Military Detention: uncovering the truth

Story 4 – Australian military lawyer's advice on interrogation techniques at Abu Ghraib

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- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
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2. Executive summary

Documents released to PIAC reveal that Major George O'Kane, a military lawyer with the Australian Defence Force, had concerns about the legality of interrogation techniques proposed for prisoners at Abu Ghraib. However, the Australian Government publicly announced that Major O'Kane's legal opinion was that the interrogation techniques complied with the Geneva Conventions. The Government has never corrected the public record.

The proposed techniques – including sleep management, dietary manipulation and sensory deprivation – are generally regarded under international law as cruel and inhuman treatment and in some cases, torture.

Major O'Kane was in Iraq, working as a legal officer in the office of the US Staff Judge Advocate, Colonel Marc Warren, the senior legal officer in Iraq, when he was asked to provide legal advice in 2003 about the proposed techniques.

Major O'Kane said he believed the techniques would be open to abuse and had inadequate safeguards. He wrote in a legal memorandum dated 27 August 2003 that the techniques '*substantially compl[y]'* with the Geneva Convention, which imposes absolute standards. He later explained that the reason he did not think the techniques fully complied was because there were no time limits on their use.

The Commanding Officer of the US 205th Military Intelligence Brigade who sought Major O'Kane's advice had previously been investigated following the death of a detainee in Afghanistan. The same Brigade was later revealed as being at the centre of the abuse scandal at Abu Ghraib.

Speaking inside the Australian Federal Parliament on 30 May 2004, the head of Defence Legal Services, Air Commodore Simon Harvey, said Major O'Kane's legal memorandum concluded that the proposed interrogation techniques were consistent with the Geneva Conventions.

In subsequent weeks, Defence Minister Robert Hill and senior Department of Defence officials knew Air Commodore Harvey's statement was inaccurate. However, the Department of Defence made no attempt to correct the public record and refused to publicly release Major O'Kane's advice without first consulting the United States.

Major O'Kane based his reservations about the legality of the proposed Abu Ghraib techniques on the fact that there was insufficient detail in the US Interrogation Manual about the length of time that interrogators could use techniques such as sleep management and sensory deprivation. Major O'Kane noted that the Australian Interrogation Manual also failed to specify time limits for these techniques and was therefore open to abuse.

Major O'Kane may not have had the appropriate clearance to provide his advice. He was asked to confine his advice to proposed interrogation techniques for one particular individual who was considered a high value detainee. However, Major O'Kane provided general advice and looked at the US Interrogation Manual in general terms.

Moreover, Major O'Kane based his advice on a view of the Geneva Conventions that was inconsistent with the Australian Government's publicly stated interpretation of international law. This placed Australia in the untenable position of endorsing a particular view about detention treatment and conditions that it simultaneously condemned.

3. Background to O'Kane's Abu Ghraib visit

The Australian military lawyer, Major George O'Kane, visited Abu Ghraib on 27 August 2003. He went there to provide legal advice to the US Commanding Officer of the 205th Military Intelligence (MI) Brigade on the Interrogation Company's interrogation techniques for a detainee who was considered to be particularly valuable.

Major O'Kane's superior, a UK Lieutenant Colonel (Deputy Staff Judge Advocate General), accompanied him to Abu Ghraib. Both men were embedded with the US military in the Office of the Staff Judge Advocate at the Combined Joint Task Force Seven (CTJF-7) in Baghdad.

The US company from the 205th MI Brigade sought legal advice on the proposed interrogation techniques because it was concerned about its legal position and wanted '*top cover*' to go ahead with its interrogation of the so-called 'high value' detainee.[1] The 205th MI Brigade wanted clearance for its interrogation methods because it had already been investigated following the death of a detainee in Afghanistan, where the Interrogation Company was previously deployed. Later, the 205th MI Brigade was at the centre of the abuses at Abu Ghraib.[2]

Major O'Kane discussed interrogation tactics, techniques and procedures (TTPs) with the MI staff, including the Company Commander and Warrant Officer, at Abu Ghraib. These interrogation techniques were included in the US Army Interrogation Manual, which '*provides a framework for military intelligence interrogations*' [3].

