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Cabinet confidentiality

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Introduction

‘Cabinet’, a key institution of the Westminster tradition of parliamentary practice, refers to a meeting of senior Ministers summoned by the Prime Minister. Cabinet also refers to a process of gaining policy coherence and political support at the apex of executive government. Yet Cabinet and indeed the Prime Minister are not referred to in the Australian Constitution nor were they established by statute. Both Cabinet and the office of the Prime Minister evolved over hundreds of years of informal conventions and practice in the United Kingdom. The system continued in colonial parliaments and the Commonwealth parliament since 1901 although the shape and structure of Cabinet have evolved greatly in this time.

According to the latest edition of the Cabinet Handbook, published in July 2009, the matters discussed in Cabinet meetings include:

- New policy proposals
- Expenditure proposals for major capital works
- Major international security issues of strategic importance to Australia
- Strategic budget and whole-of-government issues
- Proposed new legislation and priorities for the legislative program.²

Contemporary issues in relation to the operation of Cabinet may include the level of Prime Ministerial control over cabinet proceedings, the (im)balance between policy and politics in Cabinet deliberations, the criteria for determining whether an issue is worthy of Cabinet consideration, the treatment of complex whole-of-government issues, and the challenge of meeting increasing expectations of prompt and decisive responses to fast changing issues.³

The issue of Cabinet confidentiality is contested and impacts on the ability of parliament to access certain information. Over recent years there has been some statutory reform and changing judicial interpretation concerning the accessibility of Cabinet documents. There have also been a number of parliamentary inquiries concerning, among other things, the power of parliament to order the production of Cabinet documents. This follows government decisions to withhold certain information from parliament on the grounds of Cabinet confidentiality. This paper focuses on the confidentiality of Cabinet documents covering the

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2. Department of the Prime Minister and Cabinet, *Cabinet handbook*, sixth edn, DPMC, Canberra, July 2009, pp. 11–12, viewed 6 April 2010, http://www.dPMC.gov.au/guidelines/docs/cabinet_handbook.pdf
 3. M Keating and P Weller, ‘Cabinet government: an institution under pressure’, M Keating, J Wanna and P Weller, *Institutions on the edge? Capacity for governance*, Allen & Unwin, St Leonards, pp. 50–52; P Weller, *Cabinet government in Australia, 1901–2006: practice, principles, performance*, University of New South Wales Press, Sydney, 2007.

concept of Cabinet confidentiality, its origins and evolution and issues relating to cabinet confidentiality.

The concept of Cabinet confidentiality

Two key interlinked features of Cabinet are collective responsibility and confidentiality. Members of Cabinet are collectively responsible for the decisions made by Cabinet. While disagreement may be aired within the confines of a Cabinet meeting, it is a convention that cabinet decisions will be fully and publicly supported by all Ministers, despite any personal views held by individual Ministers. Ministers and any officials are expected to refrain from public comment on matters to be considered by Cabinet. The confidentiality of cabinet proceedings supports the principle of collective responsibility, by promoting open and free discussion including the airing of dissenting views and compromise. The Cabinet Handbook states:

Ministry, Cabinet and Cabinet committees are forums in which ministers, while working towards a collective position, are able to discuss proposals and a variety of options and views with complete freedom. The openness and frankness of discussions in the Cabinet Room are protected by the strict observance of this confidentiality.⁴

Fidelity to Cabinet is seen as critical to maintaining the position of a Minister of the Crown, as Quick and Garran remarked in 1901, 'if any member of the Cabinet seriously dissents from the opinion and policy approved by the majority of his colleagues it is his duty as a man of honour to resign'.⁵ While there are no formal legal mechanisms to enforce confidentiality in Cabinet among Ministers, those Ministers who participate in meetings of the Federal Executive Council, established by s. 62 of the Constitution, 'shall take the oath of allegiance, the official oath and the oath of fidelity'.⁶ However, the Council is not a deliberative forum. Its main functions are to advise the Governor-General giving effect to Cabinet decisions.

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4. Department of the Prime Minister and the Cabinet, *Cabinet handbook*, sixth edn, DPMC, July 2009, p. 4.
 5. J Quick and R Garran, *Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1901.
 6. Section 6(1), *Oaths Act 1936 (Cwlth)*.

The origins of Cabinet confidentiality

Secrecy was a defining feature in the early development of Cabinet. The word Cabinet originally referred to a 'small room or closet' and was expanded to include a group of people meeting together to deliberate in private.⁷ By the early 1600s Cabinet referred to a committee of the Privy Council, variously known as the Foreign Committee or the Intelligence Committee, made up of an inner circle of councillors. The role of the committee grew in stature and by the 1700s it came to replace the Privy Council in its importance and power.⁸ It was custom for the monarch to preside over meetings of the committee until 1717 when King George I and King George II, who did not speak English, held a greater concern for Hanover than English politics.⁹ The name Cabinet and its associated secrecy were retained after the monarch's withdrawal. The position of the Prime Minister as the head of Cabinet filled the void, and with the growth in government bureaucracy, the size of Cabinet gradually grew from five members in 1783 to more than 20 by 1915.¹⁰

