Be Honest, Minister!

RESTORING HONEST GOVERNMENT IN AUSTRALIA

Accountability Working Party
Australasian Study of Parliament Group
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CONTENTS

Glossary

Accountability	**being obliged to answer for one's acts or omissions, and those of others, to an authority.**
Answerability	**has a similar meaning to accountability i.e. being obliged to answer for one's acts or omissions, and those of others, to an authority.**
Culpability	**being blameworthy.**
Responsibility	**the sphere or extent of the duty or charge which has been entrusted or assigned to one.**
Government	**the executive group of the governing party (the Cabinet) and the public service that supports it.**
Minister	**a member of the executive (in the case of the Federal Government both the inner and outer cabinet)**
Parliamentary Secretary	**a member of the executive appointed to assist a Minister**
Presiding Officers	**Speaker of the House of Representatives and President of the Senate**

Introduction

The approach of the forthcoming Federal election is an appropriate time to review the operation of key features of the operation of government between elections, a decade after reforms introduced by the present Government.

The following assumptions underlie the preparation of this document:

- Democracy is fundamental to the Australian way of life. We enjoy its benefits and wish to keep it.
- It is the responsibility of all Australians, and most particularly our Parliamentary representatives, to act in a way which protects and enhances our democracy.
- Accountable government, where the rule of law, reason and procedural fairness flourishes, strengthens democracy.
- The power and exercise of Executive government at State, Territory and Federal levels has developed to a point where direct accountability to Parliament and to the broader public interest is significantly reduced, and reducing.
- A renewed commitment to accountability by governments and prospective governments will be beneficial to:
  - our democracy generally: the broad public interest,
  - effective parliamentary representation
  - each government or prospective government itself,
  - other nations for which we seek to be a positive model.

Australian governments operate in a context that is increasingly globalised and complex. This changed context requires review, reform and systemic change across the public sector.

Governments hold office only through the democratic electoral process and the powers that governments exercise are delegated democratic authority. The accountability of the Executive Government is the natural corollary of that delegated authority.

This was recognised by the Prime Minister, Hon John Howard MP, when he came to office in 1996. He was the first Prime Minister to

issue his ministers with a guide to their discharge of portfolio and collective ministerial responsibilities. The ***Guide to Key Elements of Ministerial Responsibility*** (referred to as the "Guide" in this paper) was a major step forward and has continued to be a valuable point of reference for ministers, public servants and others.

Now is an appropriate time to review the Guide and bring it up to date having regard to the experience of its operation, the evolution of the Australian Federal system of government since 1996 and developments in other jurisdictions including both domestically in Australian states and internationally.

Be Honest, Minister! focuses on reforms to the Prime Minister's ***Guide to Key Elements of Ministerial Responsibility***, and identifies a number of complementary areas for reform.

Ministerial accountability fails when governments seize and hold political advantage, putting partisan interests ahead of the democratic rights of citizens and their entitlement to be treated with integrity, dignity and respect.

Some ministers claim that they cannot be held personally responsible for the acts and omissions of others who are involved in the administration of their portfolios because they did not know when they should have known and those directly answerable to them did know but did not tell them. They are not told because of a culture that allows information be withheld so that the minister can say "I did not know". Effectively, personal responsibility is denied. "Bad government is the inevitable result of a lack of accountability"[1] and fertile ground is prepared for corruption.

Freedom of Information legislation is stretched to breaking point as many governments resort to delay, manipulation and court processes to defer or preferably prevent access to public information that they believe may affect voter support. This information belongs to the public. It is their votes which empower the executive to act and their taxes that provide the resources that are then used both to create information and to deny its availability in the public domain. There are only limited grounds, such as where national security is genuinely at risk, in which it is in the public interest for information to be withheld.

The relatively recent practice of hiring professional lobbyists who are often able to achieve invisible and privileged access to Ministers and senior departmental officers has become a matter of concern. Such access leads to a disproportionate level of influence on important decisions made by government. Without any requirement to record on a public register those persons and

[1] *The Age* (2006) Editorial, 13 April.

organisations acting as professional lobbyists representing outside interests, and the contact they have with Ministers and senior departmental officers, the transparency of government consultation in the process of important decision-making is brought into serious question.

Many ministers can evade answering parliamentary questions, and make a mockery of question time. They use debating artifices to at best ignore the question and at worst to turn requests for information into abusive, partisan attacks on political opponents.

The Senate has been a major instrument of accountability, but was quickly rendered significantly less effective by the election of a Government majority from 2005.

This paper proposes a range of reforms and revisions affecting the accountability of ministers and governments to Parliament and the citizens.

Government accountability would be cemented into law by a set of principles to be adopted through ordinary legislation in the first instance, but ultimately entrenched as part of the Constitution.

Complementing that, a series of modest but significant updates are proposed to the *Guide* as amended and re-issued by Prime Minister Howard in 1998. These build on the code and propose reforms to take account of:

- experience of the *Guide* in action;
- developments in the operation of Australian Government and Parliament; and
- policies and practices in other jurisdictions.

The *Guide* is reproduced, with comments and suggested amendments intended to improve the operation and outcomes of ministerial responsibility.

Collectively, the proposals we put forward a comprehensive, package of reforms to restore the accountability of government to Australian citizens, and to support those politicians, public servants and advisers who seek to uphold Australia's democratic traditions.

We propose action to:

- Legislate/ codify Ministerial Responsibility
- Legislate/ codify the exercise of Cabinet confidentiality
- Establish Ombudsman's role in mediating FOI disputes and make claims of exemption reviewable
- Regulate lobbying of the Government
- Establish Parliamentary Standards Commissioner
- Establish independent Parliamentary Presiding Officers

- Update and renew the Prime Minister's Guide to Ministerial Responsibility

We now seek a genuine public commitment to the implementation of these proposals.

In addition, Appendix 2 proposes further reforms in the following areas:

Freedom of Information

Campaign donations

Question Time

Whistleblowers

Lobbying

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Associate Professor the Hon Dr Ken Coghill
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Proposals for updating of the Guide to Key Elements of Ministerial Responsibility

Preface

In 1976, the Royal Commission on Australian Government Administration (the Coombs Commission) commented on the principles of Ministerial responsibility. It noted that

> It is through ministers that the whole of the administration—departments, statutory bodies, and agencies of one kind and another—is responsible to the Parliament and thus, ultimately, to the people. Ministerial responsibility to the Parliament is a matter of constitutional convention rather than law. It is not tied to any authoritative text, or amenable to judicial interpretation or resolution. Because of its conventional character, the principles and values on which it rests may undergo change, and their very status as conventions be placed in doubt.[2]

The Commission went on to state that the traditional conceptions of ministerial responsibility had been called into question in recent times and that

> …there is little evidence that a minister's responsibility is now seen as requiring him to bear the blame for all the faults and shortcomings of his public service subordinates, regardless of his own involvement, or to tender his resignation in every case where fault is found.[3]

It commented that

> The evidence tends to suggest rather that while ministers continue to be held accountable to Parliament in the sense of being obliged to answer to it when Parliament so demands, and to indicate corrective action if that is called for, they themselves are not held culpable—and in consequence bound to resign or suffer dismissal—unless the action which stands condemned was theirs, or taken on their direction, or was action with which they ought obviously to have been concerned.[4]

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2 Paragraph 4.2.1, page 59.

3 Ibid.

4 Paragraph 4.2.1, page 60.

The Coombs Commission recognised the realities of the increased range and complexity of government which

> ...make it unreal to expect a minister of state to take an active part in the detailed administration of the affairs of his department.[5]

It expressed no opinions as to the appropriateness of the convention as described by it.

The Commission referred to the role of the personal staff of ministers and their relationship with departmental staff and other issues. It stated that "…it is essential that the minister have full control over and responsibility for all members of his staff."[6]

Given the conventional nature of ministerial responsibility, it is important to have an authoritative, comprehensive and clear statement of its content, obligations and consequences.

In 1996 the Prime Minister published the Guide to Key Elements of Ministerial Responsibility. It was revised in 1998. It is a wide ranging statement of elements of ministerial responsibility and is the principal statement in Australia.

Events in recent years have brought into question the adequacy of the Guide. Concerns have been expressed about whether and to what extent a doctrine of ministerial responsibility still exists and, if so, what is its content.[7] In particular, it appears that the Coombs' proposition, that the convention imposes culpability for actions with which the Minister ought obviously to have been concerned, is denied. Further, oral statements by the Head of the Department of Prime Minister and Cabinet, Dr Shergold, and the Prime Minister reported in 2006, point to a government view that the personal culpability of ministers should be significantly limited.

Following an address to the National Press Club, Dr Shergold, in a Questions and Answer session, was asked when a minister should resign. He was reported as identifying two situations where a minister would be clearly responsible for failures within a department. One was where the minister was involved in a breach of the law. The other was where the minister had his or her attention drawn to matters and took no action.[8]

A few weeks later, the Prime Minister was reported as saying,

> … concepts of ministerial accountability mean that if you're directly responsible for a wrongdoing, or if there has been a total systemic failure in your administration, then you have to accept responsibility for that.[9]

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5 Paragraph 4.2.2, page 60.

6 Paragraph 4.6, page 106.

7 For example *The Age*, editorial of 13 April 2006; *The Australian*, editorial 9 February 2006.

8 John Quiggin, ARC Federation Fellow, University of Queensland, *Australian Financial Review*, 2 March 2006.

9 *The Age*, 24 March 2006 quoted by Michelle Grattan.

On one interpretation, the Prime Minister was limiting both the circumstances in which ministers would be required to account for their failings, or those of their departments, and the circumstances in which ministers would be held personally culpable.

These recent statements, if accepted, would significantly limit the principles of ministerial responsibility as they have been understood and as discussed by the Coombs Commission. It cannot be said, however, that such statements conflict with the 1998 Guide because the Guide says little about the obligation to account for departmental failings and fails to address the issue of the personal culpability of a Minister.

Another important matter is the practice that the Australian Parliament does not generally use its power to compel the attendance of ministerial advisors as witnesses. In Australia it has come to be known as the 'McMullan principle', named after the Labor minister who ordered his personal staff not to appear or answer questions. His justification was that "ministerial staff are accountable to the minister and the minister is accountable to the parliament and, ultimately, to the electors".

The McMullan principle has not been accepted or applied in Australian state jurisdictions and so is not generally accepted outside the federal parliament. Accepting that in our political system it is the minister who will be held to account by the parliament not his or her personal staff, it does not follow that his or her staff should not be questioned by the parliament. To the contrary, it is critical to holding ministers to account that their personal staff be able to be questioned by the parliament. The rise in the numbers of ministerial advisors and the important tasks they now perform make this issue even more significant.[10]

It is our view that the 1998 Guide does not adequately address the definition of ministerial responsibility and the means by which ministers are to be made answerable for the discharge of that responsibility.[11] It does not specifically address the circumstances in which ministers are to be held personally culpable for their acts and omissions and those of others in matters relevant to the ministers' portfolio. These deficiencies leave considerable

> The 1998 Guide seriously understates the nature and extent of ministerial responsibility. It reads:
> *Under the Australian system of representative government, ministers are responsible to Parliament. This does not involve ministers in individual liability for every action of public servants or even personal staff. It does however imply that ministers accept two major responsibilities: first for the overall administration of their portfolios, both in terms of policy and management; and secondly for carriage in the Parliament of their accountability obligations to that institution.*

[10] In its submission the Community and Public Sector Union (PSU Group) noted that 'For improved accountability a Minister or Cabinet as a whole should not be able to direct a staff member or public servant not to appear or not to give evidence at parliamentary inquiries. While Ministers and Cabinet have this power, ministerial staff and public servants have no real or practicable option but to act as directed by their minister' (p 5). It also supported the recommendation of the Senate Finance and Public Administration Committee report that a code of conduct be established for ministerial staff.

[11] The PSU Group concurred in this view (Submission, p 1).

uncertainty which is undesirable from the community's point of view and unsatisfactory for Ministers and the Parliament. The Guide does address the issue of the minister's responsibility for the acts and omissions of personal staff; but identifying that responsibility will have no effect as long as the convention exists that personal staff are not required to appear before parliamentary committees to answer questions. That weakness needs to be addressed. Other provisions need to be added and existing provisions strengthened to make governments accountable to parliament and the people.

