



Legislative Assembly for the
Australian Capital Territory

Select Committee on Caretaker
Conventions

Submission cover sheet

Inquiry into Caretaker Conventions

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Select Committee on Caretaker Conventions
ACT Legislative Assembly

(via e-mail: LACommitteeCaretaker@parliament.act.gov.au)

Dear Committee and Secretariat,

Thank you for accepting this submission to the Inquiry into Caretaker Conventions.

This submission is made in a private capacity. I am currently on leave from a PhD at the Australian National University where I research the public understanding of law. I specialise in public law and its intersections with national security and communications law.

I appreciate that my submission is quite long, reflecting the complexity of the issues raised by the terms of reference. In summary, the point of my submission is that the terms of reference are—with respect—confused about the issue for discussion, framing it as a ‘Caretaker Convention’ issue where the issue isn’t the Conventions. In the spirit of constructive discussion and public debate, I have tried to unpick the ‘intuition’ that motivated the terms of reference and offer more productive pathways to satisfy those intuitions. I think the intuition is really about the information that is needed to inform democratic processes, and I recommend ways to improve the quality of that information and promote a culture that can utilise the information.

Part 1: Caretaker Conventions

With respect, both the terms of reference and the debate that produced the resolution demonstrated a very poor understanding of the Caretaker Conventions. Although laborious, it is worth outlining these conceptual errors because it provides the space to have a facts-based and evidence-based discussion about how we want elections to take place in the ACT.

Sections 20C and 20D of the *Financial Management Act 1996* appear to be described in the resolution as ‘legislated principles that underpin[] the Caretaker Conventions’. A failure to brief leaders of parties and non-party members is described as ‘necessarily a breach of the Caretaker Conventions’. The Caretaker Conventions are described as ensuring that the ‘ACT Public Service (ACTPS) both is and is seen to be apolitical’.

In the debate that produced the resolution, Mr Braddock MLA put the question: ‘If no decision was required of the minister in the middle of the caretaker period, then the question must be asked: why was the information provided?’ The suggestion appears to be that Caretaker Conventions are inconsistent with the provision of information to the Minister by the public service during an election, and he suggested that ‘a majority of members hold a similar view’.

Mr Braddock MLA then stated that a response to this problem is a motion from the Assembly to ‘clearly express what apolitical behaviour is expected from the ACTPS during caretaker so that we can ensure there is confidence in the apolitical nature of the ACTPS.’ He then described the Caretaker Conventions as something that goes ‘to how the ACT public service interacts with the other entities in our democratic system.’

Ms Castley MLA described Minister Stephen-Smith as ‘the caretaker minister’ and that being briefed as Minister meant ‘voters were making decisions at the election without being fully informed about the territory’s health or budget position.’ Ms Castley further stated that ‘[t]here is clear political advantage that Labor has enjoyed because of the secrets it kept from the community’, and then argued that ‘[i]f a minister can keep these kinds of secrets from the community in an election without breaching the rules, the caretaker conventions, the Ministerial Code of Conduct or the Assembly code of conduct, it is time to change the rules.’

Mr Emmerson MLA stated that there was an ‘apparent lack of clarity in the application of our caretaker conventions’, and then discussed the nature of information disparity in elections.

Mr Cocks MLA noted that he had been a public servant for over 20 years, and then said it was ‘absolutely critical that a government and a public service embody not only the letter or the caretaker conventions but its spirit as well’. He also linked Caretaker Conventions to the provision of information, stating that ‘[p]eople in Canberra thought that they information they had going into the election was accurate, clear and absolute.’ He then stated that the Federal Caretaker period began ‘three months ahead of the federal election’ (without labouring the point further, Mr Cocks MLA had mistaken the Caretaker Conventions with the Guidelines for Pre-Election Consultation with the Opposition; they are, as the *Guidance on Caretaker Conventions* notes (at [9.1.2]) ‘distinct from the caretaker conventions and commence on a different date’).

Again reiterating my greatest respect, every single one of the above statements about Caretaker Conventions is demonstrably false. They are not unreasonable and they might point to a real problem with government information in the ACT; nevertheless, they are false about the Caretaker Conventions.

