

The Parliament of the Commonwealth of Australia

**LEGAL AND CONSTITUTIONAL
LEGISLATION COMMITTEE**

Budget Estimates 2002 – 2003 Report

June 2002

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PREFACE

On 14 May 2002, the Senate referred to the Committee the examination of estimates of proposed expenditure for the financial year 2002-2003. The Committee is responsible for the examination of the Attorney-General's portfolio and the Immigration and Multicultural and Indigenous Affairs portfolio. The portfolio budget statements were tabled in the Senate on 14 May 2002.

The Committee was required to report on its consideration of the budget estimates on or before 19 June 2002.

Estimates hearings

The Committee met in public session from 27 May 2002 to 31 May 2002 for a total of 54 hours.

Record of proceedings

The Hansard of the proceedings records the examination of budget estimates and may be accessed through the Internet at:

<http://www.aph.gov.au/hansard>

The Hansard is also available on the Parliamentary database.

An index of the Hansard for each portfolio appears at Appendix 1 and Appendix 2.

Minister

The Committee heard evidence from Senator the Hon. Chris Ellison, Minister for Justice and Customs who represented the Attorney-General and the Minister for Immigration and Multicultural and Indigenous Affairs. The Committee also heard evidence from Senator the Hon. Judith Troeth, Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry who represented the Minister for Justice and Customs for part of the proceedings.

Officers from both departments and associated agencies also appeared, and the Committee thanks them and the Minister and Parliamentary Secretary for their assistance.

Questions on notice

The Committee recorded that there were no outstanding questions on notice from the Attorney-General's and Immigration and Multicultural and Indigenous Affairs Portfolios from Additional Estimates 2001-2002.

The Committee notes that the Standing Orders require the Committee to set dates for the lodgement of any written answers or additional information and for supplementary hearings. The Committee resolved that written answers and additional information were to be submitted by close of business on Friday, 5 July 2002 for the Attorney-General's and Immigration and Multicultural and Indigenous Affairs Portfolios.

Farewell to Committee members

The Legal and Constitutional Legislation Committee farewelled Senators Cooney and McKiernan who are retiring from the Senate on 30 June 2002, following a combined parliamentary service of almost 40 years. During the hearings, members of the Committee and officers and agencies of both portfolios alike, noted the valuable contribution, instruction and dedication of both Senators over many years, and all agreed that they would be sorely missed.

Report

In this report, the Committee draws the attention of the Senate to issues and concerns raised during the five days of hearings. Amongst others, these included:

- Questioning of officers of the Building and Construction Industry Royal Commission on a range of cost breakdowns, including salaries, allowances and entitlements of commission staff and fees paid to individual legal counsel;
- Office of Parliamentary Counsel measures for productivity and monitoring of cost of drafting legislation;
- Legal advice and staff provided by the Australian Government Solicitor to both the Royal Commission into the Building and Construction Industry and the HIH Royal Commission, and the issue of client confidentiality; and
- Costs and conditions of onshore and offshore detention centres.

Senator Marise Payne

Chair

CHAPTER 1

ATTORNEY-GENERAL'S PORTFOLIO

Introduction

1.1 In the following sections of this report, the Committee summarises areas of interest and concern raised during its consideration of the Budget Estimates of the Attorney-General's portfolio for the financial year 2002-2003.

National Native Title Tribunal

1.2 The Committee noted that the Tribunal had not been requested to attend Estimates since Budget Estimates 2001-2002.

1.3 Questions focussed mainly on the increase in costs per output, particularly in the area of indigenous land use agreements (ILUAs) which had increased three-fold.

1.4 The Committee also sought information about the number of matters that had been referred to the Tribunal from the Federal Court. The Tribunal advised that there had been a total of 590 claimant applications, and indicated a breakdown of this figure would be provided.

Royal Commission into the Building and Construction Industry

1.5 Officers of the Royal Commission were questioned extensively on a range of cost breakdowns, including salaries, allowances and entitlements of commission staff and fees paid to individual legal counsel.

Federal Magistrates Court

1.6 Members of the Committee sought statistics on the Court's workload following its establishment two years ago. The Chief Executive Officer advised that the staffing level would increase from 68 to 81 over the next financial year to contend with the increased caseload.