Although the Interrogation Manual provides some guidance on interrogations, '*scope is given to interrogators to determine how the TTPs should be applied in individual cases'*.[4]

4. Compliance with the Geneva Conventions

Major O'Kane drafted a legal memorandum dated 28 August 2003, after he visited Abu Ghraib.[5] O'Kane addressed his memo to the Officer in Charge at Abu Ghraib and included his details as the point of contact. O'Kane's UK superior signed the document.

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1 Doc 39, 65.

2 See for example George Fay, "Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade", 70 available http://news.bbc.co.uk/2/hi/americas/3596686.stm (Accessed 5 April 2011).

3 Doc 115, 2.

4 Doc 115, 2.

5 Doc 84.

Major O'Kane's memorandum concluded that the proposed Abu Ghraib interrogation policy '*substantially complies with the Geneva Convention'*.[6]
In a subsequent interview, Major O'Kane said that he found that there were inadequate control measures to prevent abuse.[7] He stated that, upon reviewing the US Interrogation Manual, '*there wasn't sufficient detail or safeguards in place in the manual to stop, for example, a certain technique going too far, I wasn't prepared to go, "categorically it complies", but rather "substantially complies*".'[8]

Major O'Kane was aware the US Interrogation Manual did not include limits on the use of all interrogation techniques. His legal advice stated: '*An interrogation TTP, like any physical or psychological duress, will eventually amount to inhume* [sic] *treatment'*.[9] Major O'Kane concluded that the US Interrogation Manual was open to abuse because it did not provide adequate detail or time limits.[10]

It is particularly significant that Major O'Kane found deficiencies in the interrogation techniques proposed to be used at Abu Ghraib. Major O'Kane's attitude towards other forms of controversial interrogation techniques is worth noting. For example, in relation to an ICRC report outlining allegations of mistreatment at Abu Ghraib (such as threats, insults and verbal violence, sleep deprivation, being made to walk in the corridors handcuffed and naked with female underwear on the detainees' heads ad handcuffing for long prolonged periods), Major O'Kane said: '*they [the ICRC] call it ill treatment, but we call it successful interrogation techniques*' (see Story 5). His conclusion that there were question marks over the legality of the proposed techniques highlights the serious problems with the proposed techniques.

4.1 Sleep management, dietary manipulation and sensory deprivation

The 205th MI Brigade asked Major O'Kane to advise on several interrogation techniques: sleep management, dietary manipulation and, possibly, sensory deprivation. The US used some of these techniques, including sleep management, in Afghanistan and at Guantanamo Bay.[11]

The documents released to PIAC do not make clear how the 205th MI Brigade intended to use these proposed techniques. However, subsequent reports into the 205th MI Brigade abuses at Abu Ghraib condemned the use of similar techniques by the military police. One method of sleep deprivation involved guards taking detainees out of their cells, stripping them naked and giving them cold showers.[12] Other methods of

6 Doc 84.
7 Doc 39, 67.
8 Doc 40, 12.
9 Doc 84.
10 Doc 39, 66.
11 Fay Report.
12 Fay Report.

controlling detainees' sleep included banging on cell doors,[13] yelling and playing loud music,[14] and leaving lights on in cells[15].

Investigations into the abuses at Abu Ghraib also confirm that detainees were subject to sensory deprivation. Detainees were subject to loud music and yelling,[16] placed in excessively cold or hot cells with limited ventilation,[17] and were kept in total darkness[18].

4.2 Is this torture? International law on interrogation techniques

International law prohibits torture, cruel and inhuman treatment.[19] This prohibition is absolute. It applies during peace and during periods of armed conflict. Similarly, the Geneva Conventions specifically prohibit torture, cruel treatment, inhuman treatment and humiliating and degrading treatment.[20]

It is difficult to assess the legality of the interrogation techniques proposed for Abu Ghraib without knowing the full details of those techniques. However, in the 1970s, interrogation techniques similar to those proposed by the 205th MI at Abu Ghraib were found to be in breach of international law. It is possible the techniques Major O'Kane reviewed for the 205th MI at Abu Ghraib in certain circumstances would breach international law as they may amount to cruel and inhuman treatment and possibly, torture.