There is a clear need for the review and updating of the Guide.[12]

Proposals to remedy the deficiencies are set out in a reformed Guide on the following pages. It takes into account submissions and comments received on the discussion paper ***Why Accountability Must be Renewed***..

The reforms to be adopted in the Guide are shown in **bold**. Appropriate provisions should be included in the proposed legislative instrument.

[12] All submissions received supported this need.

Guide to Key Elements of Ministerial Responsibility

Amendments to the 1998 Guide are shown in **bold** and discussed in text boxes

FOREWORD

This *Guide* is **the** authoritative source of information and advice for ministers, parliamentary secretaries and ministerial staff. It sets out in summary form the main principles, conventions and rules by which government and ministerial conduct at the Commonwealth level is governed**.** The objective of ministerial responsibility is improved standards of behaviour in the discharge of ministers' assigned responsibilities

The foreword has been extended to actually become a **foreword** i.e. it foreshadows the key issues affecting the accountability of ministers for matters for which they are assigned responsibility addressed by the Guide. Furthermore, it recognises that the document enjoys a far higher status that the term "Guide" connotes. It is a document of great significance in the influence it has on the behaviour of ministers, public servants, ministerial private staff and the parliament in the functioning of Australia's accountability regime.

The Foreword includes a clear statement that the objective of ministerial responsibility is improved standards of behaviour in the discharge of ministers' assigned responsibilities.

The *Guide* has been updated to**:**

- **clearly identify the exercise of executive powers in the public interest for which ministers and parliamentary secretaries are responsible;**
- **confirm that ministers are answerable for the conduct of all staff under their authority, including ministerial staff;**
- **indicate the manner in which ministers and parliamentary secretaries are answerable for the exercise of their responsibilities;**
- **address the issue of the personal culpability of ministers;**
- **clarify the implication of Parliament's role as Australia's supreme democratic institution including the government's relationship with it**; **and**
- **incorporate minor editorial changes.**

The *Guide* does not seek to provide answers to questions of detail. It does, however, refer where necessary to other handbooks and guidelines which provide more comprehensive information.

Signature
Prime Minister

CONTENTS

1. THE CONSTITUTIONAL AND LEGAL FRAMEWORK

Distribution of Powers

The framework for Australian government is set out in the Constitution, with Commonwealth functions separated broadly into legislative, judicial and executive. Executive power is vested primarily in the Governor-General acting with the advice of the Federal Executive Council.

Constitutional convention requires the Governor-General to act in accordance with the advice of the Prime Minister. In accordance with this convention, executive powers are actually exercised by the Prime Minister, ministers and parliamentary secretaries.

This section is amended to now recognise

- the fundamental constitutional convention that the Governor-General acts in accordance with the advice of the Prime Minister,
- that all ministers and parliamentary secretaries must be members of Parliament, and
- that all are accountable to Parliament for the discharge of their executive responsibilities.

Under the Constitution, Ministers of State comprise those appointed by the Governor General to administer Departments of State. They include Ministers and Parliamentary Secretaries. Under the Constitution, Ministers of State are members of the Executive Council.

All ministers and parliamentary secretaries must be members of Parliament *(except for a period of up to three months e.g. following electoral defeat)*.

As members of Parliament, ministers also take part in the exercise of legislative power, including in the introduction of proposed legislation to Parliament for consideration. Similarly, parliamentary secretaries should be answerable to the parliament for the discharge of their executive responsibilities.

The Prime Minister, ministers and parliamentary secretaries are all answerable to Parliament for the discharge of their individual responsibilities and the collective responsibilities of the Government.

Ministers and Departments

Acting on the advice of the Prime Minister, the Governor-General appoints ministers.

This now indicates that the advice to appoint ministers and establish departments is by the Prime Minister. The Governor General always acts in accordance with that advice.

Acting on the advice of the Prime Minister, the Governor-General also establishes departments, then formally allocates executive responsibility among ministers through the Administrative Arrangements Order published in the Commonwealth Gazette. The Order specifies the matters dealt with by each department of state and the legislation administered by each minister of state administering a department. In accordance with the Administrative Arrangements Order, most of the general executive powers of the

Commonwealth are exercised by ministers or their departments without the direct involvement of the Governor-General or Executive Council. Many enactments also vest decision-making powers directly in ministers. However, some important powers, such as regulation-making and many appointments, are vested in the Governor-General in Council.

Cabinet

While not mentioned in the Constitution, Cabinet is the central organ for collective consideration of issues by ministers. Although the recorded outcomes of Cabinet discussions are often referred to as decisions, the holder of legal authority to make the decision is often the Executive Council, an individual minister or an official with specific statutory powers.

Parliament

Under the Australian system of representative government, ministers are answerable to Parliament for the discharge of their responsibilities.

The 1998 Guide seriously understates the nature and extent of ministerial responsibility. It reads:
Under the Australian system of representative government, ministers are responsible to Parliament. This does not involve ministers in individual liability for every action of public servants or even personal staff. It does however imply that ministers accept two major responsibilities: first for the overall administration of their portfolios, both in terms of policy and management; and secondly for carriage in the Parliament of their accountability obligations to that institution.

Ministers accept four major responsibilities:

- **for the overall administration of their portfolios, both in terms of policy and management;**
- **administer legislation assigned to them;**
- **the carriage in the Parliament of their accountability obligations to that institution; and**
- **collectively, for the policies and exercise of responsibility by fellow ministers.**

This requires ministers to be answerable to Parliament for every action of public servants, personal staff and other personnel acting under the minister's prerogative, legislative or contractual authority. In all cases, whether an action occurred with or without the minister's authorisation or knowledge, the minister remains liable to answer for that action and any corrective action.

Similarly, ministers share collective responsibility for the actions of all other ministers, whether or not those actions have been the subject of Cabinet or other collective deliberation.

It is a condition of appointment as minister or parliamentary secretary that the appointees accept restrictions on employment after ceasing to hold appointment (see below POST MINISTERIAL OR PARLIAMENTARY SECRETARY CAREER).

Restrictions on later employment, designed to avoid real or perceived conflicts of interest, are also introduced.

2. THE MINISTRY

Portfolio Ministers

Some ministerial portfolios have only one minister. In other cases, however, to enhance ministerial control over complex and diverse functions, more than one minister administers a portfolio. In those cases the Prime Minister will determine the minister who is to have ultimate responsibility for the portfolio (the portfolio minister).

The portfolio minister, subject to any general views of the Prime Minister, determines the matters that will be the responsibility of any other minister in the portfolio.

The portfolio minister is, subject to Cabinet, responsible for the direction of policy and the public presentation of it.

The portfolio minister represents the interests of the portfolio in Cabinet, but

- other ministers in the portfolio are entitled to bring forward submissions related to their allocated areas of responsibility; and
- to be present when Cabinet discusses those submissions.

The principles of collective responsibility set out in the Cabinet Handbook apply. In summary, they are:

- decisions of Cabinet are reached collectively and, other than in exceptional circumstances, bind all ministers as decisions of the government. In exceptional cases ministers who were not present for a discussion may, if they believe there are difficulties of which Cabinet would have been unaware, seek to re-open discussion;
- all ministers must give their support in public debate to decisions of the government; and
- ministers are expected to refrain from public comment on Cabinet committee decisions which are not operative until endorsed by the full Cabinet.

In the Parliament:

- the portfolio minister is ultimately accountable for the overall operation of his/her portfolio. Other ministers in the portfolio, however, also have a clear accountability for areas of responsibility allocated to them and are required to answer questions **(as discussed under "Questions")** in relation to those areas; and
- with the agreement of the portfolio minister concerned, other ministers in the portfolio may also, in relation to the whole portfolio, take legislation through, and respond to Matters of Public Importance motions.

The Prime Minister sets out his priorities and strategic direction for each portfolio in a letter sent to respective ministers shortly after they are appointed.

This letter may also indicate in broad terms how the Prime Minister sees functions being shared by ministers in the portfolio.

Parliamentary Secretaries

Parliamentary secretaries may also be appointed to help particular ministers deal with the heavy workload in a portfolio. They are not appointed under the Constitution to administer departments as ministers are, and do not answer parliamentary questions or represent ministers at Senate estimates hearings.

The duties parliamentary secretaries may undertake are allocated following consideration and discussion with the respective portfolio ministers. The duties carried out by a parliamentary secretary may include:

- policy development work in nominated areas of the portfolio;
- considering and signing replies to correspondence as appropriate;
- carriage of legislation in the Parliament;
- chamber duty;
- representing the minister at official engagements; and
- attending Executive Council meetings in accordance with arrangements coordinated by the Executive Council secretariat.

3. CABINET

Cabinet Handbook

The following is a general description of Cabinet and its procedures. More detailed information is set out in the *Cabinet Handbook* issued from time to time by the Prime Minister and available from the Cabinet Secretariat.

Composition

It is the Prime Minister who decides on the size of the Cabinet and who determines which ministers are to be included in the Cabinet.

Collective Responsibility

The principle of collective responsibility for the decisions which are taken in Cabinet is fundamental to effective Cabinet government. From this principle flows the convention that what is discussed in Cabinet and in particular, the views of individual ministers on issues before the Cabinet, are to remain entirely within the confidence of the members of Cabinet.

Similarly, the papers considered by Cabinet and the minutes recording the outcome of the Cabinet's deliberations are regarded as confidential to the government of the day. Separate procedures apply to the handling of Cabinet documents and the convention has been adopted by successive governments that the Cabinet papers (and deliberative documents generally) of a government are not available to its successors.

Papers are to be brought before Cabinet only when genuinely related to Cabinet deliberations and not as a pretext for giving them such status.

The contrived submission of documents to Cabinet with the aim of keeping them away from public view has become all-too-common.

This artificial procedure gives any document the status of a Cabinet Document and aims to exclude politically sensitive documents, which would not otherwise come to Cabinet, from provisions of Freedom of Information legislation. This is now a serious impediment to the public's right to know and the accountability of ministers for the discharge of executive powers.

This addition makes it clear that such actions are not acceptable.

Declaration of Interests

Ministers are required to resign directorships in public companies.

A minister attending Cabinet or **a** Cabinet committee meeting must, in relation to the matters under discussion, **take all reasonable steps to identify and declare any potential relevant beneficial**:

- private interests held by
  - them, or
  - members of their immediate family**, or**
- **association with a**
  - **political party, or**
  - **donor to a political party, or**
  - **sponsor of a political activity or campaign,**

of which they are aware, which give rise to, or are likely to give rise to, a conflict with their public duties. Generally, declarations should be made in all cases where an interest exists which could not be said to be shared with the rest of the community. Any such declarations will be recorded by Cabinet officers. It is then open to the meeting to excuse a minister from the discussion or to agree explicitly to his or her taking part.

These provisions have failed to keep pace with developments which could undermine the integrity of the exercise of executive powers.

Also, they were watered down in 1998 following the resignations of several ministers found to have breached the 1996 provisions affecting company directorships.

The potential for corruption of the exercise of ministerial discretion has dramatically increased with the greatly expanded use of privatised services, public-private partnerships and other arrangements. Ministers individually and Cabinet collectively make decisions and influence public service actions with massive consequences for powerful commercial interests with the ability to make generous donations to support political campaigns.

Similarly, Ministers and Cabinet may make decisions with major implications for the interests of their own or another political party. Whilst partisan considerations are intrinsic to the operation of the political system, these partisan interests must not pre-dominate over the public interest.

Requiring ministers to inform themselves and their colleagues on a comprehensive range of potential conflicts of interest would strengthen protections against corruption in the exercise of executive powers.

These amendments also restore the 1996 requirements concerning company directorships.

Once a minister has made Cabinet aware of a particular private interest, it will not normally be necessary to declare that interest in subsequent Cabinet discussions. If a significant time has elapsed since a declaration and the interest is one that might not be well known to colleagues, the minister might declare the interest again when the relevant matter is under discussion.

Ministers' responsibilities in relation to their private interests are discussed in more detail in Chapter 5.