Human Rights and Equal Opportunity Commission

1.7 Some members of the Committee noted their concern about the Commission's inadequate response to the Committee's concerns since their appearance at Additional Estimates in February 2002¹ in relation to the *Social Justice Report 2001*, the inquiry into children in immigration detention, and the Commission's responses to questioning on both matters.

1 See, *Transcript of evidence (Proof)*, 18 February 2002, pp. 99-105

1.8 Other issues raised included:

- timing of the tabling of the *Social Justice Report 2001*;
- the Commission's engagement of a researcher in Western Australia to gather statistics for the *Social Justice Report 2001*;
- hearings schedule for the inquiry into children in immigration detention;
- appointment and background of two assistant commissioners; and
- the results of the inquiries in South Australia into the alleged lip-sewing among children at Woomera.

Office of Film and Literature Classification

1.9 Questioning of officers of the Office of Film and Literature Classification focussed mainly on the absence of a recommendation for an 'R' rating for computer games, and the movie, *Baise-Moi*. The Committee sought statistical data and information about the process through the Classification Review Board of *Baise-Moi* from its initial R18 classification to eventual banning.

Family Court of Australia

1.10 Casetrack, an automated registry management system that is to replace five existing systems within the Court, was discussed. Members of the Committee noted with approval that the Family Court, Federal Court and Federal Magistrates Service were working together with the sharing of systems.

High Court of Australia

1.11 Members of the Committee inquired about the appointment of the public information officer. Officers advised that in the order of 60 applications had been received.

1.12 Senator Scullion questioned the officers on their knowledge of a so called "chronology" relating to FOI requests for Justice Kirby's Comcar records.²

1.13 On 31 May, officers from the High Court returned at the request of the Committee and further questioning regarding this evidence continued.³

Office of Parliamentary Counsel

1.14 Members of the Committee questioned officers of the Office of Parliamentary Counsel (OPC) on the number of staff involved and the number of hours spent drafting the package of bills that constitute the Government's 'security legislation'.⁴ OPC's First

2 See, *Transcript of evidence (Proof)*, 28 May 2002, pp. 167-168

3 See, *Transcript of evidence (Proof)*, 31 May 2002, pp. 478-487

4 See, *Transcript of evidence (Proof)*, 28 May 2002, pp. 210-211. The bills that constitute the Government's security legislation include: Security Legislation Amendment (Terrorism) Bill 2002 [No.2]; Suppression of the Financing of Terrorism Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002; and Telecommunications Interception Legislation Amendment Bill 2002.

Parliamentary Counsel advised the Committee that the OPC would be able to estimate the number of staff involved but not the number of hours spent drafting as the OPC does not require staff to ‘record what they are working on hour by hour or minute by minute’.⁵

1.15 This response led to questioning about how the OPC measures productivity or monitors the cost of drafting certain pieces of legislation. The Committee was advised that the OPC measures productivity through satisfaction by the client with the finished product:

...what we look at is whether we get the bills that the Government wants more or less when they need them. It is a bit hard to work out an absolute scale against which to test whatever it is that we produce. Apart from those end results – whether the bills are there when they are wanted and whether they do what they are supposed to do – there really is not any other sensible way of assessing what we are doing. We could measure pages or we could measure numbers of drafts turned around or any of those things, but none of those necessarily represent productivity.⁶

1.16 In addition, the OPC advised the Committee that whilst it does have in place performance management programs that cover all staff, ‘it is extremely difficult to produce anything that looks like a measurement of what people are doing’.⁷

1.17 The OPC took a number of questions on notice about the drafting of the ‘security legislation’.⁸

Australian Government Solicitor

1.18 The question of legal advice, legal fees and staff provided by the Australian Government Solicitor (AGS) to both the Royal Commission into the Building and Construction Industry and the HIH Royal Commission was again raised by Members of the Committee.