Precedents established in the European Court of Human Rights support this assessment of the Abu Ghraib proposals.

The European Court of Human Rights found that five interrogation techniques used in Northern Ireland in the 1970s amounted to inhuman and degrading treatment, and breached the European Convention for the Protection of Human Rights and Fundamental Freedoms.[21] These five techniques, used on suspected IRA members,

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13 Fay Report.

14 Fay Report.

15 Allegations contained in the International Committee of the Red Cross October 2003 Working Papers, see doc 55, 21.

16 Fay Report.

17 Fay Report.

18 Allegations contained in the International Committee of the Red Cross October 2003 Working Papers, see doc 55, 21.

19 See UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 1 and 16; Universal Declaration of Human Rights, Article 5; International Covenant on Civil and Political Rights, Articles 7 and 10; European Convention on Human Rights, article 3; American Convention on Human Rights, Article 5; and African Charter on Human and Peoples' Rights, Article 5.

20 Geneva Convention I, Articles 12 and 50; Geneva Convention II, Articles 12 and 51; Geneva Convention III, Articles 17, 87 and 130; Geneva Convention IV, Articles 32 and 147; and Common Article 3 to all four Geneva Conventions.

21 *Ireland v United Kingdom* (1978) 2 EHRR 25, para 167.

were: holding detainees in stress positions for hours; covering a detainee's head with a bag; subjecting detainees to continuous noise; depriving detainees of sleep; and depriving detainees of food and drink.[22] The Court concluded that these techniques amounted to inhumane treatment [23] when applied in combination, with premeditation and for hours at a stretch.

An earlier decision by the European Commission of Human Rights concluded that the five techniques used in Northern Ireland constituted torture. Controversially, the European Court of Human Rights did not support this finding, despite the Court's conclusion that the five techniques caused intense physical and mental suffering and led to acute psychiatric disturbances. However, the law in this area has developed during the past 30 years and PIAC believes it likely the European Court of Human Rights would now consider the five techniques used in Northern Ireland and elsewhere to be torture.[24]

The United Nations has considered similar techniques used by Governments against detainees and has concluded such techniques amount to torture. This includes sleep deprivation (Israel),[25] sensorial deprivation (Peru); [26] sleep, food and water deprivation, and placing naked detainees in a freezing, air-conditioned room for extended periods (Mexico)[27].

Although Major O'Kane questioned the legality of the techniques proposed for Abu Ghraib, he did not appear to consider that those techniques amounted to inhuman treatment. Major O'Kane was questioned by Mike Pezzullo, the head of the Iraq Detainee Fact-Finding Team (IDFFT), which was tasked by the Australian Department of Defence to gather information about detainee matters involving Australian personnel in Iraq. When asked about inhumane treatment, O'Kane stated: '*I rely on certain cases that I viewed both in the European courts of Human Rights… inhumane treatment from the ICTY [International Criminal Tribunal for the former Yugoslavia] judgements… interpretation of those courts and, you know, treatment really does cover things like starvation of people, concentration camp type incidents, not warm clothing through winter, summary execution, rape, you know horrible - it's called assaults, torture - those sorts of issues'*.[28]

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22 *Ireland v United Kingdom* (1978) 2 EHRR 25, para 96.

23 *Ireland v United Kingdom* (1978) 2 EHRR 25, para 167.

24 Following the decision in *Selmouni v France* (2000) 29 EHRR 403.

25 Summary Record of the 339th Meeting, UN Committee Against Torture, 20th Session, ¶ 12 (a), UN Doc. CAT?C?SR.339 (1998).

26 Report of the Committee Against Torture, 25th Session (13-24 November 2000), 26th Session (30 April – 18 May 2001), UN GAOR, 56th Sessions, Supp. No. 44

27 *Report on Mexico/Produced by the Committee under article 20 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* UN Committee Against Torture, 30th Session, UN Doc. CAT/C/75 (2003) ¶ 165.

