

Chapter 1

Overview

1.1 On 9 February 2017 the Senate referred the following documents to the Education and Employment Legislation Committee (the committee) for examination and report:

- particulars of proposed additional expenditure in respect of the year ending on 30 June 2017 [Appropriation Bill (No. 3) 2016-2017];
- particulars of certain proposed additional expenditure in respect of the year ending on 30 June 2017 [Appropriation Bill (No. 4) 2016-2017]; and
- Final Budget Outcome 2015-16.¹

Portfolio coverage

1.2 In accordance with a resolution of the Senate on 31 August 2016 the committee is responsible for the examination of the expenditure and outcomes of the following portfolios:

- Education and Training; and
- Employment.²

1.3 A full list of agencies is available at Appendix 1.

Portfolio Additional Estimates Statements (PAES) 2016-17

1.4 The Portfolio Additional Estimates Statements (PAES) 2016-17 for the Education and Training portfolio and the Employment portfolio were tabled in the Senate on 9 February 2017.³

Education and Training portfolio

1.5 The 2016-17 PAES for the Education and Training portfolio provides information on the revised estimates for the portfolio and highlights the Australian Government's education and training priorities including:

- ensuring that families can access quality child care;
- progressing the implementation of the Jobs for Families Child Care Package;
- creating an efficient and effective skills and training system;
- supporting the National Strategy for International Education;

1 *Journals of the Senate*, No. 26, 9 February 2017, pp. 888–889.

2 *Journals of the Senate*, No. 2, 31 August 2016, p. 76.

3 *Journals of the Senate*, No. 26, 9 February 2017, p. 889.

- progressing initiatives under the Government's National Innovation and Science Agenda; and
- striving to improve education outcomes for disadvantaged groups.⁴

1.6 The Department of Education and Training has two outcomes as follows:

- Outcome One: improved early learning, schooling, student educational outcomes and transitions from school through access to quality child care, support, parent engagement, quality teaching and learning environments; and
- Outcome Two: promote growth in economic productivity and social wellbeing through access to quality higher education, international education, and international quality research, skills and training.⁵

Employment portfolio

1.7 The 2016-17 PAES for the Employment portfolio provides information on the revised estimates for the portfolio and highlights the Australian Government's employment priorities including:

- providing young people with work experience through the Government's Youth Employment package;
- continuing to implement jobactive;
- encouraging more businesses to employ job seekers;
- encouraging entrepreneurship and self-employment among young people; and
- continuing to deliver the Transition to Work service, Empowering YOUTH initiatives and ParentsNext.⁶

1.8 The Department of Employment has two outcomes as follows:

- Outcome One: foster a productive and competitive labour market through employment policies and programs that assist job seekers into work, meet employer needs and increase Australia's workforce participation; and
- Outcome Two: facilitate jobs growth through policies that promote fair, productive and safe workplaces.⁷

Hearings

1.9 On 8 November 2016 the Senate resolved that Additional Estimates hearings for the committee would occur on 1 and 2 March 2017.⁸ Accordingly the committee considered particulars of additional expenditure of portfolios as follows:

4 *Portfolio Additional Budget Statements 2016-17: Education and Training Portfolio*, pp. 13–15.

5 *Portfolio Additional Budget Statements 2016-17: Education and Training Portfolio*, p. 4.

6 *Portfolio Additional Budget Statements 2016-17: Employment Portfolio*, pp. 13–17.

7 *Portfolio Additional Budget Statements 2016-17: Employment Portfolio*, p. 4.

8 *Journals of the Senate*, No. 13, 8 November 2016, pp. 411–412.

- Education and Training portfolio—1 March 2017; and
- Employment portfolio—2 March 2017.

1.10 In addition, the committee resolved to hold a spill over hearing on 30 March 2017 to continue the examination of the Employment portfolio.

1.11 The committee heard evidence from the following Ministers:

- Senator the Hon. Simon Birmingham, Minister for Education and Training; and
- Senator the Hon. Michaelia Cash, Minister for Employment.

1.12 Evidence was also provided by the following departmental secretaries who were accompanied by officers of the portfolio departments and agencies:

- Dr Michele Bruniges AM, Secretary, Department of Education and Training; and
- Ms Renee Leon PSM, Secretary, Department of Employment.

1.13 The committee extends its appreciation to the Ministers and officers of the departments and agencies who assisted the committee in its conduct of the 2016-17 Additional Estimates hearings.

1.14 An index of proceedings is available at Appendix 2.

Public interest immunity claims

1.15 In the course of examining the Fair Work Commission's recent decision to reduce weekend penalty rates, the Employment Department's legal counsel, Mr O'Sullivan, signalled his intention to make a public interest immunity claim.⁹ The following Hansard extract illustrates the exchange:

Senator CAMERON: Mr O'Sullivan, have you been asked for advice on that matter of the four-yearly review—the take-home pay?

