

APPENDIX 4

ADVICE PROVIDED BY THE CLERK OF THE SENATE REGARDING LEGAL ADVICE



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30 May 2008

Senator Trish Crossin
Chair
Standing Committee on Legal and Constitutional Affairs
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin

LEGAL ADVICE AND ADVICE TO MINISTERS

At the estimates hearing of the committee on the evening of 27 May 2008, reference was made to two notes of advice I had provided, one which was provided to the committee on 19 February 2008 and which referred to the disclosure of legal advice, and one which was provided to the Secretary of the Attorney-General's Department, Mr Robert Cornall, on 22 April 2008 and which referred to advice provided to ministers.

There is a point of clarification which should be made in relation to these two notes. I was not able to make this clarification earlier because the transcript for that hearing has only just become available.

I do not think that it was sufficiently appreciated that these two notes dealt with different subjects: the note to the committee dealt with legal advices to government, regardless of whether such advices were provided to departments or to ministers, while the note to Mr Cornall dealt with advices, of any kind, provided to ministers. The first note pointed out that legal advices are often disclosed, and some additional public interest grounds are required to support any claim that they should not be disclosed in a particular instance. The second note pointed out that, as advices provided to ministers by definition belong to ministers, in the absence of circumstances mentioned in the note, officers are justified, under the rules of the Senate, in referring requests for such advices to the relevant ministers.

In relation to legal advice specifically, such advice is not necessarily sought by, or provided to, ministers. Departments may seek, and be provided with, legal advice

without reference to a minister, and there may well be circumstances in which a department is able to disclose such advice without reference to a minister.

In practical terms, the distinction which underlies the two notes may not be significant, as, under the rules of the Senate, a department may be justified in seeking the approval of a minister to disclose legal advice which has been provided to the department. The distinction may be significant in particular cases, however, and may need to be drawn, so that departments completely understand what is being asked of them.

Perhaps this note could be added to the others in the additional information of the committee, in case of such future cases.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Harry Evans', with a small horizontal line underneath the name.

(Harry Evans)