

Legislative Assembly for the Australian Capital Territory

**A PROTOCOL for Government
Interaction with Assembly Committees**

**Report by the Standing Committee on
Administration and Procedure
March 1999**

RESOLUTION OF APPOINTMENT

On 9 March 1995, the Legislative Assembly for the Australian Capital Territory adopted standing order 16 which established the Standing Committee on Administration and Procedure. This standing order was amended on 4 May 1995 to provide the following terms of reference:

16. (1) A Standing Committee on Administration and Procedure shall be appointed at the commencement of each Assembly to:
 - (a) inquire into and report on, as appropriate:
 - (i) the Assembly's annual estimates of expenditure;
 - (ii) the practices and procedure of the Assembly; and
 - (iii) the standing orders of the Assembly;
 - (b) advise the Speaker on:
 - (i) Members' entitlements including facilities and services;
 - (ii) the operation of the transcription service (*Hansard*);
 - (iii) the availability to the public of Assembly documents;
 - (iv) the operation of the Assembly library; and
 - (c) arrange the order of private Members' business and Assembly business;

Membership

The Speaker (Presiding Member)
Mr S Corbell, MLA
Mr H Hird, MLA
Mr T Kaine, MLA
Mr P Osborne, MLA
Ms K Tucker, MLA

Secretary to the Inquiry: Ms M Weeks

BACKGROUND

- 1.1 On Thursday, 27 August 1998 the Chief Minister presented the *Protocol for Government Interaction with Assembly Committee Inquiries* and moved that the paper be referred to the Standing Committee for the Chief Minister's Portfolio for inquiry and report. The motion was amended to refer the paper to the Standing Committee on Administration and Procedure. The motion, as amended, was agreed to by the Assembly.
- 1.2 The purpose of the Protocol is clearly stated by the Chief Minister when debating the motion referring the Protocol to the Committee, "...[it] outlines processes and practices for Ministers and officials to follow in their contact with Assembly committees..."¹. The direction of the Protocol is contained in the **Introduction** and **Protocol** which state:

INTRODUCTION

- The Government is accountable to the Legislative Assembly and is obliged to respond to Committee requests for information.
- Committees of the Assembly have the power to send for persons, papers and records (Standing Order 240(*sic*)).

PROTOCOL

- Defence of government policy and administration is the preserve of Ministers.
 - Public servants assist Ministers with factual and technical background to policies and their administration.
- 1.3 The Protocol (see attachment A) then explores various levels of interaction between the Executive, public servants and committees outlining the appropriate course to take. The Chief Minister further explained that as the "... Executive is accountable to the Assembly ...[it] ... emphasises the role of Ministers in contact with committees." ²
- 1.4 The Chief Minister indicated during debate, that "...As the protocol deals with contact by members and committees with the Government, it is only appropriate that members and committees have an opportunity to comment on the protocol." ³. The motion to refer the Protocol to a committee for consideration was to provide that opportunity.

¹ Debates of the Legislative Assembly for the Australian Capital Territory, Weekly Hansard, 27 August 1998, p. 1433

² *Op cit*, 1433.

³ *Op cit*. p. 1434

WORK OF THE COMMITTEE

- 2.1 The Standing Committee on Administration and Procedure considered the inquiry at its meetings on 1 September, 7 October and 4 November in 1998, 10 February and 3 March in 1999.
- 2.2 At its meeting of 1 September 1998, the Committee agreed that it was important to consult with the Assembly committees to establish their views of the Protocol. Accordingly, the Committee asked the Presiding Member (the Speaker) to meet with the presiding members of committees and the Clerk to meet with committee secretaries to discuss the Protocol.
- 2.3 The meeting with the presiding members of committees took place on 18 September 1998 and that between the Clerk and committee Secretaries followed. Although all committee presiding members were not able to attend, the presiding members of the Standing Committees on Education and Health and Community Care and those of the Select Committee on Estimates 1998-99 and Gambling, meet with the Speaker to discuss the Protocol and the Presiding Member of the Standing Committee for the Chief Minister's Portfolio provided written comments.

