



Interacting with parliamentary committees

This briefing outlines issues relating to:

- the establishment of parliamentary committees and the sources of their powers
- appearing before parliamentary committees
- the powers which parliamentary committees have to require the production of information to them
- the circumstances in which disclosure of information or documents to a committee may not be appropriate
- the consequences of failing to comply with a committee's directions
- some practical points to remember when appearing before parliamentary committees.



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Establishing parliamentary committees

The power to establish a committee

The precise scope of the inquisitorial powers of each House of Parliament has not, to date, been authoritatively defined. However, it is well established that each House can establish a committee for the purpose of inquiring into any matter necessary to enable Parliament to carry out its legislative function or any matter which is capable of being the subject of valid federal legislation.¹

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How committees are established

Committees are generally established in one of the following ways.

Each House may establish a committee of that House by passing an appropriate motion. Additionally, the Standing Orders of each House provide for the appointment, at the commencement of each Parliament, of a number of standing committees. For example, order 25 of the Senate Standing Orders provides for the appointment of a number of Legislative and General Purpose Standing Committees to deal with a broad range of subject matters.

Joint committees – that is, committees consisting of members of both Houses – may be established by an appropriate motion of each House. However, joint committees are more commonly established by an Act of Parliament. For example, the Joint Committee of Public Accounts and Audit is established by the *Public Accounts and Audit Committee Act 1951* and the Parliamentary Standing Committee on Public Works is established by the *Public Works Committee Act 1969*.² In the remainder of this briefing, committees established by an Act of Parliament are called ‘statutory committees’ so as to distinguish them from committees created by a House or Houses of Parliament.

Sources of a committee’s powers

The source from which a committee derives its powers will depend on the way in which that committee is established.

A statutory committee generally derives its powers from the legislation which establishes it.

Committees other than statutory committees derive their powers from s 49 of the Constitution. Section 49 provides:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

The Parliament has, by enacting the *Parliamentary Privileges Act 1987*, made a partial ‘declaration’ of the powers, privileges and immunities of each House and its committees and members as provided for in the first part of s 49. Except to the extent provided for by the *Parliamentary Privileges Act 1987*, or by any other provisions of an Act which can be construed as a ‘declaration’ for the purposes of s 49 of the Constitution, the powers, privileges and immunities derived from the House of Commons continue in force.³

‘Committees other than statutory committees derive their powers from s 49 of the Constitution.’

Therefore, it remains necessary to ascertain the powers, privileges and immunities of the House of Commons, its committees and its members at 1 January 1901. These are determined by a branch of the common law known as ‘the law and custom of parliament’. This is ascertained from reported decisions of the courts and also from texts such as Erskine May’s *A Treatise on the Law, Privileges and Usage of Parliament*. In most cases, however, it is now possible to determine the powers, privileges and immunities of the House of Representatives and the Senate by reference to relevant modern Australian texts such as *Odgers’ Australian Senate Practice* and *House of Representatives Practice*.

Appearing before a committee

Preparing for attendance

There are some key documents with which any government officer called to appear before a committee should be familiar:

- the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (last issued in February 2015) (the Guidelines)
- the Resolutions agreed to by the Senate on 25 February 1988 relating to parliamentary privilege
- procedural order of continuing effect 10, made on 13 May 2009, relating to claims of public interest immunity (the 2009 Order)
- procedural order of continuing effect 11, made on 30 October 2003, relating to claims that material is commercial-in-confidence (the 2003 Order).

The Guidelines provide practical and useful instruction to government officers on the procedure to be adopted when requested to assist a committee and, in particular, they delineate the matters which are appropriately dealt with by officers and those which are more appropriately dealt with by a Minister. The 1988 Resolutions cover a broad range of privilege issues. The first of the Resolutions is particularly relevant to officers called to appear before a committee, as it is concerned with the procedures to be followed by Senate Committees in relation to witnesses. Procedural orders of continuing effect 10 and 11 set out how a claim to withhold information on the basis of public interest immunity, or that the information is commercial-in-confidence, can be made. These orders are discussed in more detail below.

A committee's power to require attendance

As a general rule, a parliamentary committee is conferred with the power to require persons to attend before it.

