



**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

SELECT COMMITTEE ON CARETAKER CONVENTIONS

(Reference: [Inquiry into Caretaker Conventions](#))

Members:

**MR S RATTENBURY (Chair)
MS L CASTLEY (Deputy Chair)
MR T WERNER-GIBBINGS**

PROOF TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 11 JUNE 2025

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**Secretary to the committee:
Ms K Langham (Ph: 620 75498)**

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents, including requests for clarification of the transcript of evidence, relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Legislative Assembly website.

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Amended 20 May 2013

The committee met at 2.25 pm.

FLETCHER, MR MARK, Personal capacity

THE CHAIR: Good afternoon, and welcome to this public hearing of the Select Committee on Caretaker Conventions. The committee will today hear from submitters to the inquiry, including the ACT government. The committee wishes to acknowledge the traditional custodians of the lands we are meeting on, the Ngunnawal people. We wish to acknowledge and respect their continuing culture and the contribution they make to the life of the city and this region. We would also like to acknowledge and welcome other Aboriginal and Torres Strait Islander people who may be attending today's hearing.

This hearing is a legal proceeding of the Assembly and has the same standing as proceedings of the Assembly itself. Therefore, today's evidence attracts parliamentary privilege. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of the Assembly. The hearing is being recorded and transcribed by Hansard and will be published. The proceedings are also being broadcast and web-streamed live. When taking a question on notice, it would be useful if witnesses used these words: "I will take that question on notice." This will help the committee and witnesses to confirm questions taken on notice from the transcript.

We welcome Mr Mark Fletcher. Please note that, as a witness, you are protected by parliamentary privilege and are bound by its obligations. You must tell the truth. Giving false or misleading evidence will be treated as a serious matter and may be considered contempt of the Assembly. We have not planned for an opening statement. We have all read your submission. Thank you. We will proceed straight to questions. I will kick off, and then we will go to the other members of the committee. As I read it, the central premise of your submission is to draw a distinction between caretaker conventions that relate to decision-making during the pre-election period and the provision of electoral information to the public. I took that to be the central point that you were seeking to draw out.

Mr Fletcher: Yes.

THE CHAIR: Based on that, do you have any specific comments on the ACT's approach to caretaker conventions as they are outlined in the guidelines that were issued prior to the 2024 election?

Mr Fletcher: That is a really great question. One of the tension points that you are going to see—I think especially in the ACT government's submission to you as well, as it is relevant—is that there is a hazy blur on the side of what the caretaker conventions are and how they have been developing, especially since the 1970s, through the 1990s and to today. I will give a quick summation. Caretaker conventions were traditionally a restriction on ministers. In the Australian context, the orthodox answer is that they come from the principle of responsible government. What we have seen since the 1970s is that they have moved from being restrictions on you fine fellows, when you are ministers, and turn into a bit of a stick towards the public service, where they then constrain. To the extent that the caretaker conventions guidelines issued by the ACT government prior to the election are quite conventional for the Australian context, that

Australian context is also moving towards being more of a restriction on public servants than on ministers. We are moving away from what was traditionally understood to be caretaker conventions to a rabbit hole. In my submission, I flagged that there are some problems and some concerns that arise from that.

THE CHAIR: Could you touch on what you think those specific concerns are and perhaps how we might address them?

Mr Fletcher: Yes. Specifically, when the caretaker conventions move further onto public servants, they constrain where public servants might reasonably act during an election. The reason is that there are tensions between major parties and the public service during election periods, especially where the one institution in the democracy that is able to contradict parliamentarians during elections is the public service. It is usually a powerhouse of an incredible amount of knowledge. Its main thing is its storage of information. The more you can tell the public service to shut up, the easier it is for you to make grand policy claims during an election period, because the one area that can contradict you, which is public service, is restrained from being able to do that.

Where you saw this at potentially its worst—and I put this in the submission—was the marriage equality debate. By that stage, public service institutions around Australia had seven years of saying, “We’re an inclusive environment and a supportive environment. LGBT rights are important. Your identity is important,” but, the moment an election or electoral-like activity occurred, it became: “Could you please be quiet about how gay you are, because we don’t want that to interfere with the electoral process that goes on around it.” That was a good example of how caretaker conventions move into a space that you do not want them to. The context of where I understand your terms of reference to be relates to health data.

THE CHAIR: Yes.

Mr Fletcher: I think the real question for the committee is: do you feel that this information should not be gatekept in the first place? This information has nothing to do with caretaker conventions and has nothing to do with the election. In order for you and every member of the public service to exercise democratic control over the state, that sort of information was supposed to flow to the public anyway. I, however, do not know what that information was. I tried to follow the debate and I tried to follow the press on it. For love nor money, I could not work out what was handed to the minister or the extent to which that should be not gatekept.

THE CHAIR: I appreciate that point, and we will draw that out with later witnesses. That is a very specific question. Are there any areas of improvement that you see for the provision of what you call electoral information?

Mr Fletcher: Yes.

THE CHAIR: This goes to the question of: what information should the public have? Were there particular areas you had a focus on in your mind as you made those comments in your submission?

Mr Fletcher: To some extent, in the ACT context, financial information is usually the

area that concerns most people. As an empirical legal researcher, legal data is the big one for me. What I really want to know on a day-to-day basis is: what are sentencing decisions like; what are activities before the Magistrates Court like—all those sorts of things. I have to wait until a PDF comes out once a year.

THE CHAIR: The RoGS data.

Mr Fletcher: Right. Then I have to program a very clever piece of R code to read the PDFs and scrape it so that I can work out the difference over time—what was the change? For everybody who is listening, R is the best form of statistical software you can get. Everybody should abandon Excel immediately.

THE CHAIR: That is another whole committee.

MS CASTLEY: That is another inquiry.

MR WERNER-GIBBINGS: Is that a separate recommendation?

Mr Fletcher: Yes! If you could write that into the recommendations, that would do me a personal favour.

That sort of information should normally come up. When you look at the data portal for the ACT, the datasets can be out of date by years. TCCS, to its great credit, has the crash data. I am a big user of e-scooters. Whenever people tell me that e-scooters are a menace and should be taken off the road, I very fortunately have TCCS's data to say that cars are way worse and continue to be way worse than anything that e-scooters have ever done. But a lot of information does not come forward. Those sorts of things, when you look at the data portal, include financial information and performance data. Which of those should be available to the public as a matter of course rather than waiting for, say, the provisions of the Financial Management Act, where a particular budget statement is made, before an election occurs?

THE CHAIR: Thank you.

MS CASTLEY: Your submission says that it is not feasible for there to be symmetry of information between the government and other parties.

Mr Fletcher: Yes.

MS CASTLEY: If the public service is to provide frank and fearless advice, does this extend to symmetric information about the territory's fiscal position? I realise we have almost touched on this.

Mr Fletcher: That is a really good question. One area I was distinguishing between was information that an ordinary member or a person on the street should be able to access fairly quickly and advice. I think you can best characterise advice as analysis or the risk framework that public servants do in turning data and information into advice: "Here is advice. Here is the strategy. Here is how this works." For frank and fearless advice to work, you need that to be secure to an element. It is not correct to frame it as a particular duty, in a sense, that is binding. It is easier to frame it this way: "Hello. My

duty is to the minister of the day, and that duty has some level of confidence around it. Here is the apolitical version of the information.” Then it goes to the minister’s office, to the minister’s advisors and the minister themselves. The office is quite rightly permitted to take the political aspect of this. “If I do the very best option, is it actually career suicide? Will I be wiped out by the public because there is simply no way for them to understand the level of detail that has gone into the application?” Those things are rightly a political consideration, but it is wrong for the public service to provide that political consideration ahead of time. That is the asymmetry of information that arises because the public themselves should never be able to get that information.

MS CASTLEY: Did you say that the public service is there to provide that information to protect the minister? Is that—

Mr Fletcher: No. It is apolitical information. It is frank and fearless. It is strategic: “Hello. You have options before you. We in the public service think that this is the best option for you.” But the minister is quite right to be able to say, “I have political considerations, and, for whatever reason, I am not going to follow the recommendation of the public service. I want option 2 or option 3.” But the only way that system works is if you have that confidence: “Hello. This information is for the minister for their consideration,” rather than “Hello. This is information for general consumption. We can all see you chose option 2.” That is where that is going.

MS CASTLEY: What happened was a fiscal blowout. Information was shared. Do you think the minister should have shared that publicly under your understanding of caretaker conventions?

Mr Fletcher: I do not fully understand what that fiscal information was, after following the media, the debates and the committee. Before making the submission, I tried to work out what the subject matter was.

MS CASTLEY: It was a \$227 million budget blowout. I believe it was the largest in the history of the ACT since self-government. We understand that information was shared with the health minister and did not go to the public or to other governing parties. Do you have any thoughts on that?

Mr Fletcher: It would be improper. This is the fundamental issue: the caretaker conventions do not go anywhere near that information. There is no interregnum period in our system where ministers stop being ministers or are something less than ministers. They continue to get information from the public service. That is right and proper. My submission goes to: are there categories of information that should be provided outside of the direct relationship between the minister and the public service? This is information that is largely statistically in nature. In that way it is not the minister gatekeeping, it is not the courts gatekeeping and it is not TCCS gatekeeping. You provide that information as a matter of course on data.gov, or whatever it is, and that information does not come through. But it is not a caretaker conventions issue. It could have been the worst thing you could imagine. It could be that Godzilla is coming back in the next three days. It could have had a wide impact on the election that was, and that would still not have been a caretaker conventions issue.

What caretaker conventions do is constrain the minister from binding an incoming

government to decisions that the electorate might not want through the virtue of the democratic process—for example, appointing a judge during the caretaker period would be poor form, although, as I said, in the period leading up to an election, a judge was appointed and nobody batted an eyelid. Appointing a magistrate or committing a large amount of money during an election would be considered binding an incoming government against those things. Those sorts of things do go to caretaker conventions. Receiving information itself is not a caretaker conventions issue.