1.19 During examination of Additional Estimates 2001-2002, the AGS was constrained in their response stating only that ‘the Commission sought provision of solicitors with appropriate experience that would assist the Commission in carrying out their role’ and that ‘this was a matter for the Royal Commissions’.⁹

1.20 Officers from the AGS again expressed concern about answering such questions, stating that ‘legal services to the Commission are a question of deployment of staff at the request of the client’.¹⁰ The AGS stated that it was in a slightly different position as it is a government business enterprise providing legal services to government clients and therefore may be in the position of breaching client privilege:

5 *Transcript of evidence (Proof)*, 28 May 2002, p. 211

6 *Transcript of evidence (Proof)*, 28 May 2002, p. 211

7 *Transcript of evidence (Proof)*, 28 May 2002, p. 212

8 *Transcript of evidence (Proof)*, 28 May 2002, pp. 216-219

9 *Transcript of evidence*, 18 February 2002, pp. 118-119. See also, Senate Legal and Constitutional Legislation Committee, *Additional Estimates 2001-2002 Report*, March 2002, p. 3

10 *Transcript of evidence (Proof)*, 28 May 2002, p. 219

The AGS as an organisation can be placed in a difficult position, depending on the types of question that are asked of it by senators. That was the subject of the letter that the Attorney-General sent to the President of the Senate about the different role that AGS plays post its transition to a statutory authority and government business enterprise. It is not so much a question of not wishing to answer your question or that you should not receive answers in relation to the expenditure of public monies. What I am querying is whether the answers to the questions should appropriately come from the Australian Government Solicitor or from our client in relation to legal services being provided to a client.¹¹

1.21 Officers of the AGS indicated that they preferred not to answer such questions on the grounds of client confidentiality. Members of the Committee brought to the AGS' attention that information in relation to the number of lawyers and their backgrounds, currently assigned to the two Royal Commissions, had been published by AGS in the *AGS News*, Issue 5, April 2002.¹² Members of the Committee expressed surprise that the AGS published such details in its newsletter but sought to withhold the information from the Committee. Through the Minister, officers from the AGS agreed to take such questions on notice and the Committee indicated that it would seek advice on the matter.¹³

1.22 The Chief Executive Officer of the AGS appeared to be under the impression that the AGS was bound by the Judiciary Act in terms of what the AGS was able to disclose and advised that the Attorney-General's letter to the President of the Senate dated 17 November 2000 stated the following:

AGS is in a solicitor-client relationship with its government clients and has, in relation to those clients and to the courts, essentially the same legal obligations as are owed by private sector lawyers to their clients and the courts (see paragraph 55Q(2) of the *Judiciary Act 1903*). AGS' legal obligations, such as the maintenance of legal professional privilege and avoidance of conflicts of interest, make it appropriate for questions about clients' matters to be the responsibility of the relevant client agencies rather than the AGS.

I am concerned that AGS would be placed in an untenable position if it were required to provide comments or advice to a Parliamentary Committee on issues such as:

- the conduct of the Commonwealth's legal affairs...¹⁴

1.23 The Senate has reaffirmed on a number of occasions that there are no areas in connection with the expenditure of public funds where any person has discretion to withhold details or explanations from the Parliament or its Committees unless the Parliament has expressly provided otherwise.¹⁵

11 *Transcript of evidence (Proof)*, 28 May 2002, p. 220

12 *Transcript of evidence (Proof)*, 28 May 2002, p. 222

13 *Transcript of evidence (Proof)*, 28 May 2002, p. 224

14 *Transcript of evidence (Proof)*, 28 May 2002, p. 229

15 For example, the Senate reaffirmed this principle in resolutions on 9 December 1971, 23 October 1974, 18 September 1980, 4 June 1984, 29 May 1997 and 25 February 1998.

1.24 The Committee sought advice from the Clerk of the Senate on this matter. The Clerk stated:

The Senate, like comparable other houses of legislatures, has never accepted that client confidentiality, or legal professional privilege in any of its manifestations, defeats a legislative inquiry, either as a matter of law or of parliamentary practice. The Senate may, of course, voluntarily refrain from seeking information otherwise protected by client confidentiality or legal professional privilege, where it considers that such restraint is warranted, but the ability to obtain such information is undoubted. The reason for this is obvious: legislative inquiries would be severely hampered if they could be automatically defeated by claims of legal professional privilege.¹⁶