A rather fine book on the history and development of Caretaker Conventions is *Caretaker Conventions in Australasia: Minding the Shop for Government* by Jennifer Menzies and Anne Tiernan (second edition, 2014).

Caretaker Conventions were originally directed to Ministers—not public servants—in order to ensure the smooth transition of power following an election. For example, in 1951, Prime Minister Robert Menzies wrote to his ministers reminding them that ‘whilst continuing to take whatever action you deem necessary in connection with the ordinary administration of your Department, you should not make decisions on matters of policy or those of a contentious nature without first referring the matter to myself’. As Menzies and Tiernan note, it was the responsibility of Ministers ‘to behave accordingly.’

Since the 1970s in Australia, there has been a bipartisan push to weaken the institutional strength of the public service. A key mechanism for this has been changing the nature of appointments to the head of departments, with the flow-on effect that public servants should be more ‘responsive’ to the needs of the government of the day. As noted by many authors, this creates the unusual situation where public servants have a loyalty to the government of the day while noting that, following an election, that loyalty must shift quickly.

This has also transmitted through the establishment of the Australian Public Service Commission (the APSC) during the Howard Government years. A key function of the APSC was to promote core ‘values’ that greater aligned the public service with the needs of the government of the day. The APSC (and its equivalent in other Australian jurisdictions) has a challenging role of balancing the traditions of the public service with ‘modernisation’, but always in the context of an institutionally weakened public service where even the ongoing employment of the Public Service Commissioner is at the discretion of the government of the day. APSC (and its equivalents) tend to be risk averse, encouraging public servants to behave in ways that avoid the need for tough, complex decisions that might bring the public service into public debate.

It is in this context that we get increasingly restrictive Caretaker Conventions that shift the burden from ministers on to public servants. Activities that were normal for public servants thirty years ago—contributions to scholarly debate, for example—are now ‘risky’. Consider the age of the ‘Seven Dwarves’ of the Australian Public Service, for example, who were genuinely nation-builders. When the Australian Electoral Commission attempted to engage people on the website formerly known as Twitter during the 2022 Federal Election, scandal broke out among the hyper-political that the AEC was supposed to be in ‘Caretaker’ and not interfering with freedom of speech. Clearly, the public’s expectation of the public service has changed as well.

The increasingly restrictive nature of the Caretaker Conventions has functioned primarily to muzzle the public service during elections, and misunderstandings about the Conventions fuel animosity towards the public service.

It is notable that, over the same period of time, there has not been a corresponding growth in enforceable directions to ministers for how they should behave during Caretaker. Where a public servant may face actual disciplinary action for breaching Caretaker Conventions, there is no corresponding sanction for ministers. And, yet, Caretaker Conventions were originally about constraining the behaviour of ministers.

There are three historic events that I wish to sketch out to illustrate the core tensions that emerge from Caretaker Conventions and why it is important for public leaders to espouse them in terms of principles rather than rules. They are:

1. The facts behind *Marbury v Madison* (1803) 5 US 137;
2. The appointments of judges to the US Supreme Court following the deaths of Justices Antonin Scalia and Ruth Bader Ginsburg;
3. The Australian Marriage Law Postal Survey.

On their face, the selection of these events might appear strange, but they reveal how intuitions about the Caretaker Conventions are fundamentally driven by partisanship.

Marbury v Madison

Every law student now remembers this case for the principle that courts have the authority to review the constitutionality of legislation (that is, the Court may rule an Act invalid). What is less remembered is why there was a legal dispute.

There was a fierce electoral contest between President John Adams, Aaron Burr, and Thomas Jefferson. Adams hated Jefferson, and when it looked likely that Jefferson was about to win the election, Adams worked through the night to make as many federal appointments as they could. One of these appointments was William Marbury as a justice of the peace, but there was a paperwork issue. Marbury sued President Jefferson's new Secretary of State, James Madison, to deliver the commission.

Adams was deliberately attempting to frustrate the incoming government. Today, we imagine that the Caretaker Conventions would have been dishonoured to act this way. And, yet, there in the 1800s, political figures thought so little of this dishonourable conduct that they were willing to launch very public Supreme Court actions to have their conduct rewarded.