MS CASTLEY: This information was about whether the health system can continue to operate.

Mr Fletcher: Yes. I am saying that I do not think you have it right in considering it in terms of caretaker conventions. I think the mischief you are trying to solve is somewhere else—in: how do you get that information anywhere?

THE CHAIR: We will come back to that, if you want to.

MS CASTLEY: Sure.

MR WERNER-GIBBINGS: Thanks very much for your submission. I appreciate you taking the time to come along. Do you have anything more that is worthy of note regarding summarising the principles of caretaker conventions as they operate in the ACT—things that make them distinct, in your understanding, from other broad Westminster style caretaker conventions in Australia and/or elsewhere? That is the first question, and I have a quick question after that.

Mr Fletcher: The simple answer is no. Australian caretaker conventions are a creature of Australian practice. There was one reference in the ACT government's submission which was quite interesting. It was about the Churchill era. It had something that was derogatorily named a "caretaker government", because it simply could not have an election during the wartime period. That is not terribly relevant to us. Our caretaker conventions have progressed like a Galapagos turtle. It is divorced from the things that shaped other jurisdictions.

MR WERNER-GIBBINGS: I will go to my final question on caretaker conventions. You have made it clear, but I will re-emphasise it: there is nothing in any caretaker convention in the Westminster system that prevents or would operate to prevent a public service from providing information to a minister at any time a minister is a minister?

Mr Fletcher: The odds of it occurring are so remote and would be so dependent on the—here is a situation I can imagine—

MR WERNER-GIBBINGS: Would it be different to the situation we might be talking about, where—

Mr Fletcher: Very different. It is not financial art. It is something along the lines of a decision not being made, and the not making of a decision at that time somehow bound the incoming government to a position. The tricky one that I can think of could be: "The minister actually did have information that a decision was needed within seven days." By not making that decision within seven days, it somehow bound the incoming

government—

MR WERNER-GIBBINGS: A little bit like the Muldoon case. I think Prime Minister Muldoon refused to make a decision about devaluing the New Zealand currency.

Mr Fletcher: Something like that—yes.

MR WERNER-GIBBINGS: That is not this instance.

Mr Fletcher: It is not this instance.

MR WERNER-GIBBINGS: The public service provided information to the minister. End of story.

Mr Fletcher: Caretaker conventions in the Australian context link back to responsible government. It is not the tie on the public service. Traditionally, it was on ministers, and it goes to them not binding incoming governments. If you are not talking about that, then you are not talking about the caretaker conventions. You may very well know something is wrong if this information can go to a minister and people do not know about it generally, but then I am saying that your solution is going to be somewhere else; it is not going to be in the caretaker conventions.

MR WERNER-GIBBINGS: Whether or not it is in our terms of reference to make recommendations or consider ways of providing information through data.gov or something like that, where is the balance between providing information quickly but providing it accurately? For instance, information can come to governments that is not necessarily scraped but compared and formed and formalised before it is then provided on a public website, for instance. It is raw data versus clean data. “Clean” might be the wrong word.

Mr Fletcher: I get where you are going. I am a big quant person myself.

MR WERNER-GIBBINGS: Sorry—what is that?

Mr Fletcher: Quantitative research. I am dealing with numbers all the time. What you really want is that raw data that comes out, even if it is messy and hectic. Then the question is: why are you capturing information that is messy and hectic in the first place? The further point is that you need to be able to shape it and massage it. That is why I said the analysis and strategic aspect of it comes in, which is the purview of the public service to the minister. But the information that we are talking about is financial information and that sort of stuff—what is the current financial state of this institution or that institution that is publicly funded? Within constraints, and noting that I am not an accountant—and the public servants who are accountants are probably screaming at me, “Please shut up right now”—at least on a quarterly basis, there is the information that flows out to the public that says, “This is the financial situation about this project at this time” or “This is the stream of funding at this time.” To me, not being an accountant, that seems like raw data that should be able to be pushed out.

MR WERNER-GIBBINGS: My understanding is that the information was more an analysis of the increased activity in the health system—what impact that may have on

the costs incurred by the government in keeping the system running. It was not finance per se; it was activity data. I would have to ask the minister that.

Mr Fletcher: I must say that I am not an expert on that sort of information. What I can hear from discussions is that it seems to be routine information. The query is: should this have been routine information that is available to the public at large or was this information strategic analysis on where things need to go in the next period? The query then becomes: was this information provided for the purpose of making a decision that would bind the incoming government? If it does that, then you have a caretaker convention issue; otherwise, it is not. The core question, which I cannot answer for you, is: when you look at that sort of information dispassionately and take away the political considerations of what you might want to argue, was that information that could have been routinely provided to the public, and was it information that went to the pre-election disclosure budget, such that it made some sort of nonsense of that process? I am not in a position to be able to tell you whether that was the case, because I deal with law and not money. We are famously bad at money.

MR WERNER-GIBBINGS: Thank you.

THE CHAIR: A question I want to ask goes to one of the issues the committee is considering: the possible codification of caretaker conventions. There seem to be varying views on that. Interestingly, the ACT government writes them down each election in its guidelines, which in some ways might be considered a form of codification. Do you have any views on the value of trying to codify the conventions and who might do that?

Mr Fletcher: Yes. I would turn your attention to the Banerji case. That was about a public servant who, in her own time, went wild on social media and said some inflammatory things that should not have been said. The High Court basically had to come to the question of whether they constrain that level of information. Your question on codification goes to: what status would the codification have, and then would it be the sort of thing that could form the backbone of a disciplinary procedure against a public servant if the code of conduct said that public servants are not allowed to provide information on these sorts of things, and that, when a public servant acting reasonably does so, is it a technical breach of the code?

The puzzle that you have is that, because the caretaker conventions move so far away from the principle of responsible government, it becomes harder to enforce as a reasonable constraint on the speech of the individual. Because you have moved away from ministers and have moved to public servants, and because the guideline comes out each round and always says, “Dear public servants, please remember there is an election going on. Do not interfere with it. Please be quiet,” the more you codify that in terms of rigid rules that you can apply against it and the further away it is from the principle of responsible government the harder it is to make it a justifiable and lawful restraint on the public servant’s speech.

The Speaker did a very good job of informing you that, once you have worked out what your mischief is, there are remedies that would deal with those sorts of things.

MR WERNER-GIBBINGS: It was the Clerk, not the Speaker.

Mr Fletcher: Sorry—the Clerk. That was my mistake—sorry. I had the word “Clerk” in my head and I said “Speaker” instead. They gave very good advice on what to do once you know what the mischief is. What I am reinforcing here is: make sure you know where the mischief is. I do not think the mischief is with the code of conduct. I think that having codification of the code of conduct would actually amplify a number of the issues that I raised in the submission. A good example of that is the LGBT mission. You codify it, thinking that what you are really talking about is electoral interference of some kind by the public service. All of a sudden, what you are really doing, for example, during the Voice referendum, is silencing all the Aboriginal and Torres Strait Islander members of the public service, who then feel they cannot be part of the process themselves. Codification is usually done with good intentions and then you say, “This is not what we intended, but it has been codified now.”

THE CHAIR: Thank you. I am interested in your submission where you say the public service must be loyal to the government of the day. In the ACT, somewhat uniquely, the objects of the Public Sector Management Act are to establish and maintain a public service and assist the executive to meet the needs of the community. When you look at most other jurisdictions, they talk about the public service serving the government, the parliament and the Australian public. The ACT seems to be somewhat unique in its focus on the executive. It is a question I intend to take up with the Head of Service later in the day. In light of what you have said, I am interested in whether we need to think about our Public Sector Act as well, in terms of setting the expectations around who the public service serves.

Mr Fletcher: Object provisions in acts tend to come from a bit of a moment where people put their hand on their chest, get a bit teary eyed and say, “Here is what I wish my perfect act would do.” That is especially true the closer you get to constitutional provisions. They get airier and bald eagles fly over when you read the objects of acts and those sorts of things! The traditional Westminster form is that the public service is a department of the executive. There are theories about whether they should be considered as a fourth branch of government or whether some aspects of the public service should be spun out into a fourth branch of government—accountability mechanisms and those sorts of things, going to the ombudsman, oversight bodies et cetera.

For my money, what I like is clean, rigid structures that reflect Westminster principles. The more we say, “I’m a servant of the public and I have broader duties to the public at large,” we get unusual litigants. Ms Banerji, for example, tried the argument that she was not an employee of the government of the day; she was actually an employee of the people, and that was why she was allowed to go wild on Twitter. For example, David McBride’s argument was that he was not actually bound by the ADF; he was a servant of the people, and that is what justified his actions. I think the more that you move away from the public service being there to serve the government of the day the more you get into murky areas where you do not really want your public service to be.

THE CHAIR: Thank you. I am mindful of the limited time we have left. Is there anything that we have not asked you that you really want to make a particular point about?

Mr Fletcher: My submission is lengthy, and I do not apologise for that. It largely goes into what I think your issue is. I think your issue is in the provision of information to the public, which we have covered a few times.

THE CHAIR: Terrific. Thank you so much. On behalf of the committee, we thank you again for making your submission and being willing to come today to take further questions.

Mr Fletcher: My pleasure. Thank you.

MS CASTLEY: Thank you. We appreciate your time.

MR WERNER-GIBBINGS: Thank you, Mr Fletcher.

Short suspension.

STEPHEN-SMITH, Ms RACHEL, Minister for Health, Minister for Mental Health,
Minister for Finance and Minister for the Public Service
HUDSON, Ms ROBYN, Acting Director-General, ACT Health directorate
LEIGH, Ms KATHY, Head of Service and Director-General, Chief Minister,
PEFFER, Mr DAVE, Chief Executive Officer, Canberra Health Services
WRIGHT, Mr ROBERT, Acting Deputy Director-General, Office of Industrial
Relations and Workforce Strategy, Chief Minister, Treasury and Economic
Development Directorate

THE CHAIR: I welcome Minister Rachel Stephen-Smith, the Minister for Health and Minister for the Public Service, and officials attending with her today. Please note that, as witnesses, you are protected by parliamentary privilege and bound by its obligations. You must tell the truth. Giving false or misleading evidence will be treated as a serious matter and may be considered contempt of the Assembly. Minister, if you want to make any opening remarks, we have a small window.

