

## **Appendix 4**

**Clerk's advice on answers to questions, 25 March 2010**



rm.let.17179

25 March 2010

Senator Guy Barnett  
The Senate  
Parliament House  
CANBERRA ACT 2600

Dear Senator Barnett

You have asked for advice on two matters arising out of the current inquiry by the Environment, Communications and the Arts References Committee into the administration of the home insulation program. The first matter relates to the committee's options for further action arising from the failure of the relevant departments to meet the committee's deadline for responding to questions taken on notice at the hearings on 22 and 26 February 2010.

From the data supplied by the secretariat, I understand that the Department has answered 21 out of 26 questions taken on notice at the 22 February hearing but has answered only 22 out of 86 questions taken on notice at the 26 February hearing.

The first option would be for the committee to seek an explanation from the Department for the late provision of answers and, if the committee considers the explanation to be reasonable, to set a new deadline for the outstanding answers.

A second option would be to raise the outstanding answers in the Senate and seek an explanation from the Minister for the Department's failure to respond on time. This could be done by way of a question without notice at Question Time. The minister's answer could then be the subject of a motion to take note of answers after Question Time.

A further option would be to give notice of a motion for an order for the production of the answers to the outstanding questions. Should the response be outstanding 30 days after the due date, you then have access to the procedure under standing order 164 which enables you to seek an explanation from the minister at the end of Question Time and move a motion without notice to take note of the explanation or, in the event that an explanation is not provided, to move a motion in relation to the minister's failure to provide either an answer or an explanation. This procedure allows serious matters of non-compliance with Senate orders

to be brought to the Senate's attention. A similar procedure would be available to you if you put the questions on notice in the Senate.

The department's performance in failing to respond adequately to questions taken on notice could also be the subject of critical commentary in the committee's report.

The second matter you raise is the acceptability of answers to questions about legal advice which rely on legal professional privilege as the basis for not answering the question. You have asked whether this is an acceptable ground. As has frequently been pointed out in the past, any particular claim not to answer questions must be assessed in the particular circumstances. In this case, the Senate has referred to the committee detailed terms of reference requiring it to inquire into the administration of the home insulation scheme. The answers by the Department in which legal professional privilege has been claimed as a ground for not producing legal advice were to questions relating to the tragic deaths of four installers and to a number of house fires possibly attributable to faulty insulation. The questions go, in some part, to the potential liability of the Department and the Minister in relation to these matters.

It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides a ground for a refusal of information in a parliamentary forum. The first question in response to any such claim is: to whom does the legal advice belong, to the Commonwealth or some other party? Usually it belongs to the Commonwealth. Legal advice to the federal government, however, is often disclosed by the government itself. Therefore, the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought.

There may well be cogent reasons for the department declining to produce the advice in these circumstances. For example there may be legal proceedings instituted against the Commonwealth in relation to these matters, and the publication of the legal advice may prejudice those proceedings, either by influencing magistrates, jurors or witnesses in their evidence or decision-making, or by creating material which, by reason that it is unexaminable in court proceedings because of parliamentary privilege, could create difficulties in any pending court proceedings. To invoke this ground, however, there should be set out the nature of the pending proceedings and the relationship of the information sought to those proceedings.

In any event, the committee should seek some elaboration of this ground because of the mere citation of the phrase 'legal professional privilege' does not provide the committee with an explanation for the department's refusal.

I also draw your attention to the resolution of the Senate of 13May 2009 which sets out the proper process for senators, committees and witnesses to follow in making and determining claims of public interest immunity. In its answers to the questions taken on notice, the Department has not followed these procedures and they should be drawn to the Secretary's attention. I have attached a copy of the resolution to this advice for information.

Please let me know if I can provide any further assistance.

Yours sincerely

(Rosemary Laing)

## **8 Public interest immunity claims**

That the Senate—

(a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;

(b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;

(c) orders that the following operate as an order of continuing effect:

(1) If:

(a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and

(b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee,

the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

(2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.

(3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.

(4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.

(5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.

(6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

(7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).

(8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

(d) requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.

*(13 May 2009 J.1941)*