

APPENDIX 1

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19 February 2008

Mr Peter Hallahan
Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

DISCLOSURE OF LEGAL ADVICE

The committee requested at its estimates hearing yesterday, and in your subsequent email, advice on the claim by the Secretary of the Attorney-General's Department, Mr Robert Cornall, that there is an "established practice that we do not disclose either advice or whether we have been asked to give advice". Earlier Mr Cornall stated: "We do not normally disclose details of advice that we give to the Attorney-General". There is a great difference between the statement that advice is not "normally" disclosed and the statement that it is an "established practice" that neither advice nor whether it has been given is disclosed. Also, it is not clear to whom Mr Cornall referred as "we". If he means his department, rather than government collectively, it is not his decision whether to disclose advice; any decision on disclosure should be made by his minister.

Leaving aside that contradiction and ambiguity, as was pointed out by senators during the hearing, Mr Cornall's claim is refuted by the number of occasions on which not only the fact that advice has been given but the advice itself has been disclosed. As was pointed out, the question whether advice has been given has often been asked and answered in estimates hearings, and government has disclosed the content of advice on numerous occasions. It is clear that government discloses advice whenever it chooses to do so. A recent leading example was the disclosure in the Senate by the previous government, in advance of any known request, of its advice on the legality of the sale of Medibank Private.

Mr Cornall asked that I be referred to the 2004 report of the Commission chaired by Lord Butler into the intelligence leading to the Iraq war. Lord Butler stated in that report: "There is a long-standing convention ... that neither the fact that the Law Officers have been consulted in relation to a particular matter nor the substance of any advice they may have given is disclosed outside Government." Unfortunately, Lord Butler, a former Cabinet Secretary, was in the same position of stubborn denial as Mr Cornall. He was dealing with a case in which the Attorney-General's advice on the

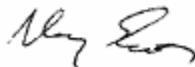
legality of the Iraq war had effectively already been disclosed. His report refers to other notorious cases of government malfunction in which advice was disclosed. It is very doubtful whether British governments in the future will attempt to uphold Lord Butler's "long-standing convention". In any event, even if it were a convention of the British government, it is certainly not a convention of Australian governments, unless conventions are established by frequent departure from them.

There is nothing in the rules of the Senate which prevents a senator requesting, or a committee or the Senate itself requiring, the production of legal advice to government. The Senate, like other comparable legislatures, has never accepted the claim that legal advice should not be disclosed as a sufficient basis for not disclosing it in particular cases. Past resolutions of the Senate make it clear that, if ministers do not wish to produce advice, or any other information, they are expected to raise a public interest ground for the consideration of the committee or the Senate. As the advice quoted to the committee indicates, public interest grounds which have been regarded in the past as having some validity include prejudice to legal proceedings, disclosure of Cabinet deliberations or prejudice to the Commonwealth's position in negotiations. If such a ground is raised it is for the committee in the first instance and the Senate ultimately to consider whether the ground is made out. It is for ministers, not public servants, to raise such a ground, as the government's own guidelines for public service witnesses make clear.

It is open to the committee to require that the unanswered question be referred to the Attorney-General, and subsequently to insist on an answer, and, if the refusal is maintained, to report the matter to the Senate.

Please let me know if I can be of any further assistance to the committee.

Yours sincerely



(Harry Evans)