Ms Stephen-Smith: I do not have anything planned. I am happy to go straight to questions.

THE CHAIR: That is fine. We will go straight to questions.

MS CASTLEY: Minister, how often did you or your office have contact with the CHS CEO between the start of caretaker and polling day?

Ms Stephen-Smith: I think we have released some information publicly on that. I will see whether I have a copy of that response to questions on notice. I do not have a copy with me, but I have responded to that information. I think it was in response to a question on notice; if not, it was an FOI request.

MS CASTLEY: Will you be able to get that information by the end of the session?

Ms Stephen-Smith: Yes, absolutely.

MS CASTLEY: If possible, could you also let us know how the contact occurred? I am trying to establish how normal it is for you to have contact with the CEO during caretaker period. Can you elaborate on that?

Ms Stephen-Smith: I have a freedom of information request; I do have a copy of a freedom of information request that went out to Mr Braddock. Presumably, that has been made public; there is no reason that it would not have been released. That provides copies of the interactions between Canberra Health Services and me and my office during the caretaker period. That is publicly available information, Ms Castley.

That request was for all digital communications. There are 34 documents in relation to this, including mobile phone text messages and emails. There was also at least one formal caveat brief; there is one here, and there was at least one other formal caveat brief that was provided to me. There were some phone calls as well, and the number of phone calls has been released, I believe, in response to a question on notice. I do not know whether Mr Peffer has that with him. I am sorry; I did not acknowledge the privilege statement, but I do acknowledge it.

Mr Pepper: I do not have those numbers in front of me, but I will attempt to get that before the end of the hearing, if that is useful.

MS CASTLEY: Do you believe the contact that you had between the two of you in that time period was consistent with the spirit and obligation of both sides of the caretaker conventions? Was it normal—

Ms Stephen-Smith: What I would say is that the contact between me and my office and both the directorate and Canberra Health Services was significantly less during the 2024 campaign than it was during the 2020 campaign, which, obviously, was in the midst of a global pandemic. There was significant contact between me and my office and the directorate and Canberra Health Services in 2020. There was not particularly a lot of contact during the 2024 campaign. There were some requests for factual information from my office to Canberra Health Services. There was some provision of factual information in relation to matters that had arisen.

One of those caveat briefs, for example, was in relation to some industrial action that ASMOF was intending to take in relation to the medical practitioner enterprise agreement. As minister, I was briefed on that potential industrial action. There was another caveat brief in relation to the orthopaedic unit at Canberra Health Services losing accreditation for the training of PGY1 and 2 trainees from the Canberra Region Medical Education Council, and their decision to suspend that accreditation. In relation to that, there were phone calls and text messages as well, because I was asked by the media to comment on that matter, as you would expect, because, as is the case during caretaker, I was the minister. It was the expectation of the media that I comment; therefore I sought some further factual information from Canberra Health Services.

Those were the kinds of things where you would expect information to flow to and from the minister, their office, and the directorate and Canberra Health Services.

MS CASTLEY: The CHS CEO contacted your chief of staff by phone on 4 October, which was a few days before pre-polling began, to discuss preliminary and inconclusive health data. This was followed up with an email on the same day. Can you let me know when you were informed about that—you, not your chief of staff—as well as who told you, and how that interaction went.

Ms Stephen-Smith: Yes, I will do that. Before I get to that, I signed a response to a question on notice to you, Ms Castley, on 15 April, indicating that during the period from 13 September to 6 November 2024 there were 15 phone calls between me and my office and the CEO of Canberra Health Services. Four of those occurred after the election but before the official swearing-in. In addition, my office and I received 10 text messages from the CHS CEO during the period, of which one was received after the election. All regular briefings with CHS ceased during the caretaker period. I am advised that CHS sought advice from CMTEDD in relation to briefing ministers during the caretaker period and that the provision of advice to me and my office was in line with the caretaker conventions. I do not have information in relation to contact between me, my office and the health directorate. If you would like us to take that on notice, we can do that. I am happy to do that.

MS CASTLEY: That would be great.

Ms Stephen-Smith: Okay, I will take that on notice.

THE CHAIR: Thank you.

Ms Stephen-Smith: In relation to your question about the advice that was provided about activity during July and August, I was verbally advised by my chief of staff. I am not sure whether that occurred before or after he received the email.

MS CASTLEY: This was 4 October?

Ms Stephen-Smith: It was the same day that he had the conversation with Mr Pepper and that he and one of my other staff received the email.

MS CASTLEY: Going back to my question on notice, I cannot remember off the top of my head whether it asked about the subjects of those communications.

Ms Stephen-Smith: No, other than the phone calls, obviously, although some of them are alluded to in the emails and the text messages. As I said, the response to Mr Braddock's freedom of information request, which should be publicly uploaded on the FOI register, contains a lot of those communications, including copies of some text messages.

MS CASTLEY: Going back to 4 October, you cannot remember whether you were told verbally?

Ms Stephen-Smith: No, I said I was told verbally.

MS CASTLEY: You were told verbally, but you do not—

Ms Stephen-Smith: I am not sure whether it was before or after, so—

MS CASTLEY: The email?

Ms Stephen-Smith: Yes, it is clear from the email that there had been a conversation between Mr Pepper and my chief of staff. My chief of staff probably told me after he had received the email. In fact, I am almost certain that he did tell me about this after the conversation and after he had received the email. It was a very quick conversation, which we have talked about before.

MS CASTLEY: What step did you take after that?

Ms Stephen-Smith: As I have indicated before, we had a very quick conversation that essentially said, "Okay, that's interesting; don't know what we're going to do with that preliminary data." These are not the exact words, obviously. "That'll be an issue for whoever comes in after the election, but we don't really know what it means at this point." It was data for July and August, so it was data for the period prior to caretaker. It indicated that the health service was busy. We had already been saying that the health

service was busy in the lead-up to the election and during the election campaign. But it was a winter period, so the extent to which that trend would continue was very unclear—when you are talking about the first two months of the financial year, whether that trend would continue through the financial year.

MS CASTLEY: Was there any communication or discussion about this data with your other officials, and had you told anybody else at this point—

Ms Stephen-Smith: No, I had not.

MS CASTLEY: going forward, between then and the election day?

Ms Stephen-Smith: No.

MS CASTLEY: No-one else? You did not tell anybody else about this data?

Ms Stephen-Smith: Not as far as I can recall, no.

MS CASTLEY: No Labor Party officials, no other team members, no other ministers?

Ms Stephen-Smith: No. It was very much, Ms Castley, BAU information of the kind that we would expect to be regularly briefed on in a non-caretaker period—really factual information. As minister, it was the kind of thing that you would expect to get as BAU, factual information. It was not the kind of thing that you would necessarily be talking to people about, in the normal course of events.

MS CASTLEY: It was pretty much as you have just claimed—that there was no obligation to disclose the information because it was preliminary and inconclusive, and it was consistent with what you had stated publicly—that you had already said it was going to be a busy winter and, as you said, things had increased?

Ms Stephen-Smith: Let us be clear, Ms Castley: I had no obligation to release this information, whatever was in it. If it was factual information, I would have no obligation under the caretaker conventions, which are public service documents, to disclose this information.

MS CASTLEY: Did you think it was unusual that the CEO would contact your staff, based on the fact that you have just said it was preliminary and unreliable, or data that reaffirmed your existing view? Why was the call made?

Ms Stephen-Smith: I did not think it was particularly unusual. Honestly, I did not really think that much about it at the time, except to think, “Okay, that’s just confirmed what we know, that the hospital is busy. Let’s get back to the campaign. Everybody’s busy.”

MS CASTLEY: I find it difficult—

Ms Stephen-Smith: It is really mountain-out-of-a-molehill stuff that I am struggling with here, Ms Castley.

MS CASTLEY: You can make a joke of this, if you would like to, but I find it quite important and significant. I find it difficult to square the claim that the data was routine and unremarkable—BAU, as you have said—and therefore it did not need to be disclosed, for two reasons. First, the CEO personally contacted your chief of staff to provide the information, and the data ultimately led to a \$300 million budget blowout, which is the largest deficit since self-government. So was it significant or was it not significant? Are you able to reconcile these claims?

Ms Stephen-Smith: Ms Castley, from my perspective—and Mr Pepper might have more to add—that was early data, about two months of the financial year. To suggest that we knew at that time that that would result in a requirement for CHS to receive an additional \$227 million across the course of the financial year is inaccurate. We have discussed this multiple times before. When I was reappointed as Minister for Health, and the Treasurer was appointed, we were briefed on what it looked like the situation was.

At that point, we did have the first-quarter data. It was still rough, but we were looking to get first-quarter data. It was not until January that we were able to work through, by way of the expenditure review committee process, exactly what the response to that information would be. That included, “Had that pressure on the health system continued or had it eased off after winter?” The reality was that it continued. But at that point, in early October, when the data was for July and August, there was no way that we could have known what that trend over the first six months of the financial year would look like, what the potential financial implications of that would be, and what choices would be before any government that was incoming at that time of considering the midyear review.

MS CASTLEY: If it was so insignificant and unimportant, why did Mr Pepper call—

Mr Pepper: Ms Castley, it is not unusual for me to call the minister’s chief of staff and engage with them on operational matters. For us, we are a demand-driven business and activity occurs every day. Throughout the year, I will have many conversations with the minister, her adviser or her chief of staff on activity-based performance metrics, what they are looking like, and if there are particular pressures across the hospital in a given week because of something that has happened. That is not an unusual thing to occur.