The emergence of a stable mass two party system in the mid 1800s has been described as an 'essential feature' shaping the environment in which cabinet evolved. Adversarial party politics necessitated an intolerance of Ministers who spoke out against Cabinet decisions, as PG Walker noted:

With the full establishment of the mass two-party system the doctrine of collective responsibility passed into the unwritten conventions of the Constitution—something that everyone took for granted. The doctrine was indeed necessary to the Cabinet from the mid-nineteenth century onwards. Cabinet Ministers were party leaders: both their leadership and the party itself would be weakened if the leaders openly attacked one another or publicly attributed views to one another.¹¹

Walter Bagehot, in his classic study of British politics in 1867, found Cabinet confidentiality quite remarkable, and this confidentiality, to some extent, explains why much detail on the operation of early Cabinet remains unknown:

The most curious point about Cabinet is that so very little is known about it. The meetings are not only secret in theory, but secret in reality. By present practice, no official minute in all ordinary cases is kept of them. Even a private note is discouraged and disliked. The

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7. N Wilding and P Laundry, *An encyclopaedia of Parliament*, St Martin's Press, New York, 1971, p. 66.
 8. ER Turner, *The Cabinet Council of England in the seventeenth and eighteenth centuries 1622–1784*, Johns Hopkins Press, Baltimore, 1930, p. 22.
 9. FW Maitland, *The Constitutional history of England*, Cambridge University Press, Cambridge, 1961, p. 395.
 10. H Daalder, *Cabinet reform in Britain, 1914–1963*, Stanford University Press, Stanford, 1963, pp. 17–18.
 11. PG Walker, *The Cabinet*, Cape, London, 1970, pp. 30–31.

House of Commons, even in its most inquisitive and turbulent moments, would scarcely permit a note of a cabinet meeting to be read. No Minister who respected the fundamental usages of political practice would attempt to read such a note ... No description of it, at once graphic and authentic, has ever been given.¹²

In terms of the civil service, Cabinet documents and related information concerning the conduct of Cabinet would have been protected under the general ‘breach of official trust’ provisions of the *Official Secrets Act 1889 (UK)*. Section 2 of that Act made it an offence for a person, having held an office under Her Majesty the Queen, to communicate a document or information ‘to any person to whom the same ought not, in the interest of the state or otherwise in the public interest’.¹³ Under common law, governments defended the retention of documents by appealing to the doctrine of crown privilege. However, given the political nature of Cabinet documents, it is not necessarily the case that the letter of the law has been consistently applied and judicial interpretations have evolved. These issues are discussed further below.

The evolution of Cabinet confidentiality

The first steps towards Cabinet government in Australia came in the form of official instructions to New South Wales Governor Darling in 1825 for the establishment of an Executive Council of senior advisors. Colonial Cabinets were more ‘foreshadowed rather than established’ in the Constitutions of the colonies with the introduction of responsible government in the 1850s and 1860s.¹⁴ These colonial Cabinets operated in much the same way as in Westminster. The Federation Conventions of the 1890s largely accepted the principles of Cabinet government without debate. It was recognised that Cabinet would form a central part of government, but it was a deliberate decision to omit the institution from the formal constitution in order to maintain the flexibility of its operation.¹⁵ The first Commonwealth Cabinet led by Edmund Barton included four former colonial (state) Premiers who were well versed in the norms of Cabinet government.¹⁶ Until the mid 1950s,

12. W Bagehot, *The English constitution*, Harper Collins, London, [1867] 1993, p. 70.

13. Section 2(1), *Official Secrets Act 1889 (UK)*.

14. M Atkinson (ed.) *Australia: economic and political studies*, Macmillan, Melbourne, 1920, p. 82 cited in S Encel, *Cabinet Government in Australia*, Melbourne University Press, Melbourne, 1962, pp. 18–19.

15. M Keating and P Weller, ‘Cabinet government: an institution under pressure’, M Keating, J Wanna and P Weller, *Institutions on the edge? Capacity for governance*, Allen & Unwin, St Leonards, p. 46.

16. The first Commonwealth Cabinet consisted of nine Ministers, whereas the current Cabinet consists of 20 Ministers. For a list of current and former cabinet Ministers, see: Parliamentary Library, *Parliamentary Handbook of the Commonwealth of Australia 42nd Parliament*, Department of Parliamentary Services, Canberra, 2008, pp. 499–574, viewed 22 April 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=HANDBOOK;group=:holdingType=:id=handbook%2Fnewhandbook%2F2008-12->

Commonwealth Government Cabinets included all Ministers. While the principles of collective responsibility and confidentiality have remained, the formality and the structure of Cabinet have evolved greatly.

In the first decade of the Commonwealth Government, Ministers were responsible for making their own notes and handing down instructions to their departments following Cabinet meetings. There was no formal agenda or written submissions for those meetings. In 1926 the first Cabinet Handbook outlined a broad set of rules for the operation of Cabinet. These rules included the appointment of Ministers as secretaries to Cabinet and the framework for setting the agenda for meetings. A Cabinet Secretariat was established to take minutes and circulate papers, although this was temporarily abolished by the Scullin Government. Even on the re-establishment of the secretariat by the Lyons Government there was no well developed system or structure to the way Cabinet worked.

