

Appendix A to Dissenting Report from Government Senators Questions on Notice to the Solicitor-General

- 1. You said in evidence: “I assist in the performance and execution of the executive power of the Commonwealth under chapter II of the Constitution.” In relation to that statement:**
 - a. Are you in any respect empowered to exercise the Commonwealth’s executive power independently of instructions from the Ministry?
 - b. If the answer to the above question is “yes”, please specify how you may exercise the executive power of the Commonwealth independently of ministerial instruction.
- 2. Were you compelled to give evidence or produce any documents to the Committee?**
- 3. Did the Committee or its Secretariat ask you or any member of your staff whether you consented to the publication of your submission on the internet?**
- 4. If the answer to the above question is “yes”, what was the answer given to the Committee or its Secretariat, as the case may be?**
- 5. You said in evidence: “to the extent the Solicitor-General appears in court, ... the Solicitor-General will take instructions from the government of the day but will also owe an ultimate duty to the Commonwealth of Australia and its people.” In relation to that statement:**
 - a. Other than in circumstances where the Commonwealth purported to instruct you to mislead a Court or otherwise to depart from your duties to the Court, are there other circumstances in which you would depart from the Commonwealth’s instructions as to the submissions to be put on its behalf? If so, what are those circumstances?
 - b. What is the precise content and source of your duty to the Commonwealth of Australia?
 - c. What is the precise content and source of your duty to the people of Australia?

- 6. You said in evidence as to the role of the Solicitor-General: “it is a full-time commitment to practice as the premier professional lawyer in the nation”. Are you subject to any of the professional duties that apply to lawyers in Australia (or in any jurisdiction within Australia)? If so, what are those professional duties, and what is their source?**
- 7. You said in evidence: “However, the Attorney-General is responsible directly to the parliament and the people as a minister of the Crown; the Solicitor-General is not.” Does that fact have any consequences so far as concerns the identity of the person who has the power to claim or to waive legal privilege on behalf of the Commonwealth? If so, what are those consequences? If not, why not?**
- 8. At one point in your evidence you described the Attorney-General’s Direction as “a radical change in practice”. Later, you described it as “at least a material change”. Which is it?**
- 9. You said in evidence, about the Direction: “It is a radical change in practice whereby a Solicitor-General can do nothing – he cannot even speak to a lawyer – until he has received a brief with a signed consent.” Please identify the precise words in the Direction that prohibit you from “even speak[ing] to a lawyer”.**
- 10. In your evidence you stated that the Attorney-General had referred a question of law to you relating to “the composition of this Senate”. In relation to that evidence:**
 - a. Are you able to provide further details about the matter?
 - b. Is it within your power to decide to claim, or to decide not to claim, public interest immunity in respect of information concerning matters upon which the Commonwealth Government seeks legal advice?
 - c. If the answer to the above question is “yes”, please identify the source of that power.
 - d. If the answer to the question is “no”, who *does* have the power to claim public interest immunity on behalf of the Commonwealth? Did you have instructions from that person or those persons in relation to the matter you mentioned concerning the composition of the Senate?

11. Elsewhere in your evidence, you refused to answer questions because to do so would “breach legal privilege”. In relation to that statement:

- a. Precisely what form of “legal privilege” were you referring to?
- b. Is the form of “legal privilege” to which you were referring one that inures to the benefit of the Commonwealth, or to the benefit of the Solicitor-General, or to the benefit of some other party? If the latter, please identify the relevant party.
- c. Is the “legal privilege” to which you referred one that it is your power to claim, or to waive, independently of the instructions of the Commonwealth Government?
- d. If the answer to the above question is “yes”, please identify the precise source of that power.
- e. If the answer is “no”, who *does* have the power to claim the privilege? Did you have instructions from that person or those persons in relation to the matters in respect of which you refused to answer questions on the ground of “legal privilege”? Did you seek the views of that person or of those persons in relation to any matter in respect of which you did not claim “legal privilege” in your evidence or submission to the Committee?

12. You said in evidence: “Under the Law Officers Act, I do not practise as a barrister.” In relation to that statement:

- a. In your capacity as Solicitor-General, are you subject to any standards of professional conduct that apply to practising lawyers? If so, what are those standards, and why are you bound to observe them?
- b. Under s 13 of the Law Officers Act, you have the rights and privileges of a barrister. Do you have any of the duties of a barrister? If so, which ones, and why?
- c. Do you consider yourself to owe any duty of confidentiality to the Commonwealth Government? If so, what is the ambit of that duty, and what is its source?
- d. Is the post-nominal, “SC”, that of a barrister?

- e. If the answer is “yes”, why do you use that post-nominal (and why do the Commonwealth Law Reports place it after your name), even though, as Solicitor-General, you do not practise as a barrister?