Committees

It is usual for the Prime Minister to establish a number of committees of the Cabinet. Committees are commonly used for dealing with especially sensitive issues (for example, security and revenue; for testing potentially controversial developments where discussion in full Cabinet would be premature; for dealing with matters where there is a lot of detail to be dealt with (economic statements

or budget outlays are an example); and where matters are relatively routine (for example the approval of the weekly government business programme by a Parliamentary Business Committee).

Meetings and Attendance by Ministers

The Cabinet and its committees meet as and when required, consistent with the Prime Minister's wishes. Generally, Cabinet meets on a weekly basis and committees meet less frequently but may undertake periods of increased activity (for example in the preparation of the Budget or major policy statements).

Subject to unavoidable parliamentary or Executive Council commitments, attendance at meetings of the Cabinet or its committees takes priority over all other engagements and the Prime Minister should be informed if for any reason a minister is unable to attend.

Business

Business comes before the Cabinet primarily by way of submissions and memorandums, but also as a result of correspondence to the Prime Minister.

Decisions on whether an item should be considered in Cabinet and what business should be considered at a particular meeting are taken by the Prime Minister.

Submissions are papers containing recommendations by the responsible minister(s) on action to be taken by the government. Departments will normally provide drafts of submissions for their ministers' consideration. Memorandums are submitted by departments to Cabinet for its information and do not include recommendations. Other matters may be brought forward only with the agreement of the Prime Minister and the general practice is for ministers to write to the Prime Minister explaining that the matter is urgent and is sufficiently straight-forward not to need the preparation of a Cabinet submission.

Appointments

Current Australian practice has not kept pace with improvements to appointment processes made in comparable countries such as the United Kingdom, where the Public Appointments Unit is responsible for appointments first being scrutinised by an independent panel or by a group including membership independent of the department filling the post.

Appointments are also brought to the Cabinet by way of correspondence from the responsible minister to the Prime Minister **following consideration of potential appointees and report by the (proposed) Appointments Commission comprised of senior public servants. No recommendation to Cabinet for an appointment will be accepted unless it has been scrutinised by an independent panel including membership independent of the department filling the post, authorised by the Appointments Commission, or is certified by the Prime Minister as an urgent appointment, giving the reasons and qualifications for selection, published in the Government Gazette.**

Business Rules

Various rules for the handling of business are determined by the Prime Minister and are set out in detail in the Cabinet Handbook. These relate to matters such as the content and presentation of papers for Cabinet, requirements for consultation with other ministers and their departments and deadlines for the lodgement of submissions in advance of meetings to ensure that ministers have sufficient opportunity to familiarise themselves with their content.

Minutes

Cabinet officials take notes of the discussions that take place in Cabinet and its committees and produce minutes recording the outcome of those discussions. The minutes indicate the matters to which the Cabinet has agreed and the significant matters it has noted. They do not record the general arguments expressed or the views of individual ministers. Cabinet minutes are generally issued to all Cabinet ministers although there are some which are given a more limited distribution.

Committee Minutes

The general practice is for minutes of committees (other than those of either a particularly sensitive or routine nature) to be submitted for endorsement at a later meeting of the Cabinet before they are accorded any final authority. Ministers not involved in a committee's deliberations who wish to address issues raised by the committee's decision in the Cabinet should give prior notice to the Prime Minister.

Cabinet Policy Unit

The Cabinet Policy Unit provides the Prime Minister with advice on issues before the Cabinet and on the strategic policy directions of the government. Staff are employed under the *Members of Parliament (Staff) Act 1984* and are accountable directly to the Prime Minister. The head of the Cabinet Policy Unit is the Secretary to Cabinet.

4. EXECUTIVE COUNCIL

Constitutional Background

Section 62 of the Constitution provides that:

> There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

By virtue of section 63 of the Constitution, the Council is involved whenever the Constitution vests a power in the "Governor-General in Council". The Council is also involved whenever legislation vests a power in the Governor-General.

Purpose

The purpose of the Council is to provide the forum through which ministerial advice is provided to the Governor-General in the exercise of his powers.

The business undertaken by the Executive Council includes:

- the making of proclamations (notice given under an Act by the Governor-General of a particular matter such as the commencement of the Act on a specified day);
- the making of regulations and ordinances (under delegated authority under an Act):
- the making and terminating of appointment to statutory offices, boards, commissions, courts and tribunals;
- changes to the Administrative Arrangements Order, including the creation and abolition of government departments (Constitution section 64);
- the issuing of writs for the election of members of the House of Representatives (Constitution, sections 32 and 33), and senators for the territories (*Commonwealth Electoral Act 1918*, section 151);
- the authorisation of Australian entry into international treaties; and
- the commissioning of officers in the Defence Force and termination of those commissions.

Composition

All ministers, and in recent years all parliamentary secretaries, are sworn in as Executive Councillors. Executive Councillors maintain that capacity for life although only Councillors who are ministers or parliamentary secretaries in the government of the day are summoned to attend council meetings

Vice President

A member of the ministry is appointed by the Governor-General to be Vice President of the Executive Council. The Vice President may from time to time be required to preside at Executive Council meetings.

Meetings

Meetings of the Executive Council are held as required and at the Governor-General's convenience. Generally there is a meeting about every fortnight but where the need arises special meetings can be arranged at short notice.

The established practice is that two Executive Councillors are required to attend the meeting to provide a quorum. The meetings are generally presided over by the Governor-General, or in his absence, for example overseas, by the Administrator of the Government of the Commonwealth. In urgent circumstances, with the Governor-General's concurrence, a meeting may be presided over by the Vice President or, if he or she is unavailable, by the most senior minister available. Again, two Executive Councillors are also present to constitute a quorum.

Meetings are generally held at Government House, although they may be held elsewhere, (for example at Admiralty House in Sydney) if the circumstances require.

Attendance by Ministers and Parliamentary Secretaries

All ministers (both within Cabinet and in the outer ministry) and also parliamentary secretaries are required to make themselves readily available on request to attend meetings of the Executive Council. A roster is generally developed for attendance at the more regular meetings. Where a special meeting is urgently required the onus falls on the minister seeking the meeting to arrange attendance by Councillors.

Papers

Papers for Council meetings are prepared by departments. The Secretary to the Council, who is an officer of the Department of the Prime Minister and Cabinet, circulates them in advance to those attending the meeting.

The Governor-General may seek assurance from the Councillors attending that the recommendations being made are appropriate. Ministers and parliamentary secretaries should therefore familiarise themselves with the general nature of the matters being considered. Often questions requiring more detailed knowledge will be dealt with by the Secretary to the Executive Council, who may undertake to obtain further information for the Governor-General.

The practice at Executive Council meetings is for the Governor-General to refer to each of the matters raised and to seek the assurances of the Councillors attending that he should proceed on the recommendations that are in the

papers. The Councillors both sign a schedule confirming this advice and the Governor-General signs the schedule indicating his approval of the advice received.

Announcement of Decisions before Executive Council Meetings

Matters coming before the Council, particularly appointments, should not be announced in advance of the Council's meeting. In exceptional cases where it is considered imperative for there to be early announcement, the Governor-General's agreement would be sought by the Secretary to the Executive Council. Early announcements should always make it clear that what the minister is announcing is his/her intention to recommend the proposed action to the Governor-General.

Further Information

Further information is included in the *Executive Council Handbook* available from the Cabinet Secretariat.

5. MINISTERIAL CONDUCT

It is vital that ministers and parliamentary secretaries do not by their conduct undermine public confidence in them or the government.

- Ministers must be honest in their public dealings and should not intentionally mislead the Parliament or the public. Any misconception caused inadvertently should be corrected at the earliest opportunity.
- Ministers should ensure that their conduct is defensible, and should consult the Prime Minister when in doubt about the propriety of any course of action.

Along with the privilege of serving as a minister or parliamentary secretary there is some personal sacrifice in terms of the time and energy that must be devoted to official duties and some loss of privacy. Although their public lives encroach upon their private lives, it is important that ministers and parliamentary secretaries avoid giving any appearance of using public office for private purposes.

The nature of their duties is such that they may need to have regard to the interests of members of their immediate families (to the extent that ministers know their interests) as well as their own when ensuring that no conflict or apparent conflict between interests and duties arises.

- Ministers (this and subsequent references to ministers should be read as including parliamentary secretaries) must not engage in any professional practice or in the daily work of any business. They must not accept retainers or income from personal exertion other than that laid down as their remuneration as ministers and parliamentarians. Notes on the meaning of "personal exertion" are included in the explanatory notes which the Prime Minister sends out with statements of interests forms.
- Ministers are required to resign directorships in public companies and may retain directorships in private companies only if any such company operates, for example, a family farm, business or portfolio of investments, and if retention of the directorship is not likely to conflict with the minister's public duty (e.g., a minister should question the retention of a directorship in a company in which share holdings extend beyond the minister's own family).
- Ministers are required to divest themselves, or relinquish control, of all shares and similar interests in any company or business involved in the area of their portfolio responsibilities. The transfer of interests to a spouse or dependent family member, or to a nominee or trust, is not an acceptable form of divestment. Ministers may transfer control to an outside professional nominee or trust providing the minister or immediate family exercises no control on the operation of the nominee or trust and that the minister and immediate family are not kept informed of the assets held or divested by the outside professional nominee or trust (i.e. a blind trust).
- Ministers are not precluded from making investments on the stock markets or other financial and trading markets, but they should not operate as traders and should exercise careful personal judgment in respect of transactions.

Ministers are required to make statements of interests in accordance with arrangements determined by the Prime Minister. The Prime Minister writes to ministers outlining these arrangements.

Ministers should perform their public duties not influenced by fear or favour - that is, by any expectation that they **or their political party or any donor to a political party or campaign** will benefit or suffer as a consequence.

The current provision fails to recognise that ministers may be tempted to put political party interests, or those of a past or prospective donor to political funds, ahead of the public interest.

Note that Canada has reformed political donations, banning all donations by corporations and limiting donations by individuals to C$1,000.

These additional words redress that weakness and complement the upgraded Declaration of Interests and Appointments provisions.

- Ministers should not accept any benefit where acceptance might give an appearance that they may be subject to improper influence (e.g. because the giver has or seeks to have a contractual relationship with government or has any other special interest in government decisions).
- Ministers may accept benefits in the form of gifts, sponsored travel or hospitality only in accordance with the relevant guidelines (provided by the Prime Minister when he writes to ministers about their statements of interests).
- **All gifts, sponsored travel or hospitality with an estimated value of more than $200 must be disclosed through updating of statements of private interests within 28 days of receipt.**
- Ministers should not exercise the influence obtained from their public office, or use official information, to gain any improper benefit for themselves **or their political party or any donor to a political party or campaign** or another **person or organisation**.
- Particular attention needs to be paid to ensuring that the scope for adverse comment is minimised if it is proposed to appoint someone who is the close relative or associate of a minister.
- Subject to provisions in legislation or other formal documents relating to the establishment of government bodies or positions, government appointments are to be made **only following consideration of potential appointees and report by the (proposed) Appointments Commission.**
- If the approving authority (which may be Cabinet or a minister) is satisfied that this condition is demonstrably met, then spouses, parents, children or other close relatives of ministers, parliamentarians, ministerial staff or heads of departments or agencies should not be discriminated against in selection processes on account of family relationships.
- There is a longstanding practice that ministers do not appoint close relatives to positions in their own offices. In addition, close relatives of a minister should not be appointed to any other minister's office irrespective of the level of the position, except with the specific approval of the Prime Minister. And a minister's close relative should not be appointed to any position in an

agency in that minister's own portfolio if the appointment is subject to the agreement of the minister or Cabinet.

- Appointment proposals should identify the elements of merit, skills, qualifications, experience and special qualities on which they are based.

Ministers are provided with facilities at public expense in order that public business may be conducted effectively. Their use of these facilities should be in accordance with this principle. It should not be wasteful or extravagant. As a general rule, official facilities should be used for official purposes. The distinction between official and personal conduct is not always clear (e.g., in relation to the provision of hospitality/entertainment and use of car transport) but ministers should ensure that their actions are calculated to give the public value for its money and never abuse the privileges which, undoubtedly, are attached to ministerial office.

