The Centre for Public Integrity

Shrouded in secrecy

Briefing paper **April 2023**

Executive Summary

Access to government information is crucial to democratic practice. It underpins the core Australian constitutional tenets of representative and responsible government. One of the most powerful tools for accessing government information is the Senate's ability to order the production of documents. This mechanism has, however, buckled in recent years under abuse of successive governments. Senate production compliance rates have fallen from 92 per cent in 1993-96, to 20 per cent for the current Parliament. The use of potentially bogus unilateral 'public interest immunity' claims to protect government documents from production in the Senate has rapidly increased under the current Albanese Government – averaging almost one claim per week compared to one every three weeks under the Morrison Government.

Clearly this mechanism purporting to promote transparency and accountability has failed, and substantial reform is required. Accordingly, the Centre for Public Integrity recommends the establishment of an Independent Transparency Monitor to promote access to information by providing a disincentive to secrecy and an independent review mechanism for Parliament's requests for documents.

Introduction

The ability of Parliament to request, access and scrutinise executive government information is the essence of Australia's 'constitutionally prescribed system of representative and responsible government'[1] and a core tenet of Australia's separation of powers.[2] As Justice Isaac Isaacs noted over 100 years ago, it is Parliament's duty to watch 'on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account'.[3] In this sense, responsible government 'is the central feature of the Australian constitutional system'.[4]

[1] *Lange v Australian Broadcast Corporation* (1997) 189 CLR 520, 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[2] Anne Twomey, 'Executive Accountability to the Senate and the NSW Legislative Council' (2008) 23(1) *Australasian Parliamentary Review* 257, 257.
[3] *Horne v Barber* (1920) 27 CLR 494, 500 (Isaacs J).
[4] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTieran, Fullagar and Kitto JJ).

Executive dominance in the House of Representatives, incidental to Australia's Westminster system of government, means that it frequently falls upon the Senate to perform the scrutiny functions of responsible government. The government of the day has also historically rarely had Senate majorities – allowing the Senate to make credible threats to the passage of legislation if demands are not met.[5]

One of the Senate's most powerful tools in holding the executive to account is its ability to order the production of government documents. This power emanates from section 49 of the *Australian Constitution* and is statutorily affirmed by the *Parliamentary Privileges Act 1987* (Cth) s 5. It is currently contained in *Senate Standing Orders* o 164(1), which provides that '[d]ocuments may be ordered to be laid on the table, and the Clerk shall communicate to the Leader of the Government all orders for documents made by the Senate'. Yet executive compliance with such orders is not guaranteed: not only are sanctions for non-compliance lacklustre',[6] a government may also avoid providing documents by claiming 'public interest immunity' (also known as 'Crown privilege' or 'executive privilege' in other contexts).

Public interest immunity

Public interest immunity ('PII'), in the context of Senate production orders, refers generally to the idea that *it is in the public interest that some government documents remain secret*. As then-Acting Chief Justice Gibbs observed of PII in another context: '[I]t is inherent in the nature of things that government at a high level cannot function without some degree of secrecy. No Minister, or senior public servant, could effectively discharge the responsibilities of [their] office if every document prepared to enable policies to be formulated was liable to be made public. The public interest therefore requires that some protection be afforded by the law to documents of that kind'.[7]

[5] For example, since 1981 the governing party or coalition has only had a majority in the Senate from 2005-2007.
[6] Order 164(3) provides that non-compliance after 30 days may result in a senator asking the relevant minister for an explanation, moving that the Senate take note of the explanation, and that if there is not an explanation a senator may move a motion 'in relation to the minister's failure to provide either an answer of the explanation.
[7] *Sankey v Whitlam* (1978) 142 CLR 1, 40 (Gibbs ACJ).

