



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

Senator Rachel Siewert
Chair
Community Affairs References Committee
PO Box 6100
Senate
Parliament House
CANBERRA ACT 2600


Dear Senator Siewert

Public Interest Immunity Claim – Legal Advice with respect to Income Compliance Programme

I refer to the Inquiry into Centrelink's compliance program and the public hearing on 16 December 2019, from which a number of Questions on Notice arose that relate to legal advice provided with respect to the Income Compliance Programme—including how many times legal advice has been sought, the source of any such advice and the dates it may have been provided.

It has been the long-standing practice of successive Australian Governments not to disclose 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)

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 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. Similarly, the disclosure of privileged legal advice may compromise the Commonwealth's legal position and prejudices the adjudication of matters under active consideration by the judiciary.

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.

I note these are not hypothetical considerations, with cases currently under active adjudication in relation to the Department of Human Services' (Service Australia) Income Compliance Programme, following filings in the Victorian Registry of the Federal Court of Australia, including a class action filed with the Court in November 2019.

Further, whilst I acknowledge that it may often be appropriate for an official to disclose who provided legal advice and when it was provided, having regard to the class action proceedings before the Federal Court and the specific matters of claim in that matter, including a claim of negligence, I consider there are compelling reasons to also keep that information confidential as the disclosure of this information may materially affect the Commonwealth's position.

Accordingly, I claim public interest immunity over the confidential legal advice discussed above and the details surrounding any such advice, including the frequency at which that legal advice has been sought, the source of any such advice and the dates it may have been provided.

Yours sincerely

Stuart Robert