The rules of Cabinet gradually developed following World War II and in 1982 the Cabinet Handbook was declassified and published for the first time in an academic journal.¹⁷ Now that the Handbook itself was no longer a secret document, the Government officially published it in 1984, and various editions have been published since. The later editions of the Handbook provide a broader range of rules and structures which clarify and elaborate old conventions and their application in a much more complex legislative and bureaucratic environment.¹⁸

As part of an election promise in 2007, the Rudd Government has established a 'Community Cabinet' program attached to its regular schedule of meetings. Community Cabinet meetings involve a public question and answer forum and 10 minute, one-on-one meetings with individual Ministers, largely following a model established by former Queensland Premier Peter Beattie. Members of the public are required to register to participate in these events.¹⁹ These forums have been valued as an opportunity for the public to take their views and grievances directly to Cabinet.²⁰ However, it has been noted that they are often held in

[19%2F0090;orderBy=;page=;query=Id%3A%22handbook%2Fnewhandbook%2F2008-12-19%2F0071%22;querytype=;rec=;resCount=](#)

17. Department of the Prime Minister and Cabinet, *The Cabinet Handbook*, reproduced in *Politics*, 17(1), 1982, pp. 146–163.
18. The general points made in this and the above paragraphs were sourced from P Weller, *Cabinet government in Australia, 1901–2006: practice, principles, performance*, University of New South Wales Press, Sydney, 2007.
19. Department of the Prime Minister and Cabinet, 'Community Cabinet', viewed 6 April 2010, http://www.dpmc.gov.au/community_cabinet/index.cfm
20. Editorial, 'Community Cabinets a worthwhile exercise', *The Age*, 22 January 2008, p. 12.

marginal electorates.²¹ Importantly, Community Cabinet meetings do not have the status of the formal meetings of Cabinet, which by convention remain strictly confidential.

Cabinet documents

Definitions

The Cabinet Handbook states that forms for the agenda of meetings include:

- submissions and memoranda
- matters without submissions
- audio-visual presentations, and
- minutes of Cabinet committees.²²

The Handbook defines Cabinet documents broadly so as to include:

- business lists for meetings
- Cabinet programmes
- Cabinet submissions and corrigenda
- reports and attachments to submissions
- papers circulated by Ministers or the Cabinet Secretariat
- relevant correspondence between Ministers²³

All Cabinet documents attract the security classification of 'Protected' and are marked 'Cabinet-in-Confidence'. Only departmental officials with a definite 'need-to-know' may access those documents. The procedures for access to and the handling of Cabinet documents within the public service are outlined in the Commonwealth Protective Security Manual.²⁴

21. C Kerr, 'Community Cabinet meetings start to look risky for Rudd', *Weekend Australian*, 16 January 2010, p. 8.

22. Department of the Prime Minister and Cabinet, *Cabinet handbook*, sixth edn, DPMC, July 2009, p. 10.

23. *Ibid.*, p. 22.

24. For a summary of the Protective Security Manual see: Attorney-General's Department, 'Protective Security Manual', viewed 6 April 2010, <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWPE30AA68A4D5313EACA2571EE000AAF9F>

The minutes of Cabinet meetings record only the outcomes of deliberations rather than the details of the discussion or the identification of who raised various views. Cabinet documents must be held separately from the other working documents of government administration and must be destroyed when no longer in day-to-day use. Governments do not have special access to Cabinet documents created by former governments.²⁵ Under the *Archives Act 1983*, government records, including Cabinet documents, are made available to the public after 30 years. However, Cabinet notebooks, written as an *aide-mémoire* for drafting the formal Cabinet decision, have a higher level of restriction and are released 50 years following their creation.²⁶

A range of legislation is in place to maintain the confidentiality of Cabinet documents and deliberations including:

- *Administrative Appeals Tribunal Act 1975*, sections 28, 36, 36B, 39B
- *Administrative Decisions (Judicial Review) Act 1977*, section 14
- *Archives Act 1983*, sections 3, 22A
- *Auditor-General Act 1997*, section 37
- *Freedom of Information Act 1982*, sections 4, 34
- *Human Rights and Equal Opportunity Act 1986*, sections 14, 24
- *Inspector-General of Taxation Act 2003*, section 22
- *Law Enforcement Integrity Commissioner Act 2006*, sections, 5, 149
- *Migration Act 1958*, sections 5, 375, 437
- *Ombudsman Act 1976*, section 9
- *Privacy Act 1988*, section 33, 70
- *Telecommunications Act 1997*, section 531G

25. Department of the Prime Minister and Cabinet, *Cabinet Handbook*, sixth edn, DPMC, p. 27.

26. Section 22A, *Archives Act 1983*. Notetaking was introduced in Cabinet in 1941, discontinued at the end of World War II, and reintroduced in 1950. It was not until 1994 that the decision was made to declassify Cabinet notebooks after 50 years. The *Freedom of Information Amendment (Reform) Act 2010* will reduce the open access period for Cabinet Notebooks to 30 years (see discussion below). The relevant provisions are due to come into force on proclamation or six months after royal assent to the related *Australian Information Commissioner Act 2010*.