While there is no prescriptive list of the grounds for PII from Senate production orders, there are several generally accepted categories. These grounds include but are not limited to:

- Damage to Australia's national security;
- Damage to relations between the Commonwealth and the States;
- Disclosure of Cabinet deliberations;
- Prejudice to an ongoing investigation;
- Disclosure of confidential sources or information in relation to law enforcement; and
- Damage to Commonwealth commercial relations.[8]

At face value these justifications are largely valid. Some documents, such as those relating to national security, are sometimes best kept from public scrutiny. Similarly, immunity for Cabinet deliberations allows incumbent governments to formulate official policy without fear that their deliberations and negotiations will be disclosed to the public.

Despite this, there is a fundamental issue with the *way* that PII claims are made within the context of Senate production orders. At the Commonwealth level, PII claims are made *unilaterally* – meaning that the government can make a claim of immunity without any independent arbiter to check the validity of the claim. It is not hard to see how this system could be used and abused by a government seeking to cover up wrongdoing, maladministration, or embarrassing and election-sensitive information under the guise of the 'public interest'. As Anne Twomey notes, a government often 'refuses to provide the documents that it does not wish to produce, as long as it thinks it can get away with it politically'.[9] The Senate has no official recourse when such documents are not produced, though it has an arsenal of punitive measures such as holding members in contempt, extending question time, delaying legislation and removing procedural advantages for ministers.[10]

[8] James Rowland Odgers, *Odgers' Australian Senate Practice / As revised by Harry Evans / edited by Rosemary Laing* (Department of the Senate, 14th ed, 2016) 662-7.
[9] Twomey (n 8) 259.
[10] Ibid.

A story of decline

Compliance with Senate production orders, typically on the ground of PII, has been continuously decreasing since data collection began. In fact, since the Parliament of 1993-96, the rate of compliance with Senate production orders has fallen precipitously from 92 per cent to approximately 20 per cent for the current Parliament.