1.25 The Clerk also stated that the reference in the letter from the Attorney-General to the President of the Senate which made reference to section 55Q of the Judiciary Act provides only a partial exemption of AGS lawyers from state and territory laws, with an exception as to the obligations which those laws impose in relation to duties to clients. The Clerk observed that the partial subjection of AGS lawyers to those state and territory laws cannot operate to defeat a federal legislative inquiry. That is, just as a general statutory secrecy provision in a Commonwealth statute does not set aside the powers, privileges and immunities of the Commonwealth Houses, this statutory provision does not affect the power of the Houses to obtain information from a Commonwealth agency.¹⁷

1.26 In addition, the 1991 Report of the Senate Legal and Constitutional Affairs Committee, *Aboriginal Development Commission - Legal costs in relation to a Senate privileges matter* clearly demonstrated precedents for providing details of the fees paid to individual lawyers. The Clerk concluded by stating that the Committee is 'clearly supported by repeated pronouncements and precedents of the Senate in seeking the information which has been sought about the resources provided by AGS to royal commissions'.¹⁸ A copy of this advice appears at Appendix 3. The Clerk subsequently provided the Committee with a further advice that included numerous examples of disclosure of legal fees.

1.27 The Committee agreed to recall the AGS to Budget Estimates on Thursday, 30 May 2002. When called before the Committee, the Secretary of the Attorney-General's Department on behalf of the Attorney-General, tabled a series of documents which detailed some information about the legal fees paid by both royal commissions and the numbers of staff working with both royal commissions.¹⁹

1.28 The Committee will fully consider its position in relation to this issue at a later meeting.

Australian Federal Police

1.29 Members of the Committee questioned officers of the Australian Federal Police (AFP) on a number of issues, including:

16 See advice from the Clerk of the Senate, 30 May 2002

17 See advice from the Clerk of the Senate, 30 May 2002

18 See advice from the Clerk of the Senate, 30 May 2002

19 See Tabled Documents, Attorney-General's Department, 30 May 2002

- The role of the AFP in countering people-smuggling;
- The commitment of funds for the AFP to supply five boats to the Indonesian National Police;
- Jurisdiction in detention centres;
- The establishment of the Australian Crime Commission;
- The status of Mr David Hicks and Mr Mamdouh Habib, currently detained in Guantanamo Bay, Cuba; and
- The progress of the Proceeds of Crime legislation and the use of telephone intercept material in civil proceedings

1.30 The Committee also sought advice from the Clerk of the Senate on the matter of procedural questions asked by Senator Crane of the Commissioner of the AFP about the AFP's investigation of matters concerning Senator Crane. The Commissioner objected to answering questions from Senator Crane for the following reasons:

Any questions asked or answers given by me are protected under parliamentary privilege. However, they are also subject to limitations in their further use by either a prosecutor or a defence counsel. Under those circumstances, I think it is inappropriate that the person who is under investigation by the Australian Federal Police is asking the Australian Federal Police any question at all about the investigation that is currently underway.²⁰

1.31 The Committee continued with questioning of the AFP while advice from the Clerk was sought. The Chair subsequently read the advice into the transcript.²¹ The Clerk recommended that the Committee accede to the Commissioner's request that he not be required to answer the questions about the investigations of Senator Crane and in doing so, the Clerk stated:

...it is impossible for the Committee to tell whether any of the questions or answers could cause a subsequent trial to miscarry because of the significance of those questions and answers to the evidence presented at the trial.

The Committee could be severely criticised for subjecting the investigating police to questions which may give rise to privileged material inadmissible in any subsequent criminal proceedings, and thereby causing difficulties for the prosecution if not causing the trial to miscarry. The Committee could be criticised even more justly for requiring the police to answer questions put to them by the potential defendant in any subsequent criminal trial.²²

1.32 At a private meeting, the Committee agreed to follow the Clerk's advice.

Department – General Questions and Issues

1.33 Issues covered in Outcome 1 included:

- Commonwealth and state and territory legal aid budget for 2002-2003;

20 *Transcript of evidence (Proof)*, 28 May 2002, p. 194

21 See, *Transcript of evidence (Proof)*, 28 May 2002, pp. 208-209

22 *Transcript of evidence (Proof)*, 28 May 2002, p. 208

- Native Title financial assistance payments;
- Role of the Family Law and Legal Assistance Division (FLLAD) and its budget of \$12 million which will be paid to respondents to native title applications;
- Public accountability processes of legal aid assistance;
- Progress of the development of the federal parliamentary protocol governing the receipt and investigation of serious complaints against federal judicial officers; and
- Meeting of the assembly of state parties to the International Criminal Court in September 2002.

