

# **The Executive Documents Release Bill 2000**

**Report Number 15**

Standing Committee on Justice and Community Safety

June 2001

Legislative Assembly for the Australian Capital Territory



## **Committee membership**

Paul Osborne MLA (Chair)

John Hargreaves MLA (Deputy Chair)

Harold Hird MLA

Trevor Kaine MLA

Secretary: Fiona Clapin

## **Resolution of appointment**

That—

The following general purpose standing committees be established to inquire into and report on matters referred by the Assembly or, matters that are considered by the committee to be of concern to the community...

...a Standing Committee on Justice and Community Safety to examine matters related to administration of justice, legal policy and services, registrar and regulatory services, electoral services, consumer affairs, corrective, emergency and police services and fair trading and any other related matter .

## **Terms of reference**

Inquire into and report on:

- a) the Freedom of Information (Amendment) Bill 1998 (*referred on 28 May 1998*); and;
- b) the Executive Documents Release Bill 2000. (*referred on 9 March 2000*)

by 19 June 2001 (as amended on 29 March 2001 and 13 June 2001).

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# **SUMMARY OF RECOMMENDATIONS**

## **Recommendation 1**

**The committee recommends that the Executive Documents Release Bill 2000 be amended to allow for release after six years instead of ten years.**

## **Recommendation 2**

**The committee recommends that the Executive Documents Release Bill 2000 should not apply retrospectively.**

## **Recommendation 3**

**The committee recommends that the bill be amended to provide public access to documents in a cost-effective manner.**

## **Recommendation 4**

**The committee recommends that the bill be amended to provide for a review process.**

# **1. Introduction**

- 1.1. The Executive Documents Release Bill 2000 was put forward in the Assembly by Mr Michael Moore MLA.
- 1.2. On 9 March 2000, the Legislative Assembly referred the Executive Documents Release Bill 2000 to the committee for inquiry and report as part of the committee's inquiry into the Freedom of Information (Amendment) Bill 1998.
- 1.3. On 14 March 2001 Mr Moore wrote to the committee chair urging that the inquiry to be expedited.
- 1.4. On 29 March 2001 the Legislative Assembly set a reporting date of 13 June 2001 for the inquiry into the Executive Document Release Bill 2000 which was later amended to 19 June 2001.<sup>1</sup>
- 1.5. There is no set reporting date for the Freedom of Information Amendment Bill 1998 inquiry but the committee expects to report in the near future.

## **Objectives of the bill**

- 1.6. The underlying principle objective of the bill is to increase government openness and accountability.
- 1.7. The practical objective of the bill is to require the annual release of ACT Government cabinet papers after 10 years have passed from the meeting at which they were considered.
- 1.8. Under this legislation, the papers would be released as an annual batch, with an entire calendar year's papers released on a specific date in the eleventh year. Exemptions are provided whereby documents are omitted from release if it is in the public interest, or in the interests of individual privacy, to do so.

## **Conduct of the inquiry**

- 1.9. The committee wrote to relevant organisations inviting submissions to the inquiry but it attracted very little interest. Submissions

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<sup>1</sup> The change of the reporting date from 13 June 2001 to 19 June 2001 was passed by the Assembly on 13 June 2001.

were received from the ACT Government, the Australian Society of Archivists and two individuals.

1.10. The ACT Government submission was received on 31 May 2001, less than two weeks before the committee was required to report. This created serious logistical problems for the committee.

1.11. It was disappointing to receive the submission so late in the process, particularly as the committee chair had urged the Chief Minister last year (both orally and in writing)<sup>2</sup> to provide a Government submission to this important inquiry in time for the committee to give it adequate consideration.

1.12. The lateness of the Government submission meant the committee needed to request a one-week extension.

1.13. The lateness of the Government submission has also meant the committee did not have time to properly consider some of the issues raised by the Government. These issues are, however, summarised in the report for the information of Members.

1.14. If the Government submission had been received earlier it would have been possible to make comments and/or recommendations on all of the issues put forward by the Government.