- *Trade Practices Act 1974*, section 155

Issues relating to Cabinet confidentiality

The issues in relation to the confidentiality of Cabinet documents discussed below are:

- the compatibility of Cabinet confidentiality with open and accountable government
- Cabinet documents and freedom of information legislation
- Cabinet confidentiality and court proceedings
- Cabinet documents and parliament
- the treatment of Cabinet ‘leaks’ and unauthorised disclosures, and
- the scope of Cabinet documents.

The compatibility of Cabinet confidentiality with open and accountable government

Perhaps the most significant issue concerning Cabinet confidentiality is its relationship with the push for greater transparency in government activities. The movement towards more open and accountable government gained momentum over the past 35 years or so with the establishment of the Administrative Appeals Tribunal, freedom of information laws, the introduction of (limited) whistleblower provisions, the creation of oversight mechanisms such as ombudsmen and the various codes of conduct for the public service, lobbyists, Ministers and their staff. In general terms, these reforms, now known as ‘new administrative law’, were developed to increase the level of openness and transparency in government while supporting public administration and the rights of individual citizens.²⁷ While most Cabinet decisions are eventually announced, the content of Cabinet discussions has largely avoided greater public exposure. The resistance to transparency in Cabinet suggests that there is a practical and political limit to openness in government.²⁸ If the proceedings of Cabinet were to be made fully transparent, it is likely that crucial ministerial discussions would be undertaken elsewhere, perhaps in the office of the Prime Minister. This would result in a greater concentration of power within the Prime Minister’s Office, possibly leading to less informed

27. See G Terrill, *Secrecy and openness: the federal government from Menzies to Whitlam and beyond*, Melbourne University Press, Melbourne, 2000; M Paterson, *Freedom of information and privacy in Australia: Government and information access in the modern state*, Lexis Nexis, Chatswood, 2005, p. 4.

28. An example of government resistance to Cabinet transparency can be found in the response by the Attorney-General’s Department to a Law Reform Commission proposal to exclude Cabinet documents as a general category from a new statutory secrecy offence. This is discussed further in a section below.

and considered decisions.²⁹ Further, the wider and more open the Cabinet consults on its deliberations, the broader the policy agenda and the less control the government has over that agenda. It is in the political interests of the government to maintain control over its agenda, support an efficient decision making process, and maintain a system that provides the appearance of a strong and decisive government.³⁰ This political imperative to maintain the confidentiality of Cabinet underpins the argument for protecting Cabinet material as a general class, rather than on the basis of the actual harm individual documents might cause. This is discussed further below.

Cabinet documents and freedom of information legislation

The *Freedom of Information Act 1982* exempts Cabinet documents as a general category from a statutory duty to release upon request. This is a blanket exemption with no public interest test. On 13 May 2010 the Parliament amended the Act by passing the Freedom of Information Amendment (Reform) Bill 2010. The amendments are yet to come into force.³¹ The new general rules for the exemption of Cabinet documents are set out in the amended s. 34:

- (1) A document is an exempt document if:
 - (a) both of the following are satisfied:
 - (i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;
 - (ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or
 - (b) it is an official record of the Cabinet; or
 - (c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or
 - (d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

29. Indeed, some would argue that less informed and considered decisions have resulted from the increasing dominance of the Strategic Priorities and Budget committee within Cabinet, comprising of the Prime Minister and the three most senior Ministers. See: L Taylor, 'The Rudd gang of four', *The Australian*, 9 November 2009, p. 13.

30. See M Keating and P Weller, 'Cabinet government: an institution under pressure', M Keating, J Wanna and P Weller, *Institutions on the edge? Capacity for governance*, Allen & Unwin, St Leonards, pp. 65–68.

31. The relevant provisions are due to come into force on proclamation or six months after royal assent to the related *Australian Information Commissioner Act 2010*.

(2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.

(3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.³²

Some have argued that the blanket protection for Cabinet documents in freedom of information legislation is antithetical to the values of open government and accountability and prevents legitimate public scrutiny of government activity.³³ The *Freedom of Information Act 1982* contains other specific exemptions on matters that could harm the public interest including national security, defence, international relations, the financial or property interests of the Commonwealth, the national economy, legal professional privilege and personal privacy.³⁴ However, most of these documents are exempt from disclosure due to the harm that could be caused on their release, rather than the class of document to which they belong. Internal working documents is the only other main class-based exception from Commonwealth freedom of information law however, in the case of those documents, the Act will require the application of a standard ‘public interest test’.³⁵ Importantly documents that will be exempt from the public interest test include the general category of Cabinet documents.

Media, civil liberty organisations and some academics criticised the exception of Cabinet documents from the public interest test when it was proposed as part of the Freedom of Information Amendment (Reform) Bill 2009. During a Senate Committee inquiry into the Bill, some witnesses argued that the release of Cabinet documents should be subject to a

32. Section 34 of the *Freedom of Information Act 1982*. Exemptions to the general rules include attachments to Cabinet submissions, a document that Cabinet has authorised to be published, and where the material concerns factual information that would reveal a deliberation or decision of Cabinet that has not been officially disclosed. See Subsections 34 (4)–(6), *Freedom of Information Act 1982*, as amended.

