



The Hon Christian Porter MP
Attorney-General

Senator the Hon Ian Macdonald
Chair
Legal and Constitutional Affairs Legislation Committee
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Dear ~~Chair~~ 

I refer to the Joint Committee of Public Accounts and Audit inquiry into the Issuing of a Certificate under section 37 of the Auditor-General's Act 1997 – Inquiry based on Auditor-General's Report no. 6 (2018-19).

At the hearing on 23 October 2018 my department took the following question on notice from Senator Murray Watt:

Senator WATT: Was it the department's view that this was an exceptional circumstance that justified this type of certificate being issued?

Mr Anderson: We wouldn't normally disclose our advice to the Attorney-General for the purpose of him then considering the exercise of the power. But even if I did disclose it, it's actually irrelevant because the point is it's the Attorney's independent exercise of judgement here.

Senator WATT: Sure, but you would think he would pay some respect to the advice that you would be providing.

Mr Anderson: If you wanted me to disclose the advice the department provided—is that what you're asking for?

Senator WATT: Yes.

Mr Anderson: I'll take that on notice. The Attorney-General may well want to make a public interest immunity claim over the advice that was given to him for the purpose of considering the certificate.

My department provided confidential legal advice on the operation of section 37 of the *Auditor-General Act 1997*, and matters relating to the issuing of a certificate under the relevant legislation.

It has been the long-standing practice of successive Australian Governments not to disclose privileged legal advice. This practice has previously been outlined by the Hon Gareth Evans QC:

...[n]or is it the practice or has it been the practice over the years for any government to make available legal advice from its legal advisers made in the course of the normal decision making process of government, for good practical reasons associated with good government and also as a matter of fundamental principle... (Senate Hansard, 28 August 1995, page 466);

Then Senator, the Hon Joe Ludwig, put the position as follows:

To the extent that we are now going to go to the content of the advice, can I say that it has been a longstanding practice of both this government and successive governments not to disclose the content of advice. (Senate Legal and Constitutional Affairs Legislation Committee, Hansard of Estimates hearing, 26 May 2011, page 161); and

Similarly, the Hon Philip Ruddock MP stated:

...It is not the practice of the Attorney to comment on matters of legal advice to the Government. Any advice given, if it is given, is given to the Government...
(House of Representatives Hansard, 29 March 2004, page 27405).

The Australian Government maintains that it is not in the public interest to depart from this established position. It is integral that privileged legal advice provided to the Commonwealth remains confidential. Access by Government to such confidential advice is, in practical terms, critical to the development of sound Commonwealth policy and robust law-making.

The specific harm that the doctrine of legal professional privilege seeks to prevent is the harm to the administration of justice that would result from the disclosure of confidential interactions between lawyer and client. Both the High Court of Australia and Federal Court of Australia have confirmed that legal professional privilege promotes the public interest by enhancing the administration of justice, facilitating freedom of consultation and encouraging full and frank disclosure between clients and their legal advisers.

Accordingly, in accordance with Senate Order 10(c)(3) of 13 May 2009, I claim public interest immunity over the confidential legal advice discussed above.

The Senate Order requires a statement to indicate whether harm would result from a disclosure of evidence in camera. Given ~~the~~ provisions of standing order 26(2), that question does not arise.

Yours sincerely

The Hon Christian Porter MP
Attorney-General