28 Doc 39, 68.

Given the existence of international legal opinion on interrogation techniques such as those proposed for Abu Ghraib, it is fair to say that Major O'Kane's advice should have been more circumspect and he should have stated definitively that the proposed techniques would be in breach of international law.

4.3 The O'Kane advice: US interpretations *v* the Australian Government view of the law

Major O'Kane based his legal advice on the premise that '*security internees*' had forfeited their rights under the Geneva Convention and were only entitled to '*be treated with humanity*' under Article 5 of Geneva Convention IV (Protection of Civilian Persons in Time of War).

The US and Australia held different views about the exemptions contained in Article 5. Major O'Kane based his advice on the *US* interpretation of the application of Article 5; this was inconsistent with the Australian Government's own position.

Article 5 of Geneva Convention IV allows for individuals to be denied rights under the Convention in certain circumstances, it states:

> Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is *definitely suspected of or engaged in activities hostile to the security of the State*, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
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> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a *person under definite suspicion of activity hostile to the security of the Occupying Power,* such person shall, in those cases *where absolute military security so requires*, be regarded as having forfeited rights of communication under the present Convention.
>
> In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be. [emphasis added].

The different views that the US and Australia held in regard to exemptions under Article 5 can be summarised as follows:

- The US relied on the Article 5 exemptions to deny many detainees their full rights under the Geneva Convention. Although the US had determined that the Geneva Conventions did apply to the Iraq conflict (in contrast to Afghanistan, where the US's view was that the Conventions did not fully apply), many of the detainees held in Iraq were regarded as

security detainees under Article 5 and therefore denied the full protection of the Geneva Conventions.

- Australia interpreted Article 5 differently. The Minister for Defence stated in Parliament on 16 June 2004 that the Australian Government considered the Geneva Conventions applied in Iraq and the exemptions in Article 5 were not applicable. He stated: '*The advice that I have is that it applies and that the exemption—I would like to check it but I think it is part 5—in the convention would not be applicable in relation to prisoners held in Iraq*.'[29]

Australian military lawyer, Colonel Paul Muggleton, has been particularly critical of the way the US applied Article 5 to detainees in Iraq. He stated, '*The way that CJTF-7 used Article V, I questioned for legality and wisdom. They were denying access systematically and it was causing a lot of angst. Particularly when the detainee facilities were so marginal, and my work with the Central Criminal Court showed that there was very little evidence to support the detention of Iraqis, especially to detain them in tough conditions for 3-6 months. I wanted those responsible for the detention system aware of my concerns and take account of Geneva Convention Article V derivations*.[30]

Another unnamed Australian Colonel, in an interview with Mr Pezzullo on 9 June 2004, was asked about whether he discussed Article 5 with Major O'Kane. He replied:

> Yes, I recall that we had discussion that as Australians and our role as coalition officers that we make sure that our values and our ROEs [rules of engagement] were reflected in everything we did, not the coalition position. I discussed the Geneva Convention and status of Iraqi people on detention. In particular, whether or not they were POWs or security detainees, then what were their rights under the Geneva Convention. Whatever advice we provided as Australian coalition officers had to be consistent with Australia's interpretation of operational law and the Geneva Conventions.[31]

Another Australian military lawyer, Colonel Mike Kelly, was also concerned about the US application of Article 5. In an interview on 8 June 2004, he stated:

> George [O'Kane] did not consult with me or speak to me about Article V. I did pass on advice to CFTF-7 on this issue as they were not aware of the meaning of this provision. I advised that it obviously applies to some detainees … and the High Value Detainees can fall into that category. However I disagreed with the CJTF-7 interpretation of Article V. They were stretching it to breaking point. … They started abusing Article V.

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29 Hansard, Parliamentary Debates, Parliament of Australia, Canberra, 16 June 2004, 23905 (Robert Hill, Minister for Defence).