Contact with Lobbyists

Ministers and parliamentary secretaries will be approached by individuals and organisations, acting on their own behalf or on behalf of others, whose purpose is to seek to influence (lobby) government on a variety of issues.

Ministers and parliamentary secretaries should ensure that dealings with lobbyists are conducted so that they do not give rise to a conflict between public duty and private interest.

In dealing with a lobbyist who is acting on behalf of a third party, it is important to establish who or what company or what interests that lobbyist represents so that informed judgements can be made about the outcome they are seeking to achieve.

Where representations are being made on behalf of a foreign government or the agency of a foreign government, special care needs to be exercised as foreign policy or national security considerations may apply. It may be appropriate in certain cases to advise the office of the Minister for Foreign Affairs of representations received.

Ministers and parliamentary secretaries should ensure that

- **There is provision for online registration of each instance of lobbying activity ('registrable activity' – see below) via a website of every agency/minister being lobbied.**
- **Registrable activity (i.e., lobbying) is defined as representing the interests of a party to the Government including to any Minister, Parliamentary Secretary, private office staff, departmental staff or other staff within a portfolio.**
- **The website is public and accessible "live" i.e. registrations appear when submitted.**
- **Ministers (& all private office, departmental and agency staff under their authority) should refuse to receive lobbying that has not been registered, but that, having regard to informal opportunities that arise**

for lobbying, provide for retrospective registration in such cases (excluding appointments e.g. informal lobbying) within a period of grace of 7 days.

- **Ministers are responsible for monitoring the register to assure that all lobbying activities related to the portfolio are registered and that any person failing to register lobbying is refused further access for lobbying for one year, except with the approval of the Prime Minister.**
- **Ministers are responsible for ensuring that a record of the content of lobbying activities is kept for each instance of lobbying related to the portfolio.**
- **Each registration of lobbying activity should require:**
  1. **The lobbyist's business name and Australian Business Number (ABN), as applicable.**
  2. **The names of the owners, partners or major shareholders of any corporation/partnerships/etc of lobbyists, as applicable.**
  3. **The contact details: name, phone number, email address. These contact details would be used for communication with the lobbyist.**
  4. **Website address (if any).**
  5. **The names and positions of all persons employed, contracted or otherwise engaged by the lobbyist to carry out the lobbying activities.**
  6. **The names of client/s for whom the lobbying activity is to be (or was) conducted, whether providing paid or unpaid services as a lobbyist.**
  7. **The name of the Minister or other person/s lobbied and the subject matter/s of the lobbying activity.**

Persons conducting lobbying activities should have the opportunity to voluntarily register to facilitate automated entry of details, especially 1-4 above.

6. MINISTERS' RELATIONS WITH DEPARTMENTS

The Australian Public Service (APS) exists to provide advice to the government, and give effect to its policies. The Service is based on a number of important principles, including: high standards of honesty, integrity and conduct; equitable service to the public; provision of frank and comprehensive advice to ministers; a strong emphasis on responsiveness to the government, the Parliament and the community; party-political impartiality; and staffing based on merit.

It is important that there be trust between ministers and public servants, and each must contribute to the establishment and maintenance of the trust. Ministers should be scrupulous in avoiding asking public servants to do anything that the APS principles do not permit, and in particular should not ask them to engage in activities which could call into question their political impartiality.

Ministers will obtain advice from a range of sources, but primarily from their private office and from their departments. There is clearly no obligation on ministers to accept advice put to them by public servants, but it is important that advice be considered carefully and fairly. It is not for public servants to continue to press their advice beyond the point where their ministers have indicated that the advice, having been fully considered, is not the favoured approach. Public servants should feel free, however, to raise issues for reconsideration if they believe there are emerging problems or additional information that warrant fresh examination.

The current Guide is seriously flawed in that it understates the nature and extent of the accountability which ministers must accept for the discharge of their responsibilities if parliamentary democracy is to have real meaning.

This wording recognises that only ministers can answer to Parliament and the citizens for the exercise of executive power, whether exercised directly or through private office staff, agencies, contracted organisations and legislation for which ministers are assigned responsibility.

The importance of ministerial responsibility for their ministerial staff was reinforced by the recent Canadian Gomery Report which stated that

> (t)he notion that (2 named staff) could provide political input without strongly influencing the decision-making process is nonsense and ignores the obvious reality that the expression of an opinion to a subordinate official by the (minister's) Chief of Staff or the Minister amounts to an order

However, as indicated below, the manner in which accountability operates does not provide that ministerial resignation is the sole manner in which it can be discharged.

Accountability

The secretary of a department is, pursuant to the Public Service Act, responsible "under the minister" for the general working of the department and for advising the minister in all matters relating to the department.

Ministers bear two major individual responsibilities: first for the overall administration of their portfolios, both in terms of policy and management; and secondly for carriage in the Parliament of their accountability obligations to that institution. This requires ministers to be answerable to Parliament for every action of public servants, personal staff and other personnel acting

under the minister's prerogative, legislative or contractual authority. In all cases, whether an action occurred with or without the minister's authorisation or knowledge, the minister remains liable to answer for that action and any corrective action.

Ministers' direct responsibility for actions of their personal staff is, of necessity, greater than it is for their departments'. Ministers have closer day-to-day contact with, and direction of the work of, members of their staff. Furthermore, **the actions of** ministerial staff are not reported in departmental annual reports, and they are not normally subject to other forms of external scrutiny, such as administrative tribunals. **However, the parliament is empowered to require them to give evidence to parliamentary committees and there is no authority to direct ministerial staff otherwise (on the same basis as any other potential witness)**.

Ministerial staff provide important links between ministers and departments when the minister is unable to deal with departmental staff personally, and add essential political dimensions to advice coming to ministers. A close and productive relationship between a minister's staff and the department maximises the minister's effectiveness. Ultimately, however, ministers cannot delegate to members of their personal staff their constitutional, legal or accountability responsibilities. Ministers therefore need to make careful judgements about the extent to which they authorise staff to act on their behalf in dealings with departments.

Discharge of Accountability

Ministers may discharge their responsibility to be accountable at one or more of six levels. The appropriate level of accountability will vary according to circumstances and judgements related to the details of each case.

The current Guide is silent on how a minister may demonstrate accountability for an event which has occurred or a decision that has been taken within an area for which he or she is assigned responsibility.

The levels at which ministers discharge their responsibilities have been clearly identified by British scholar, Diana Woodhouse. These are adapted here.

There are six accountability levels which may be summarised as:

- **redirecting the question to the relevant minister;**
- **providing all relevant information;**
- **providing full explanations;**
- **taking any necessary remedial action;**
- **accepting personal culpability; or,**
- **resignation.**[*]

The six accountability levels involve the following obligations:

[*] see Woodhouse, Diana (1994). *MINISTERS AND PARLIAMENT. Accountability in Theory and Practice.* Oxford: Clarendon: pp.28-38.

- **redirecting the question applies where the matter falls outside the minister's responsibility and is redirected to the ministerial colleague, other government or non-government entity with responsibility;**

- **providing all relevant information is appropriate when the only requirement is for the minister to provide some factual information concerning a matter within an area for which he or she has responsibility;**

- **providing a full explanation is where, in order to discharge responsibility, a minister provides an explanation of the events or actions taken but where no corrective or remedial action is required;**

- **taking any necessary remedial action concerns instances where some action was or is required in response to events which have occurred, or decisions have been taken by the minister or any subordinate, which require some corrective or remedial action;**

- **ministers are expected to accept personal culpability for their own acts and omissions and for those of:**
    - **their heads of department and their personal staff,**[13] **and**
    - **other instances in which they have participated or of which they were aware or should have been aware;**

In determining whether a minister is personally culpable, ignorance of a matter does not excuse the acts or omissions of the minister where the minister should have known or should have ensured the matter was drawn to the minister's personal attention. Without limiting the circumstances in which ministers should have known of any matter, they are deemed to have the knowledge of their heads of department and others who report directly to them and all members of their personal staff;[14]

Resignation is appropriate where a minister has lost the confidence of the House of Parliament or the Prime Minister in the minister's capacity to satisfactorily discharge the responsibilities of the office. In the rare event that a minister declines to act on advice to resign, the Prime Minister may recommend to the Governor-General that the minister's commission be withdrawn, after which the minister ceases to hold office.

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13 John Quiggin, (2006) *Australian Financial Review*, 2 March. Note also PSU Group Submission, where the point was made that public servants dealing with ministerial staff need to be confident that the actions of ministerial staff are fully authorised (p 2).

14 ibid.

Departmental Secretaries

Under the *Public Service Act 1999,* departmental secretaries are appointed by the Prime Minister.

Ministers and departmental secretaries have complementary roles. The strength of the relationship between minister and head of department, in terms of clarity of understanding of the minister's priorities and the free exchange of ideas, can be a significant factor in the achievement of portfolio goals. It is therefore incumbent upon both to maximise the opportunities that flow from productive working arrangements**.**

> Any failure of the working relationship between a minister and the secretary of a department for which the minister has responsibility may reflect a failure by either or both to establish and maintain an effective relationship. It must not be assumed that the responsibility resides only with the departmental secretary. Indeed, the relative powerlessness of the departmental secretary leaves that person extremely vulnerable if the minister acts so as to inhibit effective working relations. In so doing, a minister would actually be weakening the productive potential of the relationship.

Secretaries are appointed for fixed terms, usually five years. They are eligible for re-appointment or for appointment to another position of secretary, but all appointments and re-appointments and their associated terms and conditions are entirely at the discretion of the government. The government is able to terminate a secretary's appointment before the expiry of the term, but this step would not be taken lightly as termination involves formal action by the Prime Minister under the Public Service Act and the payment of compensation.

Senior Executive Service (SES)

Recruitment to and within the SES is merit-based. The Public Service Commissioner makes all SES appointments after receiving recommendations of the departmental secretary, who in turn receives reports from a selection advisory committee. These procedures are designed to protect the merit principle and the ongoing political impartiality of the senior ranks of the APS.

Public Engagement

Responsiveness is at the core of democratic government. Involvement of the public not only respects their rights as citizens to influence decisions affecting their lives, consultation frequently leads to improved policy, legislation and administration. It taps into knowledge that agencies can rarely capture to the same depth. Accordingly, it is important that ministers and parliamentary secretaries seek opportunities for public engagement in the scrutiny of executive actions wherever possible.

Whistleblowers

Ministers have an obligation to ensure that whistleblowers are protected against reprisal action.

7. ADMINISTRATIVE DECISION-MAKING BY MINISTERS

Background

Ministers may have to account for the exercise of their administrative powers, not only to Parliament (or its committees) and the Auditor-General, but also at law. The courts may review the legality of administrative decisions or actions taken by ministers. Some decisions can be reviewed on the merits by tribunals. The Ombudsman **and the Auditor-General**, while excluded from investigating **the merits of government policy, may investigate a minister's actions in relation to that policy and** the adequacy of advice on which that action is based.

> The current Guide fails to recognise that the processes of a minister's actions may be subject to inquiry by the Ombudsman and the Auditor-General.
>
> Although the merits of a policy decision is a political matter that is not subject to review, the basis on which the decision was made, such as the advice sought and accepted, is a matter properly open to inquiry.

Review of decisions can be initiated by individuals or organisations whose interests are affected, including by "special interest" groups. Many decisions will have sufficient commercial, environmental or other consequences to make such challenges likely if there is any doubt about the soundness of the decision-making process or the decision itself. Any legal challenge can have acute implications in terms of lost opportunities, delay and additional cost. Adverse decisions by courts also often give rise to public criticism.

Statutory Decision-Making by Ministers

The grounds for challenging administrative decisions made under legislation are set out comprehensively in the *Administrative Decisions (Judicial Review) Act 1977*. They give a clear indication of the basic requirements for decision-making. In essence:

- each decision needs to be within the scope of the power provided by the legislation;
- the procedure for reaching the decision needs to meet basic standards of procedural fairness, allowing all sides to present their cases, and must also comply with any special requirements set by the legislation;
- each decision needs to be made on the merits of the case, with the decision-maker unbiased and acting in good faith; and
- conclusions must be soundly based in reason, in particular they must reflect a proper understanding of the law, draw on reasonable evidence for findings of fact, take account of all relevant considerations and not take account of irrelevant considerations.