1.15. On 15 June 2001, the committee received advice from Mr Michael Moore MLA, the bill's author, that he intended addressing issues raised in the Government submission through amendments.<sup>3</sup>

## **Relationship with inquiry into the Freedom of Information (Amendment) Bill 1998**

1.16. The Executive Documents Release Bill 2000 was referred to this committee for consideration as part of its inquiry into the Freedom of Information (Amendment) Bill 1998. The rationale for this was that the FOI (Amendment) Bill 1998 includes reference to executive documents and it made sense for the two bills to be considered together.

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<sup>2</sup> For example Letter from Chair to Chief Minister 20 October 2000.

<sup>3</sup> Letter from Michael Moore MLA to Paul Osborne MLA, 15 June 2001.

1.17. The committee has not yet finalised its report into the Freedom of Information (Amendment) Bill 1998. However it is clear from submissions from the community and the Government that there are problems with the bill in its current form. While the committee cannot pre-empt its recommendations on that bill here, it can state that recommendations on the Executive Documents Release Bill 2000 in this report have been developed with an awareness of the likely direction of the recommendations on the Freedom of Information (Amendment) Bill 1998.

## 2. BACKGROUND

### Situation in the ACT

2.1. The Chief Minister's Department holds a collection of Cabinet records dating back to the commencement of ACT self-government in 1989. The records include:

- Cabinet decisions;
- registers of submissions, decisions and draft submissions;
- Cabinet submission files for each submission considered by Cabinet; and
- Cabinet agendas.<sup>4</sup>

2.2. At present, the ACT's *Freedom of Information Act 1989* exempts executive documents from release (section 35) and there are no formal arrangements for the release of archival documents. In short, there are currently no general rights of public access to ACT Cabinet documents. Access is limited to the Auditor General, courts and investigatory bodies, and former Ministers for refreshment of memory under arrangements outlined in the Cabinet Handbook. Archival legislation is, however, being developed which will allow for the release of documents after a period of time, including Cabinet records, subject to other exemptions for specific subject matter.<sup>5</sup>

### Other jurisdictions

2.3. In most Australian jurisdictions, general statutory rights of access to government records are provided through a two-tiered approach. Freedom of information legislation provides for access to records that are generally in current use in all states and the Commonwealth. Access to archival records is provided under 'Archives' or 'Records' legislation in all jurisdictions except the Territories. Generally, under archival legislation access is provided once the records have reached a prescribed age, which may be between 25 and 55 years depending on the jurisdiction

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<sup>4</sup> Source: ACT Government Submission, p2.

<sup>5</sup> Source: ACT Government Submission, p2.

and the records concerned. Generally, freedom of information and archival legislation is constructed to apply to all government records.<sup>6</sup>

#### Commonwealth Cabinet records

2.4. The presentation speech and Explanatory Memorandum for the Executive Documents Release Bill 2000 indicate that an annual release of ACT Cabinet documents is envisaged, similar to that undertaken for the Commonwealth's Cabinet records under the *Archives Act 1983*.<sup>7</sup>

2.5. The *Archives Act 1983* provides that records become available for public access when they are 30 years old, except where one or more of the Act's exemption provisions apply, and with the specific exemption of Cabinet notebooks which are closed until they are 50 years old. Under the *Archives Act 1983*, members of the public must apply for access to specific records. The records are then examined and any exemptions from access are claimed by the National Archives before the records are made available.<sup>8</sup>

2.6. The National Archives releases Cabinet documents in advance of requests from the public. This practice, which goes beyond the requirements of the legislation, allows the National Archives to manage access to Cabinet records more effectively given high levels of demand for access to these particular records and the complexity of the process of clearing documents for access. The annual release is also a significant public relations opportunity for the National Archives.<sup>9</sup>

2.7. The Government submission stated:

The annual release of Commonwealth Cabinet records follows a process of examination and preparation, which is lengthy, resource intensive and complex, especially where national security classified information is involved. The high level of public demand for access to these records reflects their national and social significance as well as the publicity given to their release.<sup>10</sup>

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<sup>6</sup> *ibid*

<sup>7</sup> *ibid*

<sup>8</sup> Source: ACT Government Submission, pp2-3.