Mr O'Sullivan: Again, I am a solicitor. That is clearly the subject of client-solicitor privilege. I would need instructions.

Senator MARSHALL: No. We are not going to go there again, Mr O'Sullivan. We have dealt with that. The Senate has made determinations on this matter. You may not claim legal professional privilege here.

Mr O'Sullivan: Again—and this is probably going back a bit—I am not claiming legal professional privilege; I am just noting that the subject matter of request for advice from me is subject to a claim from legal professional privilege...

Again, I do not know any solicitor who would ever disclose the contents—

9 *Committee Hansard*, 2 March 2017, p. 122.

CHAIR: Sorry, Mr O'Sullivan, but you are not here in your capacity as a solicitor; you are here giving evidence to a Senate committee.¹⁰

1.16 Ultimately, the committee indicated to the witnesses that client-solicitor privilege was not an accepted ground for a public interest immunity claim, and asked Mr O'Sullivan to provide an explanation on notice.¹¹

1.17 The Senate's rules governing the Estimates process are clearly set out in the Chair's opening statement including that 'the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Parliament or its committees unless the parliament has expressly provided otherwise.'¹²

1.18 On 13 May 2009, the Senate passed an order relating to public interest immunity claims.¹³ The order sets out the processes to be followed if a witness refuses to provide information to a Senate committee on the basis of a claim of public interest immunity. The full text of this order has previously been provided to departments and agencies and was incorporated in the Chair's opening statement on 2 March 2017.¹⁴

1.19 The committee notes that on several occasions in the past Mr O'Sullivan has attempted to claim public interest immunity on the same grounds, as detailed below.

1.20 In the Additional Estimates round of February 2007, Senator Wong asked Mr O'Sullivan about the timing of the Department's preparation of a confidentiality agreement that the members of the Minister's advisory group on the needs of people with disabilities were required to sign.¹⁵ Mr O'Sullivan objected to answering the question on the grounds that he would be in breach of the confidentiality requirement for public servants laid out in subsection 13(6) of the Public Service Act,¹⁶ which led to the following exchange:

Senator WONG—Which are you relying on? Let us be clear. Are you relying on legal professional privilege, are you relying on the Public Service Act or both?

Mr O'Sullivan—...I am relying on the Public Service Act, but I qualified the second limb to that by saying that it may be a breach of [legal professional privilege]. I would have to examine the documents in question more closely than that to give a more comprehensive and unequivocal

10 *Committee Hansard*, 2 March 2017, p. 122.

11 *Committee Hansard*, 2 March 2017, p. 123.

12 Senator Bridget McKenzie, Chair, Senate Education and Employment Legislation Committee, *Committee Hansard*, 2 March 2017, p. 3.

13 *Journals of the Senate*, No. 68, 13 May 2009, p. 1941.

14 *Committee Hansard*, 2 March 2017, pp. 3–4.

15 *Committee Hansard*, 15 February 2007, p. 28.

16 *Committee Hansard*, 15 February 2007, p. 31.

answer. But either of those I think is sufficient basis to justify the objection.¹⁷

1.21 After some debate and a private meeting of the committee, the Chair, former Senator Judith Troeth, made the following statement to the committee:

The committee notes the claim by Mr O'Sullivan that an attempt to answer the question would involve him in a breach of section 13(6) of the Public Service Act. It [the committee] noted advice to Senator Wong from the Clerk of the Senate on 6 June 2006 which was tabled at the hearing, which includes advice from the Solicitor-General. However, in view of the possibility that such a dispute may arise again, the committee has agreed that in future officers should not rely on such a claim. The committee notes that the opportunity already exists for officers to refer a matter to the minister at the table. In the meantime, the committee draws the Clerk's advice to the attention of the department.¹⁸

1.22 Furthermore, in the Budget Estimates round of 2013,¹⁹ Senator Abetz asked the department whether it had sought legal advice during the drafting of the Fair Work Act in relation to compulsory arbitration of disputes.²⁰ Mr O'Sullivan declined to answer, stating: '[a]s Chief Counsel I would not disclose the content of requests for advice to this committee as to do so would waive the legal professional privilege in that advice.'²¹ The committee regarded Mr O'Sullivan's refusal as unacceptable and Mr O'Sullivan subsequently agreed to take the question on notice.²²

1.23 The former Chair Senator Marshall subsequently made a detailed statement regarding the refusal to answer questions, part of which reads:

No witness has an independent discretion to decline to answer a question. An officer has a right under Privilege Resolution 1(16) to refer a question to a senior officer or minister. Alternatively, an officer may state the public interest ground on which he or she believes it may not be in the public interest to disclose the information requested AND specify the harm to the public interest that could result from disclosure of the information. The order of the Senate of 13 May 2009, to which I have already referred, then sets out the process to be followed. There is no other basis on which an answer may be withheld from a committee.²³

17 *Committee Hansard*, 15 February 2007, p. 36.