ISSUES

- 3.1 During discussions with both the committee presiding members and the committee secretaries concern was expressed over a number of issues. There was a general acknowledgment that, to date, there had been a good working relationship between the Executive and Public Service and the Assembly's committees. The relationship had been built on co-operation, particularly at officer level. There was a perception that the general thrust of the Protocol could well alter that current working relationship having a detrimental impact on the work of committees.

Standing Orders

- 3.2 There was a concern expressed that, although acknowledging the standing orders, particularly standing orders 239 and 240 (power to summons persons, papers and records), the Protocol would have the effect of overriding the standing orders. The example considered by the Committee related to the section of the Protocol headed *Appearances*.

Assembly Standing order 240 states:

The Presiding Member of a committee may direct the secretary to the committee to summon witnesses to be examined before the committee.

Clearly a committee has the power to call any witness, including departmental officers, to contribute to the committee's inquiry. Yet the Protocol states:

Ministers determine whether the attendance of an official or officials before a Committee is appropriate.

- 3.3 There was concern that this statement would be regarded as overriding standing order 240 and that a Ministerial refusal to agree to the attendance of an official would essentially be the power of veto.
- 3.4 Since self-government no witness has been officially summoned to appear before a committee. Rather the spirit of this standing order has operated. With the co-operation of Ministers and departmental officers and with the committee's concurrence the appropriate officers have appeared before committees. None the less it is a key to a committee's role of scrutinising the government and government actions and to compromise it in any manner would compromise this role of committees.
- 3.5 Similar concerns were expressed in relation to the first point of the section ***Provision of Information and Submissions*** which states:

Factual information may be provided to Committees at the discretion of the relevant Minister.

Again this appears to conflict with the provisions of the Assembly's Standing Orders by restricting the information made available to committees and thus may result in a constraint on the work of committees.

- 3.6 While this Committee is not concerned with dictating to the Executive and departmental officers how to conduct their business, it is concerned that the Standing Orders remain the paramount statement governing the Assembly and the conduct of the business of its committees.

Protocol and Accepted Practice

- 3.7 Discussions on the Protocol also identified a concern that the Protocol substantially altered the current practices followed by committees during inquiries and that in doing so it may impact adversely on the work of committees.
- 3.8 Concern was particularly expressed in relation to the procedures set out in the Protocol relating to a committee's contact with officials. The Protocol in both the sections relating to ***Appearances*** and that on ***Briefings*** requires that the secretary of a committee is to contact the Minister's office only and that requests to appear before a committee or for briefings should be redirected to the Minister if received by an official.
- 3.9 The statement "The secretary is to contact the Minister's office only." in the section headed ***Appearances*** is of particular concern to this Committee. Secretaries to

Assembly committees work to the direction of the committee and its Presiding Member and other members and are accountable to the Clerk. They are not answerable to the Chief Executives or any other departmental official nor to the Minister. It is therefore of concern that such a direction is in a document detailing the Government's interaction with Assembly committees. The following statement in the section headed **Briefings** is preferable:

It is inappropriate for Committees to contact officials independently and where this occurs officials should refer committees to the Minister.

- 3.10 Secondly, the directions are at odds with the current practice and to follow the new requirements to the letter may have unforeseen and unintended consequences. Currently, the usual practice is that the presiding member writes to the Minister seeking agreement to establish a line of communication with the Department. Once agreement for the liaison is established, contact with the relevant departmental officers is on an as needs basis. There is some concern that in routinely seeking the Minister's approval before contacting any departmental officer both the Minister and the committee will become bogged down in paperwork seeking authorisation. Resulting delays may frustrate the course of the inquiry and delay reporting to the Assembly.

