Tony Lupton is Professorial Fellow, Innovation and Public Policy, Monash University. He was Member for Prahran in Victoria's Legislative Assembly from 2002–10, Parliamentary Secretary for Industry and Innovation 2006–07 and Victorian Cabinet Secretary from 2007–10.

Cabinet confidentiality and parliamentary scrutiny in the information age

Tony Lupton

Introduction

The traditional concept of Cabinet confidentiality is increasingly at odds with the prevailing attitudes of the Information Age. In this atmosphere there will likely be increasing pressure on Executive Government to release more information and release it earlier than ever before. There is, however, an important public policy imperative in developing coherent rules around what should remain confidential and what should not. If we act to develop these rules for the age we live in, both parliament and the executive can benefit and the people will be the real winners. This paper presents a practical political view, from a recent practitioner, of the challenges the Australian system of Cabinet Government faces in the Information Age. Although my views are drawn from my Victorian experience as a member of parliament from 2002–10 and Cabinet Secretary between 2007 and 2010, it is hopefully broadly applicable to our other jurisdictions.

One of the first things I realised upon taking up the office of Cabinet Secretary was that security of information was an important element of the role. Under the authority of the Premier, the Cabinet Secretary is the effective custodian of the government's records, which are stored in the Cabinet Secretariat. In systems derived from Westminster, keeping things secret seems to be part and parcel of Cabinet Government because that is the way it has always been. Cabinet itself came into existence and developed in Britain while shrouded in secrecy. It still doesn't officially exist in our Australian or Victorian constitutions. Yet it is the centre of political and governmental power.[1] The traditional view has always been that

[1] Cabinet confidentiality, Parliamentary Library Background Note, 28 May 2010, Dr Mark Rodrigues, Politics & Public Administration Section, Dept of Parliamentary Services, Canberra

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ensuring frank advice from the bureaucracy and the free exchange of opinions in the Cabinet room demand that all discussions and a very broad range of documents must be kept private. And for a long time. This is generally referred to as the 30 year rule, although its legal basis and application differ between jurisdictions.

In Victoria the Public Records Act 1973 states:

> 10. Records may be withheld for 30 years
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> (1) Subject to subsection (2), the Minister by notice published in the Government Gazette may declare that any specified records or records of a specified class transferred or to be transferred from a public office to the Public Record Office shall not be available for public inspection for a period specified in the declaration, being a period of not more than 30 years, after the date of their transfer to the Public Record Office.
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> (2) A declaration under subsection (1) may only be made with the agreement of the Minister responsible for the administration of the public office concerned.
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> (3) A declaration under subsection (1) may not be varied or revoked.

Unlike in Canberra, the practice in Victoria has not been for any formal unveiling of these records each year. Perhaps this has led to a general lack of interest in these documents and the ability to gain access to them earlier. I will return to this point shortly.

Freedom of Information Legislation

Freedom of Information legislation enacted since the 1980s and a growing sentiment about the 'right to know' began to challenge that traditional view. The emergence of the Information Age, with globalisation demanding easy information flows and ICT and the internet providing the technological base, cemented the view that instant knowledge was an entitlement.[2] As a consequence the amount of government information in the public domain has increased markedly over the years. However, as more becomes available, more is demanded. Cabinet documents are a central focus of interest. Our legislative response was based on the traditional view of Cabinet confidentiality. The Victorian Freedom of Information Act 1982 (the FOI Act) was landmark legislation but it still approached Cabinet confidentiality from the traditional position. The 30th anniversary of this legislation in 2012 would be a fitting time to see this approach modernised. The relevant section of the FOI Act reads:

> 28. Cabinet documents
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> (1) A document is an exempt document if it is-
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> (a) the official record of any deliberation or decision of the Cabinet;

[2] Freedom of Information Practices, Rick Snell, *Agenda*, 13(4), 291–307, 2006. This valuable article provides a useful review of social developments, Australian and New Zealand case law and legislation.

(b) a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet;
(ba) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;
(c) a document that is a copy or draft of, or contains extracts from, a document referred to in paragraph (a), (b) or (ba); or
(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(2) Subsection (1) shall cease to apply to a document brought into existence after the day of commencement of this section when a period of ten years has elapsed since the last day of the year in which the document came into existence.

Notably, section 28 has only been amended once, in 1993 when the Kennett Government broadened the definition of exempt document by inserting sub-section (1)(ba) to include Ministerial briefing papers. What has not been widely recognised or utilised is that s.28(2) undercuts the 30 year rule and effectively provides access 10 years after the year a document came into existence. To the best of my knowledge, s.28(2) was not used to seek a Cabinet document until late 2010, when an application was made for Cabinet documents from the first months of the Bracks Government in 1999. Apparently the documents of the Kennett Government 1992–1999 were and continue to be of no interest to anyone.