MS CASTLEY: Minister, had you received any indication—formal or informal, preliminary or final—before 4 October that health demand or expenditure would blow-out, exceed your forecasts?

Ms Stephen-Smith: As I have said, Ms Castley, I had been talking, through the 2024-25 budget process; I think somebody, in the context of finalising the 2024-25 budget, pointed out that around 56 per cent of new spending in the 2024-25 budget was going to the health portfolio. That related to the fact that there was significant pressure on the health system. I had been talking about that through the 2024-25 budget. I had been talking about it through the election campaign. It was the reason that our first major election commitment was about having 800 more healthcare workers to support what we were seeing as growing demand in the health system. We did not think it would come to fruition so quickly.

Treasury had also identified in the 2024-25 budget, and pointed to this in the pre-election budget update, that the fiscal risks to the territory included risks in relation to cost-of-living pressure, labour and material costs across a range of sectors, including in relation to the health sector, with capacity and access to inputs continuing to face pressure. This was a publicly known potential pressure on the budget, and it was publicly known that the health system, like other health systems across the country—and as we have seen in the budgets of Tasmania, South Australia and Victoria—was facing pressures. It was the topic of ongoing public discussion, including in relation to the National Health Reform Agreement negotiations.

MS CASTLEY: I think the amount of money that we are talking about here is a little more than “pressure”. Are you still happy to stick with saying that the information you got was not that big a deal, and that it was business as usual because there was a little bit of pressure? It was the largest blowout since self-government.

Ms Stephen-Smith: As it turned out, that significant demand pressure continued beyond the winter period and it was more than we had anticipated in the 2024-25 budget. I absolutely accept that. It was a very significant additional investment in the health system so that we could ensure—

MS CASTLEY: Did you do any modelling at that point—if it did continue at that rate, what that would look like? If you knew that—

Ms Stephen-Smith: Did I do any modelling—

MS CASTLEY: For the first two months; for the time—

Ms Stephen-Smith: That is probably a question for officials. It was really clear in the email that it was raw, early numbers. As you have pointed out, we were a bit over two weeks from election day. I was not going to sit down with my office and do some modelling on what would happen if hypothetical situation X, Y or Z were to occur.

MS CASTLEY: In general, what legal or ethical obligations do you feel you have as a minister about what information ought to be made available to the public?

Ms Stephen-Smith: I have a strong record on transparently making information available to the public, Ms Castley. I have a strong commitment to that. The reality of government and elections is that there will always be information that ministers have that is not publicly known, for a wide range of reasons. That would apply to every single minister, including the three Greens ministers who would have had information that was not available to the Labor Party, because that is just the nature of these jobs. You are privy to a lot of information, and there is actually no way that you could make all of that information public. There is no way that you could do it.

We have big, significant, open access and transparency regimes in the ACT. There is freedom of information; people can ask for the types of information that they are interested in, and lots of our briefings get released. But we also have a lot of conversations, and there is no mechanism to report that. A lot of information is made publicly available on our website that nobody ever reports on, and probably most MLAs

never look at that, either.

MS CASTLEY: Could you provide some examples of situations, other than any urgent decisions which need to be taken, where you think it would be appropriate for a minister to make a disclosure to the public or to other parties in the midst of a campaign?

Ms Stephen-Smith: Clearly, if decisions need to be taken that will bind a future government, not only are the public service obligated under caretaker conventions, but the convention is that ministers, while remaining ministers through the duration of the caretaker period, would not take a decision that will bind an incoming government without consulting at least with the opposition, the only other party that is likely to form government. In the case of the ACT, my expectation would be that a Labor minister, for example, would consult with both the Canberra Liberals and the Greens, because we do not know what the form of government would be like. Similarly, a Greens minister would consult with Labor and the Liberals on any decision that would potentially bind a future government.

MS CASTLEY: At any time during this period that we are discussing, did you consider whether disclosure of the information was the ethical or fair thing to do?

Ms Stephen-Smith: No.

MS CASTLEY: If the data had been known several weeks earlier, do you accept that the pre-election budget update would have had to be revised; or, at the least, do you think it would have been noted as a significant risk to the budget?

Ms Stephen-Smith: I have just read to you the risk statement, the fiscal risk, from the budget paper. The pre-election budget update did not reiterate that point, but pointed back to the fiscal risks that were identified in the 2024-25 budget and stated that those risks remained—

MS CASTLEY: But if it had been known a few weeks earlier—

Ms Stephen-Smith: and one of those fiscal risks is in relation to the health sector.

MS CASTLEY: If you had known this a few weeks earlier, would that have impacted things?

Ms Stephen-Smith: You are now asking a question about the putting together of the pre-election budget update. That is a matter for officials. That is not a matter for ministers. But the reality is that this information was not available when the pre-election budget update was put together. Its nature was so preliminary that it is hard to see how it could have—beyond being identified as a potential risk, which it already was—influenced the pre-election budget update. That is a hypothetical situation and it is a matter for officials.

MS CASTLEY: Do you accept that some people in the community could form the view that you have acted out of political self-interest rather than in the public interest?

Ms Stephen-Smith: I do not understand in any way how there is any political interest

in this. I was consistently saying that the health system was busy. This data was confirming that the health system was busy. Even if this information, extrapolated out, was going to result—and there was no evidence that it was going to—in a need for the significant investment in the health system that we have had to make in the midyear review, it is not like we were going from a situation of budget surplus to a situation of budget deficit. The 2024-25 budget was already in deficit quite significantly, and this was already a significant topic of Liberal Party campaigning.

We were already in the election campaign, and the key message from the Chief Minister through the election campaign was, “We are not going to promise the world. We are in a difficult situation, like everybody is. The budget is tough. We can’t deliver everything.” That was our key election message, while other people were talking about cutting revenue and increasing spending, with some kind of magic solution to it all. But we were not doing that. Our key message during the election campaign was, “We’re not going to promise the world, because we’re in a tough situation.”

MR WERNER-GIBBINGS: Despite the last 26 minutes of questioning, this is actually an inquiry about caretaker conventions. With respect to the comprehensive weight of information that we have been made privy to or been able to read, or having regard to the previous individual who came and spoke to us, the provision of information from the public service to a minister, particularly when it is factual, has nothing to do with caretaker conventions. But because we have gone there, I would like to ask a couple of questions about the nature of the information itself. You have talked about it indicating that the health service was busy. Is that busy as in normally busy or increased activity?

Ms Stephen-Smith: Definitely increased activity, yes.

MR WERNER-GIBBINGS: Busier, maybe?

Ms Stephen-Smith: Yes.

MR WERNER-GIBBINGS: With the increased activity, from this information, does that directly lead to increased costs being expected? Are there other factors? If so, what are those factors? How do you determine the cost of services?

Ms Stephen-Smith: That is a very good question because there are then choices to be made. If that level of increased activity were to continue—obviously, we know that it did, in the end, but you cannot really extrapolate from winter—then choices are to be made about whether you increase funding, which we did, or whether you cut back on some of your elective and more discretionary activity in order to remain within budget, which is what we had seen other jurisdictions doing. There were other jurisdictions that were implementing not just the kind of FTE management that CHS has been doing, but complete hiring freezes, and really cutting back on elective surgery—not stopping altogether; cat 1 would continue. Other jurisdictions had been making other choices about how to manage their budget challenges as well.

Going to your question, this rough information would give you some indication that some decisions might need to be made by an incoming government, but exactly what those decisions would be, or the extent of them, would be a matter for the incoming

government. That is the case with a whole bunch of things that you are aware of prior to the election. Sometimes you have asked officials, “Please do some more work on this to be ready to brief an incoming government.”

MR WERNER-GIBBINGS: You were formally briefed on it after you were reappointed as the minister, so the new government had come in.

Ms Stephen-Smith: That is right; yes.

MR WERNER-GIBBINGS: The activity data versus cost data: are they contemporaneous? What is the comparison? How different are they?

Mr Pepper: I can start off; then Ms Hudson might add to it. There are two things that happen. Obviously, you observe the activity. For us, in this financial year, you have some constraints that exist in terms of workforce. You only have so much workforce available to you at a point in time. As activity pushes past a point, you start to rely more and more on premium labour, for example. People might need to fly here, whether that is locum medical cover or agency nursing.

That then establishes a lag between the costs being realised in the system and the activity that is actually occurring. For us, for agency nursing, for locum cover, for some of our VMO invoicing arrangements, that can happen sometimes many weeks, sometimes many months, after the activity has actually occurred. It is not a direct one-to-one relationship that you observe. They track generally in the same direction, but not always.

The other thing that happens in parallel is that, as the activity is occurring, it goes through a process of verification and coding to determine, given a certain throughput of patients, what the complexity of those patients is, and what intensity of effort is required of the health service to activate capacity, and provide treatments, intervention and care for those individuals.

An example might be 10 surgical patients: 10 cataracts versus 10 hip replacements. One will cost more than 10 times as much. Simple patient numbers are not always the best indicator of cost, which is why you have to go through a very involved process that takes some months before you then make a submission to the commonwealth and say, “Here are our activity levels, here is how much it is costing us to deliver that activity.” The commonwealth goes through its process.

Ms Hudson: I acknowledge the privilege statement. As Mr Pepper said, that is exactly what happens. There is a lag time regarding the way in which the data flows through. In the context of the commonwealth, it is about 12 weeks. The data that was subject to this discussion would not be ratified, for instance, until December of that year, in the context of the commonwealth. I have colleagues here who can speak in more detail, if you are interested in knowing more about that process.

MR WERNER-GIBBINGS: I have another question to ask. I was very interested in the constitutional stuff and then more about how you have to make your decisions. I do not envy you at all. Thank you for the work you do. But the rabbit hole you are talking about and how you present the information to the government—is that the National

Weighted Activity Unit? Is that what that is?

Ms Hudson: NWAU.

MR WERNER-GIBBINGS: Is that the acronym, NWAU?

Ms Hudson: NWAU; it is great! NWAU is the currency, if you like—

MR WERNER-GIBBINGS: Just before you start, the formal question is: what is that?

