

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

REPORT

ON

**ACCESS TO CABINET AND OTHER DELIBERATIVE DOCUMENTS, THE
PROPERTY OF PREVIOUS GOVERNMENTS**

STANDING COMMITTEE ON PUBLIC ACCOUNTS

Report Number 6

October 1995

RESOLUTION OF APPOINTMENT

The Standing Committee on Public Accounts was appointed by the Legislative Assembly on 9 March 1995 with the following terms of reference:

- (a) examine:
 - (i) the accounts of the receipts and expenditure of the Australian Capital Territory;
 - (ii) the financial affairs of authorities of the Australian Capital Territory; and
 - (iii) all reports of the Auditor-General which have been laid before the Assembly;
- (b) report to the Assembly, with such comments as it thinks fit, any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed;
- (c) inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question; and
- (d) inquire into and report on the implementation of the *Public Sector Management Act 1994* with particular reference to:
 - (i) the public interest; and
 - (ii) any other related matter.

CURRENT INQUIRY - TERMS OF REFERENCE

On 28 August 1995 the committee resolved to inquire into and report to the Assembly on access to the Cabinet and other deliberative documents of a previous Government.

MEMBERSHIP OF THE COMMITTEE

Ms Rosemary Follett MLA (Committee Chair)

Mr Trevor Kaine MLA (Deputy Committee Chair)

Ms Lucy Horodny MLA

Secretary: Bill Symington

RECOMMENDATIONS

The committee recommends that:

- 1) **The Cabinet Handbook provide that all provisions relating to access to the documents of a previous Government unambiguously refer to the Cabinet and other deliberative documents of those Governments.**
(Paragraph 4.14)
- 2) **The Cabinet Handbook emphasise the convention on access in all sections dealing with access to the Cabinet and other deliberative documents of a previous Government.**
(Paragraph 6.3)
- 3)
 - 1). **The Cabinet Handbook provide for the current leader in the Assembly of the political party which formed a previous Government to access Cabinet and other deliberative documents which were dealt with personally by Ministers of that former Government; and**
 - 2). **The Handbook provide for access to Cabinet and other deliberative documents which were dealt with personally by Ministers of a former coalition Government.**
(Paragraph 6.7)
- 4)
 - 1). **The Cabinet Handbook provide that the Chief Executive of the Chief Minister's Department consult with the leader of the political party which formed a previous Government whenever access to the Cabinet and other deliberative documents of that previous Government is sought by courts and investigatory bodies; and**
 - 2). **The Cabinet Handbook provide for appropriate consultation whenever access to the Cabinet and other deliberative documents of a former coalition Government is sought by courts and investigatory bodies.**
(Paragraph 7.4)
- 5)
 - 1). **The Cabinet Handbook provide that the Chief Executive of the Chief Minister's Department consult with the leader of the political party which formed a previous Government whenever the question of exemption from disclosure of Cabinet and deliberative documents relating to that Government is being considered in relation to the Freedom of Information Act; and**
 - 2). **The Cabinet Handbook provide for appropriate consultation whenever the question of exemption from disclosure of Cabinet and other deliberative documents relating to a former coalition**

**Government is being considered in relation to the Freedom of
Information Act.**
(Paragraph 8.3)

1. INTRODUCTION

1.1 During the 31 May 1995 sitting of the Legislative Assembly a Minister, in response to a question without notice, quoted from a departmental minute relating to Government offices in Gungahlin which was sent to the Chief Minister in the previous Government.¹ The Minister then tabled the minute.²

1.2 At a later hour the former Chief Minister, by leave, made a personal explanation relative to the departmental minute tabled by the Minister, and expressed concern that a document of a previous Government had been made available to the present Government.³

1.3 In question time on 1 June the Minister was asked by the former Chief Minister if the Cabinet Handbook provision relating to access to the Cabinet documents of a former Government had been breached. The Minister, in responding, noted the convention in relation to such documents and undertook to establish and inform the Assembly of the circumstances in which the document tabled on the previous day had been made available.⁴

1.4 At the time of presentation of this report, the Minister had not informed the Assembly of the circumstances of the release of the document in question.