Ministers clearly need to have careful regard to the legalities of each decision, with recourse to professional legal advice where appropriate:

- It may not be sufficient to adopt the same approach as has been adopted in the past - changing circumstances may lead to challenges affecting processes which have previously gone uncontested.
- The process for making complex or sensitive decisions needs to allow plenty of time for due process including proper consultation - starting too late may lead to pressure for shortcuts which involve legal risk.
- The decision-making process needs to be carefully documented to allow for statements of reasons to be prepared or for the defence of a decision on review. All relevant documentation may need to be disclosed in the course of review processes, or in some cases in response to requests under the *Freedom of Information Act 1982*.
- Although government policy can be, and often is, an important factor considered in making statutory decisions, it is important to recognise that policy does not of itself have the force of law. Should there be any inconsistency between the application of the policy and the legal requirements for making the decision, the legal requirements prevail.

Delegation of Statutory Powers

Many statutory powers vested primarily in ministers may be delegated to departmental officers or others. While the delegate will take direct responsibility for individual decisions taken under delegated power, the minister **retains ultimate responsibility for the operation of the Act and remains liable to be** held to account for the overall adequacy of the decision-making arrangements, the achievement of acceptable standards **and any corrective action.** A minister who has issued a delegation may still exercise the power personally in appropriate cases, but cannot dictate the outcome where a decision is made by a delegate:

The current Guide fails to acknowledge that ministers are assigned responsibility for the operation of specified Acts.

The effect of this is that a minister remains answerable to the Parliament and citizens for all action taken under the authority created by the Act, including breaches and any corrective actions.

- Ministers should consider carefully the structure of proposed delegations, the level to which particular functions are to be devolved and the general arrangements for ensuring delegates are equipped to perform the task. Any classes of decision to be handled at particularly senior level, or by the minister personally, should be identified.
- In some cases there may be scope for general guidance to delegates in the form of policy statements or guidelines provided they are

Again, the current Guide fails to acknowledge that ministers are assigned responsibility for the operation of specified Acts.

To properly discharge that responsibility, a minister must ensure that decisions made under delegated authority and other significant events are drawn to his/her personal attention and properly recorded.

consistent with the legislative scheme.

- A minister **must ensure that he or she** is to be notified promptly of decisions made under delegation **and other significant events, and that a permanent record is maintained**. This **is** particularly important where the decision could attract public comment to which the minister might be expected to respond.

Non-Statutory Decisions

While the paragraphs above deal specifically with decisions made under legislation, non-statutory decisions, such as a decision under the executive power to award a contract on behalf of the Commonwealth following a tender process, may also be subject to legal challenge. As with statutory decisions, care should be taken to ensure the decision-making process and the decision made are sound in law. Ministers should seek professional legal assistance about the decision-making process and ensure adequate time is allowed for all necessary steps.

Policy Changes

A minister's role in administering portfolio legislation includes development of proposals for policy change. This may involve proposing amendments to portfolio legislation. Notwithstanding proposals for legislative change, administrative powers need to be exercised on the basis of the existing legislation until the proposed change becomes law.

Further Information

Further information on the particular decision-making functions in each portfolio and their legal framework is available from each department. Legal advice on the application of administrative law requirements to particular decisions can also be obtained through the department, with the Attorney-General's Department or external legal advisers involved as appropriate

8. FACILITIES AND SERVICES FOR MINISTERS

Ministers are provided with support primarily from **four** sources: Ministerial within the Department of Finance and Administration, their own portfolio department, the Parliamentary Departments and the Protective Security Coordination Centre. The division of responsibility for services is described below.

Department of Finance and Administration – Ministerial Services Group (MS)

Ministerial Services (MS) has responsibility for:

- payment of the ministerial salary component (the senator or member's salary component is paid by the relevant parliamentary department);
- payment of travelling allowance;
- the provision of all travel within Australia by the minister, staff, spouse or nominee and dependent children;
- the cost of a private plated vehicle in the minister's electorate;
- the cost of the minister's official overseas visits including personal staff and spouse (but excluding departmental staff and hospitality of a personal nature);
- additional ministerial office accommodation - either in the capital city or the electorate;
- the minister's information delivery service entitlement (formerly postage entitlement) as a senator or member;
- management of office accommodation in the ministerial wing of Parliament House including parking in the basement car park;
- the supply of standard furniture and equipment in the ministerial wing;
- authorisation of the removal of any equipment from the ministerial wing;
- security policy within the ministerial wing;
- provision and maintenance of the secure communications network (ministerial communications network);
- the operation of COMCAR (costs are a charge to portfolio departments);
- payment of salaries and allowances of ministerial staff employed under the *Members of Parliament (Staff) Act 1984*.

MS has offices in Canberra, the ministerial wing of Parliament House and the capital city of each State and the Northern Territory.

Parliamentary Departments are responsible for:

- **electorate office accommodation and office requisites for the minister and electorate staff; and**
- **computer and other training for electorate staff.**

It is anomalous that the Department of Finance and Administration – Ministerial and Parliamentary Services Group - a department of the executive – currently provides support services for parliamentarians in their capacities as ordinary MHRs or Senators. These services should not be the "gift" of the executive, placing the executive in authority over the resources provided to all parliamentarians, government party, non-government and independent members alike.

The Parliament should provide these services through its administration (see below).

Portfolio Departments

A minister's department is responsible for:

- the costs of official cars, including any private plated vehicle in Canberra, for the minister and spouse;
- additional furniture and equipment, (including computer equipment), for the minister's offices both in the ministerial wing and in the Minister's home State or Territory;
- salary and other costs of a departmental liaison officer;
- stationery and office requisites for the Parliament House office, separate ministerial office in the capital city and a joint ministerial/electorate office;
- relief arrangements for personal staff absences of less than 12 weeks;
- postage for use in relation to ministerial duties;
- the costs of official residential telephone and fax services and telephone charge cards for the minister;
- portfolio-related hospitality overseas;
- official hospitality within Australia (including when a staff member represents the minister);
- mobile telephones for the minister and staff;
- membership fees of business organisations related to portfolio or ministerial functional responsibilities;
- the provision of semi-official residential telephone services and telephone charge cards for senior ministerial staff nominated by the minister; and
- payment of conference and training fees for ministerial staff, as well as any membership of airline lounges.

Parliamentary Departments

The parliamentary departments are responsible for:

- payment of the senator or member's salary and electorate allowance;
- the standard issue of facilities and equipment in the ministerial suite in Parliament House, namely telephones, two computers linked to the Parliament House network and a facsimile machine;
- **electorate office accommodation and office requisites for the minister and electorate staff; and**
- **computer and other training for electorate staff.**

Protective Security Coordination Centre

The Protective Security Coordination Centre, Attorney-General's Department, is responsible for personal security, residential security and security of personnel in offices outside Parliament House

9. MINISTERIAL STAFF CONDUCT[15]

Ministers (and parliamentary secretaries) are responsible for the conduct of members of their staff (including consultants), who act at the minister's direction and, to the extent that they have the minister's authorisation, take action on his or her behalf. For this reason, the rules of conduct applying to members of staff are in many respects similar to those applying to ministers.

Further advice on matters covered below is available in the handbook, *Ministerial Staff Entitlements,* produced by MAPS in the Department of Finance and Administration.

Members of staff must divest themselves, or relinquish control, of sensitive interests such as shares or similar interests in any company or business involved in the area of their ministers' portfolio responsibilities. The transfer of interests to a spouse or dependent family member or to a nominee or trust is not an acceptable form of divestment. Staff may transfer control to an outside professional nominee or trust providing the staff member or immediate family exercises no control on the operation of the nominee or trust.

Like ministers, members of staff should take care to avoid conflicts of interests if they make investments on the stock markets or other financial and trading markets.

A member of staff must have no involvement in any outside employment or in the daily work of any business, and must not retain any directorship in a company, without the express agreement of the employing minister.

Members of staff should not contribute to the activities of interest groups or bodies involved in lobbying the government, if there is any possibility that a conflict of interests or the appearance of such a conflict may arise. They are required to disclose membership of professional and recreational associations where any conflict or the appearance of a conflict of interests may arise.

At the time of commencing their employment, ministerial consultants and members of ministers' staff (including electorate officers) are required to complete statements of private interests on forms supplied by MS. The employing minister endorses the statement in writing after satisfying him or herself that there is no conflict of interests. The signed and endorsed statement is retained in the minister's office. Access should be strictly limited, and when a statement is updated or when a person ceases to be employed by a minister, the earlier statement should be destroyed.

The Ministerial Staff Entitlements Handbook sets out circumstances in which members of staff may be obliged to declare that they or their ministers have an interest in a matter under consideration.

[15] Guidelines will need to be adopted to reflect the conduct, authorisation and relationships with others proposed in this document.

Gifts including hospitality

Gifts, sponsored travel or hospitality should not be accepted if acceptance could give rise to a conflict of interests or the appearance of such a conflict. **All gifts, sponsored travel or hospitality with an estimated value of more than $200 must be disclosed through updating of statements of private interests within 28 days of receipt.**

The current Guide is unacceptably silent on how gifts should be dealt with expeditiously so as to avoid real or perceived conflicts of interest.

These additional words will fill that gap.

Expenses incurred by staff

On some occasions a member of staff may incur hospitality expenses at the minister's direction. Any claim for reimbursement should be endorsed by the minister indicating that the staff member was acting as directed and in accordance with the hospitality guidelines.

10. PARLIAMENTARY BUSINESS

Parliamentary Questions

There are two kinds of parliamentary questions requiring written answers:

- questions on notice which appear on the Notice Paper printed each day Parliament is sitting; and
- further information on a question without notice.

Questions on Notice

The Parliamentary Questions Officer in each department examines the Notice Papers each day Parliament is sitting for new questions asked of ministers. A draft response is then submitted to the minister for clearance. Once cleared, it is returned to the department where it is processed for lodging with the relevant Table Office.

Time constraints

Each house has set time limits for management of answers to questions on notice. House of Representatives standing order 150 **provide that** a member who has not received an answer to a question on notice within **35 calendar days may seek an explanation from the minister** for the delay**, and may repeat such request each third sitting day until an answer is provided,** and **may move that the House take note of the explanation**. Senate Standing Order 74 allows a senator who has not received an answer to a question on notice within **35 calendar days** to seek an explanation from the minister for the delay**, repeated after each third sitting day until an answer is provided,** and **may** move that the Senate take note of the explanation.

Irrespective of such limits, it is in the interest of ministers to respond to questions in a timely manner,

The current Guide makes an unjustifiable distinction between the times within which MHRs and Senators can expect a response to a Question on Notice (60 and 30 sitting days respectively) and the procedures for challenging late answers.

Both periods are unduly long given the speed with which modern technology enables data to be assembled and text prepared. Even 30 sitting days may translate to six months between a member submitting a question and the effluxion of time enabling an explanation to be sought.

NSW Standing Orders in both Houses provide that Ministers shall lodge answers to questions on notice within 35 calendar days. If the minister fails to do this, the (presiding officer) will inform the house and the minister must immediately explain. If the minister then fails to lodge within 3 sitting days the minister is to be called on again- and so on until a written answer is lodged.

The proposed changes provide for a more realistic requirement that ministers provide answers within 35 calendar days and that the procedures be common to both houses.

These changes require complementary corresponding amendments to the respective standing orders.

and for answers to cover particular points raised in the questions, so that the need for follow-up questions is minimised.

Questions without Notice

Questions asked at question time are to be answered fully by ministers or parliamentary secretaries except where the Prime Minister or Government Leader in the Senate declares the answer would require the disclosure of the deliberations of Cabinet or matters endangering the administration of justice or national security. In fully answering a question, a minister or parliamentary secretary must be directly responsive, relevant, succinct and limited to the subject matter of the question.

The current Guide fails to recognise the central role of questions without notice ("Question Time") as a key accountability mechanism. The effect is to give ministers a wide discretion to evade answering for their responsibilities and seemingly unlimited opportunities to comment on matters irrelevant to their responsibilities, including to attack the opposition, other non-government parties and their policies.