13. You said in evidence: “The reason I was at liberty to tell you that it was this, Senator: the Prime Minister in the parliament – I believe it was on Wednesday of this week – said that he had sought advices from me. So, the fact that the Prime Minister has sought advices from me is a matter which has been revealed to this parliament by the Prime Minister.” In relation to that statement:

- a. Please identify the precise statement of the Prime Minister to which you were referring, and the date on which it was made.
- b. Had the statement been made before you provided your written submission to the Committee? Assuming that you or your staff consented to the internet publication of your submission, had the statement of the Prime Minister been made prior to that consent being given?
- c. Why did you consider yourself at liberty, in your written submission, to make the following statement (and, possibly, to consent to its publication): “Indeed, there have been times when persons, such as a Prime Minister or a Governor-General, have approached me to provide advice in circumstances where I have been required to keep their very request for advice, as well as the content of advice given, confidential”?

14. You said in evidence about the advice you provided to the Prime Minister: “the subject matter of that advice remains confidential to the Prime Minister of Australia. It is his choice whether to waive or not waive the subject matter of that advice, and I sit consistently with his interests in the matter.” In relation to that statement:

- a. Is the Attorney-General ever in an analogous position to the Prime Minister, in which it is his choice whether to waive or not waive the subject matter of your advice? If so, what are the circumstances in which the Attorney-General would be in such an analogous position? If not, why not?

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- b. Was it the choice of the Attorney-General to “waive or not waive the subject matter of [the] advice” to which you referred at another point of your evidence, concerning the composition of the Senate? If so, what was his decision on the question of waiver? If not, why not?

15. You said in evidence: “First of all, I provided a submission not to the world; I provided it to a committee – a committee of the parliament. That committee decided whether to release it.” In relation to that statement:

- a. Did the Committee or its Secretariat ask you or any member of your staff whether you consented to the publication of your submission on the internet?
- b. If the answer to the above question is “yes”, what was the answer given to the Committee or its Secretariat, as the case may be?
- c. If you or a member of your staff consented to the publication of your submission, did you consult any member of the Commonwealth Government before that consent was provided? If so, which member of the Government? If not, why not?

16. You said in evidence: “My client was the Commonwealth of Australia, it was the rule of law and it was the Constitution.” In relation to that statement:

- a. What, precisely, are the duties that you owe to the Commonwealth of Australia, and what is the source of each of those duties?
- b. Please define “rule of law”, and please specify in what way the rule of law is or was your client.
- c. Please explain how the Constitution is or was your client, and please identify which of its provisions imposed upon you a duty to tell any member of parliament “what I considered the truth to be” in relation to a statement “made to that parliament that I consider conscientiously to be inaccurate”.

17. You said in evidence: “If I was asked by any member of the 44th Parliament, which was dissolved on 6 May, the day that a statement was made to that parliament that I consider conscientiously to be inaccurate as to what the true facts were, it was my duty to tell that member of

parliament, which would have included you and any person here, what I considered the truth to be.” In relation to that statement:

- a. What, precisely, was the source of that duty?
- b. What other duties do you owe to members of parliament?

18. You said in evidence: “The conversation [with Mr Dreyfus] was on the telephone in early to mid-June. The conversation I think took about two minutes or so and what we discussed were the two matters I told you.” In relation to that statement:

- a. Where were you when you took the phone call?
- b. Was anybody else in your presence when you took the phone call? If so, who?
- c. Other than the Committee, who else have you (or any member of your staff) told about the phone call?
- d. Did you or any member of your staff have any other contact or communication with any member of parliament (other than the Attorney-General or another member of the Government) or with any person on the staff of such a member of parliament, from the time at which you were notified that the Direction had been made, until the time at which you appeared before the Committee? If so, please provide full details of that contact or communication.
- e. Is it your practice to make file notes of important conversations?
- f. Did you make a file note of the phone conversation with Mr Dreyfus? If so, please provide it to the Committee.
- g. If you did not make a file note, why did you not do so?

19. You said in evidence: “Secondly, [Mr Dreyfus] asked me: did I support the direction? I said, no, I did not.”

- a. Did you have a duty to provide that second response? If so, please identify the precise source of that duty. If not, why did you provide it?
- b. Have you ever told another parliamentarian (including any member of the Government) whether you support a measure taken by the

Government or by any member of it? Please provide full details of any such instances.

- c. What is the precise scope and source of any duty upon you to provide information to parliamentarians as to whether or not you support a measure taken by the Government or by any member of it?

20. You said in evidence: “By this stage, early June, I had written two letters to the Attorney-General. The first you have seen; the second letter was a longer letter.” What were the dates of those two letters addressed to the Attorney-General?

21. You said in evidence: “my primary authority to do what I did comes from the Law Officers Act as a second law officer.” Precisely which provision(s) of that Act provided the authority to do what you did? Please specify how that provision or those provisions provided the relevant authority.

22. You said in evidence: “The people I am responsible to include, firstly, the Crown in right of the Commonwealth – that is the Governor-General. Secondly, it includes the Commonwealth. It includes, in relevant senses, the parliament.” What are those “relevant senses”, and what is the precise provision of the Law Officers Act under which you are responsible to the parliament?