1.5 On 22 August 1995 a Minister adverted to a departmental briefing document sent to the former Chief Minister in relation to the Jindalee Nursing Home. In this case while the brief was not confidential it was not a stand alone document and it appeared to have been provided to the Minister by an official on a selective basis. The potential for selective use of documents of this nature to misinform Ministers is a matter of concern to the committee.

1.6 These matters were discussed within the Public Accounts Committee and, pursuant to the resolution of its appointment relating to the Public Sector Management Act 1994, the committee resolved to undertake an inquiry into access to Cabinet and other documents of a previous Government. The committee is of the view that this report should be an appropriate basis for a consideration of the general issues of access to the documents of a previous Government.

1.7 The committee sought the Chief Minister's views on the issues of principle as well as on the broader issues surrounding the established convention relating to access to Cabinet and deliberative documents of a previous Government.

1.8 The Chief Minister, in responding, proffered the view that the inquiry does not fall within the committee's terms of reference and is thus not a matter which the committee should be considering. Nevertheless, the Chief Minister did comment

¹ Debates of the Legislative Assembly for the ACT, p641

² Minutes of Proceedings, Legislative Assembly for the ACT,

³ Debates, op cit, pp673,675

⁴ ibid, pp716,717

substantively on the issues raised by the committee⁵ and agreed to a committee request that the Chief Executive of the Chief Minister's Department meet with the committee to discuss the issues. The Chief Executive and a senior official of the Department's Cabinet and Policy Co-Ordination Office met with the committee on 9 October 1995.

1.9 The committee trusts that the issues raised in this report will be given close study by the Executive and that the Assembly will be informed on action to be taken to ensure the observance of appropriate standards in dealing with the Cabinet documents of a former Government.

2. BACKGROUND

2.1 Cabinet documents comprise agendas and notices of meetings, submissions and memoranda, addendums and corrections, reports and attachments brought into existence for the purpose of Cabinet consideration, legislation proposals, correspondence between Ministers which is submitted to Cabinet or which proposes matters to be raised in Cabinet, Cabinet Decisions, Cabinet business schedules and copies of, or extracts from, all these documents.⁶

2.2 For the purpose of the Handbook, a range of documents classed as Cabinet related are required to be handled in the same way as Cabinet documents. These are draft Cabinet submissions, Ministerial briefings on Cabinet matters, consultation comments on draft Cabinet documents, reports prepared within or for the Government dealing with significant or sensitive matters of policy which are likely to form the basis of a Cabinet document, and all other minutes and correspondence between Ministers which give an insight into the deliberations of Cabinet.⁷

2.3 Two aspects of the rules dealing with Cabinet documents are notable by their absence from the Handbook. The first of these is the matter of public access to Cabinet documents after a statutory period. In the Federal system Cabinet documents are released for public perusal after 30 years. Obviously it will be some time before a "30 year rule" could apply in the ACT, but the question as to when Cabinet documents are to be released for general perusal should be addressed at some time.

2.4 The other matter is more contemporary and it concerns access to Cabinet documents of the former Alliance Government and the documents of previous Governments of the same political party but with a different composition of Ministers.

2.5 Having regard to the particular circumstances of the ACT electoral system, the relatively small Ministry, the composition of previous Governments and uncertainties as to the structure of future Governments, the committee considers there is a clear need to ensure that appropriate administrative measures are in place and codified within the Cabinet Handbook to both protect the Cabinet and other deliberative documents generated in these circumstances and to ensure that the appropriate representatives of previous Governments can access these documents.

⁵ Chief Minister, letter dated 11 September 1995 to the committee

⁶ Cabinet Handbook, paragraph 1.11

⁷ *ibid*, paragraph 1.12

3. MATTERS OF ACCESS COVERED BY THE CABINET HANDBOOK

3.1 The Cabinet Handbook covers inter alia:

- access to Cabinet documents by the courts and investigatory bodies
- access to Cabinet documents of a previous Government;
- special access by former ministers to Cabinet and other official documents; and
- access under the Freedom of Information Act

3.2 All of these provisions are relevant to any consideration of access to and use of Cabinet documents of a previous Government. But the focus should first be upon the principal provision - namely, access to Cabinet documents of a previous Government.

