

APPENDIX 2

LETTER FROM THE CLERK OF THE SENATE TO THE ATTORNEY-GENERAL'S DEPARTMENT REGARDING DISCLOSURE OF ADVICE GIVEN TO MINISTERS



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Mr Robert Cornall AO
Secretary
Attorney-General's Department
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Dear Mr  Cornall

DISCLOSURE OF ADVICE GIVEN TO MINISTERS

I thought it might be useful to set out the basis of the points made during our conversations at the Summit, so as to indicate that we are on very firm ground.

Paragraph (16) of the Senate's Privilege Resolution no. 1, *Procedures to be observed by Senate committees for the protection of witnesses*, provides, amongst other things, that:

"An officer of a department of the Commonwealth or of a state shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister".

Paragraph 2.28 of the *Government Guidelines for Official Witnesses before Parliamentary Committees* provides that:

"Claims that information should be withheld from disclosure on grounds of public interest (public interest immunity) should only be made by Ministers (normally the responsible Minister in consultation with the Attorney-General and the Prime Minister)."

Paragraph 2.31 of the same document provides:

"If an official witness, when giving evidence to a committee, believes that circumstances have arisen to justify a claim of public interest immunity, the official should request a postponement of the evidence, or of the relevant part of the evidence, until the Minister can be consulted."

Paragraph 2.32 provides that one of the grounds for a claim of public interest immunity may be:

“material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government where disclosure would be contrary to the public interest”.

Because advice to ministers by definition belongs to ministers, unless an officer knows that there are some circumstances (for example, the advice has already been published or disclosed, or the minister has indicated that it may be disclosed) which make it unnecessary to refer the question to the minister, an officer when asked to disclose advice given to a minister is always on good ground in referring the question to the secretary of the department or to the minister.

We have to bear in mind that advice to ministers has often been disclosed, so committees have to be persuaded that the circumstances justify a reference to the minister. Sometimes the nature of the advice given by a department is known because the department has expressed its view in some other forum or context. If the content of advice to a minister has not been disclosed, however, the principle that it belongs to the minister is always unarguable.

Officers have often answered questions about whether and when advice was given. If it is obvious in the circumstances that the department would have provided advice, or it is known that a government decision was made at a particular time, it could appear to be unduly uncooperative to decline to answer a question about whether or when advice was given. In practical terms, declining to answer questions about whether or when advice was given really makes sense only when the answer would reveal otherwise undisclosed ministerial deliberations.

I hope that this elaboration of our conversation is of some assistance.

Yours sincerely



(Harry Evans)