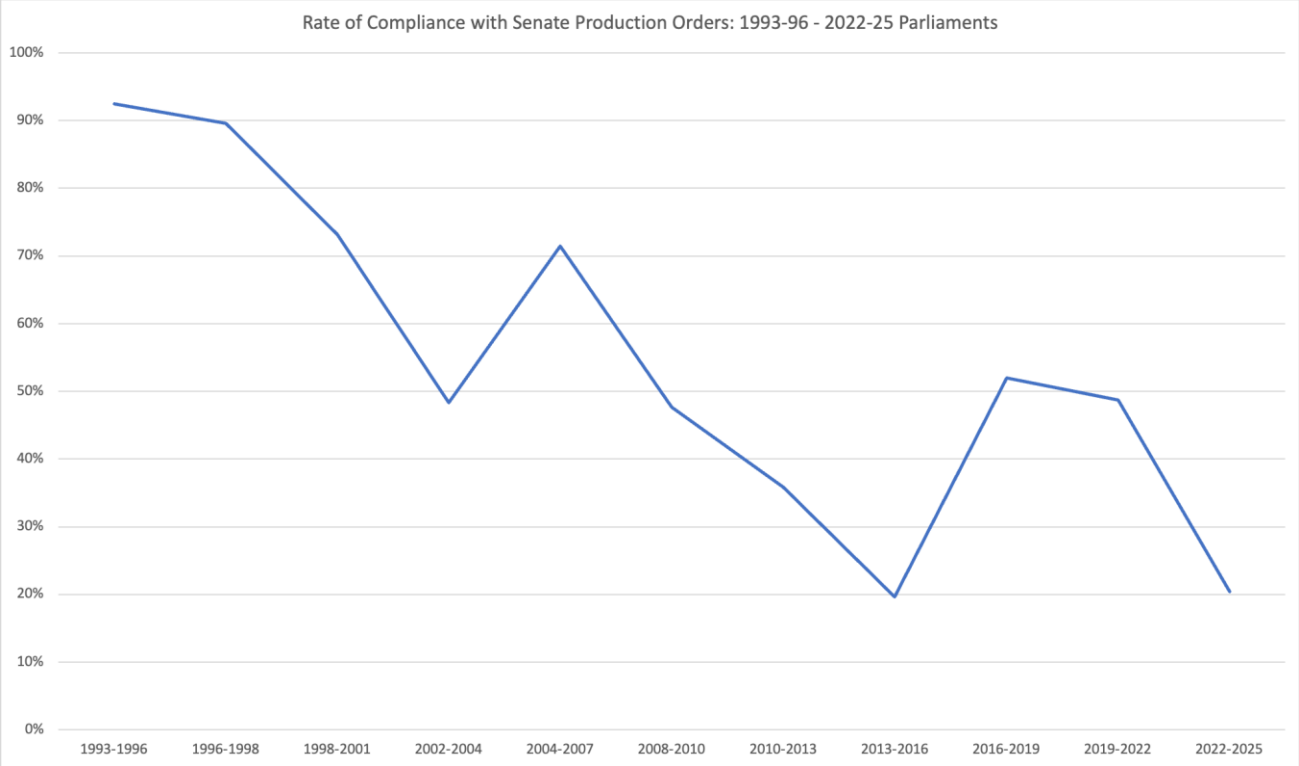

Figure 1: Rate of Compliance with Senate Production Orders: 1993-96 – 2022-25 Parliaments[11]

The year-on-year decline in compliance with Senate production orders is glaringly obvious. While some—indeed potentially many—of the documents may warrant protection via PII, it can hardly be expected that the terminal decline of the compliance rate is completely attributable to just bona fide PII claims.

[11] Figure for 2022-25 Parliament correct as of 20 February 2023 12pm. Data taken from Odgers (n 13) ch 4 including supplements up to 30 June 2022. Compliance rates for 2019-22 and 2022-25 Parliaments taken from 'Orders for production of documents', *Parliament of Australia* (Web Page, 22 February 2023 at 2pm AEST) < https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Orders_for_production_of_documents>. Compliance rates for 2019-22 and 2022-25 Parliaments are calculated with 'Order complied with' and 'Order substantially complied with' constituting compliance, and 'Order partially complied with' and 'Order not complied with' constituting non-compliance. Orders for which there are no documents are removed from the calculation. The data do not allow distinction to be made between cases where the Senate has accepted a PII claim and cases that are contested.

More granular data from the Morrison Government of 2019-22 and incumbent Albanese Government of 2022-25 reveals the extent of the decline in compliance with production orders, as well as the overuse, and potential abuse, of PII claims.

	Morrison Government (2019 – 2022)[12]	**Albanese Government (2022 – Present)**
Orders for production	159	60
Orders for production where documents exist	150	54
Full or substantial compliance	73	11
Partial or non-compliance	77	43
Compliance rate	48.7%	20.4%
PII Rejections	47	28
PII Rejections as proportion of non-compliance	61.0%	65.1%

Figure 2: Comparison of Morrison and Albanese Governments on Production Order Compliance and PII Claims[13]

The Albanese Government currently represents the lowest ebb in recent history in its compliance with Senate production orders. What is more, 65.1 per cent of all non-compliance has been attributable to PII claims, compared to the Morrison government total of 61 per cent. For 2022 alone, 83.9 per cent of non-compliance involved claims of PII.

Further, the current rate of PII claims significantly outpaces that of the Morrison Government. Over its 1014 days in power, the Morrison Government made 47 PII claims against Senate orders for documents – or about one PII claim every three weeks.[14] Conversely, the 211 days of Albanese government have provided 28 PII claims against Senate orders, or about *one claim every week*.[15]

[12] This data refers only to the Morrison Government during the 46th Parliament.
[13] 'Orders for production of documents', *Parliament of Australia* (Web Page, data current as of 22 February 2023 at 2pm AEST) < https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/Orders_for_production_of_documents>.
[14] 21.57 days.
[15] 7.54 days (data current as of 22 February 2023 2pm AEST).