The immediate question is why they did not find it dishonourable. The obvious answer is that the *dramatis personae* of the case saw the political world predominately through the lens of legal rights: what do the rules say, and how can we operate to maximum advantage without breaking the rules?

This sort of 'rules-based' culture misses the bigger picture of how we would see this case today. Even though the government was legally able to do it, the behaviour was *wrong* in some deeper, principled sense.

We also have the advantage of this event taking place in the distant past where we can be a bit more philosophical and detached. But to the public of the day, the rightness or wrongness of the action would very likely be informed by partisan considerations: my team was legally right to do it; your team was morally wrong to do it.

And we have good reason to believe that is the case due to the second historic event:

The appointments of Supreme Court judges following the deaths of Scalia and Bader Ginsburg

Consider the factual matrices following the deaths of Justices Antonin Scalia and Ruth Bader Ginsburg of the US Supreme Court. Both died shortly before a presidential election was due, and people have extremely strong opinions about whether or not President Obama and President Trump should have filled those positions.

The operating word there was 'shortly'. Justice Scalia died on 13 February 2016; the presidential election was held on 8 November 2016. The President was Barack Obama and, due to the Twenty-second Amendment to the US Constitution, was barred from seeking

re-election as President (having been elected to the position twice before). Regardless of who would win the election on 8 November 2016, it would not be President Obama. Allowing President Obama to appoint a judge would effectively bind the incoming President, regardless of who won. But that would mean no second term President could, on principle, appoint a judge.

Views on President Obama's attempt to appoint a judge (Merrick Garland) vary depending on the partisanship of the viewer. Nothing legally wrong with nominating an appointment, but the appropriateness depends on a wider, more nebulous range of factors. One of those factors is the idea of how much 'space' should be carved out for the election. Should an appointment be made in March knowing that there is an election in November?

Justice Bader Ginsburg died on 18 September 2020. A presidential election was due six weeks later. This time, President Trump had the benefit of a speedy nomination process and was able to nominate and confirm Justice Amy Coney Barrett less than a fortnight prior to the election.

It is difficult to separate the appropriateness of the action from partisan views about the presidents and the justices.

One way to view the problem here is the hyper-partisan nature of appointments to the Supreme Court of the United States that are—thankfully—lacking here in Australia. I think (and I might be incorrect) the closest recent example we have had in Australia was the appointment of (then) Justice Kiefel. Appointed by the Howard Government barely a few months prior to when the 2007 Federal Election was required to be called, her appointment was praised by the Premier of Queensland, Peter Beattie (a Labor Party politician).

And this brings one of the key issues of the Caretaker Conventions into sharp focus. In Australia, the appointment of judges to the High Court is not generally contentious. The election was very nearly due, but had not been called. And the majority of people were of the view that the appointment was appropriate. But there are obvious parallels with the previous two examples: a Government in the final period of its guaranteed power filled an important position that would constrain whoever won the next election.

The Marriage Equality Postal Survey

The Australian Public Service prides itself on its inclusivity as an employer. The APSC produces a 'Diversity and Inclusion Report', and notes that the APS is stronger when it reflects the diversity of the public it serves. During the early 2000s, there was a push to recognise sexual diversity within the APS, combatting the prejudice that homosexuals have faced in the workplace.

During the Marriage Equality Postal Survey, however, homosexual and bisexual public servants were warned about appearing partisan, with some agencies removing LGBT+ allyship materials from workplaces and e-mail signature blocks.

