

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Budget Estimates 2017 - 2018

Outcome 2 - Workplace Relations and Economic Strategy

Department of Employment Question No. EMSQ17-004032

Senator Marshall asked on 29 May 2017 on proof Hansard page 45

Relates to previous Employment Question No EMSQ17-001584

Question

Correspondence in relation to conduct before Estimates

I would also ask you to take this question on notice, too: can you provide to the committee all communication—in whatever form that may have taken—in relation to conduct before estimates, from anyone in the department with Mr O'Sullivan in relation to the conduct of estimates hearings, and can we take that back to when he was first mentioned by Senator Troeth as chair, and I think that was a decade ago.

Ms Leon: I will take it on notice and see what we can find, Senator.

Answer

The Department provides the guidelines for official witnesses to all its SES staff, including Mr O'Sullivan, in advance of Estimates hearings.

The above question was asked in the context of the Department's answer to a question taken on notice on 2 March 2017 at the Department's appearance at the 2016 – 2017 Additional Estimates hearings. The question taken on notice ('the QoN') arose because Mr O'Sullivan (Chief Counsel – Workplace Relations Legal) told the Senate Estimates Committee that he was unable to disclose whether he had been asked for legal advice on the availability of take home pay orders in the matter of the Fair Work Commission's four-yearly review without instructions from the Department or the Minister. The Secretary of the Department subsequently confirmed that no such advice had yet been given. The Department's answer to the QoN is attached ([Attachment A](#)).

Mr O'Sullivan's response, and the Department's answer to the QoN, reflected the Commonwealth's long held position, as set out in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, that the Commonwealth's legal advisers "owe a duty to their clients not to disclose the existence or content of any [legal] advice ... [and that] all decisions about disclosure of legal advice reside with the minister or agency who sought and received that advice."

Those Guidelines make clear that an official [*other than the relevant legal adviser*] may disclose whether legal advice has been sought and obtained on a particular issue (see paragraphs 4.8.1 – 4.8.3 of the Guidelines). That is why the Secretary was able to answer the question as to whether legal advice had been provided, even though Mr O'Sullivan was not.

The obligations of confidence that apply to Commonwealth legal advisers apply similarly to all legal practitioners:

- lawyers are obliged not to disclose confidential client information, including whether or not advice has been sought or given (this obligation is recognised at both common law and in statute as a subset of legal professional privilege (LPP));
- disclosure of confidential client information is inconsistent with a lawyer's professional obligation to maintain client confidentiality, and such disclosure would be destructive of the trust and candour essential to the solicitor/client relationship; and
- notwithstanding that the Senate does not recognise LPP, in and of itself, as grounds for resisting disclosure, the Senate has accepted that the public interest underpinnings of LPP are capable of supporting a legitimate claim of public interest immunity.

The Guidelines note that questions going to matters covered by LPP might properly be subject to a public interest immunity claim by the responsible minister. Any such claim would be made consistent with the process outlined in paragraphs 4.5.1 – 4.5.5 of the Guidelines and the Order of the Senate of 13 May 2009.