Ms Hudson: What is the NWAU?

MR WERNER-GIBBINGS: Yes, what is an NWAU, and what is the timing between the end of quarters for this information and the finalisation of an activity data?

Ms Hudson: I will invite Ms Chambers up to the table just in case! But I will commence.

MR WERNER-GIBBINGS: You are welcome!

THE CHAIR: Perhaps we can keep this relatively brief. It is a little off the topic of the hearing but important, nonetheless.

Ms Hudson: An NWAU is a National Weighted Activity Unit, and it is worth a certain amount of money as designed by the commonwealth. To pick up Mr Pepper's example, a hip is worth, say, 2½ NWAU. You get different amounts of money from the commonwealth for things that have more NWAU weighting versus others, because it costs you more to do that particular thing; therefore, they price it in a different way. We are commissioned under the NHRA to provide X number of NWAU every year under that particular agreement.

THE CHAIR: Does that cover it for you, Mr Werner-Gibbings, or do you want to go into more depth?

Ms Hudson: We can keep going if you like. There is a whole lot of—

MR WERNER-GIBBINGS: That is as much as I think I am going to need.

Ms Stephen-Smith: It is a bit off topic.

MR WERNER-GIBBINGS: I have three questions, but they are probably for the minister in terms of the role of the public service. Minister, caretaker conventions—the fundamental concept is, as you described, that significant impacts and commitments should not be made that would impact an incoming government. Have you been aware of or ever made those sorts of commitments, decisions or appointments that would impact an incoming government?

Ms Stephen-Smith: Not during the 2024 election, no. I have talked before about the 2020 election, where there was some consultation with the opposition around some COVID management things. But we were very fortunate that there was not a lot then

either, but there could have been some quite significant decisions needing to be made during that period.

MR WERNER-GIBBINGS: Okay. These two questions are linked now. The information described by my colleague earlier—was it insignificant or significant? But in your role as a minister, is there any situation where you would not want information provided to you, be it significant or insignificant, from the public service?

Ms Stephen-Smith: That is a hard question for me to answer, Mr Werner-Gibbings, because this was not information that I had requested. And, again, the Freedom of Information release shows that there were pieces of information that we explicitly requested because circumstances arose, and there were pieces of information that we were provided with because they were time-critical. The example I have given is the ASMOF union industrial action, which, obviously, was important to be aware of and was going to become public, so that sort of information I would expect to receive. With day-to-day information, it really is a judgment for the public service about whether or not that information is important to provide during the caretaker period.

And ministers adopt different approaches, as well. Some ministers can choose to continue to receive regular, factual updates. I do not receive my weekly briefings during caretaker period, but I think there is a weekly briefing for the Chief Minister that is, again, that sort of factual briefing, “Here is what you need to know.” He is the Chief Minister. He continues to be the Chief Minister during the caretaker period and until the new government is sworn in.

MR WERNER-GIBBINGS: Thank you. So, within the context of the caretaker conventions, but I think this is also broader, as Minister for the Public Service, what are the mechanisms that exist to provide ACT public servants with guidance, training and support to meet their responsibilities for frank and fearless—

Ms Stephen-Smith: Now I am definitely handing over to officials!

MR WERNER-GIBBINGS: advice that our previous witness spoke about.

Mr Wright: Sorry, would you mind repeating the question?

MR WERNER-GIBBINGS: Within the caretaker conventions, and more broadly, what mechanisms exist to provide ACT public servants with guidance and training and support to meet their responsibilities to provide frank and fearless apolitical advice and to interact appropriately with the executive? Is it done via an induction? Are there refreshers in the lead-up to caretaker?

Mr Wright: Thank you, Mr Werner-Gibbings. I have read and acknowledge the privilege statement. ACT public servants are briefed on the *ACT Guidance on Caretaker Conventions* and supported in their application of those.

Leading up to the 2024 caretaker period, the Chief Minister, Treasury and Economic Development Directorate implemented several proactive measures to support the implementation of the *ACT Guidance on Caretaker Conventions* to mitigate governance risks and support administrative continuity. These measures included

disseminating the *ACT Guidance on Caretaker Conventions* to the entire ACT Public Service. Those conventions, the guidance on the conventions, are also supplied on our external facing website. We conducted targeted senior executive briefings. We issued communications and reminders regarding the *ACT Guidance on Caretaker Conventions*. We provide a centralised support service to answer questions, concerns, or issues arising from agencies in the application of the guidance on caretaker conventions. We received approximately 150 requests for advice in relation to that. We have also got FAQs, which are up on our SharePoint intranet site in relation to that.

We also have a broader range of training that we make available to our public servants, not just in relation to caretaker conventions but in relation to their broader obligations as public servants. For example, we published a fact sheet on procurement and contracting during the caretaker period. We also have a whole host of guidance and supporting materials from our ACT values and the code of conduct.

In our induction training, which we conduct several times a year, we provide participants with information about their roles and responsibilities. In 2024, in the lead-up to caretaker, we also provided advice in relation to their obligations under the *Guidance on Caretaker Conventions*. So, it is quite broad in relation to the advice and support that we provide.

MR WERNER-GIBBINGS: Thank you.

THE CHAIR: Mr Pepper, I was going to ask you a couple of quick questions. Firstly, what would you describe as the threshold for deciding to proactively provide the minister or others with advice during the caretaker period? How might you describe that in your decision-making process?

Mr Pepper: That is an interesting question. We approach caretaker with the view that the minister remains the minister. Our contact with the minister is reduced during that timeframe in terms of our regular face-to-face briefings and a range of other things. But as factual, operational information comes to light, I would continue to have those conversations with either the minister or her office. I do not know I could define a particular threshold to say, “These things I would; these things I would not.” I would exercise judgment from issue to issue.

THE CHAIR: I am not meaning to unfairly paraphrase you, but I think what I heard you say is, largely, the operational information will continue to flow because you think it is relevant for the minister to know that.

Mr Pepper: That is right.

THE CHAIR: Thank you. In light of your experience as a head of agency, with the *ACT Guidance on the Caretaker Conventions*, do you think there are any areas that warrant update, clarification or change that the committee might take note of?

Mr Pepper: I do not know I am the best place to respond to that, Mr Rattenbury, other than—

THE CHAIR: As you said, you have worked right through it; I am asking in a very

practical context. Is there anything that you have looked at and thought, “It is not clear,” or “I don’t know how to operate in these circumstances”?

Mr Peffer: No, I do not think so. They are pretty clear, and the situation that we are discussing is very preliminary data that had not been verified that, really, no one could rely on to make a decision about year-end. And in fact, going through the verification process, we had data in November, which was then refined and changed to December and then changed into January to, ultimately, lead to decisions about what the likely outcome—financial and activity—was for the health service during the year. So I cannot see that the situation would have changed, given different drafting of the guidelines.

THE CHAIR: Thank you. While we have the opportunity, I wanted to ask about the status of the health budget now. Given the additional funds provided mid-year, are we operating within the increased budget you have been provided, or are you anticipating needing to ask for a Treasurer’s advance?

Mr Peffer: They are operating within the budget that has been provided.

THE CHAIR: Thank you.

MS CASTLEY: Off that second-last question that Mr Rattenbury asked, if it was so preliminary, why did you feel the need to call the minister’s office and tell them that?

Mr Peffer: There had been a level of interest in August. Obviously, we had opened a brand-new building, a new emergency department, and often that can place quite a strain on our health service in terms of people opting to go to a newer facility for a range of reasons—just to see the new facility, to see what it is like. That is a reasonably common experience interstate.

I think around pre caretaker—actually, it was—I provided some preliminary numbers to the chief of staff saying, “Here’s what we’ve experienced prior to the opening of the building in terms of the average number of daily presentations to ED. For the fortnight following building 5 opening, here’s what we’ve experienced.” This is from memory; I do not have that open in front of me. To provide operational data about an uplift in activity, or something that is occurring in the health service, is not an extraordinary thing.

MS CASTLEY: Thank you. As the Minister for the Public Service, is it your view, Minister, that officials have a duty to keep appropriate records of briefings, decisions, meetings and phone calls?

Ms Stephen-Smith: Well, yes. I do not know if the Head of Service or anyone wants to talk about this? There is clearly an obligation for officials to keep records.

MS CASTLEY: And phone calls as well—even if it is a phone call to an advisor? Would you expect that people calling your office would be making a note of those?

Ms Stephen-Smith: I think it depends on the circumstances. Certainly, there are some circumstances in which I would expect public servants would keep a file. Having been

a public servant myself in some quite interesting circumstances, there are definitely circumstances where I would recommend to public servants that they make a file note because something substantive has been discussed. But there are going to be so many verbal conversations about various things where no decision is made and no direction is given, and it is a bit of a chat through things that will then be followed up with a formal brief or with an email that then forms the record of whatever is actually going to happen, that it would be impractical to expect that every single phone call is documented in a file note. But where a substantial direction has been given, a decision has been made verbally, I would certainly expect that that would be recorded either with an email to confirm the outcome of that conversation or with a file note.

MS CASTLEY: So it is your expectation and advice, or recommendation, that people would do that. It is not a formal rule, as far as you are aware.

Ms Stephen-Smith: No, it is not. And, again, in the context that we are talking about, I think that is exactly the process that Mr Peffer followed. He made a phone call, and then he followed it up with an email that said, “As discussed, here is the data.”

MS CASTLEY: In the Assembly order relating to the health disclosure and the caretaker conventions, there were no records returned of any briefings, decisions, meetings, phone calls or anything like that from health officials. Were records not kept or simply not provided to the Assembly?

Ms Stephen-Smith: Sorry, in which?

MS CASTLEY: In the order, the Assembly order, relating to the health disclosures that we were talking about earlier and the caretaker conventions, there were no records returned of any briefings, decisions, meetings or phone calls from health officials. So I am wondering were records not kept or simply not provided?