33. JR Herman, ‘The urgent need for reform of Freedom of Information in Australia’, Public Right to Know conference, University of Technology, Sydney, 21 August 2004, viewed 6 April 2010, <http://www.presscouncil.org.au/pcsite/fop/foi.html>

34. See *Freedom of Information Act 1982*, Part IV Exempt documents.

35. The public interest test was introduced by the *Freedom of Information Amendment (Reform) Act 2010* and is due to come into force on proclamation or six months after royal assent to the related *Australian Information Commissioner Act 2010*. The Act as amended lists factors favouring access such as promoting the objectives of the Act, and factors that must not be taken into account, such as embarrassment to the government. Factors that would not favour access are not listed. The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009, p. 14, states that a factor against granting access would include where a ‘disclosure would, or could reasonably be expected to, cause damage to certain interests, or would have a substantial adverse effect on certain interests, or would, or could reasonably be expected to, prejudice certain interests’.

public interest test as currently operating in New Zealand which requires balancing the interests of collective responsibility in Cabinet with the need to ensure that significant documents are not unduly withheld.³⁶ It was also suggested that the provision should be focused on the harm that might be caused by a particular document and that exceptions should be made for older and factual material.³⁷ The lack of consideration given to the public interest in releasing a Cabinet document has been heavily criticised in the past. For example, in 1995 Anne Cossins wrote:

The absence of a public interest test under exemptions which protect such high-level documents prevents judicial scrutiny, not only of violations of an applicant's right to be informed of the affairs and decision-making processes of government, but also of whether government agencies have tried to circumvent that public interest by refusing to disclose documents. Hence the absence of the test prevents an assessment of any violation to the democratic process sought to be protected or maintained by FOI legislation.³⁸

A key issue however, is the extent to which the value of public scrutiny is balanced against the value of Cabinet as a forum for the confidential, frank and informed consideration of policy advice by government. While there may be a clear case for withholding documents that might adversely impact on vital interests of state, such as national security, the rationale for the blanket protection of less important Cabinet documents is primarily based on 'the need to promote candour in communication and to protect the public service from captious and ill-informed public or political criticism'.³⁹ As Moira Paterson explains, this rationale is 'based on the notion that disclosure of a document of the type claimed to be exempt will have the consequence that persons required to provide such opinion or advice in the future will be less frank and candid in expressing their views'.⁴⁰ Over time, this justification has been increasingly questioned in the courts.

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36. Senate Finance and Public Administration Legislation Committee, *Freedom of Information Amendment (Reform) Bill 2009 [Provisions] Information Commissioner Bill 2009 [Provisions], March 2010*, see: http://www.aph.gov.au/Senate/committee/fapa_ctte/foi_ic/report/report.pdf; M Paterson, Transcript of evidence to the Senate Finance and Public Administration Legislation Committee, 15 February 2010, p. 1, viewed 17 May 2010, <http://www.aph.gov.au/hansard/senate/commtee/S12669.pdf>
 37. See M Paterson, Transcript of evidence to the Senate Finance and Public Administration Legislation Committee, 15 February 2010, p. 1, viewed 17 May 2010, <http://www.aph.gov.au/hansard/senate/commtee/S12669.pdf>
 38. A Cossins, 'Revisiting open government: recent developments in shifting the boundaries of government secrecy under public interest immunity and freedom of information law', *Federal Law Review*, v. 23 (2), 1995, p. 258.
 39. SB McNicol, *Law of privilege*, The Law Book Company Limited, Sydney, 1992, p. 375.
 40. M Paterson, *Freedom of information and privacy in Australia: Government and information access in the modern state*, Lexis Nexis, Sydney, 2005, p. 296.

Cabinet confidentiality and court proceedings

Where Cabinet documents may relate to a matter before the courts, it is for the courts to consider and determine whether the information should be released for the purposes of its proceedings, taking into account whether it is in the public interest to do so.⁴¹ Historically, the courts have accepted Cabinet documents as a general class of documents immune from compulsory disclosure in judicial proceedings.⁴² This follows the United Kingdom House of Lords decision, *Duncan v. Laird & Co.*, in 1942, where it was held that a Minister could certify that the disclosure of a document was contrary to the public interest and that courts would not contest the certificate.⁴³ However, in 1968 the House of Lords, in *Conway v. Rimmer*, introduced the notion that the public interest in withholding a document should be balanced against the public interest in releasing it, while nonetheless maintaining protection for the general class of cabinet documents.⁴⁴

The doctrine of crown privilege was weakened in Australia in 1978 when the High Court determined that this immunity may not be absolute and that the public interest in maintaining government confidentiality could be outweighed by a superior public interest claim to disclosure, where for example, withholding the document may cause a greater harm to the administration of justice. In the historic decision of *Sankey v. Whitlam*, the High Court ordered the production of Loan Council documents of the Whitlam Government and determined that their disclosure was not prejudicial to the public interest nor to the operation of the Loan Council and that certain extracts of those documents be made available in the proceedings.⁴⁵ The decision of the judiciary to intrude into the apex of executive government was not taken lightly. Justice Stephen summarised the conflicting principles in the *Sankey v. Whitlam* (1978) judgement:

