

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

Group: 2

Program: 1.1

Question No. BE15/111

Senator Rhiannon asked the following written question from the 27 and 28 May 2015 hearing:

I refer to an article in the Fairfax press on 25 May 2015, Abbott government skirts Parliament and muzzles the FOI watchdog, by three former justices of the Supreme Court of Victoria, Tim Smith, David Harper and Stephen Charles: <http://www.smh.com.au/comment/abbott-government-skirts-parliament-and-muzzles-the-foi-watchdog-20150526-gh9ju2>

In that article they raise serious concerns about the government circumventing the requirement for Parliamentary approval to dismantle the Australian Information Office (OAI) through legislative amendments, by defunding the OAI to a point it is no longer able to perform the duties its still-existing legislation requires it to perform:

1. The Constitution (section 61) states that the Executive Government's power extends to the "execution and maintenance of this Constitution and of the laws of the Commonwealth". It is accepted that "execution" means "giving effect to", meaning the Executive Government's power only extends to giving effect to the laws of the Commonwealth.

Under the Constitution the power to repeal laws does not rest with the Executive Government but with the Parliament.

- a. It is argued the Government is no longer "giving effect to" the Australian Information Commissioner Act by defunding the Australian Information Office to the point it is no longer able to perform its role as required by the Act: Where does the Executive Government claim to get the Constitutional power to not only change a Commonwealth law but also do so in such a way as to effectively repeal it when it has no power to legislate?
- b. On what basis may the above mentioned actions of the Executive government be said to have given effect to and maintained the Constitution?
- c. What is the response to the suggestion the Government's above mentioned conduct is counter to the Constitutional demand that the Executive Branch of government is subject to the laws made by the Parliament and that it cannot act to alter the operation of the laws of the Parliament without its consent.
- d. What is the response to the concerns that the Government's actions constitute a failure to honour and maintain two fundamental principles underpinning our Constitution and our democracy: the rule of law and the separation of powers?

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

It would not be appropriate for the Attorney-General's Department to answer these questions as they are requests for legal advice.