Interpretation

- 3.11 Discussions with both the presiding members of committees and the secretaries revealed that there may be problems in the interpretation of some sections of the document. The two sections discussed were those headed the **Provision of Information and Submissions** and **Confidentiality**.
- 3.12 Of more concern to this Committee is that, during discussions, it became clear that at least one committee was receiving referrals from a Minister directly and as it was to "consider, examine and advise on matters" it was not considered necessary to have the matter referred to the committee by the Assembly. The Committee endorses the requirement in the Protocol that "the Assembly should be the source of referral of inquiries to Committees" and believes that the interpretation of this section should be broad so that all matters a Minister may wish an Assembly committee to consider are referred by the Assembly at their instigation. The Committee also notes that committees have, under the resolution of appointment of 28 April 1998, the power to "inquire into and report on mattersthat are considered by the committee to be of concern to the community..."⁴ but believes that Ministers should not seek to have committees undertake inquiries on the basis of community concern without first taking the matter to the Assembly. This, of course, is apart from those matters which are required by statute to be referred by the executive to committees and nor should it preclude briefings with a committee within its terms of reference.

⁴ *Minutes of Proceedings*, No. 2, 28 April 1998

Developments

- 3.13 One final comment that this Committee would make in relation to the document concerns the need to be mindful of the requirement to update it as practices develop. It notes, for example, that on 12 October 1998 the Chief Minister wrote to the Presiding Member of the Standing Committee on Administration and Procedure conveying an amendment to the document (see attachment B).
- 3.14 This Committee also notes that the section headed **Confidentiality** addressing the issue of public interest immunity may need to be revisited when this Committee has completed its inquiry into committee evidence.

CONCLUSION

- 4.1 The Standing Committee on Administration and Procedure notes that the Protocol has been developed from a government perspective and appreciates the opportunity to comment on the document. Assembly committees have prepared a similar document (from a committee perspective) for the use of its members. A copy of this document, *Committee Procedures and Operations - A Guide for Committee Members*, is attached (Attachment C).

Recommendation

The Committee, having considered the document and raised a number of concerns **recommends:**

That the Assembly note the document *A Protocol for Government Interaction with Assembly Committees*.

Greg Cornwell MLA
Speaker

3 March 1999

PROTOCOL FOR GOVERNMENT INTERACTION WITH ASSEMBLY COMMITTEE INQUIRIES

INTRODUCTION

- The Government is accountable to the Legislative Assembly and is obliged to respond to Committee requests for information.
- Committees of the Assembly have the power to send for persons, papers and records (Standing Order 240).

PROTOCOL

- Defence of government policy and administration is the preserve of Ministers.
- Public servants assist Ministers with factual and technical background to policies and their administration.

Appearances

- The Presiding Member of a Committee may direct the secretary to the Committee to summon witnesses to be examined by the Committee (Standing Order 240).
- The secretary is to contact the Minister's office only.
- Ministers determine whether the attendance of an official or officials before a Committee is appropriate.
- Should an officer receive a request for an appearance from a Committee member or Committee secretary, they should ensure that the request is re-directed through the relevant Minister and the Minister has given approval prior to any appearance.
- Officials are to maintain the highest standards of courtesy in their dealings with Committees. Officials should be open with Committees and if unable or unwilling to answer questions or provide information should say so, and give reasons. The requirements for Ministerial approval and handling of confidential information are set out below.
- Officials may request postponement of giving evidence where they are unable to answer questions because information is unavailable to them at the time or they wish to consult with the Minister.

Briefings

- Ministers may approve private briefings of Committees by officials.
- It is inappropriate for Committees to contact officials independently and where this occurs officials should refer Committees to the Minister.

Provision of Information and Submissions

- Factual information may be provided to Committees at the discretion of the relevant Minister.
- Submissions on matters of government policy (including the merits of policy, policy direction and development) or political sensitivity should be submitted for Government approval before being provided to a Committee.
- Information provided to a Committee becomes the property of the Committee and cannot be altered or withdrawn without approval from the Committee (Standing Order 244). The *Participation in Parliamentary Inquiries Handbook* provides advice on the correction of evidence provided to Committees.
- Regard should be paid to the *Participation in Parliamentary Inquiries Handbook* and the *Cabinet Handbook* in the handling of any relevant material.