To be effective, ministers must be under an obligation to fully answer questions.

The proposed changes are based on a Ruling by Speaker Coghill in the Legislative Assembly of Victoria, 11 August 1992 (Hansard, p.13), plus a provision enabling the government to publicly decline an answer on the grounds of the administration of justice or national security.

From time to time, a minister or parliamentary secretary may undertake to provide further information. This undertaking is regarded as taking the question (whether in part or in whole) "on notice". The minister may provide the further information or answer:

- by letter to the member/senator concerned (a response conveyed in this way will not appear in Hansard); or
- by having it delivered to the Clerk in accordance with the normal question on notice process (a response conveyed in this way will appear in Hansard); or
- by leave at the end of question time or at another early opportunity (the response will automatically be recorded in Hansard; in the Senate it is also possible to seek leave to have the answer incorporated).

Corrections

Any answer found to be incorrect should be corrected as soon as the error is found, using the procedures of the chamber concerned.

More detailed information relating to Parliamentary questions can be found in the *House of Representatives Practice*, 3rd edition, pp 499-525 and *Australian Senate Practice*, 8th edition, pp468-482.

Legislative Process

Legislation is often required to give effect to policy changes. Ministers should:

- at an early stage give clear instructions to their department on the policy direction, bearing in mind that:
    - Cabinet approval is required for major policy issues, and
    - the Prime Minister's approval is to be sought for matters with minor policy implications;
- give authority to the department for the necessary legislation to be drafted;
- when legislation impacts on other portfolios, initiate consultation with relevant ministers throughout the development of the legislation, and take their views into account;
- when legislation amends Acts for which other ministers are responsible, seek the formal agreement of the relevant minister to the policy and text of the amendments;
- allow adequate time to clear the legislation, the explanatory memorandum and the second reading speech before introduction into Parliament;
- take into account the general practice that a bill is introduced in one sitting for debate in the next; and
- whenever possible, be present in the chamber to guide the legislation through the various stages of debate.

The minister should be present in the chamber during the debate of his/her bill. If the minister's absence at the time of the debate is unavoidable, the minister should ensure that a duty minister or a parliamentary secretary is sufficiently briefed on the detail of the legislation in order to guide the bill through the Parliament in the minister's stead.

As there is likely to be pressure on the legislation programme, it is important that ministers develop a forward plan of legislation for their portfolio and allocate the appropriate priority to bills they wish to have included on the programme for a particular sittings. More detailed information on the procedures and process involved in the preparation of legislation programmes can be found in the *Legislation Handbook* issued by the Department of the Prime Minister and Cabinet.

In order to facilitate effective management of the legislation programme, ministers should nominate a senior member of his/her office as a legislation contact officer to liaise with his/her department and with the Parliamentary Liaison Officer in both chambers to ensure ministers' priorities for the preparation and debate of legislation are adequately taken into account, and to assist the orderly presentation and flow of legislation.

Parliamentary Committee Inquiries

Parliamentary committee inquiries form an important, integral part of the Australian system of parliamentary democracy and accordingly are to be treated with respect.

Ministers are to make all reasonable efforts to meet the request of a committee for information which the committee deems to be relevant to an Inquiry, including facilitating the appearance of public servants, personal ministerial staff, other employees and contractors of the Commonwealth. Personnel may be advised that they are not obliged to offer opinion on policy decisions but are required to furnish factual information within their knowledge or for which they have administrative responsibility.

Ministers are to provide statements to parliament with substantive responses to parliamentary committee recommendations relevant to their portfolios within six months of the tabling of each committee report.

11. MINISTERIAL CORRESPONDENCE

As a matter of routine, ministers receive correspondence from other ministers, Premiers, federal members of parliament and senators, State and Territory members of parliament, constituents, organisations, political groups and the general public, including children.

It is open to ministers to determine how they prefer to have their ministerial correspondence handled. For example, ministers might decide that mail received from their constituents would be handled differently from mail received from the general public. It is not possible or desirable in most portfolios for ministers to answer all correspondence personally.

Some general points of principle in handling ministerial correspondence are:

- it is the expectation of the people who write to ministers that they will receive a reply, however brief;
- correspondence should be handled expeditiously and, where a timely reply is not possible, an interim acknowledgment giving reasons for the delay should be sent;
- replies should contain an expression of genuine appreciation of the correspondence and make specific reference, however minimal, to at least some of the key points or issues raised; and
- replies should be signed by someone at an appropriate level.

It would be normal for departments to have in place procedures for the handling of ministerial correspondence. Ministers should consult with their departments at an early stage to indicate any personal preferences they might have in the handling of ministerial correspondence.

Australians have a reasonable expectation that correspondence addressed to their elected representatives, ministers and public officials will be acknowledged and receive substantive replies without undue delay. Failure to deal respectfully with correspondence from the public has become a too frequent occurrence, giving rise to widespread frustration, cynicism and loss of trust. There should be precise and public guidelines for responding to correspondence, and audit and redress procedures to ensure that responses are not unreasonably denied or delayed. Failing an acknowledgement of correspondence within two weeks of its receipt or provision a substantive response within six weeks, there should be an immediate apology and explanation for the delay.

12. OVERSEAS TRAVEL

Ministers may need to travel overseas for a variety of reasons, for example to undertake negotiations and discussions with overseas counterparts, to put Australia's view at international meetings, to represent Australia on significant occasions and to gain first hand experience in areas of relevance to Australia.

The Prime Minister is responsible for approval of official overseas travel by all ministers, their spouses and their staff.

He writes to ministers, normally twice a year, asking for advice about travel proposed over the following twelve months. If a proposal receives his approval in principle, it is placed on the programme of visits for the year and the minister is advised to write seeking confirmation of his approval three weeks before the date of departure. Guidance on making travel arrangements is available from the Department of Finance and Administration.

In developing proposals, ministers should take the following into account:

- proposals should include only the highest priority visits, where the purpose of the visit and involvement at ministerial level can be clearly and publicly demonstrated as essential;
- the duration of absences and the costs of visits should be kept to a minimum;
- priorities should be set and visits minimised through consultation within and across portfolios. Wherever possible, ministers who regularly attend international meetings should tie their other essential travel in with these meetings;
- absences should be planned around parliamentary sitting periods, Cabinet and other (e.g. Budget) commitments;
- where there is more than one minister in a portfolio, no more than one should be absent overseas at any one time.

Ministers are entitled to be accompanied by their spouses during official visits. The government will meet the cost of fares, accommodation and meal expenses incurred by spouses during official visits.

Ministers are on duty full-time when travelling overseas, although their itineraries may include rest days:

- if a minister is accompanied overseas by children or any family member other than the spouse, it must be at the minister's own expense and the presence of others should not be allowed to interfere with the minister's capacity to attend to business;
- ministers may request approval to take leave while overseas, but the period on leave must not be excessive and the visit must be clearly defensible in terms of the official business undertaken. All costs associated with a minister's leave are to be met by the minister.

Ministers are normally entitled to be accompanied by one staff member during official visits. Additional staff support is rarely required.

13. POST MINISTERIAL OR PARLIAMENTARY SECRETARY CAREER

It is a condition of appointment that, after ceasing to hold appointment as a minister or parliamentary secretary, for a period of five years or two years respectively, he or she may not accept any substantial benefit (e.g. employment, a directorship, provision of services pursuant to a contractual relationship, gift or other relationship)

There has been a perception of impropriety where holders of ministerial office have accepted lucrative employment or directorships shortly after leaving office. This is especially concerning where the corporation benefited from dealings with the minister, parliamentary secretary or his/her department.

It is important to remove the potential for perceptions that favourable treatment of a business could have been in anticipation of any form of benefit or reward.

A five/two year "cooling off" period will ensure that it is much less likely that either party would be party to such an arrangement.

- **relating to contracting or accepting employment with, and making representations to, entities with which they had direct and significant official dealings, or, in the case of former ministers, contacting former Cabinet colleagues[16];[17] or**
- **in relation to lobbying of the government or any other body for the exercise of government discretion, legislative authority or the allocation of public resources.[18]**

16 Taken directly from s.35, *The Federal Accountability Act 2006* (Canada).

17 Approaches taken in other jurisdictions vary and were surveyed in Ian Holland (2002) 'Post-separation Employment of Ministers' *Department of the Parliamentary Library* available at http://www.aph.gov.au/Library/pubs/rn/2001-02/02rn40.htm and Deirdre McKeown, (2006) 'A survey of codes of conduct in Australian and selected overseas parliaments' *Department of the Parliamentary Library* available at http://www.aph.gov.au/library/intguide/POL/conduct.htm. For example, where a Code approach is taken and bans imposed on related employment, it will be found that there is a general ban of two years in South Australia and a permanent ban prohibiting the changing of sides in the USA and Canada.

18 A five-year ban on lobbying is provided for in legislation passed in 2006 in Canada as part of the new Harper Government's election policy program (*The Federal Accountability Act 2006*).

Reforms affecting the Executive

The principles of ministerial responsibility are not stated in formal, authoritative statutory documents. Incorporation of the fundamental principles of ministerial answerability in legislation would have enormous symbolic weight. We propose that the principles be adopted in a declaratory, non-justiciable legislative instrument, stating that:

- ministers are answerable for all acts and omissions of persons and organisations acting under prerogative, legislative or contractual authority assigned to them;

- ministers are held personally culpable for their own acts and omissions and for those of:
    - their heads of department and their personal staff, and
    - others in which they have participated or of which they were aware or should have been aware;

- in determining whether a minister is personally culpable, ignorance of a matter does not excuse the acts of omissions of a minister where the minister should have known or should have ensured the matter was drawn to the minister's personal attention. Without limiting the circumstances in which ministers should have known of any matter, they are deemed to have the knowledge of their heads of department and others who report directly to them and all members of their personal staff;

- ministers are expected to have in place systems which will ensure that they are kept properly informed at all times by their departments and private offices;

- in discharging their responsibilities, ministers are obliged to respond to any questions or other matters raised in parliament in a number of different ways as appropriate according to the circumstances of the case, ranging from the mildest to the most severe responses. These are:
    - redirecting the question to the relevant minister;
    - providing all relevant information;
    - providing full explanations;
    - taking any necessary remedial action;
    - accepting personal culpability; or,
    - resignation[*];

- ministers shall provide answers to Parliamentary Questions which are direct and relevant;

[*] See Woodhouse, Diana (1994). *Ministers and Parliament: Accountability in Theory and Practice.* Oxford: Clarendon: pp.28–38. These levels of accountability are explained in detail in the proposals for updating the *Guide to Key Elements of Ministerial Accountability.*

- ministers shall do nothing to prevent or hinder personal or departmental staff from giving evidence to Parliamentary Committees when requested to do so;

- freedom of information (FOI) requires that there be expeditious access to public records in all but specified exceptional circumstances where the public interest requires non-disclosure (e.g. genuine risk to the administration of justice or to national security); and

- all appointments are to be made on merit and in accordance with due process.

These principles should also be reflected in the Guide, which should be amended accordingly at the earliest possible opportunity. It is not necessary that updating of the Guide should await passage of the legislative instrument. However, a legislative instrument would add to the effectiveness of the Guide.

The establishment of a Parliamentary Standards Commissioner as proposed in this Paper would also greatly strengthen the effectiveness of the Guide.

Reforms to the Operation of the Executive

Access to Public Information - Freedom of Information legislation

Information created by ministers and parliamentary secretaries or on their behalf by public service agencies, is information created for public purposes by the Executive Government. Accountable government requires that it should be readily accessible by the public except where there are genuine public interest grounds for limiting access e.g. where national security could be placed at risk.

Freedom of Information legislation operates upon the foundational principle that there there ought to be a firm presumption in favour of the disclosure of government documents. Exceptions to that rule should be narrow, limited and defined by law. These documents after all are held in trust by the government for the benefit of the people. Members of the Executive, therefore, must be accountable for observance of the presumption.

In that light, we believe that the legislation should be strengthened by the inclusion of an interpretative clause requiring that its provisions be read, as far as possible, in a manner that favours public disclosure.