In the case of a statutory committee, the legislation establishing the committee usually confers a power to summon witnesses.⁴ For example, s 21(1) of the *Public Works Committee Act 1969* provides:

The Chair or a member authorized by the Committee by resolution may summon a person to appear before the Committee to give evidence and to produce such documents (if any) as are referred to in the summons.

In the case of any other committee established by a House or by both Houses, s 49 of the Constitution empowers the Houses to confer on the committee a power to summon persons. It is clear that the House of Commons in 1901 had the power to summon persons and could give that power to its committees. Accordingly, each House of Parliament may confer a committee with the power to summon persons. The power to summon a witness is usually conferred either by a relevant motion of a House or by the Standing Orders of a House. For example, order 25(14) of the Senate Standing Orders provides that Legislative and General Purpose Standing Committees 'shall have power to send for persons and documents'. In relation to Senate Select Committees, order 34(1) provides that the 'Senate may give a committee power to send for persons and documents, and a committee with that power may summon witnesses and require the production of documents'.

Immunities of witnesses appearing before a committee

The *Parliamentary Privileges Act 1987* puts it beyond doubt that both the giving of evidence before a committee and the submission of documents to a committee (even if outside the formal hearing for the reception of evidence) form part of the ‘proceedings in Parliament’.⁵ This means, in effect, that the giving of evidence before, and the submission of documents to, a committee are absolutely privileged.

The effect of absolute privilege is that a witness cannot be made the subject of any sanction for giving evidence before, or submitting documents to, a committee, apart from any penalty for the offence of giving false or misleading evidence to that committee. Any attempt to do so is both a contempt of Parliament liable to punishment by the relevant House and also a criminal offence punishable by a court. Also, s 16(3) of the *Parliamentary Privileges Act 1987* makes it clear that, for example, a witness’s evidence to a committee cannot be used as a basis for an attack on his or her credit in court or other proceedings.

It should be noted, however, that the actions of a committee contrary to the Standing Orders of the relevant House or otherwise without authority of that House probably are not ‘proceedings in Parliament’, as they could not relate properly to the ‘business’ of the House or the committee for the purposes of s 16(2) of the *Parliamentary Privileges Act 1987*.

Also, it seems that, in general, correspondence to individual members of Parliament does not form part of ‘proceedings in Parliament’.⁶

Accordingly, evidence given to a committee acting without the authority of the relevant House and correspondence with individual members of Parliament probably do not attract absolute privilege. Care will need to be taken when disclosing information in those circumstances. For example, an officer should be careful not to disclose defamatory or self-incriminating information in the absence of absolute privilege.

Powers of committees to require information

In addition to the power to require persons to attend before it, a committee is generally conferred with the power to order the production of information and documents to it. As with the power to summon persons, this power is derived:

- in the case of a statutory committee, from the legislation creating the committee
- in the case of committees other than statutory committees, from a House of Parliament exercising the powers it has under s 49 of the Constitution.

The power which a committee has to require production of information and documents is usually very broad. However, there may be circumstances in which it is not appropriate to disclose information or documents to a committee and where the committee will agree not to seek the information or documents.

Claims of public interest immunity

This will most commonly be the case where the Executive government considers that the public interest in information or documents remaining confidential outweighs the public interest in the information or documents being made public through disclosure to a committee. In those cases, the government may resist disclosure of the information or documents on the basis that they are subject to ‘public interest immunity’.

‘...a committee is generally conferred with the power to order the production of information and documents to it.’

The procedure for making a claim of public interest immunity, and the kinds of information and documents which may be the subject of such a claim, are discussed in the Guidelines mentioned above, which take into account the 2009 Order.