The ACT Public Service Commissioner put out guidelines to encourage public servants not to seem to support either side of the marriage equality campaign during their work. Three days later (17 August 2017), the Legislative Assembly passed a motion introduced by Chief Minister Barr stating:

I move:

That this Assembly:

(1) notes that:

- (a) the Federal Government is seeking to instruct the Australian Bureau of Statistics to conduct a non-binding voluntary postal survey on whether the law should be changed to allow same sex couples to marry;
 - (b) the Assembly supported a motion on 10 August 2016 which called on the ACT Government to:
 - (i) demonstrate that the ACT is the most LGBTIQ friendly jurisdiction by supporting the case for marriage equality; and
 - (ii) support the LGBTIQ community through the anticipated marriage equality plebiscite debate; and
 - (c) consistent with this resolution the ACT Government will provide additional support to the LGBTIQ community throughout the period of the voluntary postal survey;
- (2) supports the ACT Government joining and actively participating in the campaign to achieve marriage equality; and
- (3) reaffirms its view that all Australians should be treated equally under the law and that includes being able to marry the person they love. LGBTIQ Australians should have the same opportunities for love, commitment and happiness as everyone else.

The reference to ‘ACT Government’ in (2) appears to have meant something inclusive of the ACT Public Service. Here was a direction from the Assembly to be participants in a political campaign.

Intuitions about the various elements of this case again are largely informed by partisan views. People who are more supportive of marriage equality are likely to think that the APSC’s approach was unnecessarily restrictive of public servants in the workplace, with no rational connexion to the requirement that public servants be capable of serving the government of the day. Conversely, people who are less supportive of marriage equality are likely to see something philosophically troubling about the Assembly passing a motion to direct the public service to champion one side or other of a political debate.

The role and function of the public service are contested concepts. The limitations put on public servants arise from two sources. First, veto players like the APSC who are able to codify risk-averse approaches to avoiding criticism and scandal by interpreting principles with an approach that errs on the side of restricting public servants. Second, the public—through or instigated by the media—in its criticisms of how public servants behave during elections, with a focus on calling out behaviour that prejudices their ‘side’ of politics.

By this point, it becomes clearer why the comments about Caretaker Conventions in the terms of reference and the associated debate were incorrect.

First, Caretaker Conventions are about ministerial behaviour and the burden of upholding them has slowly shifted over to the public service.

Second, intuitions about Caretaker Conventions are increasingly informed by partisan intuition rather than a general principled view about the public service's function and role.

Third, Caretaker Conventions are about appointments and significant policy decisions that would bind the incoming government, and yet this has shifted to muzzling public servants during election periods even when it is not rationally connected to the ability of the public service to serve the government of the day.

Fourth, the net result has been an increasingly restrictive view of the appropriate behaviour of public servants that favours risk-aversion and the avoidance of controversy.

Part 2: Government Information and Electoral Information

If you ignore the Caretaker Conventions aspect of the Terms of Reference, the residual is a series of statements about the way government information (the information that government uses to fulfill its functions) and electoral information (the official information that is put before the public to inform electoral behaviour) are managed.

Section 20D of the *Financial Management Act 1996* is titled 'Purpose and contents of pre-election budget update'. It does not reference Caretaker Conventions but, instead, subsection (1) states:

- (1) The purpose of a pre-election budget update for an election is—
 - (a) to allow the assessment of the government's financial performance against the financial policy objectives and strategies set out in the latest financial policy objectives and strategies statement; and
 - (b) to give the electorate an accurate picture of the Territory's financial position before the election.

It was inserted by the *Financial Management Amendment Act 2003 (No 2)* and was a response to some Australian jurisdictions implementing a 'Charter of Financial Integrity'. Rather than have a separate Charter, the key features were legislated directly into the *Financial Management Act 1996*. In theory, a voter could read these documents and develop an understanding of how well the government had performed fiscally. With a sufficient mass of informed voters who cared about fiscal performance, the electorate would exercise democratic control over the government.

One of the advantages of incumbency is access to the advice of the bureaucracy. Even with the pre-election budget, a government is likely to have additional documents supplied, including expert interpretations of the data and strategic advice on how to use the data. It is very likely that, given the nature of the pre-election budget update, that the Directorate of the Chief Minister, Treasury and Economic Development would refrain from much outside the statement that would assist the government to win the election, but it is possible and would not be grossly inappropriate.

But the update is also made in the context of ongoing reporting to the government. Prior to the update, there would be information given with data interpretation and strategic advice. As a result, there will never be—as suggested by the Terms of Reference—a symmetry of information.