1.20 There were no questions in the area of Outcome 2 at the hearings, though written questions were provided to the Department.

CHAPTER 2

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

Introduction

2.1 In the following sections of this report, the Committee summarises matters of interest and concerns raised during its consideration of the Budget Estimates of the Immigration and Multicultural and Indigenous Affairs portfolio for the financial year 2002-2003.

Indigenous Business Australia

2.2 Officers of Indigenous Business Australia (IBA) were welcomed for the first time before the Legal and Constitutional Committee. Officers explained that allocations were previously received from government, and subsequent to that, operate from the returns that are generated from IBA's investments, reporting to government based mostly on the *Commonwealth Authorities and Companies Act 1997* which requires reporting against corporate goals, aims and objectives.¹

2.3 Committee members sought information about:

- IBA's corporate plan;
- Investments and acquisitions, in particular in the Northern Territory; and
- Project development.

Aboriginal and Torres Strait Islander Commission

2.4 Questioning of this agency focussed on the Community Employment Development Program (CEDP) which represents about 48 per cent of total program outlays, and a range of other issues.

2.5 Other issues included:

- The Community Housing Infrastructure Program (CHIP), representing approximately 25 per cent of ATSIC's program;
- Indigenous health programs; and
- National Indigenous Development Alliance (NIDA), including make up of board members and process and security of loans.

1 See, *Transcript of evidence (Proof)*, 29 May 2002, p. 271

Migration Review Tribunal and Refugee Review Tribunal

2.6 The Tribunal advised the Committee of its growing caseload, which has increased from 8,200 cases to approximately 8,500 cases since February 2002.

2.7 Questions focussed on the joint arrangement of the Migration Review Tribunal (MRT) with the Refugee Review Tribunal which takes effect from 1 July 2002. The Committee was advised that this amalgamation was not expected to have any impact on the caseload hence not affecting the capacity of the Tribunal to decide cases, and that the next stage of bringing the executive structures together, which will also come into effect from 1 July, is the single registrar of both tribunals.

2.8 The Committee sought information from the MRT about the current pricing agreement with the Department of Finance, noting a decline in the payment per decision. The Committee asked whether this would affect the Tribunal's case finalisation. Officers advised that the MRT was currently in the process of renegotiating the price and the agreement with the Department of Finance. The Committee noted that there is a clear recognition that the process needs to ensure that there is resourcing to allow the Tribunal to start making some significant inroads into the back load of cases over the next two years.²

2.9 Questioning of the Refugee Review Tribunal focussed mainly on the induction, briefing and on-going training of tribunal members and the required experience to make impartial decisions.

Migration Agents Registration Authority

2.10 Officers of the Migration Agents Registration Authority (MARA) advised the Committee that they currently had 2,740 registered agents and that the complaint rate had increased about 50 per cent since the end of 2001, which is an average of 30 complaints per month.

2.11 Other issues included:

- Communication flow with the department;
- Decreased budget for estimated expenses;
- Professional indemnity insurance for migration agents; and
- Overseas migration agents, and the rate and source of overseas complaints.

Department – Issues and Concerns

2.12 The Committee commenced questions of the Department in the Indigenous Affairs area – Outcome 3.

2.13 A member of the Committee noted the difficulty of ascertaining expenditure in the Indigenous affairs area from the “grab bag” of information in the portfolio budget statement. Cost breakdowns of other portfolio areas were requested.

2 See, *Transcript of evidence (Proof)*, 30 May 2002, p. 369

2.14 Other issues raised included:

- Litigation costs;
- Reconciliation Place;
- Legal costs to the Commonwealth, including costs supplied to the applicants through the legal aid provisions of the native title process of the Yorta Yorta and the Cubillo and Gunner native title claims;
- Proposed ATSIC review; and
- Proposed amendments to the Land Rights Act.

2.15 Questioning by the Committee in Outcome 1 was quite extensive, particularly in Output 1.3, Enforcement of immigration law.