On the one hand, a measure of secrecy must surround at least some aspects of what has been called the counsels of the Crown; the executive government of the Commonwealth should, in those cases where real need arises, be able to preserve the confidentiality both of information which it possesses and of advice which it receives. On the other hand, in civil and criminal cases alike, the course of justice must not be unnecessarily impeded by claims to secrecy and those who, with the Governor-General, exercise the executive power of the Commonwealth, Ministers of the Crown acting in exercise of their offices, should, in

41. The use of the term 'public interest' henceforth is not restricted to the statutory meaning as used in the discussion of freedom of information legislation above. The concept is not well defined in law.

42. For a discussion of other court disputes over Cabinet documents see: B Galligan and DR Slater, 'Judicial intrusion into the Australian Cabinet', CN Tate, T Vallinder, *The global expansion of judicial power*, New York University Press, New York, 1995, pp. 81–100.

43. *Duncan v. Cammell Laird & Co.* (1942) AC 624.

44. *Conway v. Rimmer* (1968) AC 910.

45. *Sankey v. Whitlam and others* (1978) 142 CLR 1.

common with those officers of the public service of the Commonwealth who advise them, be as amenable to the general law of the land as are ordinary citizens.⁴⁶

In 1991 the High Court applied the same reasoning in response to the Commonwealth's challenge to Federal Court order for the production of 126 Cabinet notebooks. In *Commonwealth v. Northern Land Council*, the High Court upheld the Commonwealth's claim to immunity, but nonetheless expressed that it was for the court to determine public interest claims and in 'quite exceptional circumstances' involving significant detriment to be public interest, it may be necessary to order the production of Cabinet documents to the courts.⁴⁷

Cabinet documents and Parliament

Parliamentary orders

While the changing judicial practice has not directly expanded the powers of parliament in relation to the confidentiality of Cabinet documents, it has had some influence on the approach taken by parliament to claims of public interest immunity.⁴⁸ The publication, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, published in 1989 but still in use, sets out matters to which officials can withhold information from parliamentary committees on the basis of public interest immunity. These matters are consistent with the provisions of the *Freedom of Information Act 1982* and include 'material disclosing any deliberation or decision of the Cabinet, other than a decision that has been officially published, or purely factual material the disclosure of which would not reveal a decision or deliberation not officially published.'⁴⁹

The Cabinet Handbook states that the Cabinet secretariat, located with the Department of the Prime Minister and Cabinet, must be consulted if a Minister or department receives a request for Cabinet documents and Cabinet related material, by a court, investigatory body or parliamentary committee. 'This consultation should always take place before consideration is given to claiming 'public interest immunity' in respect of Cabinet documents and should be additional to any consultations with legal advisers'.⁵⁰

46. Justice Stephen, *Sankey v. Whitlam* (1978) 142 CLR 49.

47. *Commonwealth v. Northern Land Council* (1991) 103 ALR 415. The Federal Court of Australia also supported the principles of *Sankey v. Whitlam* in *Harbours Corporation of Queensland v. Vessey Chemicals Pty Ltd* (1986) 67 ALR 100.

48. Evans, H. (ed.), *Oggers' Australian Senate Practice*, 12th edn, Department of the Senate, 2008, p. 470.

49. Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, DPMC, 1989, p. 8.

50. Department of the Prime Minister and Cabinet, *Cabinet handbook*, sixth edn, DPMC, July 2009, p. 27.

However, the general power of the government to withhold documents from Parliament and its committees on the basis of crown privilege or public interest immunity is contested. The main interests in conflict here are the interests of Cabinet as a forum for confidential deliberation, the interest of the parliament in holding the executive to account, and the broader interests of citizens in participating in informed democratic deliberation. There are no effective limits or general exceptions on any class of document that may be ordered to be tabled. It is within the power of each House of Parliament to determine the merits of an argument for public interest immunity.⁵¹

In *Egan v Chadwick*, the NSW Supreme Court upheld the NSW Legislative Council's power to compel the production of documents which may be subject to a public interest immunity claim, but notably, it found that the Council did not have the power to compel the production of Cabinet documents.⁵² However, the NSW decision does not directly apply to the Commonwealth due to their differing constitutional frameworks.⁵³ The limits of the power of the Commonwealth Parliament to compel the production of documents has not been fully tested. While requests may be made for information which may be contained in cabinet documents, it is generally accepted that such documents are not summoned by the Senate.⁵⁴ As Professor Anne Twomey submitted to the Senate Finance and Public Administration References Committee:

The full extent of [the Senate's] powers has never been the subject of a ruling by the High Court. While one may draw analogies from *Egan v Willis* and *Egan v Chadwick*, there is no certainty that the Commonwealth Government is legally obliged to produce privileged documents to the Senate, as ordered by the Senate. It may be that all privileged documents are excluded, or it may be that only some of them (such as Cabinet documents) are excluded, or it may be that none are excluded.⁵⁵

51. For example, see resolution of the Senate in H Evans (ed.) *Odgers' Australian Senate Practice*, 12th edn, 2008, p. 468.

