



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY  
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),  
Mr Andrew Braddock MLA

## Submission Cover Sheet

Inquiry into the Freedom of Information  
Amendment Bills 2022

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Chief Minister  
Treasurer  
Minister for Climate Action  
Minister for Economic Development  
Minister for Tourism  
  
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Dear Mr Cain

Thank you for the opportunity to make a submission to the Standing Committee on Justice and Community Safety (the Committee) Inquiry into Freedom of Information Amendment Bills 2022 introduced in the ACT Legislative Assembly on 21 September 2022.

I note the Committee is inquiring into two bills, the Freedom of Information Amendment Bill 2022 (the Government Bill) and the Freedom of Information Amendment Bill 2022 [No 2] (Private Member's Bill). This submission relates exclusively to the Private Members Bill as the Explanatory Statement for the Government Bill clearly sets out the purpose and detail of that Bill.






This submission seeks to highlight matters of importance in relation to the Committee's consideration of the Private Member's Bill. This includes the operation of Cabinet government in the ACT, the ACT Government's commitment to supporting community access to Government information and the experiences of other jurisdictions – in particular New Zealand and Queensland.

Notwithstanding the Government's reservation with the Private Members Bill, the ACT Government continues to consider its position in relation to the Bill.

The Government will consider and respond to the recommendations of the Committee following its Inquiry.

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## Operation of ACT Cabinet

The [ACT Cabinet Handbook](#) sets out the operation of Cabinet in the ACT. ACT Cabinet is based in the Westminster Tradition of parliamentary practice and is a process of collective, consensus-based decision making.

The conventions of the Cabinet facilitate collective ministerial responsibility for decisions that are binding on Ministers as government policy, with Ministers expected to give their support in public debate to the decisions of government.

Confidentiality surrounding Cabinet papers and deliberations in Cabinet allow Ministers to discuss proposals frankly while developing a collective position. This confidentiality extends to Cabinet committee and subcommittee meetings, reflecting the complexity of issues considered by Government and the need for iterative consideration in the development of a final decision.

Confidentiality of Cabinet documents and deliberations are in the public interest as this facilitates thorough and genuine consultation, compromise and innovative approaches to reach collaborative agreement. This in turn supports community confidence in the completeness of the decision-making process and the institutions of Government.

A delay in the release of Cabinet documents also supports Ministers to discuss proposals frankly without the prejudice of increased public pressure and partisan criticism. This in turn enables the Government to consider a range of options and make decisions that reflect the public interest.

Successive Court decisions have recognised the public interest in Cabinet government and upheld the conventions surrounding confidentiality of Cabinet papers, including protections from disclosure for those documents prepared to support the deliberations of Cabinet and detail the deliberations of Cabinet.<sup>1</sup>

## The ACT's nation-leading regime for transparency

The ACT has a nation-leading regime surrounding transparency of Cabinet records, which includes:

- publishing publicly accessible summaries of Cabinet decisions and Wellbeing Impact Assessments shortly after Cabinet meetings under section 23 of the *Freedom of Information Act 2016* (FOI Act);
- making full Cabinet records accessible on application after 10 years (faster than almost all other Australian jurisdictions) under the *Territory Records Act 2002* (Records Act); and
- alerting the public to the Cabinet records that become available each Canberra Day under Part 3A of the Records Act.

No other Australian jurisdiction has an equivalent legislative requirement to section 23 of the FOI Act, or provides the same level insight into the decisions of its Cabinet. This section of the FOI Act requires the Chief Minister to make information publicly available about each Cabinet or Cabinet Committee decision made after commencement of the Act, including:

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<sup>1</sup> Note in particular: *Egan v Chadwick* (1999) 46 NSWLR 563; *Egan v Willis* (1998) 73 ALJR 75; and *Commonwealth v Northern Land Council and Another* (1993) 176 CLR 604.

- a summary of the decision;
- the decision reference number;
- the date the decision was made; and
- the Wellbeing Impact Assessment summary for the decision.

As Chief Minister, I regularly make decisions to publish this information, which is available on the ACT Government Open Government Website at:

[https://www.cmtedd.act.gov.au/open\\_government](https://www.cmtedd.act.gov.au/open_government).