We have no way of knowing whether these PII claims are bogus, or whether the information really merits protection. Perhaps all the claims are valid, or perhaps they are not. Nevertheless, what emerges from this analysis is that the system of unilateral PII claims is not fit for purpose, and serves to undermine a core Australian constitutional tenet of responsible government.

The way forward

Access to information is undermined by the executive's ability to resist production to the Senate by unilaterally claiming privilege over documents. The executive does not have to provide evidence to support the claims, and there is no safeguard against the executive abusing privilege claims to withhold important information from the public and the Parliament.

Access to information could be improved by introducing an independent appeal mechanism to deal with disputed privilege claims. In New South Wales, standing order 52 permits parliamentarians to contest claims of privilege with an independent legal arbiter.[16] The arbiter may access the documents in question and assess whether they meet the criteria of the relevant PII claim (ultimately, it remains for the House to determine the validity of a claim).[17] A similar mechanism exists in Victoria, where pursuant to standing orders 10.04 and 10.05 an independent arbiter can be appointed to determine a claim of privilege.[18] However, the involvement of such an arbiter depends upon executive compliance with the requirement of standing order 10.03(1) to provide to the Clerk documents in relation to which privilege is claimed. As no Victorian government has ever complied with this requirement, the independent arbiter provision has never been able to be used. In effect, as a former Clerk of the Victorian Legislative Council observed, this practice means that 'the Government regards itself as the sole arbiter of its own claim'.[19]

[16] *Legislative Council Standing Rules and Orders 2023* (NSW) o 52.
[17] Ibid o 52(9).
[18] See generally *Legislative Council Standing Orders 2022* (Vic) ch 10.
[19] Andrew Young, Submission No 8 to Legislative Council Select Committee on the Production of Documents, Parliament of Tasmania, *Production of Documents* (2019) 2.

The Centre for Public Integrity proposes to extend these models and establish an Independent Transparency Monitor within the *Senate Standing Orders* to adjudicate contested claims of privilege, in order to promote a culture of openness and disincentivise secrecy in government. The Monitor would have the function of considering disputed privilege claims, where the government provides them with the relevant documents, or making a 'secrecy finding' in the event that the government refuses access (in order to guard against what happens in Victoria). The proposed process is laid out below, and graphically represented at Figure 3.

A model for Parliamentary disputes

1. If a Senator's request for information is denied based on a claim of privilege, the Senator can apply to the Independent Transparency Monitor. This mechanism would apply to information requested through Senate estimates (including Questions on Notice), Senate Committees and Production Orders.

2. If the Government fails to supply the documents to the Independent Transparency Monitor to assess the claim, the Monitor will have the ability to make a 'secrecy finding' against the relevant Government member (with 'secrecy finding' a tool designed to have the same deterrent function as a 'corrupt conduct' finding by an integrity commission).

3. If the Government provides the documents to the Independent Transparency Monitor, the Monitor can assess the claim and either uphold it or release the documents. Parliamentary privilege will not apply to the Monitor, so it may access documents for the purposes of determining the validity of claims.

Conclusion

The system of Senate orders for the production of documents is broken. Compliance has fallen to new historic lows since the early 1990's. Unilateral, incontestable claims of PII fundamentally undermine responsible government and prevent the Senate from adequately performing its core scrutiny function. While *forcing* an unwilling majority government to hand over documents is extremely difficult and arguably impossible, any overt secrecy should be called out and on the public record for all to see. The Centre for Public Integrity therefore recommends the establishment of an Independent Transparency Monitor which would provide:

- A disincentive for the executive government to make spurious privilege claims and otherwise unjustifiably resist access;

- An independent review mechanism for Parliament's requests for documents; and

- Accountability in respect of executive claims of privilege.

About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Stephen Charles AO KC, the Hon Anthony Whealy KC, the Hon Pamela Tate AM KC, Professor George Williams AO, Professor Joo Cheong Tham, Geoffrey Watson SC and Professor Gabrielle Appleby. More information at www.publicintegrity.org.au.

Figure 3: Functions of the proposed Independent Transparency Monitor