Paragraph 4.6.1 of the Guidelines sets out a non-exhaustive list of generally accepted grounds for a claim of public interest immunity. These grounds include where the disclosure of documents or information would, or might reasonably be expected to:

- a) damage Australia's national security, defence or international relations
- b) damage relations between the Commonwealth and the States
- c) disclose the deliberations of Cabinet (other than a decision that has been officially published)
- d) prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance
- e) 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
- f) endanger the life or physical safety of any person.⁷

The Senate accepts that public interest immunity may be claimed by Ministers (and officials can refuse to answer questions pending an opportunity for a Minister to make such a claim – this is discussed further below).⁸ However, it does not accept that such claims by the Executive are a conclusive answer. The position adopted by the Senate has been that the claim may be determined by the Senate and, if determined against the Executive, that the Senate has the legal right to the information.⁹

However, in the absence of any exercise of the penal powers of the Senate, the practical effect of this approach to date has been that conflicts are resolved in the political arena rather than in the courts. In both the Executive and the Senate, the predominant view appears to be that the courts should not have jurisdiction to determine such claims of public interest immunity.¹⁰ That is, the resolution of these disputes is essentially a matter of political judgment, not a question of legal rights and obligations.¹¹

Public interest immunity claims may only be made by Ministers (or by statutory office holders in limited circumstances). In accordance with the 2009 Order, a public official who considers that they have been asked to provide information or a document (either by way of a submission or in a hearing) that might properly be the subject of a public interest immunity claim must advise the committee of the grounds for that belief and specify the damage that might be done to the public interest if the information or document were disclosed.

'Public interest immunity claims may ... be made by Ministers...'

If requested, the official must refer the question of the disclosure of the information or document to a responsible Minister. If the Minister concludes that it would not be in the public interest to disclose the information or document, a statement should be provided to the committee setting out the ground for that conclusion and specifying the harm to the public interest that could result from the disclosure of the information or document.¹²

The Guidelines provide further guidance about making public interest immunity claims.¹³ Where 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 chair.

Legal professional privilege

Legal professional privilege is a common law principle which allows a person, in civil and criminal cases, to preserve the confidentiality of statements and other materials which have been made or brought into existence for the dominant purpose of seeking or being furnished with legal advice by a practising lawyer, or for the dominant purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings.¹⁴

The principle has no formal application in parliamentary proceedings. However, the Guidelines suggest that material which is subject to legal professional privilege may in some circumstances also be subject to a claim of public interest immunity.¹⁵ The confidential nature of material which is subject to legal professional privilege is a consideration which a committee can take into account in deciding whether to press for its disclosure.

Confidential information

The fact that particular information is confidential – for example, because it relates to the commercial activities of a person or body – does not of itself provide grounds for resisting disclosure of the information on the basis of public interest immunity. In effect, the 2003 Order provides that Senate committees will not entertain any claim to withhold information from the committee on the grounds that it is commercial-in-confidence, unless the claim is made by a Minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of the information. A committee may allow the officers of a statutory authority to make the claim where the authority has a degree of independence from ministerial direction such that it would be inappropriate for the Minister to make the claim.¹⁶

Matters of policy

A government officer should not advocate, defend or canvass the merits of government policies when giving evidence to a committee. It is for the relevant Minister to assist the committee with such issues.¹⁷ A witness may, however, describe policies to a committee and, if the Minister agrees, discuss policy options for dealing with a particular issue.¹⁸

Relevance of question

A committee can only inquire into matters which fall within its terms of reference. Accordingly, a witness is not required to disclose information or produce documents in response to a question or request which is not related to a committee's terms of reference. Similarly, a witness cannot be required to disclose information in response to a question relating to a matter which is the responsibility of a person within another part of the Government. For example, an officer of the Attorney-General's Department cannot be required to answer a question which relates to a matter for which the Department of the Treasury is responsible.

'A committee can only inquire into matters which fall within its terms of reference'

Self-incrimination

As a general rule, a witness before a parliamentary committee cannot refuse to answer a question on the ground that to do so would be incriminating. That is because a witness's response to a committee's question is privileged and therefore cannot be relied upon or questioned in court proceedings. The response could not be relied on as a

basis for bringing criminal proceedings against the witness.¹⁹ The position is probably different in relation to some statutory committees where a witness is permitted to refuse to answer questions on grounds on which a witness in a court could do so, including self-incrimination. For example, s 25 of the *Public Works Committee Act 1969* provides:

A person summoned to appear or appearing before the Committee as a witness has the same protection and privileges, and is, in addition to the penalties provided by this Act, subject to the same liabilities in any civil or criminal proceeding, as a witness in proceedings in the High Court.²⁰