Appointments

- The *Statutory Appointments Act 1994* (the Act) requires that, where a Minister has a power under an Act to appoint a person to statutory office, the Minister shall consult with the relevant Committee of the Assembly. Further, the Act provides that the Minister is not to make such an appointment until a recommendation from the Committee has been received or 30 days has expired. Under the Act, the Minister is to have regard to the recommendations of the Committee in proceeding with an appointment.
- Provision of information to a Committee should include sufficient detail about the proposed appointment to allow the Committee to give the matter adequate consideration. However, Ministers should use their discretion and ensure that the personal privacy of proposed appointees is not unduly affected. Committees should not be provided with information regarding any persons considered but not proposed for appointment.

Referral of Matters to Committees

- Ministers may identify matters within their portfolios which could usefully be referred to the Standing Committees. If any appropriate matters are identified, the Minister should inform the Government prior to acting to refer the matter.

- In accordance with the Government's position that the Assembly should be the source of referral of inquiries to Committees, Ministers should move the referral of any such matters in the Assembly.

Inter-Governmental Agreements

- Under the provisions of the Administration(Interstate Agreements)Act]1997, Ministers are required to inform Members and consult the relevant Committee concerning negotiations for any interstate agreements which will give rise to a legislative outcome in the ACT.
- Ministers may also wish to consider informing the relevant Committee of any treaty negotiations of each they have been informed or consulted, where the subject of the treaty is relevant to the ACT.

Confidentiality

- Information provided to a Committee in confidence (in camera) will remain strictly confidential, unless publication is authorised by a resolution of the Committee or the Assembly (Standing Order 24 1). In this manner Committees have the discretion to publish any information provided to them (Standing Order 243).
- Ministers should approve any claims to be made by officials that it would be in the public interest to withhold documents or oral evidence, or requests that hearings be conducted in camera. Only Ministers should make claims of public interest immunity, by way of a letter from the Minister to the Committee chair, and only after consultation with the Attorney-General.
- Officials should not provide or withhold any information without approval of the relevant Minister. If a Committee seeks agreement from an official to publish in camera evidence given by the official as a witness, the official should consult the relevant Minister. All such decisions are matters for Ministers.

Cabinet information

- Information concerning the deliberations of Cabinet should be treated in accordance with the Cabinet conventions laid down in the *Cabinet Handbook*. Accordingly, all requests for access to Cabinet documents are to be referred to the Chief Executive of the Chief Minister's Department, as Secretary to Cabinet.

Statutory authorities

- It is recognised that the role and nature of some statutory authorities will require the selective application of this Protocol, especially in relation to Ministerial approval of appearances and submissions.
- Members of authorities which have statutory public information and education roles clearly are able to express views on the policy responsibilities of their authorities.

However, care should be taken to avoid taking a partisan position on matters of political controversy. In other respects this Protocol should be followed as far as is relevant.

REQUESTS FOR INFORMATION FROM INDIVIDUAL MEMBERS

- *The Participation in Parliamentary Inquiries Handbook* provides advice on handling requests for information from individual Members outside Committee processes. All such requests and responses should be directed through the relevant Minister.

OTHER GUIDANCE

- The *Participation in Parliamentary Inquiries Handbook* remains the primary source of advice on Government participation in parliamentary and other inquiries in the ACT, the Commonwealth and the States. The Handbook is available to officials on the intranet or from the Assembly Liaison Office (telephone: 6205 0543). Advice about the Handbook is available from the Manager, Assembly Liaison on 6207 6136.
- The Standing Orders (Nos. 215-264) of the Assembly set out rules for the operation of Committees and appearance of witnesses before Committees.

ATTACHMENT B

ATTACHMENT C