4. ACCESS TO CABINET DOCUMENTS OF A PREVIOUS GOVERNMENT

4.1 The relevant paragraphs from the Cabinet Handbook (March 1995 edition) are:

10.14 Cabinet documents (**like other Ministerial deliberative documents**) [emphasis added by the committee - see comment in paragraph 4.4 below] are confidential to the Government which created them and access by succeeding Governments is not granted except with the approval of the Leader of the Opposition, or the current leader of the appropriate political party, as the case may be.

10.15 Requests for Cabinet documents of a previous Government, including requests under the Freedom of Information Act 1989, must be referred to the Secretary, Chief Minister's Department.

10.16 Before each Assembly election, Agencies should ensure that all Cabinet documents held by them are accounted for and stored so that access can be controlled appropriately. If the Government is returned, the documents can be made available again in accordance with normal practice. If there is a change of Government, Cabinet documents of the previous Government must be destroyed.

10.17 Continuity of administration may necessitate reference to Cabinet documents of former Governments. To ensure such continuity, Agencies may provide Ministers with summaries of facts and operative Decisions necessary for an understanding of current issues - including, if essential to that understanding, summaries of Cabinet Decisions of a previous Government, though not the Decisions themselves.

10.18 Where, for the sake of administrative efficiency, Agencies need access to Submissions and Memorandums of a previous Government, these are to be sought in writing from the Secretary, Chief Minister's Department. Agencies are not to pass on these documents to other Agencies.

4.2 It should be noted that the Handbook provides for the destruction of Cabinet documents by agencies when a change of Government occurs. This is done in accordance with procedures set out in the Commonwealth Government Protective Security manual which is operative for the ACT Government Service until such time as ACT procedures are established.⁸ The Handbook provides for Cabinet Office to retain full sets of all Cabinet documents.⁹

4.3 With regard to the destruction of Cabinet documents by agencies when there is a change of Government, the committee considers that paragraph 10.16 of the Handbook should be qualified to indicate that the Cabinet Office is required to retain full sets of such documents.

4.4 The words “**like other Ministerial deliberative documents**” in paragraph 4.1 above are emphasised in order to draw attention to the fact that there appears to be no other specific reference in the Handbook to control of access to the “deliberative documents” of a previous Government. This lack of clarity in the Handbook relating to the documents of a former Government is, in the committee's view, a serious omission.

4.5 The Chief Minister advised that the current Government policy is that the provision in the Cabinet Handbook in relation to access to Cabinet documents is accurate and denotes actual practice and that the Government's interpretation of “other deliberative documents” is those documents which, while not formal Cabinet Submissions or decisions, are other documents considered by the Executive [that is, the Cabinet] as a group.¹⁰

4.6 In elaborating this policy, the Chief Minister advised that incoming Governments must have access to the files, except Cabinet files, of previous Governments in the interests of continuity of decision making and good government. The Chief Minister went on to say that it is particularly important for incoming Governments to understand the financial and social factors leading to decisions made and that it is not good enough to rely on interpretation by public servants. The Chief Minister advised that the Cabinet Handbook is being amended to more clearly reflect the Government's policy and interpretation of conventions.¹¹

4.7 The committee was concerned that any amendment of the Cabinet Handbook should ensure that there be no ambiguity which could lead to inappropriate access to the Cabinet and other deliberative documents of a previous Government, which appears to have been the case in the particular instances outlined in this report.

4.8 The Chief Executive of the Chief Minister's Department assured the committee that the intention of the proposed amendments to the Handbook is to remove ambiguity as to what are Cabinet deliberative documents and what are non-Cabinet deliberative documents. The Chief Executive noted that the current definition of

⁸ *ibid*, paragraph 9.28

⁹ *ibid*, para 9.30

¹⁰ Chief Minister *op cit*

¹¹ *ibid*

Cabinet related documents included reports or studies prepared within the ACT Government or the ACT Government Service dealing with sensitive policy and/or administrative matters and which are likely to form the basis of a Cabinet document or an attachment to a Cabinet document.

4.9 The Chief Executive advised that the current definition led to confusion as to what documents could be accessed as part of normal departmental operations and the proposed amendments would clarify the position.

4.10 The committee notes the Chief Minister's response and oral advice provided by the Chief Executive. They appear to confirm the committee's understanding of what documents should be regarded as the deliberative documents of a previous Government, namely documents which are developed within departments and agencies for the purpose of informing, advising or providing options to Ministers on courses of action in relation to specific issues.