More than that, there simply cannot be a symmetry of information if the public service is to provide frank and fearless advice to the government of the day. The government of the day will always know what options are on the table for policy, and will make political decisions about which option is best. The public service cannot provide that advice if it places the government of the day visibly at odds with the best advice of the public service. This is entirely appropriate: apolitical advice is provided to the government, the government considers the political aspect of the advice, and the government sets the policy agenda based on the apolitical and political consideration. The loyalty of the public service demands that—within constraints—the government can make political decisions that might be at odds with the best apolitical advice. This is fundamental to democracy.

So what is intuited as ‘information’ by the Terms of Reference must necessarily be constrained.

There is some government information that is inappropriate for wider dissemination if the various bodies of democracy are to function. This information may be the public service’s interpretation of data and its advice for its strategic use.

And then there is electoral information that is needed or desirable for an informed expression of democratic will. Non-experts might not be able to understand the data, but at least the information is available for the interested voter.

The scope of ‘electoral information’ here should be broader than mere financial data. Voters might reasonably want information that cuts across a range of policy areas. And if the data in those datasets held by the government are of poor quality, then at least the public can lobby the government to improve.

Further and importantly to the Terms of Reference, this electoral information probably should not be gatekept by the government of the day but should be released independently to the public. The government of the day might get privileged (in the non-legal sense) interpretive and strategic materials related to the data, but the data itself should be regularly provided directly to the electorate.

I suspect this is the symmetry of information intuited in the Terms of Reference. And then the question becomes whether the information provided to the Minister for Health should have been in that ‘electoral information’ category. As I am unable to work out exactly what the information was, I do not have an opinion on that.

By making ‘electoral information’ a business-as-usual activity, the issues of ‘Caretaker Conventions’ and ‘apolitical nature’ are entirely sidestepped. There is no reason why the information published should not be relatively current, assisting political parties to do policy

development further in advance of elections, and informing members of the Assembly for annual report hearings.

To reiterate, by reframing the conversation away from the Caretaker Conventions, the conversation avoids imposing more restrictions upon public servants and, instead, opens up the discussion of what business-as-usual processes and frameworks should be established to ensure 'electoral information' is readily available and not gatekept by the government of the day.

Part 3: Informing the Democratic Process

If Parts 1 and 2 are accepted in broad terms, paragraphs (2)(a), (b), (g), (h), and (i) of the Terms of Reference are no longer apt for detailed discussion. If those paragraphs are removed, it is clear that the discussion points more towards how information should be made available to the electorate and political parties.

As a general principle, I do not think it is appropriate that political parties should have privileged access to information that is not available to the broader public. Paragraph (2)(f) seeks an exploration of the view that political parties and potential candidates to seek briefings from the public service. The public service must be loyal to the government of the day, and it is entirely appropriate that the government of the day facilitate access to the public service on terms it feels are appropriate. Briefings to non-government members of the Assembly might be helpful when contemplating complex policy or legislative issues. Access to the public service is efficient and promotes better policy debate. Constraining this to Members of the Legislative Assembly is rational and linked to the appropriate outcome of enhancing the capacity of the Assembly.

It is not clear that the same is true for those contemplating contesting the election. Consider some person with politically extreme views who simply wants to lecture public servants about their ideas about economics or law. It is not clear what rational goal is achieved by subjecting public servants to their novel views simply because they have decided that they might contest the next election, no matter how remote their chances of election. It is not clear why this person needs special access to the public service.

And responsibility for handling information about decisions to be made urgently during an election should similarly return to the ministers. If a decision is needed urgently that would bind an incoming government, the minister should, in consultation with the Chief Minister, contemplate whether the decision is necessary and whether it should be made in consultation with the leaders of the other parties represented in the Assembly. The burden of that political decision should not be shouldered by the public service.

Electoral information, on the other hand, should not be constrained by the government of the day but, instead, published directly to the public, informing policy debate and enhancing the ability of non-government parties to contest elections.

The above discussion noted that there was raw data and information ('electoral information') and the interpretation and strategic analysis ('government data'). It is possible to create cost-effective infrastructure that helps address both needs for the public.