18 *Committee Hansard*, 15 February 2007, pp. 70–71. The Clerk's advice is reproduced at Appendix 3.

19 See Education, Employment and Workplace Relations Committee, *Budget Estimates 2013-14*, June 2013, p.2.

20 *Official Committee Hansard*, 4 June 2013, p. 114.

21 *Official Committee Hansard*, 4 June 2013, p. 114.

22 *Official Committee Hansard*, 4 June 2013, p. 115.

23 *Official Committee Hansard*, 5 June 2013, p. 53. The former Chair's full statement is at Appendix 4.

1.24 On 12 April the committee received the department's answer to the question Mr O'Sullivan took on notice, which references the following material from the *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters* (Government Guidelines):

Legal advisers owe a duty to their clients not to disclose the existence or content of any advice. It would therefore be inappropriate for any official who has provided legal advice to government ... to disclose that advice. All decisions about disclosure of legal advice reside with the minister or agency who sought and received that advice.²⁴

1.25 The answer did not however include the subsequent paragraph of the Government Guidelines which clearly states that:

Where an official has been asked a question about the content of legal advice, it may be appropriate to advise the committee that such information might properly be subject to a public interest immunity claim...²⁵

1.26 The Government Guidelines also outline a process for claiming public interest which largely mirrors the Senate's order referenced in paragraph 1.17.²⁶

1.27 Furthermore the Government Guidelines set out that government officers or the relevant minister, when making a claim of public interest immunity, should specify the harm to the public interest that could result from the disclosure of the information or document.²⁷ The committee notes that Mr O'Sullivan did not state the harm in the most recent instance despite being given the opportunity. He chose to take the question on notice.

1.28 The committee notes that its view on this matter is confirmed in *Odgers Australian Senate Practice*, which states: '[i]t has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides grounds for a refusal of information in a parliamentary forum.'²⁸

1.29 The committee again reminds the department and Mr O'Sullivan in particular that legal professional privilege has not been established as an acceptable ground for a public interest immunity claim, and thus does not constitute a satisfactory reason for declining to answer questions.

24 Department of Employment, answer to question on notice EMSQ17-001584, 2 March 2017, (received 12 April 2017).

25 Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters*, February 2015, p. 12.

26 Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters*, February 2015, pp. 10–12 and 29–35.

27 Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters*, February 2015, p. 10.

28 Harry Evans and Rosemary Laing, eds, *Odgers Australian Senate Practice*, 14th Edition, Department of the Senate, 2016, pp. 668–669.

1.30 On a more fundamental level, the committee notes the Government Guidelines emphasise that officials have a duty to assist parliamentary inquiries:

A fundamental element of Australia's system of parliamentary government is the accountability of the executive government to the parliament... Officials' accountability regularly takes the form of a requirement for them to provide full and accurate information to the parliament about the factual and technical background to policies and their administration.²⁹

1.31 In this regard, the committee also reminds the department and in particular Mr O'Sullivan of the Senate's resolution regarding the duties of public officials, including 'the statutory values which Australian Public Service agency heads and employees are required to uphold include a requirement to be open and accountable to the Australian community under the law and within the framework of ministerial responsibility'.³⁰

1.32 Finally, in noting the department's response to the question on notice, the committee expresses serious concerns that this situation has arisen on numerous occasions and informs the department such refusals to answer questions are not and will not be accepted.

Questions on notice

1.33 In accordance with Standing Order 26(9)(a), the committee agreed that the date for the return of answers in response to questions placed on notice from the Additional Estimates 2016-17 hearings on 1 and 2 March would be 13 April 2017, while those from the hearing on 30 March would be due on 11 May 2017.

1.34 Answers to questions on notice are published as they become available on the committee's website:

www.aph.gov.au/Parliamentary_Business/Senate_Estimates/eetctte/estimates/add1617/index.

Hansard transcripts

1.35 Committee Hansard transcripts are accessible on the committee's website: www.aph.gov.au/Parliamentary_Business/Senate_Estimates/eetctte/estimates/add1617/index.

1.36 In this report, references to the most recent Committee Hansard are to the proof transcripts. Page numbers may vary between the transcripts of the Proof Hansard and the Official Hansard.

29 Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters*, February 2015, p. 2.

30 Procedural order of continuing effect 52A, Standing orders and other orders of the Senate, August 2015, pp. 150–151.