2.16 Issues covered included:

- Issues relating to registration on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) – administered by the Department of Education, Science and Training;
- Increased funding in the Adult Migrant English Program (AMEP);
- Delays in implementation, and backlog in processing caused by problems with the new computerised scanning software system for passenger card data collection; and
- Costs and conditions of detention centres, in particular Maribyrnong and Coonawarra.

2.17 In Outcome 2, members of the Committee sought information and statistics in regard to Christmas Island and Nauru detention centres, particularly in the areas of public consultation, tendering processes and contractor and outsourcing costs.

APPENDIX 1

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APPENDIX 3

Clerk's Advice of 30 May 2002 to the Committee

30 May 2002

Senator M. Payne
Chair
Legal and Constitutional Legislation Committee
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Payne

Estimates hearings — AGS — refusal to answer questions

The committee has requested advice on the refusal of officers of the Australian Government Solicitor's Office (AGS) to answer some questions about the resources provided by AGS to royal commissions, on the basis of client confidentiality. It was made clear that that was the only basis on which answers were not given, as it was stated at one stage of the hearing that "We as AGS have no difficulty in your having that information." (transcript, 28 May 2002, p. 231)

During the hearings references were made to resolutions of the Senate, first made in 1971 and reaffirmed on various occasions up to 1998, to the effect that no person has a discretion to withhold details or explanations of the expenditure of public funds. The 1998 version of this resolution was as follows:

The Senate reaffirms the principle, stated previously in resolutions of 9 December 1971, 23 October 1974, 18 September 1980, 4 June 1984 and 29 May 1997, that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Parliament or its committees unless the Parliament has expressly provided otherwise.

The 1980 version of the resolution contained a specific reference to fees paid by the Commonwealth to private counsel:

the affirmation, in accordance with this principle, that the right to privacy of individual counsel accepting a brief on behalf of the Commonwealth for which money is appropriated by Parliament is supervised by such acceptance, subject to the reasons for the information being clearly defined and to the proviso that injudicious or unwarranted invasion of privacy is not the intention of the Parliament or its committees ...

The provisos in this resolution are expressions of the Senate's intention in seeking information about fees, not limitations on its ability to do so.

It is clear that the expenditure of public funds is involved in the matter before the committee. Money appropriated for public bodies in the form of royal commissions is transferred by way of fees to another public body, AGS. The fact that AGS is established as a corporation and does not receive any funds directly from appropriations does not affect the situation. The appearance of AGS at estimates hearings is based on its status as a public body expending public funds coming ultimately from appropriations.

The Senate, like comparable other houses of legislatures, has never accepted that client confidentiality, or legal professional privilege in any of its manifestations, defeats a legislative inquiry, either as a matter of law or of parliamentary practice. The Senate may, of course, voluntarily refrain from seeking information otherwise protected by client confidentiality or legal professional privilege, where it considers that such restraint is warranted, but the ability to obtain such information is undoubted. The reason for this is obvious: legislative inquiries would be severely hampered if they could be automatically defeated by claims of legal professional privilege.

During the hearings reference was made to section 55Q of the Judiciary Act. The relevant part of that section provides:

- (2) An AGS lawyer acting in that capacity in a State or Territory is not subject to a law of a State or Territory that relates to legal practitioners except to the extent that such laws:
 - (a) impose rights, duties, or obligations on legal practitioners in relation to their clients or to the courts; or
 - (b) provide for disciplinary proceedings in relation to the misconduct of legal practitioners.

This is a partial exemption of AGS lawyers from state and territory laws, with an exception as to the obligations which those laws impose in relation to duties to clients. The partial subjection of AGS lawyers to those state and territory laws cannot operate to defeat a federal legislative inquiry. Just as a general statutory secrecy provision in a Commonwealth statute does not set aside the powers, privileges and immunities of the Commonwealth Houses, this statutory provision does not affect the power of the Houses to obtain information from a Commonwealth agency.

