

Senate Economics Legislation Committee

CORPORATIONS AMENDMENT (IMPROVING OUTCOMES FOR LITIGATION FUNDING PARTICIPANTS) BILL 2021

Attorney-General's Department

Hearing date: 17 January 2022

Hansard page: 21

Question type: Spoken

Senator Deborah O'Neill asked the following question:

Dr Smrdel: I can advise that, subsequent to our initial appearance before the parliamentary joint committee but prior to the tabling of the parliamentary joint committee's report, the Attorney-General's Department did seek some additional legal advice from the Australian Government Solicitor.

Senator O'NEILL: On what date?

Dr Smrdel: The date was 16 November and we received that on 23 November.

Senator O'NEILL: Is that documented in that time line that you've provided?

Dr Smrdel: That document is not in that time line.

Senator O'NEILL: Could you amend the time line to indicate that evidence, please. And is there anything else that we should know about, with regard to the constitutionality that has been undertaken, that is not yet in the time line that you've provided to us this afternoon?

Dr Smrdel: We can do that. And, no, there is nothing else to add.

The response to the Senator's question is as follows:

The department's attached opening statement, which was provided to Committee members prior to the hearing, has been amended to note that additional legal advice was sought on the constitutionality on the Bill subsequent to the department's appearance before the Parliamentary Joint Committee on Corporations and Financial Services. This advice was sought from the Australian Government Solicitor on 16 November 2021, and received on 23 November 2021.

SENATE STANDING COMMITTEE ON ECONOMICS PUBLIC HEARING

17 JANUARY 2022

ATTORNEY-GENERAL'S DEPARTMENT OPENING STATEMENT

- The Committee has requested the Attorney-General's Department provide a full chronology and background to the Attorney-General's claim for public interest immunity over legal advices in relation to the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021.
- On 12 November 2021, in a public hearing of the Parliamentary Joint Committee on Corporations and Financial Services, the Department was asked questions by Committee members relating to the constitutionality of the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 and the source of the Commonwealth's legislative power to sustain the Bill.
- The Department stated the Government had received a number of legal advices relating to the constitutionality of the Bill, including from the Solicitor-General. The Department assured the Committee that, on this basis, the Government was confident that the Bill is Constitutional.
- In accordance with Government Guidelines for Official Witnesses before Committees, the Department took four questions on notice relating to the content of legal advices sought on the constitutionality of the Bill, indicating also that the Attorney-General, Senator the Hon Michaelia Cash, may wish to make a

claim of public interest immunity over the content of legal advices provided to the Department.

- On 16 November 2021, in response to the questions taken on notice, the Department provided the relevant dates of legal advices received on the constitutionality of the Bill. The responses noted that in accordance with longstanding practice of successive Australian governments it is against the public interest to disclose the contents of confidential legal advice. The department's responses noted that it is important that the Government can engage with legal advisers fully, frankly, and with confidentiality. A copy of the responses can be found on the Committee's website.
- In addition to the list of advices provided in this response, the department sought further legal advice on the constitutionality of the Bill from the Australian Government Solicitor on 16 November 2021. This advice was received on 23 November 2021.
- On 19 November 2021, the Parliamentary Joint Committee made an order to the Department, to produce, on a confidential basis, all legal advices relating to the constitutionality of the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021.
- On 24 November 2021, the Department notified the Parliamentary Joint Committee that the Attorney-General intended to make a claim of public interest immunity on the legal advices received by the Department.
- The Attorney-General wrote to the Parliamentary Joint Committee on 24 November 2021 making a claim of public interest immunity over these legal advices.

- In her letter to the Committee, the Attorney-General stated that it has been the longstanding practice of successive Australian Governments to not disclose privileged legal advice, and that it is not in the public interest to depart from this established position. The Attorney-General noted that it is integral to the development of sound Commonwealth policy and robust law-making that privileged legal advice provided to the Commonwealth remains confidential.
- The Attorney-General noted the specific harm that would result from the disclosure of confidential interactions between lawyer and client would be to the administration of justice by discouraging full and frank disclosure between clients and their legal advisors.
- On 25 November 2021, the Parliamentary Joint Committee requested the Department appear at an in-camera hearing on 26 November 2021 to further discuss the constitutionality of the Bill. The Department appeared at the hearing, but was unable to assist the Committee's inquiries given the Attorney-General's claim of public interest immunity.

- On 2 December 2021, the Department corrected a response to a question on notice sent to the Committee, advising of two additional legal advices that had been received prior to the public hearing missed in the original response due to oversight. The additional advice received on 23 November 2021 was not included in this correction as it was sought after the public hearing on 12 November 2021 and therefore was not within the scope of the question. A copy of this letter can be found on the Committee's website.
- On 29 November 2021, the Parliamentary Joint Committee on Corporations and Financial Services Committee Chair, the Hon Tony Smith MP, wrote to the Attorney-General advising the Committee did not accept the Attorney-General's claim of public interest immunity on advice from the Clerk of the Senate, stating the claim did not meet the requirements of the Senate. However, the Committee noted it did not intend to press the claim, noting the head of power and constitutional validity of the bill may be clarified when the bill is debated in the Senate.