Giving evidence in a closed hearing

As an alternative to resisting disclosure of information and documents, a witness may request that a committee hear certain evidence ‘in camera’ – that is, in proceedings which are closed to the public. A witness before most Senate committees has the option of seeking a closed hearing for sensitive material.²¹ In certain circumstances a witness before the Parliamentary Standing Committee on Public Works or the Joint Committee of Public Accounts and Audit will have a right to give evidence in private and for that evidence to be kept confidential. For example, s 23 of the *Public Works Committee Act 1969* relevantly provides:

‘A witness before most Senate committees has the option of seeking a closed hearing for sensitive material.’

- (2) Where, in the opinion of the Committee, any evidence proposed to be given before, or the whole or a part of a document produced or proposed to be produced in evidence to, the Committee relates to a secret or confidential matter, the Committee may, and at the request of the witness giving the evidence or producing the document shall:
 - (a) take the evidence in private; or
 - (b) direct that the document, or the part of the document, be treated as confidential....
- (4) Where, at the request of a witness, evidence is taken by the Committee in private:
 - (a) the Committee shall not, without the consent in writing of the witness; and
 - (b) a person (including a member) shall not, without the consent in writing of the witness and the authority of the Committee under subsection (6);disclose or publish the whole or a part of that evidence.
- (5) Where evidence is taken by the Committee in private otherwise than at the request of a witness, a person (including a member) shall not, without the authority of the Committee under the next succeeding subsection, disclose or publish the whole or a part of that evidence.
- (6) The Committee may, in its discretion, disclose or publish or, by writing under the hand of the Chair, authorize the disclosure or publication of, evidence taken in private before the Committee, but this subsection does not operate so as to affect the necessity for consent of a witness under subsection (4).²²

The option of a closed hearing is not available in the case of a Senate Legislative and General Purpose Standing Committee when it is considering estimates of proposed or additional expenditure.²³ However, such a committee may take evidence in camera when it is performing non-estimates functions.²⁴

Secrecy provisions

Secrecy provisions (that is, legislative provisions which purport to restrict disclosure of certain information) do not bar production of documents or information to a House or a committee, unless the secrecy provision concerned necessarily deals with such production. The power of a House or a duly authorised committee derived from s 49 of the Constitution to question witnesses or send for papers can only be taken away in an Act by express words or probably also by a necessary implication of the legislation.

'Secrecy provisions ... do not bar production of documents or information to a House or a committee...'

Has the committee made a request?

A final point worth noting is that it is the committee, not individual members, which can require a witness to answer questions or produce documents. If an individual member asks a question or seeks documents, the witness may consider it appropriate to seek confirmation from the Chairperson of the Committee that the committee requires a response to the member's question or request.

Contempt – failing to comply with a committee's directions

If a witness does not attend in response to a summons or does not answer a question or produce a document, a committee has no power to compel these things.

A House of Parliament (as opposed to a committee of a House) has the power to impose a penalty of a fine or imprisonment where it finds that a person has committed an offence within the meaning of s 4 of the *Parliamentary Privileges Act 1987*. An 'offence' requires conduct which 'amounts, or is intended or is likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member'.

Section 9 of the *Parliamentary Privileges Act 1987* requires that a warrant committing a person to custody set out the particulars of the matters determined to constitute the breach of privilege or contempt. This provision now allows a court to determine whether the ground for the imprisonment was sufficient in law. It seems, however, that a court would not be entitled to examine 'proceedings in Parliament' for that purpose.²⁵

Each House of Parliament has the power to fine as an alternative to imprisonment.²⁶ A fine could be enforced using the general law for recovery of debts and, unlike imprisonment, does not require a resolution and a warrant setting out particulars of the matters determined to constitute the offence. This clearly still restricts the capacity of a court to review whether the conduct could amount to a breach of privilege.

Other sanctions, such as penalties imposed for offences in relation to the giving of evidence to the statutory committees,²⁷ would be dealt with by the criminal courts in the usual way.