<sup>9</sup> *ibid*

<sup>10</sup> ACT Government Submission, p3.

2.8. Unlike the States the Commonwealth only provides for access to Cabinet or Executive documents under its archival arrangements. The Commonwealth *Freedom of Information Act 1982*, as with the ACT *Freedom of Information Act 1989*, currently exempts Cabinet documents from release.

#### State Cabinet records

2.9. The states' archival legislation provides for broadly similar arrangements to those operating in the Commonwealth. State government Cabinet records are generally closed for a period of time (from 25 to 55 years) and access may be provided following written application and clearance of the records.

2.10. According to the ACT Government 'the Freedom of Information legislation operating in a number of states provides arguably the more significant means of access to state Cabinet records'.<sup>11</sup>

2.11. In New South Wales, Victoria, Tasmania and Western Australia, FOI legislation provides that Cabinet documents are exempt from public access until they are 10 years old. After that time, they may still be exempt if they fall within one of a number of other exemption categories. South Australia's FOI Act makes similar arrangement for access to Cabinet records once they are 20 years old. In all cases, as under the Commonwealth *Archives Act 1983*, access is considered in response to a written application and the legislation provides other specific exemptions from release that may be claimed, where appropriate.

2.12. The ACT Government submission stated that:

Due to delayed commencement provisions, the arrangements for access to Cabinet records under FOI legislation have become operational only in New South Wales, Victoria and South Australia. Each of these states has reported very little demand for access to Cabinet records, in the order of one or two requests per year.<sup>12</sup>

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<sup>11</sup> ACT Government Submission, p3.

<sup>12</sup> ACT Government Submission, pp3-4.

### 3. Community and Government views

#### Government position

3.1. The Government submission states:

the Government supports the principle of increasing government openness and accountability. As Cabinet is the central decision-making body for the Government, it is appropriate that the records of Cabinet be made accessible after a suitable period of time and subject to certain restrictions to safeguard individual privacy and the concept of collective responsibility for decisions.<sup>13</sup>

3.2. However the Government considers the practical effect of the Bill would be to fix in legislation a regime for access to Cabinet documents which is ‘administratively cumbersome and unnecessarily resource intensive, especially given the likely level of demand for access to these records’.

3.3. The Government also considers the ‘public interest’ ground for exemption from access would be uncertain in its application. The Government therefore seeks changes which would more clearly specify criteria that may be used to withhold documents from public scrutiny.

3.4. The Government suggested that the treatment of the review of decisions regarding access should be of the same standard as exists in similar legislation.<sup>14</sup>

3.5. The ACT Government submission explained the advantages and disadvantages of earlier release of executive documents:

A strict interpretation of the convention of Cabinet confidentiality would argue against the release of Cabinet documents at any time. The rationale for the convention is that Cabinet acts collectively to consider and determine complex issues with all the relevant information and it is important for the purposes of good government that

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<sup>13</sup> ACT Government Submission, p1.

<sup>14</sup> *ibid*

individual member's views, and the interchange of those views, remain in camera.

In this way, individually and collectively, Cabinet members are able to be fully candid. Cabinet members can properly debate all relevant issues freely, without the potential for specific or sectional interests to use individual views or performance to weaken Cabinet's collective performance.<sup>15</sup>

It can be argued equally strongly from a community perspective that this protection need only remain for the political life of the participants. Further, it can also be argued that the need for the protection of Cabinet confidentiality dissipates over time once Cabinet's decisions are fully implemented. This may particularly be the case in state and territory jurisdictions, where the decisions of Cabinet are, generally, unlikely to have the same long-term sensitivity as those of the national Cabinet. For example, state and territory jurisdictions generally do not consider national defence, security and foreign affairs matters. Such decisions often have significance and sensitivity that may last for several decades.<sup>16</sup>

3.6. The Government submission further stated:

A period of 6 years should be sufficient, in most cases, to allow for the sensitivities within ACT Executive documents to have lessened. There will be some matters, however, for which there will be a sensitivity or a genuine public interest in the records (or part of them) remaining confidential after 6 years. The exemptions provided in the FOI Act would be likely to cover the most probable grounds for any such residual sensitivity.