Ms Stephen-Smith: That is not a question that I am able to answer. I do not know if Kathy, the Head of Service, wants to talk about the process for the 213A response; that is a responsibility, obviously, of the Chief Minister.

Ms Leigh: I have read the privilege statement.

THE CHAIR: Thank you.

Ms Leigh: In relation to that Assembly order for production of documents, CMTEDD went out to all directorates with the terms of the order and asked for documents that came within it to be provided. I would expect and believe that the public service discharged that responsibility thoroughly. I am not aware of any suggestion that documents that came within the terms of that order were not provided. But, Ms Castley, if you believe that is the case, I am certainly willing to look into it. I am quite confident it would not have been done intentionally.

THE CHAIR: Is the official from the health directorate, who would have had responsibility for that, in the room, who might take that question?

Ms Stephen-Smith: It was health directorate, not—

THE CHAIR: No, sorry, my mistake—Canberra Health Services.

Ms Stephen-Smith: That is part of my question; I do not even know what documents you are talking about—

MS CASTLEY: Mr Pepper, did you take a file note of the phone call to the chief of staff?

Mr Pepper: No. Shortly after that phone call I sent through an email, which was what I indicated I would do. In that email I documented very clearly that my advice was to observe the data with caution because it was preliminary only and subject to change.

THE CHAIR: On Ms Castley's earlier question though, in terms of the order of the production of documents, who from the Canberra Health Services would have had responsibility? I am not trying to pin down an individual by name.

MS CASTLEY: Yes; how do we find that out?

THE CHAIR: But do we have a clarity, or is someone in the room able to come and answer Ms Castley's question: were the full set of records sent through to the Head of Services area?

Mr Pepper: My office coordinated that, and I can tell you that the full set of records has been provided. That includes the email, which I think is the subject of what you are asking about.

MS CASTLEY: That is useful.

Mr Pepper: I can clarify: I did not take a separate file note and then document what I said and send it in an email as well.

THE CHAIR: Thank you; I just wanted to make sure we had clarity before we move along.

Mr Pepper: Yes.

MS CASTLEY: Okay. I will have to look into that and follow-up if we have got further concerns.

THE CHAIR: Mr Werner-Gibbings, I think you have one question. We will come back to Ms Castley in a minute.

MR WERNER-GIBBINGS: This is seeking a view, Minister. Reading through the resolution that has set up this inquiry, there are lines about information in number 1(d): that you received information, which is what we have been discussing, and "This information was not provided to the representatives of other political parties or candidates"—there are 140-odd candidates—and "Preliminary data was tabled ..." How often do you receive ballpark information in your role as a minister? You said it was less during caretaker, so maybe we can go with that smaller amount, but how often

do you receive information emailed, orally, written, face-to-face, normally—not during COVID or in 2024?

Ms Stephen-Smith: In this most recent caretaker period, I really did not receive very much information directly from CHS or the directorates. I cannot put a firm number on it, but there is also me and my office.

MR WERNER-GIBBINGS: Yes.

Ms Stephen-Smith: And the office would have had a lot more conversations and emails directly with the public service than I did during the caretaker period. But I think I indicated that the response to Mr Braddock's FOI included 34 different items. That is, roughly, the electronic communications between my office and CHS, and me and CHS. It is hard for me to judge what is normal, because I have only had two caretaker periods, and one was not normal.

MR WERNER-GIBBINGS: Yes, that is alright. I will leave that. Thank you.

MS CASTLEY: I would just like to get a bit of a better understanding about how reliable the health forecasting is and how it has been in the previous years. Can you tell me what benchmarks you use to evaluate your forecasts?

Ms Stephen-Smith: Ms Castley, I think we can answer this question, but, really, as Mr Werner-Gibbings pointed out earlier, this is an inquiry into the caretaker conventions, and we really are straying into something that is well beyond the terms of reference for this committee, when you start talking about health activity, forecasting and data to this level. I just do not understand how that question is in any way relevant to the terms of reference for this committee.

MS CASTLEY: I will ask another couple to just expand then. What is an acceptable error range for your forecasts, or health demand expenditure, and what went wrong in this instance during caretaker?

Ms Stephen-Smith: Nothing went wrong in this instance during caretaker. But again, if you want to talk about financial forecasting, there will be a budget soon and there will be a budget estimates process, and that is the appropriate process, with Treasury and Health officials in the room, to talk about budget processes.

MS CASTLEY: So you are confident in your forecasts and your budget processes. The information you were given a couple of days before election day resulted in an over \$300 million blowout, but you are comfortable with the way you handled things and the information flow from your team. You are very comfortable with the way all of that went?

Ms Stephen-Smith: I think we have just discussed, Ms Castley, that there was some preliminary activity data that was from two months at the beginning of the financial year that could not be extrapolated to a financial outcome for the full financial year, which actually was \$227 million. The rest of the funding that had to be allocated to the health portfolio related to a reassessment of the funding that we would receive under the National Health Reform Agreement; and, again, that related back to some decisions and assumptions that were made in the 24-25 budget, but all of those things are very

carefully worked through. It would absolutely be inappropriate during a caretaker period to revise, and there is no opportunity during a caretaker period to revise and review those decisions, because while you are a minister you are not in a decision-making capacity to bind a future government. So there was no action that could possibly be taken in relation to that very preliminary data.

MS CASTLEY: So it was not incumbent upon you to accept that there was possibly a forecasting issue, coming into winter, and that demand would increase—that resulted in \$227 million of additional money needed—and that you did not need to tell anybody about that. You were very comfortable with the decision that you made?

Ms Stephen-Smith: There was no action that I could take on this information that was available to me.

MS CASTLEY: Other than transparency and telling Canberrans about it.

Ms Stephen-Smith: Again, my question would come back to you, Ms Castley: what would I say that I had not already been saying, which was, “The health service is very busy. We have seen an uptick in activity during winter”? Mr Peffer just talked about the opening of the critical services building. In the week after the critical services building opening, I was in the media saying, “We have seen some of the busiest days in the ED that we have ever seen.”

MS CASTLEY: And the incoming government—

Ms Stephen-Smith: And this was in mid-August, and the data that Mr Peffer sent through was to the end of August, so it was a period we had already been publicly talking about. And, effectively, that data was saying, “Confirming what you have publicly been saying; the data is showing that we are busy.”

MS CASTLEY: But you did not feel it important to go that further step and explain to Canberrans about the \$227 million possible blowout?

Ms Stephen-Smith: We did not know.

MS CASTLEY: That is why I asked about your modelling. Did at any point anyone say, “This is actually really big, and if it continues, the incoming government, whoever they are, will be facing the largest deficit.”

Ms Stephen-Smith: That, Ms Castley, would go to a question between a conversation that would appropriately be being had at officials’ level and appropriately not being shared, at that point, around Treasury, Chief Minister’s—

MS CASTLEY: Did Treasury know? Did anyone talk to Treasury about that? Are you aware of that?

Ms Stephen-Smith: Well, I would not be aware of that. Again, that would only be on the basis of it being very preliminary data and very preliminary numbers. Clearly, Canberra Health Services and Treasury had had a conversation before Minister Steel was briefed as the incoming Treasurer, because he was then briefed on the financial

pressures that were being experienced. So clearly there were conversations being held at officials' level in relation to, "What do we need to brief the incoming government on?"

But it is part of the job of the public service during the caretaker period to go through not only the election commitments of anyone who might form or be part of government but also what the other emerging issues are that they are going to have to brief an incoming government on—"Let's get all of our ducks in a row so that when we have an incoming minister we can talk them through the decisions they are going to have to make—quick decisions, early decisions, that they are going to have to make." As the Chief Minister has pointed out, our caretaker period is long, so there are often decisions that do need to be made quite quickly but also decisions that are going to have to be made through the mid-year budget process or in the next six months. That is actually part of the job of the public service during caretaker, to keep monitoring those things.

MS CASTLEY: So if it was not appropriate for them to tell you that there was a possible deficit, the largest that we have ever seen, do you believe that the public service should have been telling anybody—Treasury, somebody, you—about that?

Ms Stephen-Smith: Again, Ms Castley, it was too early for anyone to reach that conclusion at that time.

MS CASTLEY: But it was only two weeks before election day, and you said that when the Treasurer was brought in, he was briefed at that point. That is three weeks.

Ms Stephen-Smith: The first briefing, in my recollection, of the information that is on the public record already, was that it was in early November that those briefings took place in relation to any detail, so more than a month later, and it was still preliminary information. It was still, "We are still working through what the detail looks like. We haven't made any decisions." The decisions about mid-year review were not made until January. That was when we determined what the additional funding requirement to be included in the appropriation bill would be—in January.

THE CHAIR: Thank you.

MS CASTLEY: Thanks.

THE CHAIR: Minister, on behalf of the committee, thank you, and to your officials, for appearing before the committee today.

Ms Stephen-Smith: No worries; we would have been very happy to talk more about the caretaker conventions, but the Chief Minister might have to do that.

THE CHAIR: I believe there are a number of questions that were taken on notice. As is the usual requirement, please provide your answers to the committee secretary within five business days of receiving the uncorrected proof *Hansard*.

Ms Stephen-Smith: No worries; thank you.

Short suspension.

BARR, MR ANDREW, Chief Minister, Minister for Economic Development and Minister for Tourism and Trade

GARRISSON, MR PETER, Solicitor-General for the ACT, Justice and Community Safety Directorate

LEIGH, MS KATHY, Head of Service & Director-General, Chief Minister, Treasury and Economic Development Directorate

MATTHEWS, MS EMMA, Executive Branch Manager, Workforce Governance and Recruitment, Office of Industrial Relations and Workforce Strategy, Chief Minister, Treasury and Economic Development Directorate

WRIGHT, MR ROBERT, Deputy Director-General, Office of Industrial Relations and Workforce Strategy, Chief Minister, Treasury and Economic Development Directorate

THE CHAIR: The committee will now recommence its hearings for this afternoon and I welcome Mr Andrew Barr, MLA, Chief Minister, and officials, to this session. Please note that as witnesses you are protected by parliamentary privilege and bound by its obligations. You must tell the truth. Giving false or misleading evidence will be treated as a serious matter and may be considered contempt of the Assembly. Chief Minister, were you wishing to make any brief opening remarks to frame this, or are you happy to go straight to questions?