4.11 The committee considers there is little, if any, inconvenience for Ministers or departments in accessing primary source material in the form of files and other material which is available to departments and agencies and which can be resourced to develop briefing documents and minutes for Ministers in another Government without recourse to the same briefing notes and minutes prepared for the previous Government.

4.12 In any case, the Handbook currently provides [paragraph 10.18 see extract above] for access, under certain conditions, to [Cabinet] Submissions and Memorandums where this is necessary for administrative efficiency.

4.13 That being the case, the committee considers that there should be absolutely no possibility that officials should be under any misapprehension as to the status of Cabinet and other deliberative documents.

4.14 Accordingly, the committee recommends that the Cabinet Handbook provide that all provisions relating to access to the documents of a previous Government unambiguously refer to the Cabinet and other deliberative documents of those Governments.

5. GENERAL CONVENTION RELATING TO ACCESS TO THE DOCUMENTS OF A PREVIOUS GOVERNMENT

5.1 As noted in paragraph 6.1 below the Cabinet Handbook refers in one particular section to "commonly accepted convention" in relation to access by former Ministers to a previous Government's documents.

5.2 The convention on such access is both well established and observed in the Westminster Parliamentary environment. [Sir] Ivor Jennings' authoritative *Cabinet Government* (Cambridge University Press, 1969) discusses the issue.

5.3 Jennings notes that in the past it was open to Cabinet Ministers in the British Parliament, on their resignation, to take away with them their copies of Cabinet

minutes and memoranda. The Cabinet decided in 1934 that Ministers would return their documents and asked former Ministers to do the same.

5.4 In 1945, the British Prime Minister, Mr Winston Churchill, established the rule that retiring Ministers are entitled to keep all telegrams, minutes or documents circulated to the Cabinet which they wrote and signed themselves. These were regarded as their personal property, except that they would be bound by the rules governing the use of official papers, which were well established. Although all other [Cabinet] papers were to be available to the retiring Ministers concerned, and they were to have free access to them, it was understood that the Ministers of one Government were not entitled to examine the Cabinet documents of their predecessors.

6. ACCESS TO DOCUMENTS BY FORMER MINISTERS

6.1 Paragraph 10.19 of the Cabinet Handbook states:

“It is a commonly accepted convention that former Ministers are entitled to special access to “refresh their memories” of Cabinet and other official documents with which they dealt personally while in office.”

6.2 However, the Handbook makes no other reference to “accepted convention” with regard to access to a previous Government's Cabinet or other deliberative documents. The committee sees this as a further ambiguity in the Handbook which, it trusts, will also be a focus by the Chief Executive in the Department's review of the Handbook provisions. To emphasise the point, the committee is firmly of the view that there should be no cause for doubt as to the strength of the convention regarding such access.

6.3 The committee recommends that the Cabinet Handbook emphasise the convention on access in all sections dealing with access to the Cabinet and other deliberative documents of a previous Government.

6.4 With regard to access to Cabinet documents dealt with personally by former Ministers, the committee refers to its earlier comments (paragraph 2.5 above) about the particular circumstances which bear upon the formation of governments in the ACT.

6.5 Situations arise where it is imperative that the leader in the Assembly of the political party which formed a previous Government should have access to the Cabinet and other deliberative documents dealt with personally by former Ministers of that Government who are no longer Members of the Assembly. The committee observes in this context that, while Ministers, in many cases, sponsor Cabinet submissions and other deliberative documents, Cabinet is collectively responsible for decisions taken and that the relevant Cabinet documents are, in effect, dealt with by all Ministers.

6.6 The committee is aware that the Handbook provisions relating to access by former Ministers have been used to prevent former Chief Ministers from accessing Cabinet documents relating to their periods of Office but which were determined to be

documents dealt with personally by former Ministerial colleagues who are no longer Members of the Assembly.

6.7 The committee considers that the Handbook provision relating to such documents is unreasonably restrictive having regard to the particular circumstances of government within the ACT and that the Handbook provisions on access should take this into account.