3.7. The Government acknowledges that if the ACT has a shorter closure period than other jurisdictions (which generally have a minimum of 10 years), there may be potential for the ACT to become the default mechanism for national access to documents where the ACT seeks to

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<sup>15</sup> ACT Government Submission, p4.

<sup>16</sup> *ibid*

conform with national legislation or policy. However, this could be overcome by not releasing interstate, other state and cross-jurisdictional material until 10 years has expired.

## **Community submissions**

3.8. **The Society of Archivists** made the following points in their submission:

- the release of executive documents should be considered within the framework of whole-of-government archives regime underpinned by relevant legislation;
- the proposed ACT Government Archivist should have decision-making responsibility for release of all ACT Government records (including executive documents), in consultation with record creators, such as the Legislative Assembly;
- any regime for providing access to government records must be adequately resourced;
- a sunset clause is needed on exemption provisions for the release of records;
- no record should be permanently exempted from public access;
- an independent ACT Government Archivist should be empowered to produce guidelines on all aspects of decision-making about the release of records in order to ensure consistent and equitable decision-making; and
- there should be provision for appeal against decisions made under the act.

3.9. **Mr Ron Fraser** expressed strong support for the general thrust of the Executive Documents Release Bill 2000. He argued there is too great a protection in our system of government of documents relating to cabinet decisions but acknowledges it is difficult to know where to draw the limits of that protection.

3.10. **Mr Tom Campbell** urged the committee to reject the bill on the following grounds:

- the bill appears to be ‘nothing more than the desires of a voyeur to satisfy his or her fetish’;

- decision-makers are entitled to their rest and not to be hounded by people questioning decisions made years ago.<sup>17</sup>

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<sup>17</sup> Mr Tom Campbell, Submission.

## 4. Committee conclusions

4.1. The key issues considered by the committee were:

- key principles;
- the time frame for release of executive documents; and
- mechanisms for public release, exemptions and appeals.

### Key principles

4.2. The committee supports the bill's principle objective of improving government openness and accountability.

4.3. The committee detects a bipartisan spirit supporting improved transparency and openness with the Labor Party's recent policy announcements and the Liberal Government's recent policy announcements on the public service.<sup>18</sup>

### What is the appropriate time frame?

4.4. The bill provides for the annual release of ACT Government cabinet papers after 10 years have passed from the meeting at which they were considered, with an entire batch released on a specific date in the 11<sup>th</sup> year.

4.5. Since the bill was referred to the committee, the ACT Labor Party expressed public support for a release of cabinet documents after 6 years. The Government submission supports this new time frame, as does Mr Moore, the author of the bill.<sup>19</sup>

4.6. The committee also supports the concept of a shorter time frame, on the basis that it promotes open, transparent and accountable Government.

4.7. The committee has received no substantial evidence supporting the case against the ten-year period. Because the six-year period was only flagged after written submissions were received and after public hearings

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<sup>18</sup>

<sup>19</sup> Letter from Mr Moore MLA to committee chair, 14 March 2001.

were held, the committee did not directly test the six-year concept with submitters.

4.8. The majority of the committee considers it is reasonable for executive documents to be released after six years. This should not have any adverse consequences. A release of executive documents should, instead, promote good government through greater transparency and accountability. It should have the effect of promoting community confidence in political decision-making with interested citizens having the opportunity to scrutinise relevant documents within a reasonable time frame.

4.9. One member of the committee, Mr Hird MLA, did not support the release of Cabinet documents after six years and argued instead for a ten-year period before release.

