

Parliamentary Service Amendment (Freedom of Information) Bill 2013

Introduced into the House of Representatives on 29 May 2013

Portfolio: Leader of the House

Summary of committee view

1.30 The committee seeks clarification as to why it is necessary to provide a complete exemption for parliamentary departments and officers from the application of the *Freedom of Information Act 1982* and whether this is proportionate to the objective of protecting the integrity of parliamentary processes and the confidentiality of advice.

Overview

1.31 This bill seeks to amend the *Parliamentary Service Act 1999* to provide that a Department of the Parliament, or a person who holds or performs the duty of an office established under that Act, is not a 'prescribed authority' for the purposes of the *Freedom of Information Act 1982* (FOI Act). This would exempt parliamentary departments and office holders under the Act from the application of the FOI Act. The bill provides that the FOI Act is taken to have effect as if each parliamentary department and office holder had never been taken to be a prescribed authority since 1999 (from the date of application of the *Parliamentary Service Act 1999*).

1.32 The bill is intended to correct a recently discovered but unintended consequence of the *Parliamentary Service Act 1999* which inadvertently applied the FOI Act to the Department of the Senate, Department of the House of Representatives and the Department of Parliamentary Services. When the Parliamentary Budget Office was created it was specifically exempted from the operation of the FOI Act and is not affected by this bill. The committee notes that a review of the operation of the FOI Act is currently being undertaken by Dr Allan Hawke AC, which includes examining the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act. The report was due to be provided to government by 30 April 2013, but has yet to be tabled in Parliament.⁶

Compatibility with human rights

1.33 The bill is accompanied by a self-contained statement of compatibility which states that the bill engages the right to freedom of expression, including the right to

6 See Review of Freedom of Information Laws, including the terms of reference, available at: <http://www.ag.gov.au/Consultations/Pages/ReviewofFOIlaws.aspx>

receive information, in article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19(2) of the ICCPR provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

1.34 This right is not absolute and may be limited; article 19(3) provides:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

1.35 The statement of compatibility states that in exempting all parliamentary departments and officers from the application of the FOI Act, while this may limit the right to receive information, this limitation 'is reasonable and proportionate to its objective of protecting the integrity of the parliamentary service'.⁷ In particular, the statement notes:

The Bill protects public order by facilitating public administration, as it protects the integrity of the parliamentary departments. ...

By its very nature, much of this advice is provided on a confidential basis to senators and members to inform their parliamentary work and deliberations, and to assist them in carrying out their constitutional duties as members of Parliament ...

Although some exemptions within the FOI Act may apply to documents held by the parliamentary departments, there is no certainty that such exemptions would apply to all FOI requests. In the absence of an exemption from the FOI Act to ensure confidentiality, senators and members may be reluctant to request such advice, leading to a deleterious effect on the work of the Parliament. Additionally, arguably such advice should not be subject to the FOI Act because FOI disclosure could lead to such advice becoming part of the political process, thereby potentially jeopardising the ability of parliamentary officers to carry out their legislative responsibility of providing "non-partisan and impartial" advice and services to members of parliament.⁸

7 Statement of compatibility, p. 4.

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1.36 The committee accepts that the bill seeks to achieve a legitimate objective of protecting the integrity of the parliamentary process and the necessary confidentiality of advice provided to senators and members. The committee also considers that, in exempting the application of the FOI Act, there is a rational connection between the limitation and the objective. However, it is not clear to the committee why it is necessary to exclude parliamentary departments or officers from the entire application of the FOI Act. The statement of compatibility notes that some exemptions in the FOI Act may apply to documents held by parliamentary departments, but that this may not apply to all FOI requests. It is unclear to the committee why it is necessary to exclude all documents held by parliamentary departments from the FOI Act, rather than strengthen the existing exemptions. The committee notes that this is the approach taken in the United Kingdom, where parliamentary departments are subject to freedom of information laws, but there are exemptions, for example, for parliamentary privilege.⁹

1.37 The committee notes that the Leader of the House, in introducing the bill, stated that this bill 'is an interim measure to preserve the right of the Parliament to make a deliberate decision about the FOI status' of the various departments and noted that there may be alternative approaches, giving the courts as an example whereby the separation of powers is respected 'by the application of the FOI Act to documents of an administrative character only'.¹⁰ However, while the intention may be that the bill may be an interim step only, there is nothing on the face of the legislation that limits it in this way.

1.38 The committee intends to write to the Leader of the House to seek clarification as to why it is necessary to provide a complete exemption for parliamentary departments and officers from the application of the FOI Act and whether this is proportionate to the objective of protecting the integrity of parliamentary processes and the confidentiality of advice.

9 The UK *Freedom of Information Act 2000*, lists the House of Commons and the House of Lords as public authorities, but has exemptions for parliamentary privilege (s 34); information that could prejudice public affairs (in the opinion of the Speaker or Clerk) (s 36); personal data (s 40); material provided in confidence (s 41) etc.

10 See Second Reading Speech of Mr Albanese, Leader of the House, 29 May 2013.