6.7 The committee recommends that:

- 1). The Cabinet Handbook provide for the current leader in the Assembly of the political party which formed a previous Government to access Cabinet and other deliberative documents which were dealt with personally by Ministers of that former Government; and**
- 2). The Handbook provide for access to Cabinet and other deliberative documents which were dealt with personally by Ministers of a former coalition Government.**

7. ACCESS TO DOCUMENTS BY COURTS AND INVESTIGATORY BODIES

7.1 The Cabinet Handbook outlines the procedures arising from requests from any source outside the usual Ministerial/Agency system, such as from a court or an investigatory body, for access to Cabinet documents of a previous Government.¹²

7.2 The Handbook notes that "public interest immunity" in respect of the documents of the Government in office should be claimed by a Minister [normally the responsible Minister] in consultation with the Chief Minister. With regard to Cabinet documents of a former Government, claims of immunity are to be made by the Secretary [Chief Executive] of the Chief Minister's Department. However, there is no requirement for the Secretary of the Chief Minister's Department to consult representatives of the former Government. There is no specific provision for the claim of public interest immunity in respect of the deliberative documents of either the Government in office or of a former Government.

7.3 The committee considers it inappropriate that public interest immunity in relation to the Cabinet documents of a previous Government should be determined solely by the Secretary of the Chief Minister's Department and that access to such documents by courts and investigatory bodies should be handled in a different manner, as regards consultation, to those documents belonging to the Government in office.

7.4 The committee recommends that:

- 1). The Cabinet Handbook provide that the Chief Executive of the Chief Minister's Department consult with the leader of the political**

¹² Cabinet Handbook, paragraphs 10.10 - 10.13

party which formed a previous Government whenever access to the Cabinet and other deliberative documents of that previous Government is sought by courts and investigatory bodies; and

- 2). The Cabinet Handbook provide for appropriate consultation whenever access to the Cabinet and other deliberative documents of a former coalition Government is sought by courts and investigatory bodies.**

8. ACCESS TO DOCUMENTS UNDER THE FREEDOM OF INFORMATION ACT

8.1 The Cabinet Handbook notes that in general terms a document is exempt from disclosure under the Freedom of Information Act 1989 if it is a document or extract from a document that has been submitted to the Executive for consideration, an official record of the Executive, or a document or extract the disclosure of which would reveal any deliberation or decision of the Executive.¹³

8.2 However, with regard to requests made under the Act for Cabinet documents of a previous Government the Handbook provides that such requests must be referred to the Secretary [Chief Executive] of the Chief Minister's Department.¹⁴ The Handbook does not indicate what action the Secretary of the Department might, or should, take on such a request, but the committee considers that the Secretary should be required to consult with the leader of the political party which formed the previous Government concerned or, where relevant, the appropriate person or persons who formed a previous coalition Government..

8.3 The committee recommends that:

- 1). The Cabinet Handbook provide that the Chief Executive of the Chief Minister's Department consult with the leader of the political party which formed a previous Government whenever the question of exemption from disclosure of Cabinet and deliberative documents relating to that Government is being considered in relation to the Freedom of Information Act; and**
- 2). The Cabinet Handbook provide for appropriate consultation whenever the question of exemption from disclosure of Cabinet and other deliberative documents relating to a former coalition Government is being considered in relation to the Freedom of Information Act.**

9. CONCLUSIONS

9.1 The committee recognises that the Cabinet Handbook is a self imposed discipline on the Government which does not derive from any Act or regulation of the

¹³ *ibid*, paragraph 10.31

¹⁴ *ibid*, paragraph 10.15

Assembly. As such it is subject to amendment by administrative action without any need to inform the Assembly. The committee further accepts that interpretation of the Handbook provisions is an administrative matter although it considers these matters are capable of examination by the Assembly vide Section 22 of the ACT Self Government Act.

9.2 The Handbook provisions on access to the Cabinet and deliberative documents of a previous Government, and the convention relating to such access, may be breached from time to time, although the committee accepts that this would be infrequent.

9.3 Where breaches occur this may indicate a lack of clarity in the rules about access to such documents and, in such instances, the committee would expect that the Cabinet Handbook would be reviewed to ensure that any of its provisions which could lead to misunderstanding would be speedily rectified.

A handwritten signature in black ink, reading "Rosemary Follett". The signature is written in a cursive, flowing style.

Rosemary Follett MLA
Chair

