



**The Hon Stuart Robert MP
Minister for the National Disability Insurance Scheme
Minister for Government Services**

2 April 2020

Senator Wendy Askew
Chair
Community Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Chair

Public Interest Immunity Claim – Income Compliance Program

On behalf of the Government, I am writing to claim public interest immunity in respect of any request for information about legal advice relating to the Income Compliance Program that may be made by Senators arising out of the Additional Estimates 2019-20 hearing, including by way of questions on notice.

The public interest immunity claim covers all legal advice (including drafts) provided by internal or external lawyers to Ministers, departments and agencies in relation to the Income Compliance Program or in connection with litigation or potential litigation (including administrative review matters) relating to the Income Compliance Program. The claim also extends to all communications involving Services Australia, Departments and Ministers about any litigation involving the Income Compliance Programme.

The claim extends to, but is not limited to:

- the dates legal advice was sought and provided;
- the identity of the person, agency or firm who provided legal advice;
- the costs of legal advice;
- the dates and content of any briefings or meetings (including Ministerial briefings and Ministerial meetings) that relate to legal advice;
- the dates and content of any communications between Ministers, department and agencies in relation to legal advice;
- instructions to lawyers; and
- any legal advice provided in relation to the modification or enhancement of the Income Compliance Program.

The Government takes the view that it would not be in the public interest for the matters covered by this claim to become public. The specific harms to the public interest that could result from the disclosure of the legal advice and the circumstances surrounding the legal advice are as follows:

- undue prejudice to the Commonwealth in relation to current litigation relating to the Income Compliance Program; and
- the need to maintain confidentiality of interactions between lawyers and Government clients.

Current litigation

The current class action relating to the Income Compliance Program (*Prygodicz & Ors v Commonwealth of Australia* (VID1252/2019)) includes a claim of unjust enrichment and a claim for damages based in negligence against the Commonwealth. The Commonwealth's ability to respond to these proceedings may be prejudiced if the applicants or their solicitors are made aware of matters covered by this public interest immunity claim. Details of the legal advice, the content of that advice and the date of briefings on that advice could be directly relevant to the applicants' claims.

The possible prejudice to the Commonwealth's ability to respond to the claims in the class action successfully exists even though Parliamentary privilege would apply to evidence given in response to a question on notice.

Confidentiality of legal advice generally

Additionally, the Government takes the view that it would not be in the public interest for the matters covered by this public interest immunity claim to become public because of the need to maintain the confidentiality of legal advice provided to the Government, including to departments and agencies.

It has been the long-standing practice of successive Australian Governments not to disclose privileged legal advice. This practice has previously been outlined by the Hon Gareth Evans QC:

...[n]or is it the practice or has it been the practice over the years for any government to make available legal advice from its legal advisers made in the course of the normal decision making process of government, for good practical reasons associated with good government and also as a matter of fundamental principle... (Senate Hansard, 28 August 1995, page 466);

Then Senator, the Hon. Joe Ludwig, put the position as follows:

To the extent that we are now going to go to the content of the advice, can I say that it has been a longstanding practice of both this government and successive governments not to disclose the content of advice. (Senate Legal and Constitutional Affairs Legislation Committee, Hansard of Estimates hearing, 26 May 2011, page 161); and

Similarly, the Hon Philip Ruddock MP stated:

...It is not the practice of the Attorney to comment on matters of legal advice to the Government. Any advice given, if it is given, is given to the Government... (House of Representatives Hansard, 29 March 2004, page 27405).

The Government maintains that it is not in the public interest to depart from this established position. It is integral that privileged legal advice provided to the Commonwealth remains confidential. Access by Government to such confidential advice is, in practical terms, critical to the development of sound Commonwealth policy and robust law-making.

The specific harm that the doctrine of legal professional privilege seeks to prevent is the harm to the administration of justice that would result from the disclosure of confidential interactions between lawyer and client. Both the High Court of Australia and Federal Court of Australia have confirmed that legal professional privilege promotes the public interest by enhancing the administration of justice, facilitating freedom of consultation and encouraging full and frank disclosure between clients and their legal advisers.

Yours sincerely

Stuart Robert