### **Recommendation 1**

#### **4.10. The committee recommends that the Executive Documents Release Bill 2000 be amended to allow for release after six years instead of ten years.**

4.11. The committee considered whether this bill should be applied retrospectively and decided this would not be appropriate. The general principle of retrospectivity, is problematic in relation to any law. In this case, the committee envisages potential resistance by some officials and elected representatives who, in the past, have been involved in the Cabinet process on the understanding that their comments would not be released into the public arena.

4.12. When discussing the advantages and disadvantages of earlier release of government documents, the Government submission refers to the protection of participants in relation to their 'political life'. However, the committee notes that the retrospective application of the bill may have ramifications for individual officials and politicians previously involved with Cabinet decisions who have left 'political life' to work in the public or private sectors.

4.13. While many of these officials and elected representatives may have no problem with the release of executive documents relating to their work, it is possible some will object.

4.14. The committee believes it would be reasonable for the Government to consult with officials and elected representative involved with previous

Cabinet documents before enacting this law retrospectively. If none of those people object it may be appropriate to apply the law retrospectively in the future. Without this consultation, the committee does not support retrospective application of the law.

4.15. One member of the committee, Mr Osborne, did not see any problem with the Executive Documents Release Bill 2000 applying retrospectively.

## **Recommendation 2**

**4.16. The committee recommends that the Executive Documents Release Bill 2000 should not apply retrospectively.**

### **Outstanding issues- release, exemptions and appeals**

4.17. The committee noted that the Government submission raised concerns about the bill's approach to a number of issues. Three of the most serious issues seem to be the bill's approach to (1) public release, (2) exemptions and (3) review or appeals.

#### **Public release**

4.18. The Government considers 'the proposed access regime is administratively costly and inadequate in its approach to release'. The Government supports access in response to requests rather than by general release on a specified day.

4.19. The Government noted that the Executive Documents Release Bill 2000 would require the annual release of ACT Cabinet documents in a similar fashion to that undertaken by the National Archives. According to the Government, the wholesale public release would require the allocation of significant resources by the Government. The Government noted that given state experience of the interest in accessing such information under FOI legislation, it is unlikely that there would be sufficient level of demand for access to the records to justify such expenditure.

4.20. The Government argued that 'given that the level of demand for access to ACT Cabinet records is untested, and given the low level of demand for access to equivalent records in state jurisdictions', a regime should be established that is efficient and flexible and which could meet a range of possible demand. The Government suggested that this can be provided by arrangements which allow for access in response to a specific written request and have the capacity to be modified to meet a higher level of demand, should this eventuate.

4.21. The committee considers it appropriate that the bill be amended to provide for public access to records in a cost-effective manner. It may be

appropriate for papers to be promoted widely (including on the internet and in the gazette) and for interested citizens to be encouraged to apply for copies of papers of particular interest to them.

### **Recommendation 3**

**4.22. The committee recommends that the bill be amended to provide public access to documents in a cost-effective manner.**

#### **Exemptions**

4.23. The bill provides for the exemption from release of documents on three grounds: personal privacy; inter-governmental relations; and the public interest.

4.24. The Government found the arrangement for exempting documents in the bill to be of limited and uncertain scope.

4.25. The Government sought clearer specification of the criteria that can be used to withhold documents from public scrutiny.

4.26. According to the Government, this would provide members of the public with greater assurance that only legitimate and defined considerations could be used to withhold access. It would also preserve consistency in the treatment of the range of government documents for which access may be sought.

4.27. The Government suggested that the grounds be specified as they are in the FOI Act 1989:

- inter-governmental relations;
- business affairs;
- personal affairs;
- internal working documents;
- law enforcement and public safety;
- secrecy provisions in other legislation;
- legal professional privilege;

- damage to the economy
- damage to the financial and property interests of the Territory;
- material obtained in confidence;
- contempt of court or the Legislative Assembly;
- breach of companies and securities legislation.

