

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
AUSTRALIAN GOVERNMENT SOLICITOR

Question No. 55

Senator Brandis asked the following question at the hearing on 18 October 2011:

Senator BRANDIS: There is a schedule to the opinion. It is a one-page schedule. It lists 18 documents with which Messrs Gageler, Lloyd and Kennett were briefed. I do not mean any disrespect at all in saying this, but it is not perfectly clear from the face of the opinion precisely what questions they were asked to address. It is pretty clear the area that they were asked to address but the questions to which they respond are not formulated in the text of their opinion. What I am eager to know, because there has been a little bit of unpleasant political misrepresentation of the effect of the Solicitor-General's opinion, is what the precise questions were that Messrs Gageler, Lloyd and Kennett were asked to answer for their opinion of 2 September. Are you able to help us with that?

Mr Govey: No, I am not.

Senator BRANDIS: Are you able to tell us, or if you cannot take it on notice, whether in fact the instructions for that opinion came from your office?

Mr Govey: I will need to take that on notice and talk to both my own colleagues and the department of immigration.

Senator BRANDIS: Indeed it is not apparent from the face of this opinion who the client was. Counsel do not, for example, say, 'we were asked to advise'—X, Y, Z—'on these matters.' Would it be unusual for the Solicitor-General to be approached directly by a minister or even the Prime Minister to give advice without the interposition of an instructing solicitor?

Mr Govey: I would have to take that on notice as well. I am certainly aware that it has happened and I do not just mean in recent times as I can say over many years. It was not unusual—I should not say 'unusual'—but it was not unknown for the Solicitor-General to receive those sorts of requests including under the former government.

Senator BRANDIS: We know that on the evening of the High Court decision on 31 August the Solicitor-General briefed the cabinet viva voce, because the Prime Minister has said that. It was the day before she attacked the High Court. And we know, because the government has released the opinion, that the Solicitor-General and his two senior colleagues provided an advice on 2 September and the Solicitor-General himself, though on this occasion without co-authorship, the following day provided another brief opinion about the guardianship aspects of the High Court decision as well. Now, given that the government itself has publicly released the Solicitor-General's two opinions, might I ask you, in those slightly unusual circumstances, to provide—or if your office had no involvement in commissioning the opinions to let us know, but this is if you did—the instructions to counsel so that the opinions might be properly interpreted and in particular the expressed questions that the Solicitor-General was asked to address, which would have appeared in the instructions to him, can be made part of the public record as well.

Mr Govey: I will take that on notice but, as you would appreciate, that will not be a call that AGS makes.

Senator BRANDIS: I understand why you say that. Mr Govey, there were other opinions not released by the government provided by the Solicitor-General before the High Court's decision. Did the Australian Government Solicitor instruct the Solicitor-General in relation to any of those opinions; that is, opinions about the Migration Act?

Mr Govey: Again, I would need to take that on notice, but I know that he did work very closely with Ian Deane in particular.

Senator BRANDIS: So would it be a fair surmise that, if the Solicitor-General did provide advice—as we know he did because we have been told so—that he would have provided that advice on the instructions of Mr Deane?

Mr Govey: I really would prefer to take it on notice.

Senator BRANDIS: Okay.

The answer to the honourable senator's question is as follows:

Following consultation with the Attorney-General's Department, AGS advises that the Government's general position in relation to the disclosure of instructions is the same as that relating to the disclosure of legal advice. AGS has consulted the Department of Immigration and Citizenship which has advised that it would not be appropriate to disclose the requests for advice

made to the Solicitor-General. (The fact that the terms of 2 of the Solicitor-General's advices were later disclosed does not of itself remove the confidentiality of the instructions given in obtaining these advices.)

Also, AGS is able to indicate that in its experience, as with former Solicitors-General, the current Solicitor-General receives occasional requests for legal advice directly from a Government Minister.

On instructions from the Department of Immigration and Citizenship, AGS instructed the Solicitor-General (in some cases, together with external counsel) in relation to a number of requests for advice on aspects of the Malaysian arrangement. The Opinion of the Solicitor-General of 2 September 2011 SG 21 of 2011 was not prepared on the instructions of AGS, although Mr Deane provided assistance in relation to the request.