Written evidence submitted by the Australian Senate

Select committees and contempts

I refer to your email of 29 September 2020 regarding the House of Commons' Committee of Privileges inquiry into select committees and contempts which attached a questionaire.

I have had the benefit of reading the response to the committee's questions from the Clerk of the House of Representatives so I will not traverse the constitutional and legislative framework she has explained, which applies equally to the committees of both Houses. Like House committees, the constitutional powers of the Senate are delegated to its committees either through the standing order establishing the committee (for example Senate standing order 25(14) empowers its legislation and references committees to send for persons and documents) or through the resolution appointing the committee.

However, there are two questions where I wish to add to the response from the Clerk of the House to outline matters specific to the Senate or to committees the Department of the Senate supports. I have concluded with some observations regarding the *Parliamentary Privileges Act 1987.*

What rules and guidelines do you have to ensure witnesses and potential witnesses before select committees are treated with fairness and due respect?

The Parliamentary Privilege resolutions, agreed on 25 February 1988, apply to Senate standing and select committees. By convention, joint committees also follow Senate standing orders and therefore operate consistently with the Senate Privilege resolutions. As these resolutions accompanied the passage of the 1987 Act, they are reflected in well-entrenched committee procedures and practices for the protection of witnesses.

The resolutions contain additional protections for witnesses appearing before the Committee of Privileges investigating allegations of contempt. That committee has commented on the requirement

to observe the principles of natural justice for such witnesses, particularly noting that the 1987 Act provides for limited judicial review of penalties imposed by the Houses for contempt.[1]

Are there any recent examples from your Parliament of contempts relating to investigative committees, including non-compliance of witnesses summoned to appear before a Committee?

As the Clerk of the House has outlined, committees rarely use their powers to compel attendance and, when they do, witnesses generally comply. However, in 2018 a joint committee issued a summons to two reluctant witnesses who then lodged an application with the High Court challenging the power of the committee to compel their attendance. The decision of Justice Gordon in *Alford v Parliamentary Joint Committee on Corporations and Financial Services* confirmed that the committee had the power to call for witnesses to attend under the 2016 joint resolution appointing the committee. Justice Gordon noted that, if necessary:

> Section 49 of the Constitution provides a source of coercive authority for the two Houses of the Commonwealth Parliament and the members and committees of each House to summon witnesses or require production of documents, under pain of punishment for contempt; a power that can be traced to English practices pre-dating Federation.[2]

Justice Gordon also noted the protections afforded to witnesses under the Parliamentary privilege resolutions:

> Consistent with the Parliament judging the occasion and the manner of the exercise of its own powers, the Senate has made provision through the 1988 Resolutions to deal with the protection of witnesses that appear before committees. The Corporations and Financial Services Committee adopted those Resolutions as part of its procedures. The protections provided by the 1988 Resolutions are extensive.[3]

In dismissing the interlocutory application, her Honour suggested the jurisprudence of the High Court created some doubt about whether the matters raised by the plaintiffs were even justiciable, noting:

> Where, as here, there is an apparently validly appointed joint committee…which has a power to direct a person to attend, it is difficult to identify a role for the courts in relation to that exercise of power.[4]

Following this decision the witnesses appeared before the committee.[5]

Parliamentary Privileges Act 1987

Your email mentions interest in the *Parliamentary Privileges Act 1987* as a potential model. The committee may be aware that the 1987 Act was prompted by court decisions which, in the view of the Australian Parliament, made unwarranted incursions upon parliamentary ground. The central task of the Act was to set privilege back to its understood foundation on Article 9.

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[1] Senate Committee of Privileges, *150th report*, paragraphs 2.36-2.41.
[2] [2018] HCA 57, pp 6-7.
[3] p. 16.
[4] p. 9.
[5] See Procedural Information Bulletin No. 331 for further details.

A fundamental concern in drafting the 1987 Act was that it redress the New South Wales Supreme Court's radical reading down of Article 9, but do so in a manner which did not undermine its traditional scope to the detriment of the jurisdictions that continue to rely upon it. This influenced in particular the drafting of section 16, as a declaration of the understood scope of those protections enacted 'for the avoidance of doubt'.

This limited codification of parliamentary privilege certainly served its immediate purpose of reasserting the immunity of proceedings in Parliament from questioning or impeachment before the courts but it is not without difficulties. By way of example, the Senate Committee of Privileges in its 174th Report: *Parliamentary Privilege and the use of search warrants* considered the execution of warrants by the Australian Federal Police (AFP) where the warrants named a senator, a Senate committee and a particular committee inquiry. AFP officers were clearly alive to the possibility that a claim of privilege may prevent material seized under the warrant being relied on in subsequent court proceedings but do not appear to have contemplated that execution of the warrant might amount to an improper interference with the committee inquiry. This matter, and other evidence provided by law enforcement agencies to the Committee of Privileges[6], suggests that a risk inherent in the partial codification of privilege by the 1987 Act was that executive agencies may mistakenly come to view the statutory clarification of a particular element of parliamentary privilege (the use immunity) as the full scope of parliamentary powers and immunities.

On the question of whether such legislation invites interference in the internal workings of Parliament by the courts, the Australian jurisprudence, including the recent decision in *Alford,* bears out the argument made by the former Clerk of the House of Commons, Sir Malcom Jack KCB, in his memorandum to the committee: namely that the exclusive cognisance of Parliament over its own affairs is clearly acknowledged by the courts. This is not to say that there will not be the occasional skirmish over just where that boundary is drawn.

I would be pleased to provide any further information which would assist the committee.

Yours sincerely

(Richard Pye)

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[6] Senate Committee of Privileges, *168th report: Parliamentary Privilege and Use of Intrusive Powers*, paras 3.11-3.12.