23. You said in evidence: “During that caretaker period – I think you will find it is paragraph 2.4 of the caretaker rules – there was a major policy decision which was required to be made by the Attorney-General.” In relation to that statement:

- a. Irrespective of whether you were in all respects bound by the Caretaker Conventions, was your behaviour at all times consistent with those Conventions? If the answer is “no”, in what respects was it inconsistent?
- b. Did you at any point ask the Attorney-General whether he had informed the Shadow Attorney-General of the “major policy decision” that had to be made? If so, please provide details of the circumstances in which you asked that question.
- c. Are you bound by the Caretaker Conventions? If not, please specify the respects in which you are not bound.

- 24. You said in evidence: “I have a duty to the Commonwealth of Australia under my statute.” Please specify the precise content and the precise provision(s) that is or are the source of that duty.**
- 25. To your knowledge or belief, have you or any member of your staff (whether current or former) ever communicated with a person in any of the following categories about the subject matter, content, or fact of legal advice you were to provide, had provided, or might provide to the Government? The categories are:**
- a. Journalists, publishers or commentators;
 - b. Members of the legal profession who work outside government; and
 - c. Members of parliament or their staff (other than members of the Government and their staff).
- 26. You said in evidence: “He asked me, secondly, did I support the direction. And I gave him my opinion: I did not support the direction.” At another point you said: “I was asked by Mr Dreyfus two factual questions. ... Number two: he asked me if I supported the direction and I said I did not support the direction.” In relation to those statements:**
- a. Was the second question asked by Mr Dreyfus one of fact or opinion?
 - b. In your answer to Mr Dreyfus’s second question, did you provide an opinion or did you provide a fact?
- 27. You said in evidence: “My primary duty is to the Law Officers Act, which is a binding statute. It binds me.” Please identify the precise provisions of the Law Officers Act that bound you to do the following:**
- a. To provide answers to the two questions asked by Mr Dreyfus; and
 - b. To refrain from informing the Attorney-General of the telephone conversation with Mr Dreyfus.
- 28. You said in evidence: “What happened during June of this year, as one got closer to the election date of 2 July, was that it became apparent that there was a possibility that there would be a hung parliament or some other situation where the Governor-General, consistent with practice, would be seeking the advice of the Solicitor-General.” In relation to that statement:**

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- a. When did it become apparent to you that there was a possibility of a hung parliament or some other situation of the kind to which you referred? Was this apparent to you when you took Mr Dreyfus's phone call?
 - b. Please identify all of the instances of a Governor-General seeking advice from the Solicitor-General that you regard as constituting "practice". In which of these instances has the Governor-General sought the advice of the Solicitor-General without the approval of the Attorney-General or the Government?

29. You said in evidence: "If I had simply said, 'Mr Dreyfus, I cannot say a word to you,' I think I would have compromised the independence of my office and I would have compromised the ability to advise the Governor-General." In what way(s) would the independence of your office have been compromised, and in what way(s) would you have compromised the ability to advise the Governor-General?

30. You said in evidence: "To the extent that the Prime Minister or the Governor-General may wish to come to me tomorrow for an advice, if the direction were read literally I would not be able to comply with that." In relation to that statement:

- a. Have you ever asked the Attorney-General, who made the Direction and who would enforce it, whether the Direction is to be "read literally"?
- b. If the answer is "yes", please provide details of the Attorney-General's response.

31. You said in evidence: "So the problem is that the drafting of the carve-out renders the direction inconsistent with section 12(a)." In relation to that statement:

- a. Are there any other arguable interpretations of the carve-out, or is your construction of it the only possible such construction?
- b. Have you ever asked the Attorney-General, who made the Direction and who would enforce it, whether the carve-out is to be construed as you construe it? If so, please provide details of the Attorney-General's response.

- c. Have you ever asked the Attorney-General whether it was his intention that the carve-out be construed in the manner you construe it? If so, please provide details of the Attorney-General's response.

32. You said in evidence: "The effect of that is that to get within the carve-out I have to already be lawfully acting as counsel under 12(a)". In relation to that statement:

- a. Are there any other arguable interpretations of the carve-out, or is your construction of it the only one possible?
- b. Have you ever asked the Attorney-General, who made the Direction and who would enforce it, whether the carve-out is to be construed as you construe it? If so, please provide details of the Attorney-General's response.
- c. Have you ever asked the Attorney-General whether it was his intention that the carve-out be construed in the manner you construe it? If so, please provide details of the Attorney-General's response.

33. In answer to a question from Senator McKim, asking whether you were aware of any other instances where constitutional advice was sought by the Attorney from any source other than you, you replied: "Senator, I cannot answer that question without breaching privilege, I am afraid." In relation to that response:

- a. What "privilege" were you referring to?
- b. Why were you unable to answer the question without breaching that privilege?

34. You said in evidence: "If I had not answered that question honestly, whoever asked it, in my conscience I would have been lending myself to an inaccurate statement to the parliament, and that is something I am not prepared to do as a matter of my duty." In relation to that statement:

- a. What "duty" were you referring to?
- b. To whom is that "duty" owed?
- c. What is the precise content of that "duty"?
- d. What is the precise source of that "duty"?