The ACT's transparency regime also includes the Open Access scheme established under the FOI Act. This scheme provides a framework for community access to certain Government Information by obligating Ministers and agencies to proactively release a range of information, such as:

- information about ministerial and ministerial staff travel and hospitality expenses;
- Ministers' diaries that set out all meetings, events and functions attended by Ministers that relate to their responsibilities; and
- a range of regularly developed briefings after five years, including:
  - incoming ministerial briefs;
  - parliamentary estimates briefs;
  - annual reports briefs; and
  - question time briefs.

The Records Act (rather than the FOI Act) also currently provides the framework for access to Cabinet material (Executive Documents) on application after 10 years. Under the Records Act, while some limitations are identified, Cabinet material is presumed to be open for public access after 10 years. This is the shortest legislated timeframe for access to Cabinet material of any Australian jurisdiction.

The ACT Government is also committed to build on existing transparency and open government features of the ACT system with the ACT Parliamentary and Governing Agreement identifying associated Administrative Reforms.<sup>2</sup> One element of the work that forms part of this commitment are administrative improvements to Cabinet document release processes.

During 2022, the Chief Minister, Treasury and Economic Development Directorate has implemented improvements to administrative processes to facilitate access and awareness of Cabinet record release processes under the Records Act. As a product of these improvements, the community can now access:

- information in relation to Cabinet decisions and how to access Cabinet Documents from a prominent location on the Open Government website; and
- all Cabinet documents (referred to as Executive Records in the Records Act) that have been released to applicants from 2022 online through the [ACT Memory](#) platform.<sup>3,4</sup>

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<sup>2</sup> Page 14 of the [Parliamentary & Governing Agreement: 10th Legislative Assembly Australian Capital Territory](#)

<sup>3</sup> The Territory Records Office is also continuing to develop the ACT Memory database. This database supports community access to historical government information, including publicly released Executive documents. The database will grow and be added to over time.

<sup>4</sup> As of 28 October 2022, 86 release decisions and associated Cabinet Records were available at ACT Memory.

## **Contention with the Private Member's Bill**

The primary contention of the Government with Private Member's Bill is that contemporaneous, proactive release of Cabinet documents can undermine principles of collective ministerial responsibility. The Private Member's Bill as drafted, does not acknowledge the established convention and the need to preserve the confidentiality of deliberations leading up to a final Cabinet decision.

Unlike the New Zealand model (discussed in more detail below), the Private Member's Bill does not provide for a final decision to be made by Cabinet prior to release. Instead, it proposes Cabinet records be released 30 business days after the record was considered by Cabinet. This would impede ongoing consideration of issues which require numerous or iterative discussions to arrive at a final decision.

An effective Cabinet Government may consider a range of complex or interlinked policy and investment considerations which require iterative discussions over several months. This type of deliberative and considered decision making is not supported by the Private Members Bill and would undermine responsible Government in the ACT.

The Private Member's Bill also inadequately acknowledges:

1. the risk that candidness may be compromised if Cabinet records like minutes reveal decision-making consideration soon after a proposal is considered.
2. the existing framework for facilitating access to Cabinet material on application under the Records Act.
3. the unsuitability of the FOI Act framework for accessing Cabinet material and the need to consider an alternative framework to facilitate the release of this class of information to appropriately contemplate public interest considerations.
4. that proactive public release of executive records would require reallocation and provision of new resources by the Government. The additional resources required for the proactive release of documents within the 30-day period following consideration are un-costed and would be significant. The resourcing impacts may also risk diminishing the capacity of Government to meet other existing commitments.
5. the financial implications of an independent review of a non-release decision by the ACT Ombudsman. The ACT Government notes this element of the Bill is un-costed and is not a feature of the New Zealand model Ms Lee purports to have modelled the proposed legislation on.

## Australian Jurisdictions

No other State or Territory Government in Australia contemporaneously and proactively releases Cabinet documents.

The Federal Government currently releases executive records 20 years after their submission date through the National Archives of Australia (NAA). Only South Australia provides for release after 10 years, with other jurisdictions providing for release after 20 to 30 years. South Australia's 10-year release model, unlike the ACT's, is underpinned by Cabinet Policy rather than legislation.<sup>5</sup>

While the Queensland Government is yet to formally respond to a report by Professor Peter Coaldrake AO into culture and accountability in the Queensland public sector, it has indicated publicly it will accept all recommendations.<sup>6</sup> These recommendations included:

*Cabinet submissions (and their attachments), agendas, and decisions papers be proactively released and published online within 30 business days of such decisions.*

The ACT Government continues to monitor the experiences of these jurisdictions.