4.28. The Government argued that these exemptions should apply only where the sensitivity of the information is current.

4.29. The Government also suggested that the means by which records are exempted from access should be clear, simple and not involve lengthy enforcement processes. In the Government's view, the processes involved in determining exemptions provided by the Bill 'appear unnecessarily complex and problematic'.

4.30. According to the Government;

The Bill provides differing mechanisms for the operation of the personal privacy and governance grounds of exemption. In the case of personal privacy, exclusion is given effect by the Chief Executive determining either a delayed release date or that a document is not an executive document. This is a novel approach that appears unnecessarily complicated. It would be preferable for a decision to be made simply that the records are withheld from access and for this decision to stand until there is a decision to the contrary. Such later decisions could be triggered by further application, review or other administrative processes. The FOI Act provides for this type of exemption process.

The mechanism for exemption on governance issues provides that the Chief Executive may determine a delayed release date. Such determinations must be laid before the Legislative Assembly within 6 sitting days of the original release date and be ratified by resolution of the Assembly within 3 months. Cabinet documents are a core record of the Executive. It would not be proper for the legislature to determine questions of access to executive documents. It would be preferable to have these matters decided within the Executive but to allow for review mechanisms that include

review to an independent body. The FOI Act provides such an approach.

4.31. The committee shares the Government's concerns and would support amendments to the bill which provide for clearer specification of exemption grounds and improved mechanisms for the operation of personal privacy and governance grounds of exemption.

### **Review/Appeal Mechanisms**

4.32. The Bill does not contain provisions for the review of access decisions.

4.33. The Government noted that a common approach in legislation dealing with access to government records is to provide for a stepped process involving internal review by agencies and external review by an independent body.

4.34. The committee shares the Government's view that it would be appropriate for the bill to be amended to provide for internal review and review by an independent body such as the Administrative Appeals Tribunal.

### **Recommendation 4**

**4.35. The committee recommends that the bill be amended to provide for a review process.**

Paul Osborne

Chair

18 June 2001

# Appendix 1-Submissions

## Submissions to Freedom of Information (Amendment) Bill 1998 and Executive Documents Release Bill 2000 inquiries

1. Regula Baker
2. ACT Ombudsman
3. The Law Society of the ACT
4. Cyclists' Rights Action Group
5. ACT Council of Social Service
6. ACT Government
7. Mr Tom Campbell\*
8. Australian Society of Archivists Inc\*
9. Mr Peter Bayne Law School ANU
10. Mr Ron Fraser\*
11. ACT Government\*

\*denotes those submissions which discussed the Executive Documents Release Bill 2000

## Appendix 2-Outstanding issues

The Government submission drew attention to the following problems with the bill:

- **Clause 3**      **Definitions – *executive document***

The definition given to executive documents is limited. If a regime for access were linked to the definition contained in section 35 of the FOI Act, access may be made available to more records after the closed period (ie 10 or 6 years).

- **Clause 3**      **Definitions – *release day***

The definition of release day in (a)(i) as the 11 May of the 11<sup>th</sup> calendar year after the calendar year of the submission day would in practise close documents until they are 11 years old. The Government would prefer to follow the model utilised in the FOI legislation of several states, by which access is possible after 10 (or 6) years and in response to requests rather than by general release on a specified day.

- **Clause 6-**      **Release day may be delayed in the public interest**

**Sub-clause 6(1)** The provision for consideration of inter-governmental relations issues does not provide for the inclusion of consideration of relations with the Northern Territory. Section 34 of the FOI Act is drafted in such a way and is linked to a provision for consultation with the relevant jurisdiction (section 26).

**Sub-clause 6(2)** The process of determining a future release day seems unlikely to be an appropriate response to any sensitivity remaining in records. It is likely to be difficult to predict when the sensitivity of information will have waned sufficiently to allow the proper release of records. The adoption of this approach could lead to the release of information prematurely or to the prolonged exemption of documents. Maintaining proper exemptions under this approach is also likely to be administratively costly as compared to consideration of access to records in response to public requests.