52. *Egan v Chadwick* (1999) 46 NSWLR 563.

53. For example, the Commonwealth Parliament has codified powers, privileges and immunities, whereas those relevant powers in the NSW Parliament have been extrapolated from common law principles over time.

54. H Evans, 'The Senate's power to obtain evidence', submission to the Senate Finance and Public Administration Committee, November 2008.

55. A Twomey, cited in Senate Finance and Public Administration References Committee, *Independent Arbitration of Public Interest Immunity Claims*, February 2010, p. 17.

Parliamentary proceedings

Whereas the Senate has had greater experience in attempting to gain government information, including information contained in Cabinet documents, the House of Representatives, whose dominant membership forms the government, has had different issues with respect to Cabinet concerning the status of Cabinet material. As Sol Encel has documented, Cabinet documents have been referred to and quoted from, in proceedings of the House of Representatives on many occasions since the early years of federation.⁵⁶ Notably, in 1942 the Speaker ruled against the tabling, quotation and otherwise disclosing of information from a Cabinet document, when then Minister for Labour and National Service, Eddie Ward, referred to a submission by his predecessor, Harold Holt. During a debate on the employment of women in wartime, Holt interjected, advising the Speaker, ‘that the Minister is violating the oath of secrecy by proxy, as it were, in divulging the contents of such a document’.⁵⁷ In response, the Speaker went on to state that Cabinet documents must remain confidential. When advised, on a point of order, that the ruling might not accord with past practice, the Speaker went on to say:

The Minister is debarred from making the document itself public, and also from revealing its contents. As for the case cited by the honourable member for Batman, when certain documents were quoted in the course of a debate in this House, I point out that the contents of those documents had previously been published in the press.⁵⁸

The status of Cabinet documents in the House of Representatives evolved further when, in 1950, Prime Minister Menzies justified the limited use of a Cabinet document of the previous government, by the Minister for the Army. Menzies told the House:

I want to re-affirm my belief as the Leader of the Government that it would be a sound practice that no reference should be made to Cabinet files except for the purpose of—(a) discovering what operative decisions have actually been made; and (b) ascertaining the contents of communications in fact made between the government and outside persons or authorities.⁵⁹

Like the Speaker’s ruling of 1942, the approach of Menzies in 1950 did not establish an enduring precedent.

56. See discussion in S Encel, *Cabinet Government in Australia*, Melbourne University Press, Melbourne, 1962, pp. 285–293.

57. H Holt, ‘Employment of women’, Senate and House of Representatives, *Debates*, 20 May 1942, p. 1440.

58. WM Nairn, ‘Employment of women’, Senate and House of Representatives, *Debates*, 20 May 1942, pp. 1440–1441.

59. R Menzies, ‘Secret documents’, Senate and House of Representatives, *Debates*, 23 March 1950, p. 1146.

In 1999 the Government resorted to a rarely used power in the House of Representatives, in an attempt to compel the production of a Cabinet document from the opposition.⁶⁰ Both an opposition spokesperson and the leader of the Opposition quoted from a leaked Cabinet submission during question time. The opposition then attempted to censure the Minister for Education, Training and Youth Affairs, claiming the leaked document contradicted his position. The government amended the censure motion, and after some protracted debate, successfully moved that the House order the production of the Cabinet submission so that it would be tabled in the chamber.⁶¹ In response, Michael Lee, the Member for Dobell, initially stated that he no longer had possession of the document, then added that he believed ‘it is wrong for the executive to impugn the rights of members’.⁶² Another consideration in withholding the document could have been the need to protect his informant within the government. No further action was taken against the member.

The treatment of Cabinet ‘leaks’ and unauthorised disclosures

If a Commonwealth public servant discloses Cabinet material without authorisation, under current law they could be subject to criminal prosecution under s. 70 of the *Crimes Act 1914*.⁶³ Section 70, Disclosure of information by Commonwealth officers, is a general secrecy provision that the Commonwealth adapted from s. 86 of the *Criminal Code Act 1899 (Qld)*. The Australian Law Reform Commission recently recommended to the government that the general secrecy provision within the Crimes Act be amended to focus on the harm that could result from the unauthorised release of information rather than the general category of that information. It was not considered that harm to collective responsibility or to the political process necessitated protection via criminal law. Accordingly, the Commission recommended that Cabinet documents as a general category should not be included in a

60. The last return of a document following an order of the House of Representatives was in 1917. See I Harris (ed.) *House of Representatives Practice*, fifth edn, Department of the House of Representatives, Canberra, 2005, p. 591, fn 58.

61. The protected debate concerned the ability of the government to use its numbers in the House of Representatives to order the production of documents from a non-government backbencher.

62. MJ Lee, ‘Minister for Education, Training and Youth Affairs—Motion of censure’, House of Representatives, *Debates*, 13 October 1999, pp. 11512–11513.