The Senate's adherence to the principle that it will inquire into fees paid to private counsel, where such inquiry is justified, is well demonstrated by a reference to the Legal and Constitutional Affairs Committee in 1991 relating to the fees paid by the Aboriginal Development Commission for representation of the Commission before the Senate Privileges Committee. The Privileges Committee had inquired into possible interference with witnesses, and the reference arose from a concern that excessive fees had been paid for representation in that inquiry. The Legal and Constitutional Affairs Committee secured details of the fees paid to individual lawyers in connection with the Privileges Committee inquiry, and examined the accounts. The committee reported that the rates charged by two firms were excessive, but was unable to determine whether the claimed hours were justified. (Report of the committee, Parliamentary Paper No. 451 of 1991)

During the estimates hearings references were made to the royal commissions "waiving their privilege" in relation to the fees paid to AGS and the services provided. It was unfortunate that this expression was used. As has already been indicated, the royal commissions have no privilege in relation to a legislative inquiry. It is not a matter of them waiving any privilege but of providing information of their expenditure of public funds as public bodies.

This is not a case in which the government is making a public interest immunity claim, that is, a claim that certain information should not be disclosed because of apprehended harm to the public interest arising from the disclosure. In the statement of government policy made on behalf of the Attorney-General (transcript, 28 May 2002, p. 232-3), there is a statement which may be regarded as a hint of a public interest immunity claim: the government's policy is said to be that the daily or hourly rates at which the Commonwealth engages counsel will not be disclosed, to protect the government's financial interests and to maintain its negotiating position. If this is a public interest immunity claim, it is not clear how it can be made in relation to royal commissions, which are public bodies independent of government direction except in respect of their terms of reference. In any event, the Senate has declared that a public interest immunity claim by government is only a claim, and it is for the Senate to determine whether the claim is sustained. The committee may well make an assessment of whether this ground for confidentiality is plausible, given the immensely strong position of the Commonwealth in allocating its legal work and the ability of the legal profession easily to discover the rates paid by the Commonwealth from time to time.

The disclosure of amounts paid to individual counsel in the past by the Attorney-General's Department, referred to in the statement on behalf of the Attorney-General, severely undermines the current claim for confidentiality. As that information was provided then, there would seem to be no barrier to the provision now of at least the same information. Similarly, as was pointed out during the estimates hearing, the publication by AGS in its newsletter of some details of the services it provides to the royal commissions undermines the claim for confidentiality in this area, notwithstanding that this publication is apparently based on a "waiver of privilege" by the royal commissions. If the "privilege" can be "waived" for publicity purposes, it can surely be "waived" for the purpose of legislative scrutiny of the expenditure of public funds.

Lest there be any suggestion that private practitioners are in any way sensitive about their fees being disclosed, my invariable experience in dealing with them is that they completely understand and accept that details of the fees they are paid must be disclosed in the event of any legislative inquiry.

The committee is therefore clearly supported by repeated pronouncements and precedents of the Senate in seeking the information which has been sought about the resources provided by AGS to the royal commissions.

Options for future action

Given the strong ground on which the committee stands in seeking this information, it would be open to the committee to consider the following options for further action.

The committee could wait to see what information is produced following the undertaking on behalf of the Attorney-General to consider the publication of some information (it is not clear whether this is an undertaking to provide information to the committee or simply to consider future publication) and the undertaking by AGS to take some questions on notice. It is suggested that this option is not likely to be effective unless the committee clearly indicates that it expects some early responses in consequence of these apparent undertakings.

The committee could indicate in writing to AGS that it believes that it is entitled to the information sought and intends to pursue it. Given that the Attorney-General has become involved in the matter through the statement made on his behalf, a similar indication could be given to him.

The committee could undertake an inquiry into AGS and the administration of the royal commissions under its general reference in standing order 25(2)(b) relating to the performance of departments and agencies. This option would also provide the committee with the option of offering to receive in camera information about rates at which fees are paid to counsel, although this has the drawback of conceding some sensitivity about the information, which has not been established, and of inhibiting the use which may be made of the information by the committee, including in its reports.

The committee could ask the royal commissions for details of their payments to AGS, either in the course of estimates hearings or as part of option (3).

The committee could issue a formal summons for the information. This could be addressed to AGS, or to the Attorney-General given his involvement, and could be followed up by a report to the Senate in the event of non-compliance.

The committee could recommend that the Senate make an order for the required information.

None of these options are mutually exclusive, and they could be pursued in succession depending on the success achieved by each of them in turn.

Please let me know if I can be of any further assistance to the committee in relation to this matter.

Yours sincerely

(Harry Evans)

