

**(e) a copy of legal advice that the disclosure of evaluation reports to the committee may create a significant risk of litigation to the Commonwealth;**

Provided are extracts from legal advice noting that the disclosure of evaluation reports to the committee may create a significant risk of litigation to the Commonwealth.

From legal advice dated 7 February 2001, of the complete advice comprising paragraphs 1-17, the paragraphs relevant to the Senate Notice are 10-17, and are reproduced here:

10. However, in our view, although the documents submitted to the Committee could well be protected by absolute parliamentary privilege, the privilege would be unlikely to extend to other copies of the same document, or to documents relating to the submitted document. There is therefore a risk that the disclosure of the documents would alert an aggrieved tenderer to the existence and contents of such documents. Disclosure might encourage or assist the tenderer in pursuing other means, including discovery by which it could obtain proper discovery of either:
  - (a) copies of the same information or documents; or
  - (b) other documents and information related to the documents submitted to the Committee,not subject to parliamentary privilege under the Privileges Act.
11. Certain of these documents, in particular the evaluation reports, might contain highly sensitive confidential information regarding the evaluation and decision-making processes adopted by the Commonwealth. Information of this kind could assist an aggrieved tenderer in bringing a successful claim against the Commonwealth.
12. Hence, disclosure of the documents, especially the evaluation reports, indirectly to tenderers, through submission to the Committee, could seriously damage the Commonwealth's interests, as to do so would increase the Commonwealth's exposure to litigation.
13. As discussed in our advice to you dated 5 January, there may be an argument that the disclosure of the documents could be denied on the grounds of public interest immunity. As we have stated, governmental claims to such immunity have the best chance of success where an issue of national security can be raised. We do not think that a claim of public interest immunity is likely to be upheld in the context merely of the disclosure potentially increasing the Commonwealth's exposure to litigation.
14. Failing any reliance on public interest immunity, we recommend that the evaluation reports only be provided to the Committee in camera and only on condition that they be kept confidential.

15. The Committee could nevertheless decide to release the information.
16. While the interests of public scrutiny of documents would support release to the Committee, our concern focuses on potential risk to the Commonwealth of legal actions from disgruntled tenderers should the Committee decide to make those Reports or parts of them public. Another issue to consider is that some information in the evaluation reports may be confidential to tenderers. An analysis of such information would need to be made on a case-by-case basis. We have advised you separately on the confidentiality provisions in the Services Agreements and RFT provisions.
17. We recommend that OASITO seek the agreement of the Committee that any release of evaluation reports to the Committee be in camera and an undertaking by the Committee not to disclose that material (see SOR 37(3)(b)). However, we appreciate that such an agreement and undertaking may be refused or (if given), later revoked or overruled by the Committee or Senate. We note that, in such an event, the Commonwealth could be exposed to legal challenge by a third party. As discussed, the issue of an order to disclose by the Committee would provide the most protection to the Commonwealth in respect of tenderer confidential information.

From legal advice dated 7 March 2001, of the complete advice comprising paragraphs 1-17, the paragraphs relevant to the Senate Notice are 10-17, and are reproduced here:

10. \* However, in our view, although the documents submitted to the Committee could well be protected in Australian courts by absolute parliamentary privilege, the privilege would be unlikely to extend to other copies of the same document, or to documents relating to the submitted document. There is therefore a risk that the disclosure of the documents would alert an aggrieved tenderer to the existence and contents of such documents. Disclosure might encourage or assist the tenderer in pursuing other means, including discovery by which it could obtain proper discovery of either:
  - (a) copies of the same information or documents; or
  - (b) other documents and information related to the documents submitted to the Committee,not subject to parliamentary privilege under the Privileges Act.
11. Certain of these documents, in particular the evaluation reports, might contain highly sensitive confidential information regarding the evaluation and decision-making processes adopted by the Commonwealth. Information of this kind could assist an aggrieved tenderer in bringing a successful claim against the Commonwealth.
12. Hence, disclosure of the documents, especially the evaluation reports, indirectly to tenderers, through submission to the Committee, could

seriously damage the Commonwealth's interests, as to do so would increase the Commonwealth's exposure to litigation.

13. The Privileges Act would not prevent the use of documents as evidence in court proceedings in other countries. Given the international aspects involved in the tendering, the risk of proceedings elsewhere cannot be disregarded. Nor would the Privileges Act prevent or legally inhibit the taking, in accordance with the terms of a contract, of collateral action beyond the jurisdiction of Australian courts. However, we envisage that the probability of such an action would be low. As discussed in our advice to you dated 5 January 2001, there may be an argument that the disclosure of the documents could be denied on the grounds of public interest immunity. We do not think that a claim of public interest immunity is likely to be upheld in the context merely of the disclosure potentially increasing the Commonwealth's exposure to litigation.
14. In the absence of any Ministerial direction to claim public interest immunity, we recommend that the evaluation reports only be provided to the Committee in camera and only on condition that they be kept confidential.
15. The Committee could nevertheless decide to release the information.
16. While the interests of public scrutiny of documents would support release to the Committee, our concern focuses on potential risk to the Commonwealth of legal actions from disgruntled tenderers should the Committee decide to make those Reports or parts of them public. We appreciate however, that this is only one issue to consider. Another issue to consider is that some information in the evaluation reports may be confidential to tenderers. An analysis of such information would need to be made on a case-by-case basis. We have advised you separately on the confidentiality provisions in the Services Agreements and RFT provisions. Breach of those provisions would need to be proven by the Contractor/Tenderer. This may be difficult to do in light of the Privileges Act.
17. We recommend that OASITO seek the agreement of the Committee that any release of evaluation reports to the Committee be in camera and an undertaking by the Committee not to disclose that material (see SOR 37(3)(b)). However, we appreciate that such an agreement and undertaking may be refused or (if given), later revoked or overruled by the Committee or Senate. We note that, in such an event, the Commonwealth could be exposed to legal challenge by a third party. It will however be a requirement that the third party prove the action they bring. As discussed, the issue of an order to disclose by the Committee would provide the most "protection" to the Commonwealth (bearing in mind the various confidentiality provisions in the Services Agreements) in respect of tenderer confidential information.