Consequences for governments

In a democracy there should be a mature understanding of how Cabinet works and what debate in Cabinet is about, but this is hampered by the secrecy surrounding the process. It should not be surprising that different departments and ministers have different priorities and different views about matters of policy. It should be understood that robust debate about different options is a sign of a healthy system. Unfortunately, too often such debate is characterised as division by the media. Cabinet submissions are circulated among Ministers and departmental views are sought. It would be surprising if they all agreed with every policy option. This process allows the Cabinet to test different points of view and decide which it prefers. As the government of the day, it is responsible for decision making and is not bound to follow one particular piece of advice over another. Nonetheless, the secrecy of the process often puts governments on the defensive when limited information becomes public.

Another consequence of excessive confidentiality is the time-honoured leak to the media. I see three basic categories of leak: (1) leaks that seek to influence or undermine a policy or program; (2) leaks from someone in the government itself, hoping to get a good story published; and (3) leaks that seek to expose some supposed wrongdoing. It would be naive to attempt to construct a system that would

prevent leaks from occurring. Nonetheless, it is axiomatic that where more of the potential material for leaks is in the public domain, there is less remaining to leak. In particular, categories 1 and 2 above would be impacted to some extent by earlier and broader disclosure. When a leaked document is the only evidence presented to the public, it carries far more authority than it is often worth. It will generally be leaked to progress an agenda and will be unlikely to tell the full story. The way it is presented will often refer to the government ignoring departmental advice.

One such example among many is provided by an article in the *Melbourne Age* headlined 'Solar power advice ignored'.[3] This article involved a leaked Cabinet submission concerning a solar feed-in tariff for Victoria. There was considerable agitation between proponents of gross (such as in New South Wales) versus net feed-in schemes. The leaked submission supported a gross tariff. This leak and the media stories around it were intended to pressure the government at the expense of sound policy. The government nonetheless decided to implement a net tariff. The type of gross scheme that was touted as superior via the leaked submission turned out to be shockingly expensive in New South Wales, whereas Victoria's scheme turned out to be economically viable while effective in encouraging take-up of solar power by households, non-profits and small business. The leaked submission proved to be wrong in its forecast. The government's decision was justified. But a normal process of departments putting strong views about policy options, which should be encouraged, was viewed in the media as a good way to pillory the government. A different and more open approach to dealing with such documents may have meant that the leak was less likely in the first place or the government would have been better placed to explain its decision. The result would be a better informed public.

Blue books and red books

All governments eventually feel the consequences of secrecy and leaks. The current Victorian Government has recently been dealing with the leaking of the Department of Treasury and Finance 'Blue Book' to *The Age* newspaper. Some examples of stories include the article headlined 'Slash state taxes, says Treasury'[4] and another headlined 'Pay teachers more: Treasury'.[5] A nice predicament of paying more with less revenue has been established. These Red and Blue books, prepared by departments prior to elections as briefs for incoming ministers, contain a broad range of departmental and policy information. Red books are prepared for a re-elected government. Blue books are prepared for the then Opposition if it is elected. Much of the material in these books need not be kept confidential. Where they deal with policy, it is a blend of departmental objectives and the government's announced election policies and programs. Surrounding these documents with secrecy allows them to be used selectively by those in receipt of them if they are

[3] *The Age*, Royce Millar, 28 January 2009
[4] *The Age*, Josh Gordon, 14 September 2011
[5] *The Age*, Josh Gordon, 17 September 2011

leaked. It is of some interest that the newspaper has not published the entire document for people to read and consider for themselves. The Commonwealth Government has begun releasing the relevant Red or Blue book in recent years. For example, Treasury[6] and Department of Foreign Affairs and Trade[7] Red books were posted on the Departments' websites within months of the 2010 federal election. Although redacted, they give a comprehensive outline of the issues facing the government.

Consequences for legislatures

While confidentiality issues seem more pertinent to the executive government, the way issues play out also have consequences for legislatures. These arise from the powers and processes legislative chambers have at their disposal for seeking information from the Executive. Apart from the unusual circumstances of minority government, it is naturally an upper house in which the government does not command a majority of votes that is most interested in holding the executive to account. Methods include the commonly understood question time, questions on notice and questioning Ministers and departmental representatives at parliamentary committee hearings.

An approach that has gained popularity in recent years is the Opposition-dominated upper house demanding documents from the government. This led to suspensions of a Minister and protracted litigation in New South Wales in the 1990s[8] and was repeated without the litigation in Victoria between 2006 and 2010. The documents sought by Victoria's Legislative Council were wide ranging and numerous, including Cabinet-in-Confidence material.[9] The government established a robust process for assessing each request to determine if any documents were Cabinet documents and acted according to legal advice provided in deciding whether or not to claim exemption. A vast number of documents were released to the Council, most of which were never heard about again.[10] Notwithstanding this process, the Council repeatedly censured and suspended the Leader of the Government in the Legislative Council for failure to comply fully with the Council's order.[11] It was an unedifying spectacle and arguably did the Parliament no good service in the eyes of the community.