Mr Barr: No.

THE CHAIR: Terrific. Thank you. I want to start on page 3 of the government's submission which does express a concern about codification of caretaker conventions. Given that you were quite concerned at the prospect of codifying them, what do you imagine codification looks like and why are you so concerned about that?

Mr Garrisson: I have read the privilege statement and I understand it. Chair, I think the issue with codification involves a more fundamental understanding of the concept of the caretaker conventions but also their place in the system of government. There has been a lot of discussion about the Westminster system of responsible government and how it operates. It has a number of key elements to it, but one of the things that stands out across all of the Westminster-style governments in Australia and around the world, is that it is determined by their social, cultural, legal and constitutional frameworks, and they are all different.

So, for example, the United Kingdom has no written constitution; Australia or the commonwealth has a very restrictive constitution; and states and territories have their own constitutions which have a different balance between them. So the essence of the system of responsible government with its key elements of a legislature, an executive, the courts and a public service is flexibility, because the demands of a system of government vary over a period of time as we have seen over recent decades.

One of the key elements of responsible government is the operation of convention. These are political conventions; they are constitutional conventions. One of the key risks to parliamentary democracy and responsible government is that people take those frameworks and, if you will, try and push the barriers. We have seen, in a place on the other side of the world, where those barriers are being pushed very, very hard.

The caretaker conventions sit in that context. They do not describe the relationship between the executive and the Assembly. What they in fact do is they build on the concept of fairness in terms of how the executive conducts itself in a period leading up to an election. The concept of caretaker conventions has evolved over a period of time, from something as simple as a half-page letter to the sorts of documents that are now common in every jurisdiction. That means that if one seeks to codify, if you will, those caretaker conventions, first of all, what does that actually mean? I note through the Office of Legislative Assembly submission that there were some suggestions that they put up. That is obviously a matter for the Assembly to consider but the reality is that the caretaker conventions describe how the executive is going to conduct itself and that is a matter for the executive and for the public service.

There are statutory elements to what I will call the pre-election process. So for example, the pre-election budget update is mandated by statute. That is not actually part of the caretaker conventions. The caretaker conventions deal with a range of behavioural and conduct issues so that an incoming government is not disadvantaged. And, as I have said before, it operates as a convention. It is an understanding, and if people depart from those understandings then you put your democratic system under a great deal of pressure because people say, “How do we fix that?”

THE CHAIR: Thank you, those are all really interesting points. The Head of Service, I think, issues the guidelines in the leadup to the election period. One might consider the documentation in the guidelines is, in fact, a codification of the expectations. If we accept that premise, I think the point you actually then go on to make is the concern is not so much the writing down, which is the codification; it is that somebody other than the executive might do it, because the observation you have just made is that this describes how the executive is going to conduct itself. So I think the actual point the government seeks to make in its submission is, the executive should set the rules, not somebody else, if I am interpreting it correctly. Please challenge that but—

Mr Barr: Well, I just make a couple of observations. There is a difference between guidelines and what is commonly understood to be codification, which I think has at least an understood meaning in politics and in the law to be a lot further than a set of operating guidelines. Then obviously there will be an intersection with the Self-Government Act and some of the many other requirements that are placed upon ministers, including that you continue to be a minister even though you may have lost your seat in the Assembly. You have certain legal requirements in legislation upon you. You are being paid to perform certain roles.

So I think there are elements of how I would interpret codification. Certainly the nature of this debate, and what I have witnessed in the last hour and a half up on the television and all of the politics around this particular issue, is that the concept of codification would be interpreted in one particular direction. That is the political angle on this. The legal angle I will let Peter put some further detail around.

Mr Garrison: The interesting thing is that a practice has evolved in every jurisdiction where the caretaker conventions are formulated, articulated and updated by the public service. Of course, they did not start that way. They started with a very simple ministerial statement. I mean, it is from Menzies, I think, back somewhere in the 1950s.

THE CHAIR: Yes, that is what has been put to us by another witness, yes.

Mr Garrison: Yes, and I have read his statement.

The essence of it is that the caretaker conventions focus on the exercise of restraint and judgement by the elements of government. It is that exercise of restraint and judgement which militates, in my respectful view, against formalising them through some form of legally binding obligation because that is not what the conventions are about and one of the key elements of responsible government is that very flexibility in the way conventions operate.

The most famous breach of convention was, of course, the sacking of the Whitlam government by the then-Governor-General, operating within, arguably, strict legal powers, but so much in the face of the convention of how that would operate. Canada had the same problem early in the 20th century and they always said, “Well, we would have written our constitution differently if we had known what had happened.”

So the elements of caretaker convention have to be seen in the context of that broader set of—call them constitutional principles, but responsible government principles where, for example, prime ministers are not mentioned anywhere. Ministers are not—they are in the ACT Self-Government Act, but if you look at other jurisdictions, all of those things operate by convention in terms of who goes to the monarch in the United Kingdom to form government, the fact that there is a prime minister and the fact that there are ministers.

THE CHAIR: So would it be fair if I tried to identify your concern then as the process of codification, as perhaps suggested by the Clerk into a legislative instrument or some other, which gives them a status that is quite different? That is the nature of your concern?

Mr Garrison: Yes.

THE CHAIR: My next question is on the ACT government submission. On page 4 there is a reference to:

The ACT Guidance is regularly updated in line with contemporary governance guidance material reflecting evaluations from previous caretaker periods...

Probably for yourself, Ms Leigh, as Head of Service: are there evaluations available from previous elections? Can you either provide them to the committee or outline to us any key lessons that have been identified during previous caretaker periods?

Ms Leigh: After every election, or before the next election, there is a review of issues that arose during the previous election because the central area of the public service is supporting public servants across the service when issues arise, so they are aware of the issues that arise. If it is found that it might have been helpful to have more clarity on an issue, then that is followed up when the reviews are conducted. I am unaware of whether we have made publicly available those reviews. My understanding is that they are often fairly minor technical changes.

The other thing that we do is we look at all the other Australian jurisdictions because it is a rolling process. Everybody is reviewing their conventions before every election. They look to their own experience and update that in their conventions, plus they look to others, and so we also look to everyone else's to see where there are new issues that have arisen that we could benefit from.

Mr Wright: I have read and acknowledge the privilege statement. The 2024 ACT Guidance on caretaker conventions was updated. Following each general election, the ACT public sector undertakes an evaluation of the guidance for operational effectiveness. The update of the 2024 ACT Guidance on caretaker conventions began approximately six months prior to the announcement of the caretaker period.

The update reference recommendations made from the review of the 2020 ACT Guidance on caretaker conventions included: clarifying the procedures for ministerial correspondence; clarifying the processes for consulting with the opposition; establishing weekly meetings with directorates to discuss issues arising in the application of the ACT guidance on caretaker conventions; and collecting data throughout the caretaker period on questions or issues that arise. That was the 150 queries I referred to.

The update also incorporated amendments to address administrative contextual changes since the last election, so removing references to emergency operating measures following the end of the COVID-19 public health emergency. I would note that in our submission, one of the reasons we were not supportive of the codification of the guidance on caretaker conventions was our ability to effectively adapt to that type of emergency setting in a flexible way.

THE CHAIR: Sure, but given, on that point, they are renewed each election, so every four years they get refreshed anyway. This is why I am uncertain about the hesitancy in codification, because they get refreshed every four years. Surely that provides the adaptability to which you speak?

Mr Barr: Well, sure, refreshed in the context of all being written by the parliament and then the parliament then has to agree on something ahead of each election. Is that the context in which you raise that?

THE CHAIR: I guess that is the question we are exploring, yes.

Mr Barr: Yes, and what happens when the parliament does not?

Mr Garrison: Perhaps if I might, Chair, I think the essence of the issue goes back to what I was saying earlier and that is, what is the nature of the caretaker conventions? It is about reflecting the exercise of restraint and judgement by the executive and the public services as part of that broader concept in the way its tasks are undertaken in a certain period in relation to not binding or discomfiting an incoming government. Those are, of course, the well-known elements of policy decisions, major contracts, appointments and how the public service engages.

The current guidelines that applied for the 2024 election go through all of those elements in some detail, and that detail has emerged over a period of years based on

lived experience of what occurs during elections. Questions do arise as to the operation of the caretaker conventions in particular circumstances and that, as I said, requires the exercise of restraint and judgement. I think the terminology is important. If one has a codification, which implies with it some form of legally binding effect, then you remove the flexibility to exercise judgement in relation to how they apply. I think that is the essence of it, Chair.

MS CASTLEY: On this subject for a moment, Ms Leigh, you talked about there being a review each time. I am wondering, given the issue that we have discussed earlier in the previous session, was that issue considered in the review? If it has not been published, is it something you are willing to publish or table then?

Ms Leigh: So we will review the experience of the 2024 election before the 2028 election.

MS CASTLEY: I understand. That is what you said, okay. Have you in the past ever made changes yourself to the caretaker conventions in any of these reviews? You have seen a number.

Ms Leigh: The review is done by Mr Wright's area. They would check in with me, usually, whether I had any issues that I thought needed to be covered, but I cannot recall anything specific.

MS CASTLEY: Chief Minister, I am just wondering if I can have some questions for you now. Outside the caretaker period, what is the usual process by which an agency would inform the Chief Minister or Treasury about expenditure that is significantly exceeding forecasts that have been made and/or risks to the financial position?

Mr Barr: Well, that would vary depending on the agency, its appropriation and the terms on which it operates—whether it has own-source revenue, for example. Probably best I take that on notice to provide you with—rather than just an off the top of my head answer.

