

Senate Finance and Public Administration Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Dear Madam/Sir

### **Inquiry into Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009**

Subsequent to a critical report by the Australian National Audit Office, the Department of Finance and Deregulation established the 'Independent Panel' to provide advice and recommendations to Government addressing a range of issues but primarily to improve clarity concerning uses to which parliamentary entitlements can be put, and to improve the openness and accountability of the system. The entitlements review is to have regard to a range of matters including entitlements provided at Parliament House. That review will undoubtedly recommend the increase of the regulatory burden on government by proposing that further information regularly be made available to the public through the tabling process. It would be far more regulatory efficient for these matters to be dealt with through an increase in scope of the FOI Act to cover the Parliament.

### **Openness and Accountability**

*"The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information."*<sup>1</sup>

### **Key Points**

- Australia's liberal democratic system of government is underpinned by a constitutional framework, which establishes the rule of law and defines the limits of government power and its political institutions<sup>2</sup>
- Australia's system of government is formed around the Parliament, the Executive and the Judiciary, and the notion that their separation is paramount in a system of checks and balances. The Australian

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<sup>1</sup> Australian Law Reform Commission/Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, Report No. 77 No. 40, December 1995, p. 12.

<sup>2</sup> Parkin, A & Summers, J 2006, 'The Constitutional Framework', in A Parkin, J Summers & D Woodward (eds), *Government, politics, power and policy in Australia*, 8<sup>th</sup> ed, Frenchs Forest, Pearson Education Australia, p. 46.

Constitution and the two Houses of Parliament reflect the extent to which separation and accountability are paramount to preserving democracy in Australia. Accountability is dependent upon the availability and flow of relevant information.

- Tony Fitzgerald, AC, QC, architect of Queensland's anti-corruption reforms has indicated that secrecy impedes accountability whilst 'knowledge is quite literally power,' enabling citizens to effectively participate in the political process.<sup>3</sup> Accountability is therefore dependent upon the availability and flow of relevant information.
- Citizens require information from the Parliament, the Executive and the Courts to enable effective representative democracy.
- Open government enables public scrutiny through the maximum disclosure of information about all arms of government. Public scrutiny reduces the need for prescriptive regulation and the cost of bureaucratic checks and balances.
- Public scrutiny of the use of public funds is fundamental to representative democracy. Public scrutiny, as an element of any accountability mechanism, fundamentally strengthens the mechanism's effectiveness. Public scrutiny enhances the ability of the elected representatives to concentrate on issues of importance to the community rather than defending issues arising where there has been a lack of public scrutiny over time.
- The business of both Houses of Parliament involve the use of public funds and should be subject to public scrutiny through the availability and flow of relevant information.
- Expanding the scope of the FOI Bill to cover the Parliament will build a stronger foundation for more openness in government and parliamentarians will be seen to be leading the pro-disclosure culture by subjecting themselves to the same law that applies to the other two arms of government, namely, the judiciary and executive government.

### **Consideration of the right to information (which permits public scrutiny) about the administration of the Parliament**

The Senate Standing Committee on Legal and Constitutional Affairs undertook an inquiry and reported on the *Freedom of Information Bill 1978*. The Bill at that stage included only the executive branch of government, excluding the operations of the courts and the Parliament.

With respect to the courts, the Standing Committee proposed instead that the exemption be limited to the non-administrative functions of the courts, commenting:

*We have reservations about the total exclusion for the courts. There is obviously very good reason for governments not imposing requirements which would interfere with the independence of the judiciary and the*

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<sup>3</sup> See Lane, W 2009, *Queensland Administrative Law*, Loose-leaf, Lawbook, Balmain, NSW at [2.20].

*proper administration of justice....There are other documents of a more clearly administrative character associated with the function of registries and collection of statistics on a host of matters associated with judicial administration which, equally clearly, should be opened up to public gaze...The very existence within the Commonwealth Attorney-General's Department of a Division of Judicial Administration is testimony to the ability to distinguish between the judicial and administrative aspects of the operation of the courts.*

The scope of Bill was subsequently expanded to include the administrative functions of the court.

With respect to the Parliament, the Committee commented:

*The total exemption for parliamentary departments conferred by clause 3 of the Bill appears even less justified than in respect of the courts. The only official justification is that the Freedom of Information Bill is concerned with the granting of access to the documents of the Executive. Seen as an exercise in ensuring accountability of governmental decision making, there clearly is a difference between the executive and parliamentary departments. But that is not to say that there is not a corresponding need to open up for public inspection the activities of the parliamentary departments. The public has a legitimate interest in ensuring, first, that its parliamentary representatives are properly going about their tasks of representation and executive scrutiny, and secondly, that its parliamentary representatives are properly assisted to fulfil those functions.*

The Committee expressed the view that were no expansion of the scope Bill contemplated, "parliamentary departments should be encouraged to act as if the legislation were applicable to them".

In its 1995 report *Open Government: A review of the Federal FOI Act 1982* the ALRC/ARC recommended that parliamentary departments be made subject to the FOI Act. This was supported by a number of submissions including one from the Clerk of the Senate. The Department of the Senate had apparently always acted as though it were subject to the FOI Act, releasing documents unless they would have fallen within the exemption that exempts documents, the disclosure of which would infringe parliamentary privilege.

This recommendation has not been taken up in the Commonwealth Government's recent review of the FOI legislation, despite an informed citizenry being essential to the effective operations of representative government, and to meeting the stated objectives of many of the Commonwealth Government's open government reforms which are designed to:

- inform the community of the government's operations
- ensure effective oversight of expenditure of public funds
- enhance government's accountability
- promote open discussion of public affairs
- recognise that information in the government's possession or under the government's control is a public resource

- contribute to positive and informed debate on important issues or matters of serious interest
- assist inquiry into possible deficiencies in the conduct or administration of an agency or official.

The scope of the UK FOI Act and the Scottish FOI Act extend to the respective Parliaments.

## **Conclusion**

The Department of the Senate's experience, as well as that in the UK and Scotland shows that there are no practical barriers to the Parliament being the subject of FOI laws so that parliamentary privilege is not infringed. The ALRC and the Standing Committee Reports show that there are no cogent policy reasons for the exclusion of the administrative functions of the Parliament from FOI laws. On the contrary there are very cogent policy reasons for the expansion of the scope of the FOI Bill to include the parliamentary departments.

Yours sincerely



Julie Kinross  
**Queensland Information Commissioner**