

NEWS GOVERNMENT BUSINESS

Privilege puts some knickers in a knot

Confusion reigns about how to retain privacy while obtaining evidence, writes **Verona Burgess**.

The Rudd government has made some positive moves towards more open government, but it seems to have got its legislative knickers in a knot over parliamentary privilege.

Ironically, it has happened in a bill whose intention is to further safeguard the privacy of taxpayers' information.

The Senate Privileges Committee is looking at provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 that relate to the disclosure of taxpayer information to committees and their possible conflict with the Parliamentary Privileges Act 1987.

The committee, chaired by Liberal senator George Brandis, has no quarrel with the bill's aim to consolidate and standardise various provisions (now spread over 18 tax acts) into a single framework.

Rather, the concern is that particular provisions appear to place limits on information that tax officers can provide to parliamentary committees and the circumstances under which it can be provided.

They might also give rise to court action. During that, either parliamentary proceedings would be questioned in court, thus contravening the privileges act, or the privileges act would have to be "read down" to permit the questioning.

There is a long history to this. It is focused largely on whether parliamentary privilege can be



The Senate Privileges Committee, chaired by George Brandis, is looking into the disclosure of taxpayer information to committees. Provisions appear to place limits on tax officers.

Photo Glenn Hunt

abrogated by only an express statute (such as in the Auditor-General Act 1997, aimed at guaranteeing the independence of the auditor-general and possibly the only statute that does abrogate privilege) or whether it can be abrogated by "necessary implication".

In a submission to the inquiry, the new clerk of the Senate, Rosemary Laing (herself a previous secretary of the privileges committee), elucidates that history and says only an express statute can abrogate privilege. This is because, in short, Section 49 of the constitution requires a declaration by parliament to modify the powers, privileges and immunities of the houses as inherited at the establishment of the commonwealth.

"The danger of allowing that parliamentary privilege may be abrogated by necessary implication is readily apparent,"

she says. "If that were so, governments would argue the existence of necessary implications in every conceivable circumstance in order to limit the powers and the reach of parliaments. It would not be in their interests to do otherwise."

The tax bill proposes to make it an offence for a former or serving tax officer to disclose protected information. Some exceptions relate to parliamentary committees, including that such a disclosure, oral or written, must be treated as evidence taken in camera. Under the bill, it is also an offence for anyone who is not a tax officer to disclose such information. Overall, Laing says the provisions are confusing and unsatisfactory.

"The reason for this may be that the instructors and drafters lacked sufficient understanding of parliamentary privilege to avoid the pitfalls they have created." But

she says this is not a criticism. "The committee will know from its own experience that there is widespread ignorance of these matters in the public sector."

The bill's explanatory memorandum, Laing says, does not inspire confidence that the issues have been fully understood.

"The use of such expressions as 'the new framework limits the scope of parliamentary privilege to authorise disclosure of taxpayer information' betrays a confused understanding of the concepts involved," she says. "How can parliamentary privilege authorise disclosure? This is the wrong end of the stick. Parliamentary privilege is the term given to that collection of powers and immunities that enable parliaments to operate without outside interference... It is torturing the logic to describe this immunity as an authorisation."

There are, Laing says, no known

instances in which Senate committees have demanded tax file numbers or other individual taxpayers' information.

If a committee were to request such information, it would be open to a witness to follow the normal procedures leading to a claim of public interest immunity on the well-established ground of unreasonable (and potentially harmful) invasion of privacy.

Committees in the past, Laing says, have had no difficulty in accommodating privacy concerns while still obtaining evidence.

She urges the inquiry to consider recommending that the offending provisions be removed, leaving the existing law to operate.

Malcolm Stewart, who is vice-president of the not-for-profit Rule of Law Association, also recommends dropping the provisions. He says in his submission that they "have the potential to cause confusion and uncertainty, and, moreover, they offend the separation of powers doctrine and the rule of law".

University of Sydney associate professor Anne Twomey is equally critical. She says that if she, a constitutional lawyer familiar with parliamentary privilege, finds it extremely confusing, what hope would a tax officer have.

"All these provisions are so unclear, it is impossible to know what to make of them," she says.

"Personally, they just make my head spin. Heaven only knows how a court would interpret them. This is the nub of the problem. How can Parliament be asked to limit the privileges and powers of its houses when it cannot really know how the legislation would operate in practice or be interpreted by a court?"

The committee report is due on May 12. vburgess@afr.com.au