30 Matrix, 66–7.

31 Doc 26, 2.

> My main point of contention was that Article V dealt with contact and communications aspects only. It does not allow for any derogation of rights to humane treatment and other rights under the Geneva Convention. I passed that strong advice on to CJTF-7.
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> Furthermore, the first paragraph of Article V relates only to the domestic territory of the party to the conflict. It does not relate to occupied territory. Paragraph two applies to occupied territory. ?They were not interested in these details.?[32]

Major O'Kane's view of Article 5 of Geneva Convention IV did not align with the Australian Government view. It is not clear whether Major O'Kane was directed to draft his advice in accordance with the US view of Article 5 or whether he assumed he should draft the advice on that basis. It is also not clear whether he discussed the matter with his superior, the UK Lieutenant Colonel, who signed off on the advice.

Major O'Kane helped draft other important documents on behalf of the US, and these documents also relied on the US view of Article 5. In a letter Major O'Kane drafted on 24 December 2003 to the International Committee of the Red Cross on behalf of US Brigadier General Karpinski, the exemption in Article 5 was used to justify the denial of Geneva Convention rights to detainees. Major O'Kane said his interpretation was the result of discussions in his office, although he later suggested the interpretation originally came from a US fragmentary order from August 2003.[33]

On at least two occasions, Major O'Kane drafted important documents relating to detainee treatment at Abu Ghraib. Major O'Kane's advice on these occasions relied on an interpretation of the Geneva Conventions that was inconsistent with the Australian Government's view of the law.

4.4 Are Australian interrogation techniques lawful?

In an interview with Mr Pezzullo, Major O'Kane said both the US Interrogation Manual and the Australian Interrogation Manual failed to put time limits on the use of interrogation techniques.[34]

Following the IDFFT Report, the Department of Defence convened a special meeting to identify problems with the handling of detainees. Vice Admiral Russel Shalders, Air Marshal Houston, and General Cosgrove attended this meeting, together with the Defence Secretary Ric Smith, Shane Carmody and Alan Henderson. The result of this meeting was a document outlining lessons learned and proposed actions.[35] The full details of these recommendations were not revealed to PIAC. The Government has not publicly revealed whether it was recommended that the Australian Interrogation Manual be revised or updated following the abuses at Abu Ghraib.

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32 Doc 6, 1-2.

33 Doc 39, 48.

34 Doc 40, 12.

35 Doc 193.

5. 'Not my job'

Despite Major O'Kane's concerns about the legality of the proposed interrogation techniques and the absence of appropriate safeguards, he did not consider it incumbent upon him to advise how the techniques could be modified to ensure compliance with the Geneva Conventions.

When Australian Department of Defence officials questioned Major O'Kane about why he did not outline in the legal memorandum how the techniques could have been modified, he replied: it '*wasn't our job'*.[36]

Instead, Major O'Kane reasoned that the US Army Interrogation Manual needed to change. In Major O'Kane's view, the people responsible for interrogation needed to amend the manual and that would '*take a long time'*.[37] Major O'Kane assumed that such follow-up action would take place. He reasoned that his advice was interim advice. As a result, Major O'Kane did not follow up this issue himself. This is despite the fact that Major O'Kane was aware, shortly after preparing the memorandum, that Major General Miller arrived from Guantanamo Bay. Major General Miller's role was to review interrogation policy because it was not producing the results needed. Major O'Kane was of the view that '*thresholds were going to be lifted somewhat*'[38] following Major General Miller's review. Even with this knowledge, Major O'Kane failed to raise the interrogation issue with his Australian or US superiors.

6. Did Major O'Kane have clearance to provide the advice?

Major O'Kane sought clearance from his Australian superiors to provide the advice on interrogation. He was required to do this by an Australian Command and Control Directive.[39]

Major O'Kane sought this clearance from Air Commodore Bentley, the Commander of the Australian Joint Task Force 633, and an unnamed individual.[40] Major O'Kane received verbal approval on the condition that he limited his advice to the matter of interrogation of the nominated individual, not interrogation techniques more generally.[41]

Contrary to this condition, Major O'Kane prepared advice that was broad reaching in nature because he reviewed the US Interrogation Manual. In addition, Major O'Kane's memorandum is entitled: '*ABU GHURAYB, Saddam Fedayeen Interrogation Facility (SFIF) Detainee Interrogation Policy'*.