**Sub-clause 6(4)** The Government supports the principle that reasons must be set out for decisions to exempt documents from release. However, the Bill proposes that the determinations setting out such reasons be kept with the excluded document and released on the release of the document. The Government prefers the arrangements in section 25

the FOI Act for the decision-maker to provide a statement of reasons to the person who has requested access at the time that the person is informed of the decision.

**Sub-clause 6(6)** The Government is of the view that it is not appropriate for the Legislature to have a role in decisions regarding the exemption from access to documents which are at the core of Executive policy formation. It is preferred that decisions to exempt Cabinet documents greater than (6 or) 10 years old from release be subject to more conventional methods of enforcement and review, such as those provided by the FOI Act, which are also consistent with principles of the separation of powers. Under the FOI Act decisions to exempt documents stand until they are overturned by a later decision, either in response to internal review, review by the Administrative Appeals Tribunal, a later request or an unrelated decision by the executive. The FOI Act also provides practised and accepted processes for the review of access decisions. As currently drafted, this provision would allow very few sitting days for tabling and ratification of access exemptions.

**Sub-clause 6(7)** This proposed paragraph outlines a range of possible release dates for documents. It would be difficult for a member of the public to know when a document is likely to have been released. It compounds the possibility for confusion caused by the terminology in the Bill which includes 'release day', 'current release day' and 'later release day'. It would be preferable to have a regime which allowed for decision in response to request and each decision to stand until the next decision is made concerning the affected record, as is the case under the FOI Act.

**Subclause 6(7)(c)** would provide for the compulsory release of all Cabinet records when they are 21 years old. While the sensitivity of Cabinet records should have substantially decreased once they are 21 years old there may be some matters which should legitimately be withheld from public access at this time. This could be achieved by having the records subject to similar provisions in the FOI Act for the period from their creation until the period at which arrangements for access for all government archives come into effect under the proposed archival legislation

- **Clause 6 Protection of individual privacy**

**Sub-Clause 7(2)(a)** The Government would prefer that rather than determination of a later release day, exemption of material on this grounds would stand until a later decision is made to the contrary. Under

the Government's approach it could be possible for a decision to be revised and overturned in a relatively short period after the original decision, if this were appropriate in the circumstances. It would also be preferable to allow for consultation with the person concerned, which is provided for by the FOI Act (the so-called 'reverse FOI' process).

**Sub-Clause 7(2)(b)** The provision that a decision could be made that a record is not an executive document for the purposes of protecting individual privacy is unnecessary restrictive. The permanent exclusion of access is unlikely to be warranted, even for personal information. In the unlikely event that the most sensitive of personal information regarding named individuals were found in Cabinet records (for example, relating to adoption or personal illness) the sensitivity of this information should have dissipated over time. Such information should be adequately protected using similar provisions to the FOI and archival access regime without the need to permanently exclude material from access. It is also not clear how this provision, if enacted, would interact with the FOI Act. For example, whether an Executive document which is declared not to be an Executive document to protect personal privacy under this proposed legislation would be an Executive document for the purposes of the FOI Act.

- **Sub-Clause 7(4)-(5)** The comments provided against subclause 6(4) also apply to these provisions.
- **Clauses 6 and 7**

These clauses outline a limited range of exemptions from release of Cabinet documents, being for inter-governmental relations, 'public interest' and personal privacy. It is preferable that the grounds for such exemptions are clearly spelt out in the legislation rather than left as a matter of 'public interest'. The FOI Act outlines a number of well-established grounds for exemption of release. If arrangements for the removal of the Cabinet exemption after 6 or 10 years were established using similar provisions to the FOI Act, these additional and specific grounds for exemption would then be available where appropriate. This would provide reassurance to the Assembly and the ACT community that only legitimate grounds were being used to exempt documents rather than a broad and nebulous concept of 'public interest'.

- **Access regime**

Throughout the Act an access regime is proposed that would have all records released at 11 years, subject to exemptions. This approach for the

wholesale release does not have regard to the cost of such an approach and the predicted low level of interest in access, if the experience of state jurisdictions is a guide.