



Richard Glenn
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Dear Mr Glenn

Submission to the Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010

As Parliamentarian Librarian I wish to make the following submission to the review of freedom of information (FOI) legislation being conducted by Dr Allan Hawke.

As you would be aware, the view of successive governments and presiding officers of the Parliament had been that the *Freedom of Information Act 1982* (FOI Act) did not apply to the parliamentary departments. However, this view was called into question earlier this year when the Australian Information Commissioner determined that the parliamentary departments of the Senate, House of Representatives and Parliamentary Services are subject to the FOI Act. The Commissioner has reissued his Guidelines under the FOI Act to reflect this position.

The broader issue of the application of the FOI Act to the three parliamentary departments is being addressed in a joint submission by the three departmental heads. My submission addresses paragraph 1(e) of the Review's Terms of Reference, and, in particular, whether it is appropriate for all the work of the Parliamentary Library to be subject to the FOI Act.

The statutory office of Parliamentary Librarian is established by section 38A of the *Parliamentary Service Act 1999*. Section 38B of that Act specifies that the key function of the Parliamentary Librarian is to provide high quality information, analysis and advice to Senators and Members in support of their parliamentary and representational roles. This function is to be carried out in a timely, impartial and confidential manner, having regard to the independence of the Parliament from the Executive.

I have sought clarification from the Commissioner regarding the status of Library services under the FOI Act. As noted above, section 38B of the Parliamentary Service Act specifies that the Librarian's function is to provide 'high quality information, analysis and advice', in a 'timely, impartial and **confidential** manner'. However, the Commissioner has advised that he considers that this declaration is too general to provide a blanket exclusion from the FOI Act. In the Commissioner's view, client advices as a class of document are not, therefore, entitled to prima facie protection from disclosure.

Furthermore, while requests and advices between parliamentarians and the Library may in many or most cases qualify for specific exemption under the FOI Act (for example under section 45 – breach of confidentiality and section 46 – infringes the privileges of parliament), the Commissioner advises this may not be free from doubt in all cases. Therefore any application for access to such documents under the FOI Act would need to be considered on its individual merit.

I am extremely concerned by these developments. Parliaments require timely and accurate information and advice to do their work effectively. The functions of parliamentarians have become increasingly complex and the role of the Library in assisting Senators and Members remains essential and highly valued. The provision of confidential and individually commissioned analysis and advice to assist and support clients in their parliamentary duties is fundamental to the Library's service.

Although existing exemptions may apply to potential FOI requests for Library documents, it cannot be said with certainty that they would apply to all such requests. The consequence is that information, analysis and advice provided by the Library is not as fully protected from release as the Parliament clearly intended it should be. Senators and Members may become hesitant to seek such analysis from the Library without the certainty that their request and the information provided in response would not be released under the FOI Act.

As the Joint Chairs of the Joint Standing Committee on the Parliamentary Library note in their submission to this inquiry, "subjecting client requests and advice to the FOI regime is contrary to the will of the Parliament as set out in the Parliamentary Service Act, and would have the effect of jeopardising the Parliamentary Librarian's ability to carry out her statutory obligations to provide a confidential service 'having regard to the independence of Parliament from the Executive.'"

I note that the Parliament has recently enacted amendments to the FOI Act to strengthen the exemptions for the newly established Parliamentary Budget Office (PBO). The Library also plays an important role in serving the Parliament. Its functions are in many ways similar to those of the PBO; and analysis and advice provided to Senators and Members from the Library warrants the same assurance of protection from disclosure as that provided by the PBO. I submit, therefore, that the FOI Act should be amended as a priority to provide the Parliamentary Library with a similar exemption from the FOI regime. Given the importance of this issue to the Library's independence and integrity, such amendments should also operate retrospectively.

There are several forms that the exemption might take.

For example, it could be a blanket exclusion similar to the PBO exemption. Under this model, Division 1 of Part I of Schedule 2 of the FOI Act would be amended to add the Parliamentary Library and the Parliamentary Librarian to the list of exempt agencies.

This model has several advantages. It is straightforward and Senators and Members would be left with no doubt that their communications with the Library would always remain confidential. Logically and consistently this model would mean that two bodies with similar functions (the PBO and the Library) are treated in an identical fashion under the FOI Act. However, it would not enable access under the FOI Act to Library documents of an administrative nature.

The other option is a partial exemption and this could follow two different drafting models.

One approach would be to follow the model of exemption that currently applies to courts. Section 5 of the FOI Act provides that the Act does not apply to any request for access to a document of a court unless the document relates to matters of an administrative nature. Following this model, the FOI Act could be amended to provide that the Act does not apply to any request for access to a document of the Parliamentary Library unless the document relates to matters of an administrative nature. Such an approach makes clear that the Library, in providing a service to the Parliament is, like the courts, independent of the Executive.

Another approach would be to provide an exemption in respect of particular documents. Under this model, Part II of Schedule 2 of the FOI Act would be amended to provide that the Parliamentary Library would be exempt in relation to documents concerning the performance of a function or the exercise of a power under paragraph 38B(1)(a) of the Parliamentary Service Act. This would have the effect of exempting from the FOI regime the Parliamentary Librarian's functions of providing information, analysis and advice to Senators and Members, but would not exempt the Parliamentary Librarian's other responsibilities within the Department of Parliamentary Services (as set out in paragraph 39B(1)(b)).

The advantage of these partial exemption models is that they would protect the Parliamentary Library's confidential relationship with its parliamentary clients, while at the same time ensuring that the Library is open and transparent about its administrative operations.

In the interests of transparency and accountability, I believe a partial exemption is to be preferred. However each of the models would provide the protection necessary to allow the Parliamentary Library to continue to provide impartial, high quality and confidential information, analysis and advice to the Parliament. In my view, without such an exemption, the Parliamentary Library's effectiveness and integrity will be compromised.

Yours sincerely



Dr Dianne Heriot
Parliamentary Librarian

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