63. Section 70, *Crimes Act 1914*: Disclosure of information by Commonwealth officers (1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, shall be guilty of an offence. (2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him or her), any fact or document which came to his or her knowledge, or into his or her possession, by virtue of having been a Commonwealth officer, and which, at the time when he or she ceased to be a Commonwealth officer, it was his or her duty not to disclose, shall be guilty of an offence. Penalty: Imprisonment for 2 years.

criminal secrecy provision, but rather subject to administrative processes and disciplinary penalties.⁶⁴ The Attorney-General's Department argued against softening the penalties for breaching Cabinet secrecy arguing:

... the unauthorised disclosure of Cabinet documents regardless of the information contained in them, has the potential to prejudice the effective working of government by diminishing the government's faith that the Cabinet process provides a forum for free and frank debate and consideration of issues.⁶⁵

Often nothing is done about leaks emerging from a Minister's office where they are intended to create good news stories for the government. These are a kind of authorised leak which are politically calculated and accepted, and often occur in the lead up to the Budget. However, unauthorised leaks that originate from within the public service may be treated as a major breach of government confidentiality and potentially dealt with under criminal law (as discussed above). When the government seeks to take serious action against a public servant following a leak, it may concern a leak that has caused political embarrassment to the government as much as a leak that has caused actual harm to the public interest, although often these are intertwined.⁶⁶ Some leaks are motivated by a personal disagreement with a legitimate decision of government, rather than a genuine concern about upholding the 'public interest'. For example, in mid 2008 departmental advice criticising a Cabinet submission on the government's FuelWatch Scheme was leaked, exposing the government as acting against its own advice. These leaks damage the level of trust between the government and the public service and lead to greater restrictions on the circulation of Cabinet documents within departments, which may ultimately impact on the quality for the advice provided to government.⁶⁷ On the other hand, by publishing the material, it is clear that the media consider there is some interest in having access to this kind of information.

64. Australian Law Reform Commission, *Secrecy laws and open government in Australia*, Report 112, December 2009, p. 164.

65. Commonwealth Attorney-General's Department cited in Australian Law Reform Commission, *Secrecy laws and open government in Australia*, Report 112, December 2009, p. 164. The Government is yet to respond to the recommendations of the Law Reform Commission report.

66. On 17 March 2010 the government released its response to a House of Representatives Standing Committee on Legal and Constitutional Affairs report into whistleblower protection laws, in which the Government stated its intention to introduce a Public Interest Disclosure Bill this year. See:
<http://www.aph.gov.au/house/committee/laca/whistleblowing/report/GovernmentResponse.pdf>
According to the government's response, public servants who make unauthorised disclosures of official information to third parties, including the media, may be granted protection from criminal prosecution in certain circumstances.

67. L Oakes, 'Leaky business', *Courier Mail*, 31 May 2008, p. 53; B Toohey, 'FuelWatch leak fiasco turns up heat on PM', *West Australian*, 2 June 2008, p. 21.

The scope of Cabinet documents

Given the scope of documents that can be covered under the definition of ‘Cabinet documents’, there is a possibility that certain documents, that might not warrant consideration in Cabinet, are nonetheless brought into Cabinet for the sole purpose of avoiding public scrutiny of a politically sensitive matter. Once a document is brought into Cabinet as a submission, attachment to a submission or circulated at a meeting of Cabinet, it might attract immunity from statutory, parliamentary or judicial orders for their production. This has been an issue in Queensland. For example, Tony Fitzgerald, the former Chair of the Commission of Inquiry into Official Corruption in Queensland has claimed that widespread government secrecy was re-established in the 1990s ‘by sham claims that voluminous documents were ‘Cabinet-in-confidence’’.⁶⁸ However, the introduction of a ‘dominant purpose test’ as part of the *Freedom of Information Amendment (Reform) Act 2010* goes some way towards addressing this issue in statutory law. This test will provide that a Cabinet submission will be protected if it was brought into existence for the dominant purpose of submission to Cabinet for its consideration.⁶⁹ As noted earlier, the selection of matters that warrant formal consideration by Cabinet has been an ongoing and more general issue concerning the operation of the forum.

Conclusion

Cabinet is an institution that has evolved from a range of conventions over hundreds of years. The need for confidentiality of Cabinet documents has been called into question by values of democratic scrutiny, transparency in government and the interests of the administration of justice. A consequence of opening Cabinet to full transparency would likely be a much less rigorous system of advice to government which would not be well suited to today’s administratively complex policy environment. The values of open and accountable government need to be balanced against the benefits of stable government and the facility of confidential, frank and informed consideration of policy advice by the executive. A possible middle-ground between blanket confidentiality and open transparency in Cabinet might be a harm-based approach where protections are removed where there is no significant threat to the broader Cabinet process, considering the public interest merits of individual documents.

68. T Fitzgerald, ‘What went wrong with Queensland’, *Courier Mail*, 29 July 2009, p. 4.

69. Section 34(1), *Freedom of Information Act 1982*, as amended by the *Freedom of Information Amendment (Reform) Act 2010*. The relevant provisions are due to come into force on proclamation or six months after royal assent to the related *Australian Information Commissioner Act 2010*.

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