Government Senators' Dissenting Report

1. The Labor Party and Greens Political Party majority of the Legal and Constitutional Affairs References committee (the committee) have contended that the Attorney-General has failed to answer a number of questions in their Appendix 1 of the committee's interim report.

2. Answers to questions on notice from the hearing (during which questions were addressed to the Attorney-General's Department) on 17 February were provided to the committee on 24 March 2017 (in an email from Alana Fraser of the Attorney-General's Department to the Secretariat).

3. Answers to questions taken on notice at the hearing on 8 March 2017 (addressed to the Attorney-General) were provided on 23 March and 29 March 2017.

4. All bar one of the questions[1] specifically cited by the committee were answered in the above responses. More particularly:

Question No.	**Response Provided**	**PII Claim made**
1	24 March 2017, pp.2-3	Yes- over notes (see from 'it would not be appropriate to further disclose the nature of the issues covered')
2	No	
3	24 March 2017, pp.14-5	n/a
4	24 March 2017, pp.14-5	n/a
5	23 March 2017	Yes- refer from 'the public interest in non-disclosure' onwards.

5. The sole unanswered question was asked at the committee's hearing on 17 February 2017. Given that all of the questions on notice from that hearing were otherwise answered in the response tabled on 24 March, the most likely explanation is that this question was accidentally overlooked, either by officials of the Attorney-General's Department or the Attorney-General's Office. Government Senators note that this oversight has now been brought to the Attorney General's attention and would urge the Attorney General to provide an answer to the committee at his earliest convenience.

[1] Question No.2 of Appendix 1 to the Committee response

6. The majority report also contends that the Attorney-General should make a public interest immunity claim on the basis of legal professional privilege, or that documents were confidential.

7. In fact he Attorney-General's response to the committee tabled on 23 March 2017 contained, under the heading 'the public interest in non-disclosure' a comprehensive explanation of the harm to the public interest that would result from answering the relevant questions on notice (see Appendix 1 to this Dissenting Report). The Attorney has complied with the committee's request.

Senator David Fawcett

Government Senators' Dissenting Report

Appendix 1

The public interest in non-disclosure

It is not in the public interest to depart from the established position that has been maintained over many years by successive governments, from both sides of politics, not to disclose privileged legal advice. Absent exceptional circumstances, it is essential that privileged legal advice provided to the Commonwealth remain 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 High Court of Australia has repeatedly affirmed that there is a public interest in maintaining the confidentiality of legal advice. In *Grant v Downs*, Stephen, Mason and Murphy JJ stated:[2]

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers.

It has further been recognised that the doctrine of legal professional privilege itself arises from a weighing of the public interest for and against disclosure. In Waterford v Commonwealth, Mason and Wilson JJ opined:[3]

> Legal professional privilege is itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognised crime or fraud exception, the public interest in "the perfect administration of justice" is accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence. Given its application, no further balancing exercise is required.

That view was reaffirmed by Gleeson CJ, Gaudron and Gummow JJ in *Esso Australia Resources Limited v Commissioner of Taxation*.[4] Their honours succinctly stated the

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[2] *Grant v Downs* (1976) 135 CLR 674, 685.
[3] *Waterford v Commonwealth* (1987) 163 CLR 54, 64.
[4] *Esso Australia Resources Limited v Federal Commissioner of Taxation* (1999) 201 CLR 49, [35]

rationale for the privilege: it "exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers."

It follows from these observations that the specific harm that the doctrine seeks to prevent is the harm to the administration of justice that would result from the disclosure of confidential interactions between lawyer and client.

It also follows that to invoke the doctrine of legal professional privilege is to identify the specific harm to the administration of justice that the doctrine seeks to prevent.

Here, the Committee's questions go to the heart of the Commonwealth's approach to constitutional litigation in the High Court. Disclosure of advice in this context would mean that in some of the most sensitive litigation faced by the Commonwealth — constitutional litigation with a State — the Commonwealth could no longer be assured that its dealings with its lawyers would remain confidential.

There may be circumstances where there is an overriding public interest in disclosure, notwithstanding a legitimate legal professional privilege claim. Indeed, the common law itself has long recognised that legal professional privilege is not absolute.[5]

[5] The privilege does not extend to communications facilitating the commission of a crime or fraud.