There are other reforms that we believe should be considered as part of a wider review of the Act's operation. Modern information technology (ICT) enables the large scale disclosure of government documents to be achieved at very low cost. ICT allows all documents created by government organisations to be automatically uploaded and published on websites at the time of their creation. There is no reason why this should not be done for all documents except those protected by privacy legislation and the specific, narrow legislative exemptions. By default, electronic documents would be released to the public, leading to large cost savings in the administration of FOI legislation. Contests would be limited to those few cases in which non-disclosure was based on claims that a document's disclosure would be contrary to the public interest.

Further, documents whose disclosure is clearly in the public interest has been shielded from release by the inappropriate use of the exemption for Cabinet documents under freedom of information legislation (FOI). This misuse has been possible because the present exemption for Cabinet documents is cast too widely and their disclosure may be prevented by the simple expedient of issuing a 'conclusive certificate. We propose therefore that it be amended in accordance with the principles below.

A crucial component of the convention of collective ministerial responsibility is the 'confidentiality rule'. This provides that the deliberations and decisions of Cabinet must remain secret. Without such a rule, Cabinet unanimity would be impossible to uphold. Further, it is in the nature of collective deliberation that competing views will be put, issues argued, compromises struck, minds changed and individual ministerial submissions accepted or rejected. Were

confidentiality not to attach to such discussion, the views expressed in Cabinet may not be as open as they should be. The quality of debate in Cabinet, therefore, would suffer and so could the decisions made by it.

For these reasons it is generally accepted that the deliberations of Cabinet should remain secret. Cabinet papers therefore are regarded as confidential. However, to say that Cabinet papers should remain private begs one important question. That is, which papers generated at the highest levels of Government are properly designated as Cabinet papers?

The short answer to this question is that only those papers whose release may undermine the unanimity of Cabinet or which may jeopardise fundamental matters of public interest such as the administration of justice and national security, must remain confidential. Documents recording Cabinet decisions should also be protected since the proper forum for the announcement of such decisions is the Parliament and the timing of their announcement is a matter for the government.

It follows that not every document that goes to Cabinet is deserving of protection from disclosure. It cannot be sufficient to exempt a document that it is merely passed across the Cabinet table. Rather, a document must be such as to disclose either the deliberations of the Cabinet or its decisions to qualify for exclusion. So, for example, those parts of a Cabinet document providing factual or statistical information to assist in Cabinet decision-making should not be exempt. This is because such raw material cannot, by definition, disclose Cabinet's deliberations.

We propose, therefore, that the exemption be recast so that only only the following classes of Cabinet document should be capable of exemption under freedom of information legislation:

- A document that is an official record of any deliberation of the Cabinet.
- A document that has been prepared by a Minister, or his or her staff, solely for the specific purpose of submission for consideration by Cabinet.
- A document the disclosure of which would involve the disclosure of any deliberation of the Cabinet.
- A document the disclosure of which would involve unacceptable risk to the public interest on a specified ground (e.g. the administration of justice, national security)

It follows that a document (or parts of a document) will not be exempt if:

- it contains factual, statistical, technical or scientific, including social scientific, material prepared for the purpose of consideration by Cabinet in making its decisions, after the decision to which that material relates has been made.
- the document is a document considered by the Cabinet but has not been prepared specifically for that purpose.
- it has entered the public domain.

We also propose that all claims for exemption be reviewable.[19] In other words, the government should not be able to avoid its public responsibilities for the disclosure of public documents by issuing 'conclusive certificates' declaring that exemptions apply. Such unilateral action defeats the purpose of the legislation. All conclusive certificate provisions should be abolished. In the end, it must be for the Courts rather than the government itself to determine whether legislative exemptions are made out.

We note finally in this respect that the High Court in the recent case of *McKinnon v Secretary, Department of the Treasury (2006),* gave an extraordinarily and undesirably broad reading to the conclusive certificate provisions. The abolition of such certificates will serve to overcome an interpretation which runs clearly counter to the Act's presumption in favour of disclosure.

FOI Administration

It has been remarked frequently that Government departments seek to avoid their obligation to disclose documents under freedom of information legislation on the grounds that a request for documents is voluminous either in relation to the resources required to fulfil the request or the quantity of documents sought. Further, applicants may frequently be discouraged from applying for documents because the charges for access are too great. Sometimes applicants are further deterred by the excessive delay involved in the processing of requests.

Conversely, the spirit of freedom of information laws has also been abused by oppositions seeking to make political mileage by a range of tactics including:

- "fishing"- i.e. simply inserting a request for "everything said, written or done by a particular person over a particular period" or "every document on a particular issue", where the request is not targeted at a specific investigation, but is a generalised search for anything which can be used for political gain.
- blanket volume requests- where the objective is in itself to overwhelm a department's capacity to respond on time, so the charge of non-adherence to FOI laws can be trumpeted at a government, again for political gain.

Adhering to such requests can be a costly exercise for the public purse, with limited public interest benefit.

In order to deal with these matters we propose that an Ombudsman be given jurisdiction to review disputes in each of these areas.

This raises a final matter for consideration. In many jurisdictions, review of government decisions with respect to documents has been transferred from quasi judicial tribunals to a Freedom of Information Commissioner. The advantage of such a proposal is that the Commissioner would be expert in this area specifically. And such an office can also undertake other important functions such as public education with respect to the Act and the auditing of

[19] Recent changes to state FOI legislation (e.g. in Western Australia) have ensured that all claims for exemption be reviewable.

departmental practices in relation to it. Consequently, we propose that amended FOI legislation Freedom of Information Commissioner or, if preferred, a senior official appointed within the Ombudsman or the Privacy Commissioner's Office[20], to:

- advise and educate the Executive Government and the public service on the principles and operation of freedom of information
- audit the information practices of government department and agencies to ensure their effective compliance with the provisions of the Act
- mediate, investigate and report in disputes over:
  - the processing of voluminous requests at the request of either an applicant or an agency;
  - the level of charges imposed for processing freedom of information requests;
  - complaints of excessive delay in the processing of a request and where a request has not been processed within a designated statutory time limit; and
  - refusals by government departments and agencies to disclose documents.
- engage in public education with respect to the Act's purposes and practical operation.

[20] "Canada now has an Access to Information Commissioner to protect the public's right to know and a Privacy Commissioner to protect the release of privileged information" John Williams, Member of House of Commons, Canada (2007).

Lobbying

Major issues of accountability are associated with lobbying activity. Lobbying has frequently involved unethical or illegal activity which corrupts democratic principles. A major effort to reduce the corrupting potential of lobbying is long overdue.

Having regard to the Sixth Report of the (UK) House of Commons Committee on Standards in Public Life and strengths and weaknesses observed in recent schemes including earlier Australian Government practice and that of a number of States,[21] a scheme is proposed that builds on that understanding and takes advantage of contemporary information technology. It is centred upon each activity of lobbying, rather than upon issue/s. Registration would be through a publicly accessible website.

It is proposed that legislation regulate lobbying as follows:

- "Lobbying" be defined to mean, in relation to a person who, for payment or reward communicates with a public office holder in an attempt to influence:
  - any government program, policy, or any financial or planning decision;
  - the awarding of any government contract; and
  - the development of, passage of, defeat of or amendment to any bill, legislation or regulation.
- "Public Office Holder" be defined to mean any:
  - Minister;
  - Parliamentary Secretary;
  - Member of the House of Representatives or the Senate;
  - Member of the Australian Public Service who is appointed to any office or body by or with the approval of the Prime Minister or any Minister.
- The Act provide for online registration of each instance of lobbying activity ('registrable activity', as prescribed – see below) via a website of every agency/minister being lobbied. (The use of an online registration system would avoid cumbersome, voluminous and inefficient paperwork; organisations that engage in lobbying generally have access to the internet.)
- Registrable activity (i.e., lobbying) be defined as representation directed to achieving a specific outcome on behalf of the interests of a party to the Government including to any Minister, Parliamentary Secretary, private office staff, departmental staff or other staff within a portfolio.
- The website be public and accessible "live" i.e. registrations appear when submitted.
- Ministers (& all private office, departmental and agency staff under their authority) be required to refuse to receive lobbying that has not been

[21] See generally UK House of Commons, *Sixth Report of the Committee on Standards in Public Life* (2000); Scottish Parliament Standards Committee, *Report on Lobbying (First Report)* (2002); Julian Fitzgerald, *Lobbying in Australia* (2006); and the New South Wales 'Guidelines for Managing Lobbyists and Corruption Allegations Made During Lobbying', at http://www.premiers.nsw.gov.au/TrainingAndResources/Publications/MemosAndCirculars/Memos/2006/M2006-01.htm.

registered, but that, having regard to informal opportunities that arise for lobbying, the scheme allow retrospective registration in such cases (excluding appointments e.g. informal lobbying) within a period of grace of 7 days.

- Ministers be responsible for monitoring the register to assure that all lobbying activities related to the portfolio are registered and that any person failing to register lobbying is refused further access for lobbying for one year, except with the approval of the Prime Minister.
- Ministers be responsible for ensuring that a record of the content of lobbying activities is kept for each instance of lobbying related to the portfolio.
- It be an offence for an individual or an organisation to issue a charge (tax invoice or cash in hand) for any unregistered lobbying activity
- It be an offence for the client (or related party) of a lobbyist to make a payment to any person who conducts unregistered lobbying on behalf of that client.
- Each registration of lobbying activity require:
    1. The lobbyist's business name and Australian Business Number (ABN), as applicable.
    2. The names of the owners, partners or major shareholders of any corporation/partnerships/etc of lobbyists, as applicable.
    3. The contact details: name, phone number, email address. These contact details would be used for communication with the lobbyist.
    4. Website address (if any).
    5. The names and positions of all persons employed, contracted or otherwise engaged by the lobbyist to carry out the lobbying activities.
    6. The names of client/s for whom the lobbying activity is to be (or was) conducted, whether providing paid or unpaid services as a lobbyist.
    7. The name of the Minister or other person/s lobbied and the subject matter/s of the lobbying activity.

    Persons conducting lobbying activities have the right to voluntary registration to facilitate automated entry of details, especially 1-4 above.

Reforms to Parliament

The operations of Parliament, especially each House in which the government has majority support, are severely biased in favour of the executive. The public interest and the right to know what is being done by government acting with the citizens' democratic authority should prevail. Accordingly, the proposals are:

1. conventions be established whereby Presiding Officers abandon participation in parliamentary party affairs and be accorded greater respect for the independence of their functions;
2. the independence of Presiding Officers be recognised with a view to enabling:
   - o them to better ensure adherence to already existing rulings regarding appropriate responses to Questions without Notice;
   - o each Presiding Officer to establish a multi-party presidium (similar to that common in Europe) to control the business program (bills, motions, etc);
3. extend opportunities for public engagement in scrutiny of legislation & enquiries;
4. parliaments insist on their right as sovereign institutions to examine and investigate the actions of ministers' personal staff and departmental officials;
5. the enhanced constitutional role of Parliamentary Secretaries requires that they be treated generally similarly to Ministers;
6. ministers, parliamentary secretaries and their staffs be required to appear before Parliamentary Committees on request;[22]
7. ministers and parliamentary secretaries be required to be directly responsive, relevant, succinct and limited to the subject matter of the question in answering Questions Without Notice. This requires reforms to Standing Orders (Rules of Procedure) and rulings by Presiding Officers,
8. parliaments extend opportunities for public engagement in the scrutiny of parliamentary legislation and inquiries; and
9. petition processes be reformed to take advantage of the potential for ICT to facilitate submissions of petitions and responses to them.

[22] Senate Finance and Public Administration Committee Report into Staff employed under the *Members of Parliament (Staff) Act 1984*, October 2003.