Points to remember

Before you attend

Interacting with a parliamentary committee by appearing as a witness can be a difficult experience. If you are asked to appear as a witness before a committee, it is important to be thoroughly prepared:

- Be familiar with the committee's terms of reference.
- Be familiar with all the relevant material.
- In particular, ensure you are familiar with any formal departmental or Government submission that has been made to the committee.
- Ascertain what issues the committee is particularly interested in. The committee's secretariat may be able to assist you in this regard.
- Prepare an outline of your presentation.
- Think about what questions might be asked, and develop answers.
- Consult with other relevant departmental officers and, if necessary, your Minister.

Answering questions

It is also important that care be taken in answering questions:

- Listen carefully to the question.
- Consider whether it is appropriate for you to answer it. In particular, consider whether the question:
 - is relevant to the terms of reference
 - relates to a matter which is the responsibility of another Department or agency
 - relates to a matter of policy
 - asks for material that is subject to public interest immunity or legal professional privilege
 - asks for material which will incriminate you
 - asks for confidential material.
- If it is not appropriate for you to answer the question, raise this with the committee and, if necessary, your Minister.
- Consider whether you should ask that the answer be taken in camera.
- Consider whether you know the answer. If not, say so. Questions can be taken on notice.
- Answer clearly and concisely.
- If an extended answer is required, develop a structure to the answer. Explain that structure to the committee, follow it and summarise.

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- 1 G Lindell, 'Parliamentary inquiries and government witnesses' (1995) 20 MULR 383.
 - 2 Other joint parliamentary committees are established by the *Intelligence Services Act 2001*; *Parliamentary Joint Committee on Law Enforcement Act 2010*; *Australian Securities and Investments Commission Act 2001*; and *Parliamentary Proceedings Broadcasting Act 1946*.
 - 3 See s 5 of the *Parliamentary Privileges Act 1987*.
 - 4 See also s 13 of the *Public Accounts and Audit Committee Act 1951*.
 - 5 See s 16(2) of the *Parliamentary Privileges Act 1987*.
 - 6 Correspondence may, in the hands of a member of Parliament, in some circumstances attract parliamentary privilege: *Rowley v O'Chee* [2000] 1 Qd R 207.
 - 7 Additional grounds are set out in para 4.6.1 of the Guidelines.
 - 8 See Senate Parliamentary Privilege Resolutions paragraphs 1(16) and 1(10); R Laing (ed), *Odgers' Australian Senate Practice*, 14th ed, 2016 (Odgers) at 568–9, 643–5.
 - 9 See Odgers at 643–645.
 - 10 Government submission to Senate Standing Committee of Privileges on the Parliamentary Privileges (Enforcement of Lawful Orders) Bill 1994 (August 1994); Senate Standing Committee of Privileges (49th Report) *The Parliamentary Privileges (Enforcement of Lawful Orders) Bill 1994* (September 1994).
 - 11 See Odgers at 645.
 - 12 See also paras 4.5.1–4.5.3 of the Guidelines.
 - 13 See para 4.5.4 of the Guidelines.
 - 14 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.
 - 15 See para 4.8 of the Guidelines.
 - 16 See Odgers at 653.
 - 17 See para 2.3 of the Guidelines.
 - 18 See para 2.3 of the Guidelines.
 - 19 See s 16(2) and (3) of the *Parliamentary Privileges Act 1987*.
 - 20 See also s 19 of the *Public Accounts and Audit Committee Act 1951*.
 - 21 Senate Standing Orders 25(14), 33(1), 36 and 37.
 - 22 See also s 11 of the *Public Accounts and Audit Committee Act 1951*.
 - 23 Senate Standing Order 26(2).
 - 24 Senate Standing Order 25(14).
 - 25 Section 16(3) of the *Parliamentary Privileges Act 1987* would present an obstacle to a court having regard to the proceedings of Parliament for these purposes. The exception in s 16(6) appears to relate only to criminal prosecutions.
 - 26 See s 7 of the *Parliamentary Privileges Act 1987* (maximum \$5,000 for a natural person; \$25,000 for a corporation).
 - 27 See, for example, ss 28, 30 and 33 of the *Public Works Committee Act 1969*; and ss 15, 17 and 21 of the *Public Accounts and Audit Committee Act 1951*.

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