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36 Doc 40, 12.
37 Doc 40, 12.
38 Doc 40, 10.
39 Doc 115, 2.
40 Doc 115, 3.
41 Doc 39, 65; Doc 40, 3.

In later conversations, Mr Pezzullo disagreed with Major O'Kane's view that the advice he provided was limited to one person. Mr Pezzullo said '*Well sorry mate, not on my reading of it. It might be associated with your visit the day before about one person.*'[42] However, IDFFT Report stated that the advice '*related only to this one detainee'*.[43]

Did Major O'Kane exceed the parameters set by his superiors?

7. Senate Committee mislead

The Australian Government knew that Major O'Kane had reservations about the legality of techniques to be used at Abu Ghraib.

On 31 May 2004, before Senate Estimates, Air Commodore Simon Harvey, the Director General of Defence Legal Service, was asked whether Major O'Kane concluded that the US interrogation manual and proposed interrogation policy were consistent with the Geneva Conventions. The Air Commodore stated: '*I believe he did'*.[44] Air Commodore Harvey had had initial conversations with Major O'Kane before this date, but it is possible that he had not discussed the full details of his legal advice by that stage.

On 10 June 2004, Mr Pezzullo interviewed Major O'Kane about his role in Iraq and his work drafting the legal advice about Abu Ghraib, among other things. During this interview, Major O'Kane detailed the concerns he had about the proposed Abu Ghraib techniques, the absence of time limits, and his conclusion that the techniques '*substantially complied*' with the Geneva Convention – with the clear implication that this amounted to something less than full compliance.

Following this interview, on 13 June 2004, Mr Pezzullo sent a brief to the then Minister for Defence, Robert Hill, (with copies to the Chief of the Defence Force and Secretary of Defence) summarising Major O'Kane's comments. The brief stated:

> MAJ O'Kane confirmed that the reason he provided the qualified advice, that the 205th interrogation techniques 'substantially' complied with the Geneva Conventions, is that the interrogation manual he was reviewing lacked sufficient detail and clear safeguards to categorically rule out the possibility of abuses occurring.[45]

The brief was for marked '*for action ASAP'*. Under the heading '*sensitivity'* it stated:

> Due to the embedded status of MAJ O'Kane much of the detailed information he has provided in interviews would be considered AUS/US [redaction] by the US.

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42 Doc 40, 20.

43 Doc 115 [4].

44 Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 31 May 2004, 60 (Simon Harvey, Air Commodore).

45 Doc 58, 3.

> This information should not be released publicly without de-classification consultations with the US.

On 1 June 2004, during Senate Estimates, Senator Bob Brown asked whether it was possible for the Department of Defence to provide a copy of Major O'Kane's legal advice. The response was that it was not possible: '*Defence is not in a position to release, without consultation, on its own authority documents which are the property of another State'*.[46] The Australian Government did not release the legal advice.

Given the widespread public interest in Major O'Kane's role in investigating abuses and detention issues in Iraq, it was in the public interest that the legal advice was released. PIAC believes the Australian Government should have consulted with the US to secure permission to release the advice. Throughout the second half of 2010, the Department of Defence consulted with the US about the release of the document to PIAC; the US agreed to its release. This consultation should have occurred in June 2004.

Even if the Australian Government did not release a copy of the advice, at the very least, the public record should have been corrected at the Senate Estimates hearing on 17 June 2004.

By this stage, Minister Hill and Department of Defence officials knew the details of Major O'Kane's advice and the reservations he had about compliance with international law. They would also have known, therefore, that Air Commodore Harvey's earlier statement to the Senate was inaccurate. However, this important detail regarding an Australian military lawyer's opinion on the potential illegality of interrogation techniques used at Abu Ghraib was not made public. Instead, the Australian Parliament and the Senate were left with the impression that Major O'Kane had found the techniques compliant with the Geneva Conventions.

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[46] Senate Foreign Affairs, Defence and Trade Legislation Committee, Answers to questions on notice form Department of Defence, Budget Estimates, 2004-05, 31 May, 1 June and 17 June 2004, question 17.

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