Parliamentary Standards Commissioner

A Parliamentary Standards Commissioner should be appointed as an Independent Officer of the Parliament (similar to the Victorian Auditor General and Ombudsman).[23] The Commissioner's primary role is to support and assist parliamentarians in the discharge of their responsibilities. The main responsibilities would be:

- Preparing guidance and providing training for ministers, members and senators on matters of conduct, propriety, conflicts of interest including how to manage them and ethics;
- Providing advice on a confidential basis to individual ministers, members and senators and to each House about the interpretation of the Guide and any code;
- Providing advice to each House about the provisions of the Guide to the Key Elements of Ministerial Accountability (Guide) and any code of conduct adopted by either House (code), whether existing or recommended to be introduced;
- Monitoring the operation of the Guide and each code and, where appropriate, proposing possible modifications to the Parliament.
- Overseeing the maintenance and monitoring the operation of the registers of members' and senators' interests;
- Receiving and investigating complaints about ministers, members and senators who are allegedly in breach of the Guide and code;
- Investigating evidence of possible breaches of the Guide or code by ministers, members and senators, on the Commissioner's own motion;
- Reporting to the Parliament, and thereby the public, upon:

    1. annually on compliance with the principles and spirit of the Guide and each code;
    2. through special reports on
        - any failure (whether wholly, partly or in spirit) to comply with the provisions of the Guide, or code, or
        - any abuse of parliamentary privilege
        - any misuse of public resources for electoral purposes;
    3. the extent and seriousness of any failure to comply;
    4. the responsibility of any person for such failure;
    5. whether any matter should be referred to the Privileges Committee of the House of which the minister, member or senator is a member, or was at the time of the event(s) in question;
    6. the remedial action, if any, required.

In exercising the functions of the office, the Commissioner shall have the privilege of the Parliament i.e. investigations will enjoy the authority of the

[23] Public Accounts And Estimates Committee (Victoria) (2006) *Report on a Legislative Framework For Independent Officers Of Parliament.*

House of which the minister, member or senator is a member and reports shall have parliamentary privilege.

The Commissioner would be appointed on the recommendation of an all-party Parliamentary Committee.

APPENDIX 1

Parliamentary Commissioner for Standards (UK)

The Commissioner's main responsibilities are:

- Overseeing the maintenance and monitoring the operation of the Register of Members' Interests
- Providing advice on a confidential basis to individual Members and to the Select Committee on Standards and Privileges about the interpretation of the Code of Conduct and Guide to the Rules relating to the Conduct of Members.
- Preparing guidance and providing training for Members on matters of conduct, propriety and ethics.
- Monitoring the operation of the Code of Conduct and Guide to the Rules and, where appropriate, proposing possible modifications of it to the Committee.
- Receiving and investigating complaints about Members who are allegedly in breach of the Code of Conduct and Guide to the Rules, and reporting his findings to the Committee.

APPENDIX 2 – Additional areas for reform

A number of areas associated with accountability have emerged as requiring further investigation and development. These include:

- **Freedom of Information** (i.e. beyond those proposals outlined in this paper)
- **Campaign donations** (e.g. a total ban on donations, other than small donations by individual people, complemented by public funding, as in Canada)
- **Question Time**
- **Whistleblowers**
- **Lobbying by "in house" personnel.** In respect of the latter, our proposals are based on the Canadian legislation - the Lobbyists Registration Act 1995 - which includes the activities of an 'In - House Lobbyist" i.e. a person employed by a person, company or organization and whose duties of employment include in significant part to lobby government on behalf of the employer. There are a number of issues arise with this. For example, what would constitute a significant part of an employee's duties, and how would this be proven? How easily could this control be circumvented by employers? Why control the activities of an employee and not the activities of the major shareholder or an unpaid director of a company? There could also be problems for worthwhile charity organizations which lobby government for funds or assistance e.g. Cancer Foundation; Alzheimer's Foundation. Would registration of their activities discourage their approaches to government to address pressing and genuine community problems? Whilst the Canadian experience helps provide answers, these and other issues require further examination.

With the exception of **Question Time reforms** (see next page), these matters are to be further examined in later reports.

QUESTION TIME PROCEDURES

The Australian practice of questions without notice is unique. Most parliaments elsewhere allow only questions on notice, although many allow Supplementary Questions, which may be similar in effect to questions without notice.[24]

Question time is intended to further the accountability of government to the parliament. This is achieved if there is ample opportunity for questions addressed to ministers in respect of their responsibilities and if those questions are answered to the limits of the ministers' knowledge.

Among the factors that undoubtedly affect the operation of the procedures is the manner in which the provisions affecting questions without notice are interpreted by the Presiding Officer, including previous Rulings by which they are guided, and by Ministers' responsiveness to questions.

A very early Ruling is at the heart of the enduring problems with the procedure. Why? Rulings by Speakers since 1901 have created and exacerbated this peculiarly Australian problem. During the first Session of the House of Representatives, the Speaker was asked whether the practice of asking question without notice should be created. He said:

> There is no direct provision in our Standing Orders for the asking of questions without notice, but as there is no prohibition of the practice if a question is asked without notice and the Minister to whom it is address chooses to answer it I do not think I should object.[25]

Those words leaving a discretion as to whether to answer with the Minister is the escape clause that has since permitted Ministers to evade direct responses and frustrate questioners, the House and ultimately democratic accountability. That ruling is reflected in the practices of the Legislative Assembly and the Senate.

To redress this historical legacy, Standing Orders could be amended to provide that -

> A Minister can only decline to answer any question or part of a question where criminal investigation and prosecution or ongoing tender processes could be jeopardised (a limited "ground of public policy"), where the Minister is unable to answer the question fully and accurately without notice and requests that the question be placed on Notice, or where the Minister undertakes to give an extensive answer through a Ministerial Statement or announcement.

Such a Standing Order would require that the Ministers must answer the question unless he claimed a valid ground of public policy, upheld by the Presiding Officer, for his refusal or need for notice to ensure that he could provide a full and accurate answer. Answers should be directly relevant and responsive to the question, be succinct and should not introduce extraneous matter or debate the issue.

The questions themselves should also be tightened. Argument or opinion should be banned. Facts or names of persons should be included only if essential to explain the question.

To be effective, ministers must be under an obligation to fully answer questions.

This is recognised in the recent Canadian Guide[26] which states:

> In the context of their accountability to the House of Commons, Ministers are required to answer parliamentary questions within their areas of responsibility as clearly and fully as possible. This responsibility is not diminished by the obligation of accounting officers to answer questions pertaining to their management responsibilities before

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[24] K. Coghill, *Submission to: Inquiry into Question Time in the House of Representatives*, (2007)

[25] Speaker (1901) *Hansard* (Australia) 3 July Vol.2 p.l954

[26] Canada (Prime Minister), *Accountable Government. A Guide for Ministers and Secretaries of State*, (Ottawa 2007).

parliamentary committees. It is of paramount importance for Ministers to give accurate and truthful information to Parliament, and to correct any error at the earliest opportunity. Parliamentary questions cannot be directed to a former Minister concerning policies or transactions in a portfolio he or she no longer holds. However, current Ministers must account to the House for taking any corrective action required to address problems that may have occurred prior to their appointment.

This responsibility to answer was recognised in a Ruling which the Hon Dr Ken Coghill issued as Speaker of the Legislative Assembly, Victoria, in August 1992. The ruling stated:

> It is important that question time is conducted in a manner which both ensures that it fulfils its intended purpose and is consistent with the status and proper dignity of Parliament.
> The following are the guidelines based on Standing Orders, Speakers' rulings and May[27] which apply to the conduct of question time:
>
> - a member or a Minister must not read a question or an answer[28]. Such questions and answers may be ruled out of order by the Chair;
> - questions and answers must relate to government administration or policy and should be directed to the Minister most directly responsible or answering on behalf of such Minister in another place;
> - questions to the Premier may relate to matters within the Premier's portfolio responsibilities and to general matters of government policy and administration, but questions concerning detail affecting another portfolio should be directed to the responsible Minister;
> - questions should not seek an expression of opinion, seek a legal opinion or ask whether statements reported in the media are accurate or correct;
> - questions should not seek a solution to a hypothetical proposition, be trivial, vague or meaningless;
> - questions should not contain epithets or rhetorical, controversial, ironical, unbecoming or offensive expressions, or expressions of opinion, argument, inferences or imputations;
> - questions should not raise matters which are sub judice or anticipate debate on an Order of the Day;
> - where a question relates to an allegation, assertion, claim, imputation or similar matter, the member is responsible for the accuracy of the facts.
> - Where the facts are of sufficient moment the member may be required to provide prima facie proof to the Speaker before the question is admitted;
> - questions cannot reflect on the character or conduct of members of either House and certain other persons in official or public positions which are defined in May. Attention is also drawn to the provisions of the Australian House of Representatives Standing Orders which restrict questions critical of the character or conduct of other persons to questions on notice;
> - where a question seeks information which is too lengthy to be dealt with in an answer to a question or otherwise invites a Ministerial statement, the Chair may disallow it and suggest that the Minister to whom it is directed consider making a Ministerial statement on the matter following question time.
> It should be noted that such action is not constrained by the practice of issuing copies of Ministerial statements, which is a courtesy only, or by the relatively recent practice of Ministerial statements being followed by debate on the question that the Ministerial statement be noted ;
> - questions which breach the guidelines are out of order and there is no right to immediately rephrase or re-ask questions which have been disallowed;
> - answers must comply with the same rules and practices as apply to the asking of questions;
> - answers must be directly responsive, relevant, succinct, limited to the subject matter of the question, may provide statements of policy or the intentions of the government, including information on examinations of policy options and other

[27] *Erskine May's "Treatise on the Law, Privileges, Proceedings and Usage of Parliament"*

[28] This proscription, especially applying to questions, has been little observed and serves little practical purpose.

actions which the Minister has had undertaken but must not debate the matter. (Answers to questions should be limited to 2 minutes usually and an absolute maximum of 5 minutes actual speaking time);

- an answer may be refused on the grounds of public policy, for example,
  - that answering may jeopardise criminal investigations or for some other particular reason may be against the public interest
  - that the information is not available to the Minister, in which case it may be requested that it be placed on notice
  - that the Minister intends to make a Ministerial statement on the subject matter in the near future.

The conduct and effectiveness of question time is in the hands of members. It will assist if:

- personal conversation is limited as it is discourteous and adds to the background sound which creates difficulty in clearly hearing questions and answers;
- a member or a Minister speaking pauses whenever audible conversation, interjection or other disorderly behaviour occurs;
- a member or a Minister who is unable to control his/her disorderly conduct leaves the Chamber for the remainder of question time rather than risk being named. The Chair may exercise its absolute discretion concerning the call by not giving the call to a member or a Minister whose conduct has been disorderly, including interjections.
- A member or Minister who has been consistently warned as a result of disorderly conduct in question time may be named without further warning as a result of further disorderly conduct during any part of proceedings on that day or a future day during the current sittings period.[29]

Subject to further consideration, it is proposed that

- The Speaker and President each made a Ruling redressing the effects of the 1901 Ruling by the House of Representatives Speaker and making other reforms requiring ministers to provide answers to questions and similarly setting requirements for questions (as described above) similar to the Ruling by Speaker Coghill but adding a provision enabling the government to publicly decline an answer on the grounds of the administration of justice, national security or ongoing tender processes;

- After a trial period of the operation of the above Ruling, Standing Orders be amended to make similar provision, with any amendment found to be desirable;

- The Prime Minister issue guidelines for ministers supportive of and complementary to the above Ruling, e.g.

  Questions without Notice

  Questions asked at question time are to be answered fully by ministers except where the Prime Minister or Government Leader in the Senate declares the answer would require the disclosure of the deliberations of Cabinet or matters endangering the administration of justice. In fully answering a question, a minister must be directly responsive, relevant, succinct and limited to the subject matter of the question.

  From time to time, a minister may undertake to provide further information. This undertaking is regarded as taking the question (whether in part or in whole) "on notice". The minister may provide the further information or answer:

  - by letter to the member concerned (a response conveyed in this way will not appear in Hansard); or

[29] Coghill, K (1992) *Victorian Parliamentary Debates (Hansard)*, 11 August, p.13)

- by having it delivered to the Clerk in accordance with the normal question on notice process (a response conveyed in this way will appear in Hansard); or

- by leave at the end of question time or at another early opportunity (the response will automatically be recorded in Hansard; in the Legislative Council it is also possible to seek leave to have the answer incorporated).

Corrections

Any answer found to be incorrect should be corrected as soon as the error is found, using the procedures of the chamber concerned.

The role of the Parliament in holding the Executive of the day to account must be restored and respected. These reforms could be major steps in that direction.

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