## The New Zealand Model

The Private Member's Bill purports to adopt the New Zealand model for proactive release of Cabinet material. However, the ACT Government notes there are significant differences in the proposed model.

One of the most striking differences between the Private Member's Bill and the New Zealand approach is the New Zealand model is not legislatively enshrined, but effected by a Cabinet policy (Cabinet Office Circular CO (18) 4).<sup>7</sup> The policy requires that Cabinet and Cabinet committee papers and minutes, including any attachments or appendices, be proactively released and published online within 30 business days of final decisions being taken by Cabinet, unless there is good reason not to publish all or part of the material, or to delay the release.

There are several other significant differences between the New Zealand model and that proposed in the Private Member's Bill:

1. The New Zealand model requires that a final decision be made, whereas the Private Member's Bill applies to all Cabinet considerations. As discussed previously in this submission this does not acknowledge the established convention of collective ministerial responsibility and the need to preserve the confidentiality of processes prior to a final Cabinet decision.

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<sup>5</sup> Note the South Australian [Premier and Cabinet Circular PC 031 – Disclosure of Cabinet Documents 10 Years or Older](#).

<sup>6</sup> Note the media statement [Taskforce to implement Coaldrake recommendations](#) (4 July 2022) and [Coaldrake Review Final Report](#) (28 June 2022).

<sup>7</sup> Note the New Zealand Cabinet Office circular [CO \(18\) 4: Proactive Release of Cabinet Material: Updated Requirements](#)

2. The New Zealand model explicitly excludes appointments and honours papers from the release policy, given the privacy implications and because any related remuneration packages are publicly reported where appropriate. No such exemption is made in the Private Member's Bill, despite the same considerations applying in the ACT.
3. The Private Member's Bill and the New Zealand Policy prescribe different processes for how Cabinet records are reviewed for release. The Private Member's Bill combines the FOI Act public interest test with the existing Records Act assessment for granting access to information. Whereas in New Zealand, all material proposed for release must undergo a review process.

The matters that must be considered in the New Zealand review include whether access would be refused under the *Official Information Act 1982 (NZ)* as well as considerations of privacy, national security, legislative secrecy provisions, any potential criminal or civil liability arising from disclosure, copyright, breach of contract, contempt of court, and whether there are timing sensitivities that warrant delaying release.

Although the New Zealand review process provides for broadly similar considerations to those contemplated by the ACT FOI Act, the New Zealand policy is drafted in a more flexible way and the *Official Information Act 1982 (NZ)* provides for consideration of Cabinet convention and the effective conduct of public affairs.

The New Zealand Official Information Act has been used to provide for instances of redaction on the basis of the information being 'confidential advice to Government' and 'free and frank opinions' which are identified as a 'good reason' under section 9 of that legislation.<sup>8</sup>

The ACT FOI Act does not provide for equivalent factors because the Act provides for a general factor favouring non-disclosure, being information that can reasonably be expected to prejudice the collective responsibility of Cabinet or the individual responsibility of members of the Assembly. The Private Member's Bill seeks to remove the application of this factor to Cabinet material released under an expanded Open Access Scheme, but does not provide for any additional or more nuanced considerations to be applied to this material.

This departure from the New Zealand model is another example of how the Private member's Bill does not adequately acknowledge the established convention of collective ministerial responsibility.

4. The New Zealand policy explicitly requires consultation with third parties, including individuals and organisations named in any information proposed to be released. Although the Private Member's Bill does not prohibit consultation, it does not require it, nor does it make timing allowances for this consultation within the proposed legislated release period.

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<sup>8</sup> An example of a New Zealand release decision applying 'Confidential advice to Government' is the New Zealand Minister for COVID-19 Responses paper of 8 December 2021: [A National Quarantine System: options for the ongoing COVID19 Response and Future Pandemic Preparedness](#).

Finally, the ACT Government is committed to maintaining its nation-leading open government and transparency regime. The Government welcomes this Inquiry and the detailed consideration of the issues raised by the Private Member's Bill.

Yours sincerely



Andrew Barr MLA  
Chief Minister

4 November 2022