somlyay) – That the submission from Dr Coghill be received as evidence.

The Committee deliberated.

Resolved (on the motion of Mr Cleeland) – That (1) the Committee contact persons who had made submissions to the inquiry concerning Senator Kernot's bill to invite them to make a submission to the Committee's inquiry, and (2) the Chairman write to all Members of the House to invite them to make submissions to the inquiry.

The Committee deliberated.

At 5.28pm the Committee adjourned until 11.30am on Thursday, 1 September 1994.

Confirmed.

CHAIRMAN

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

Parliament House - Canberra
Thursday, 13 October 1994

PRESENT: Mr Sawford (Chairman); Mr Andrews; Mr Brown; Mr Holding.

The meeting opened at 11.40 am.

Minutes

The minutes of the meeting of 1 September 1994 were confirmed.

On the motion of Mr Brown, Mr Andrews was elected Deputy Chairman of the Committee.

Reference concerning public interest immunity

The Committee deliberated.

Reference concerning Mr Katter

The Chairman presented:

- a letter dated 7 October 1994 from the Leader of the House, forwarding a submission on the matter; and
- a letter dated 5 October 1994 from the Chairman of the Administrative Law Section of the Law Institute of Victoria, forwarding a submission.

Resolved (On the motion of Mr Andrews)

(1) That the submissions be received as evidence, and

(2) that the Committee authorises the publication of the submissions.

The Committee deliberated.

At 12.45 pm the Committee adjourned until **11.30 am on Thursday, 20 October 1994.**

Confirmed.

CHAIRMAN

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

Parliament House - Canberra
Thursday, 17 November 1994

PRESENT: Mr Sawford (Chairman); Mr Andrews; Mr Brown; Mr Holding; Mr Lieberman; Mr McLeay; Mr Somlyay.

The meeting opened at 11.42 am.

Minutes

The minutes of the meeting of 20 October 1994 were confirmed.

Reference concerning complaint raised by Mr Katter

The Committee deliberated.

Reference concerning public interest immunity

The Committee deliberated.

At 12.28 pm the Committee adjourned until **2.00 pm on Tuesday, 6 December 1994.**

Confirmed.

CHAIRMAN