

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Group 3

Question No. 4

Senator Xenophon asked the following question at the hearing on 24 February 2014:

Senator XENOPHON: Welcome. I acknowledge the National Archives as a critical repository of the nation's memory. Could you, given the very limited time, indicate how you interact with researchers, government departments and the broader community? In particular, how do you respond to access groups? Are there other groups from whom you receive access requests apart from those three?

Mr Fricker: It is a fairly broad question.

Senator XENOPHON: Because I only have a few minutes, you may want to take that on notice. But you understand I just want to set the context of the questions I am asking you.

Mr Fricker: Yes.

...

Senator XENOPHON: I will put some of these questions on notice. In terms of a section 36 certificate, could you indicate how often they have been issued in the last five years and give examples?

Mr Fricker: For the statistics that you are after I might need to take that on notice to accumulate those statistics over the last several years. The process of a section 36 certificate—I do not know if the Secretary of the Attorney-General's Department may wish to—

Mr Wilkins: I cannot illuminate you on that.

CHAIR: I think it might be better taken on notice.

Senator XENOPHON: Could you take it on notice?

Mr Fricker: I will take it on notice because it is a technical legal procedure. I will be delighted to take that on notice and provide a fulsome response.

The answer to the honourable senator's question is as follows:

The Archives' National Reference Service responds to access requests from the public with information, guidance and copies of records. These services can be accessed either by visiting our reading rooms, by submitting requests through our website or by telephone. Researcher groups include professional, local and family historians, academics and staff from Commonwealth agencies.

The Archives has a network of reading rooms in each state and territory capital which provides members of the public and official researchers with access to original records. The Reference Service also assists researchers not able to visit our offices by providing guidance in locating relevant information held in the collection. For Government agencies access requests for records under 20 years old are covered under lending arrangements consistent with s 30 of the Archives Act 1983. Other key interactions with Departments relate to authorisation of retention and destruction of records, transfer of records to the Archives, setting standards, provision of advice, and delivery of training, forums and other events.

Researchers from international archival organisations and government delegations often make use of our services, through visiting the reading rooms in Australia to view original records. The Archives engages with international stakeholders through responding to requests for access to specific records relevant to their country or topic of interest, and hosting visits from international delegations. International stakeholders include Ambassadors and diplomatic staff resident in Australia and representatives from international interest groups. A range of social history, genealogy and indigenous groups consult the Archives and access the collection. Australian

Educational institutions including schools and universities access the Archives education program and collection as do national research and history associations, journalists and media groups.

The Attorney-General has issued a public interest certificate 5 times in the last 5 years under s 36 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) in relation to matters where decisions by the National Archives of Australia have been challenged. These certificates were issued on 9 September 2010, 14 March 2012, 28 May 2012, 23 January 2014 and 17 February 2014.

Where there is a need to protect confidential evidence in Tribunal proceedings the Archives may ask the Attorney-General through his Department to issue a public interest certificate (the certificate) under s 36 (1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act). The confidential evidence usually relates to matters contained in certain classified affidavits proposed to be relied upon in the proceedings and information concerning the matters canvassed in those affidavits.

If the Attorney-General's Department (AGD) receives a request from the Archives it writes to the applicant in the proceedings informing the applicant of the request and inviting the applicant to identify any issues that may be relevant to the Attorney-General's decision on whether to issue a certificate. Any issues identified by the applicant, along with the Archives' request and the confidential evidence, are given to the Attorney-General so he can make an informed decision on the matter. If the Attorney-General decides to issue a certificate he is not deciding whether the material that is the actual subject of the proceedings should be exempt from release - that is a decision for the Tribunal.

If the Attorney-General issues a certificate the Archives informs the Tribunal and provides the certificate to the Tribunal once it is received from AGD. The Tribunal is then required to do all things necessary to protect the confidential evidence from being disclosed to any person other than a member of the Tribunal as constituted for the purpose of the proceeding (section 36(2) of the AAT Act). The certificate prevents the appellant and the public from being given access to any classified, confidential evidence, including:

- any such evidence witnesses may give orally at the hearing;
- the names of witnesses which are to remain confidential; and
- the submissions made by the Archives to the Tribunal.

The confidential evidence is still made available to the Tribunal which will consider the merits of the Archives' exemptions in the usual way and will be able to ask questions on behalf of the applicant. Without the certificate the Tribunal may permit the appellant or the public more generally to be present to hear evidence given in support of the exemption claims.

List of AAT hearings:

- 9 September 2010– Fernandes and National Archives of Australia
- 14 March 2012– Fernandes and National Archives of Australia
- 28 May 2012– Fernandes and National Archives of Australia
- 23 January 2014– Fernandes and National Archives of Australia
- 17 February 2014– Smyth and National Archives of Australia