The obvious infrastructure for electoral information is a data warehouse. The ACT already operates an open data portal at data.act.gov.au. In the Justice, Safety and Emergency Data portal, it appears that only three datasets have been updated in 2025. Another three datasets have been updated in 2025 for 'Public Transport'. It is very clear that there are datasets in the ACT public service that are not regularly pushing data to the open data portal.

The infrastructure for interpretation and strategic analysis is more complex. The key idea is that information should find the user who needs it, rather than requiring the user to undertake their own exploration. The user who needs it should be equipped to understand the data and use the information to form their own political beliefs.

Despite being the political epicentre of Australia, the ACT has surprisingly little in the way of political media. Our media has a clear focus on Federal Politics, and those media outlets have a light touch approach to the ACT community and the ACT Government. There are very few political media outlets in Canberra, with most focused on servicing the interests of older Canberrans. There are opportunities for the ACT Government to support the incubation and development of new media outlets that take advantage of new technologies to promote the ACT as a City of Democracy. Especially in a global environment of democratic backsliding, promoting the growth of innovative, diverse, sustainable news outlets means we get better political outcomes in the ACT and lead the nation in promoting democratic norms and culture.

Combined with a data warehouse, promoting the development of media outlets that can analyse, interpret, and communicate ACT Government data means a better informed electorate, better informed political parties, and better informed democratic processes.

Moving the conversation in this way is, in my view, more constructive than the blame-oriented discussion motivated by misconceptions about the Caretaker Conventions. A better conversation is one that promotes more information being disseminated rather than a culture which restricts the public service through additional disciplinary rules.

Part 4: Conclusions

With the greatest respect to those who clearly intuited a serious issue that deserves to be discussed seriously, the Terms of Reference for this inquiry were unfortunately weighed down with inaccurate understandings of the Caretaker Conventions. The great risk is that those misunderstandings work their way into new legislation (or legislation-like instruments) that further pushes a risk-averse culture on the public service.

Caretaker Conventions should be understood clearly and precisely: a constraint on ministers from making appointments or policy decisions that bind a potential incoming government. Ministers should be responsible for managing the requirements of the Caretaker Conventions.

Intuitions about the Caretaker Conventions—pushed through guidance materials produced by the APSC and its equivalents—have had the effect of muzzling public servants above and beyond what is required of them to maintain the confidence of the government of the day. These inaccurate intuitions have had significant consequences: hindering the Australian Electoral Commission’s ability to engage with people spreading disinformation, and requiring APS employees to feel like their sexuality was a political statement incompatible with their function.

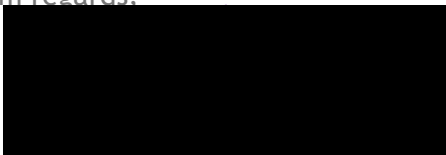
The discussion of Caretaker Conventions has typically been partisan: it is appropriate for the public service to behave in ways that benefit my ‘side’ of politics, but there is outrage when it acts in a way that is perceived to benefit the other ‘side’ of politics. This occurs where there are points of controversy or contention within the political public. Appointing Justice Kiefel was applauded despite being in the twilight months of a government due to call an election. Presidents Obama and Trump had their appointments criticised on principled grounds that were motivated by partisan interest.

The serious issue that deserves to be discussed seriously is not the conduct of the public service: the issue is the way that information is made available to the electorate. It is inappropriate for government information to be made public as that would undermine the relationship between the public service and the government of the day, but it also seems inappropriate that electoral information is not routinely and rapidly pushed out to the public. Not only is this information needed by voters, it is also information that should inform democratic processes generally.

But having access to information is unhelpful if the public has no good way to interpret, analyse, and use the information that is published. This is where we need greater support to incubate and develop the infrastructure for world-leading political media here in Canberra. There are cost-effective ways to use existing budgets to make this happen, especially through leveraging private investment. The ACT should be promoting itself as a City of Democracy, and an easy way to achieve that is to promote the development of political media that pushes information out to where it is needed in a format that facilitates its use.

Thank you for considering my submission.

Warm regards,



Mark Fletcher