With a new government in Victoria that also has a majority in the Legislative Council, that chamber has become far less interested in demanding government documents, at least those of the current government. For as long as political parties exist, this situation will continue.

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[6] www.treasury.gov.au
[7] www.dfat.gov.au
[8] Egan v Chadwick (1999) 46 NSWLR 563; Egan v Willis (1998) 73 ALJR 75
[9] e.g. List of documents sought, Minutes of Proceedings, Victorian Legislative Council, May5, 2010
[10] See Victorian Legislative Council Hansard, 27 July, 2010, pp. 3225–8
[11] See e.g. Victorian Legislative Council Hansard, 1 September, 2010, pp. 4366–78

A new approach

A new approach to what is an exempt document, that clarifies the process for assessment and disclosure, would take some of the heat out of these issues and take many of them out of the political arena where there is too much potential for abuse. The blanket Cabinet exemption in freedom of information legislation, and its interpretation by the courts, has meant much material that could be made public has not been.[12] It has led to a piecemeal approach where the peculiar circumstances of a documents creation, its subsequent handling and whether it fortuitously saw the inside of a Cabinet room are more important than its contents or its consequence. In this case we may be able to learn from experience in New Zealand. The approach to freedom of information has taken a very different course across the Tasman and this is particularly so in relation to Cabinet documents. Unlike in Australia, where there is a blanket exemption from disclosure, the New Zealand Official Information Act 1982 (OIA) allows access to cabinet documents if it can be demonstrated that the consequences of releasing the information do not outweigh the public interest in keeping the information confidential. The general principle is set out in section 5 of the OIA, which states:

> **Principle of availability**
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> The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

Exceptions include these set out in section 9, which states in part:

> (f) maintain the constitutional conventions for the time being which protect—
> (i) the confidentiality of communications by or with the Sovereign or her representative:
> (ii) collective and individual ministerial responsibility:
> (iii) the political neutrality of officials:
> (iv) the confidentiality of advice tendered by Ministers of the Crown and officials; or
>
> (g) maintain the effective conduct of public affairs through—
> (i) the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty; or
> (ii) the protection of such Ministers, members of organisations, officers, and employees from improper pressure or harassment;

Examples of Cabinet documents released until 2006 under these provisions in New Zealand indicates the difference between our jurisdictions:

- Cabinet papers for $14 million funding for Maori development (*The Dominion Post* 17 Aug 2004)

[12] Commonwealth v. Northern Land Council (1991) 103 ALR 415; McKinnon v Secretary, Department of Treasury [2006] HCA 45

- Cabinet papers for a $2.3 million government programme for a cultural diplomacy international programme, launched by Prime Minister (*The Dominion Post* 3 May 2005)
- Cabinet papers revealing that the NZ government had ordered an urgent review of New Zealand's patchy tsunami-readiness systems because of concerns they were not adequate (*The Dominion Post* 28 February 2005)
- Access given to Cabinet discussions about New Zealand's aid contribution. Bob Geldorf criticised New Zealand's aid efforts. An access request revealed that two years earlier two Labour cabinet ministers had raised similar arguments in Cabinet (*Sunday Star Times* 23 July 2006)
- The *Sunday Star Times* was given the financial breakdown under the OIA of the cost of New Zealand's defence commitment to East Timor and also received cabinet papers showing April's violence left the UN undecided about its future in East Timor (*Sunday Star Times* 6 August 2006)
- Information released under the OIA revealed that high-risk paedophiles could be chemically castrated under a radical plan being considered by the government. The Cabinet papers revealed government departments here are divided over the proposal, amid fears it would breach the Bill of Rights and medical ethics (*Sunday Star Times* 11 January 2004)
- Cabinet papers reveal that due to manufacturing constraints and CSL's priorities, bird flu vaccine it would not be available in New Zealand for 15 to 27 weeks after the World Health Organisation declared a pandemic and New Zealand placed its order. New Zealand is third on CSL's list, after Australia and a small country in the region that neither CSL nor the ministry would name (7 February 2006)
- Cabinet papers, obtained by Radio New Zealand under the Official Information Act, show Treasury has deep concerns about the effectiveness of the public service's spending (20 April 2006)[13]

Conclusion

Such an approach based on the principle of availability, which balances the consequences of release against the public interest in disclosure, has the potential to transform an important way in which our executives and legislatures interact. There do not appear to have been any dire consequences suffered in New Zealand as a result of this approach. We spend too much time on the quest for information. Too little is spent on a genuine debate about the merits of policy alternatives. As a supplementary benefit, such a change might induce some in the media to raise their sights also. If the question remains 'The executive versus the parliament: who wins?', the losers will continue to be the people they serve. Steps toward a more informed and engaged electorate may produce a win-win. In Victoria the 30th anniversary of Freedom of Information would be a good time to take such a step. ▲

[13] Freedom of Information Practices, Rick Snell, *Agenda*, 13(4), 291–307 at 296, 2006