MS CASTLEY: Yes, okay. Is it something that your office would be informed directly by another minister's office, or would the information come to you in your office through Treasury and then to—

Mr Barr: Well, generally through Treasury and more often than not on the formal quarterly reporting, or half-yearly reporting, requirements. Many agencies have own-source revenue, and so their budget management involves both their government payment for output—that is what comes off the budget that is appropriated for them—as well as their own-source revenue. So they are expected to operate within the revenue resources that they have, that are multiple often and are not just the territory government. In some instances there is a stream of commonwealth funding as well. So it is a much more devolved set of financial arrangements in the directorates and agencies within directorates who are responsible for their own financial management, for their own reporting. We do not have a large commonwealth finance department-style operation when it comes to ACT Treasury.

MS CASTLEY: So does Treasury have its own access to that spending information for

the other agencies, or do they rely on the agencies to report to them?

Mr Barr: Agencies are reporting to Treasury.

MS CASTLEY: How often does that happen?

Mr Barr: I will take that on notice but it would be—certainly, there is mandated, legislated quarterly reporting. That is the absolute minimum. There may be more frequent updates with some agencies but again it will depend on their circumstances.

MS CASTLEY: And does it change during caretaker?

Mr Barr: Well, public service requirements would not change. Obviously there are quarterly—the September quarter ends during the caretaker period. I think there are requirements under the FMA, from memory, for certain reports to be required within 45 days of the end of a quarter. So, to cut to the chase of what you are actually interested in in all of this, the issue is the timing of the PEBU and the timing of the election and the extent of our caretaker period, which is insanely long by any measure. Our campaigns are longer than federal campaigns because of the current acts and timing of our election. So if you want a neat solution to solve the information asymmetry, which is what all this is actually about, you would need to ensure that the PEBU is aligned with the September quarter reporting—

MS CASTLEY: Great recommendation.

Mr Barr: —which means that it should come at about some time in the middle of October, which would mean that you would need to shift the election about three or four weeks. If you did that—

MR WERNER-GIBBINGS: Back?

Mr Barr: Push it back, yes. If you did that, then the PEBU would contain the first quarter of the new financial year's financial information and that would be available to everyone on an equal basis. That obviously requires an amendment to the Electoral Act to change the date of the election. Do that and you have solved most of the issues that have been identified around everyone having access to information at the same time.

MS CASTLEY: Got it, thanks. When were you or your office first informed about the surge in health demand expenditure?

Mr Barr: There was a one-sentence reference in a weekly Chief Minister's update towards mid-October, so like 7 or 8 October. I think after that long weekend; from memory, around that time. I will get the exact date for you. It would have been, I presume, in the information that was released. It referred to increased activity in the health system which, frankly, is a report line I would get every winter.

MS CASTLEY: Sure. I do not know that we have received that. Can you table that?

Mr Barr: I think it has already been released, but we will—

THE CHAIR: And check the date and resolve that on notice, thank you.

Mr Barr: Yes, yes.

MS CASTLEY: So in your capacity as Chief Minister, do you believe this is something the health minister should have informed you about as soon as she found out?

Mr Barr: Well, I was informed by way of a one sentence saying—

MS CASTLEY: She found out on the 4th.

Mr Barr: Yes, I will check the exact date, but it would have been a matter of days, and that was a long weekend as I recall; Friday the 4th, going into the October Labour Day long weekend. I was at that time preparing for my debate against the Leader of the Opposition so I would not have been, I guess, focused particularly on routine weekly updates from directorates. We were at the closing stages of the election campaign, with probably the most significant event in the election happening a matter of days away. I will confirm all of those dates and those questions for you on notice.

MS CASTLEY: But to confirm: you did not know about it until that briefing? There was no phone call or anything like that?

Mr Barr: Look, I will have to check whether a call was made to my office to say, “I have had a call from Canberra Health Services,” but certainly it was not a major issue at that time.

MS CASTLEY: The health minister has claimed that the information provided was routine and well-known, but I believe that this claim—there is a bit of tension with the fact that the CEO of CHS did feel it was necessary to contact her office to inform her during the campaign period. Do you accept that the information was actually significant and known to be significant at the time?

Mr Barr: I have no basis to reach that conclusion. It certainly was post-election when it was briefed to the incoming Treasurer and health minister and then brought forward through the appropriate process of an appropriation bill before the Assembly.

MS CASTLEY: So you felt it was not significant before, like the weekend before pre-poll opened, but it was significant by the time the Treasurer was—

Mr Barr: Well, because by the time the Treasurer had taken office, the information had advanced considerably—that month difference, I think possibly even five weeks difference; then beyond that, the consideration in December from the government through the ERC process; and then finally, the final determination on that in January, ahead of the presentation of the appropriation bill to the Assembly in February.

MS CASTLEY: So did you give any consideration to the question of whether the information should have been made publicly available, or was it a matter for the minister responsible or the public service?

Mr Barr: Well, principally in relation to demand management within the health system,

that is obviously something that both Canberra Health Services and the health minister would be the avenue to communicate that, if necessary. Then, obviously, in the context of any appropriation bill before the Assembly, the Treasurer would bring that matter forward, and did. There were numerous media reports and public comments in August, in September, in November, in December and in January, and then, obviously, it peaked in terms of people's interests in February, when the appropriation bill was introduced. But it is not as if this issue and demand in the health system is a new feature. It was explicitly referenced in the statement of risks in the 2024-25 budget. It has been the biggest issue in public policy and health public policy in Australia for every state and territory, essentially since Tony Abbott started cutting health funding in 2014.

MS CASTLEY: So then how was the forecast so wrong? As the minister corrected me, it was \$227 million. How was it so wrong and at what point was it appropriate—

Mr Barr: Well, I think the health officials have addressed that.

MS CASTLEY: If you would just let me finish my question. At what point was it appropriate for the public service or the health minister, who knew that there was a pending blowout, to keep one slice of that information from the public?

Mr Barr: I have heard the hearings before, and I think you have had the first part of your question comprehensively answered by the people who are best placed to do so.

MS CASTLEY: Do you agree with the minister's decision?

Mr Barr: Of course. And, to the second part of the question, the appropriate timing for the public release of all of that information was when it was done by the various ministers and when the Treasurer introduced the appropriation bill to the Assembly. The policy decision that was before the government was: would we increase health funding to meet the increased demand? The answer to that was yes and the Assembly agreed with us.

Your party may not have. You might have voted no to that legislation and you are perfectly entitled to. You have to explain to the people of Canberra why you would vote no or would have made a different decision than the government did in relation to health funding. But again, that is a political debate that will play out. It played out pretty comprehensively in Australia on 3 May, and I think we know the answer there. That is the position the government has taken—to invest in health.

MS CASTLEY: Under the Financial Management Act, the Treasury is required to publish the PEBU—we briefly touched on this—to allow the assessment of the government's financial performance and to give the electorate an accurate picture of the territory's financial position. This was published only two weeks before the health minister was informed about the blowout, so it is clear that the electorate did not have an accurate picture of the territory's financial position. Are you aware of whether the Head of Service, the Under Treasurer or anyone at the Treasury had any awareness of the surge in health demand and expenditure, or the risks of it, at the time the PEBU was published?

Mr Barr: The PEBU includes a statement by the Under Treasurer, in accordance with

section 20C of the Financial Management Act, which says:

Consistent with section 20D of the *Financial Management Act 1996*, the 2024 Pre-Election Budget Update provides updated fiscal and economic estimates and projections to allow for an assessment of the Government's financial performance against stated fiscal strategy and policy objectives.

The information contained in this update:

- i. reflects the best professional judgment of Treasury officers in the ... Directorate;
- ii. takes into account all available economic and fiscal information; and
- iii. incorporates the fiscal implications of any government decisions and other circumstances that may have a material effect on the financial statements and budget estimates.

This update is current as at 11 September 2024.

That was signed off by the Under Treasurer in accordance with the law. So, unless you have an allegation that you would like to make, and if you do have one—

MS CASTLEY: I am asking questions. I would appreciate it if you could just answer the question. That would be great. When was the Treasury informed—

Mr Barr: You are aware of the—

MS CASTLEY: When was the Treasury informed about the situation in the health portfolio with regard to the budget?

Mr Barr: You would need to ask the Treasurer. I can take that on notice on his behalf, if you would like.

MS CASTLEY: That would be great. Thank you. When did the Treasury first provide you with analysis, advice or briefings about the situation or its implications for the budget?

Mr Barr: The Treasury did not, because I was not the Treasurer after the election. I will take on notice when the Treasurer was provided that information.

THE CHAIR: As the Chief Minister, when were you made aware of it?

Mr Barr: As part of the mid-year review update process. I will take on notice the date of the first ERC meeting, if that would be helpful for the committee.

MS CASTLEY: Have you reflected on how interagency processes could be improved so that the Treasury is aware of fiscal pressures earlier—you were the Treasurer for a very long time—so that budget documents can be more accurate?

Mr Barr: I explained to you, in answer to an earlier question, how this particular issue can be fixed by adjusting the timing of the pre-election update to align with the September quarter reporting that is required under the FMA. That is the easy answer to

this. In future, it would ensure that the PEBU information is aligned with the first quarter of the fiscal year's information. But, until that point, unless you are going to require every agency to provide weekly updates, there will always be a point at which the PEBU is prepared, and information that occurs after that is going to be supplementary to what is the line-in-the-sand moment that is the PEBU, just as the budget is a line-in-the-sand moment. Then there is a mid-year update after that.

THE CHAIR: I will go to Mr Werner-Gibbings and will give you a chance to come back to that in a while.

MS CASTLEY: Sure. Let me think about that.

MR WERNER-GIBBINGS: I will wrestle it back to the topic of the inquiry.

Mr Barr: Valiantly, you have been trying for 2½ hours!

MR WERNER-GIBBINGS: Caretaker conventions. That is the topic. What is your role in managing caretaker conventions in the ACT, as Chief Minister?

Mr Barr: Limited, because it really only extends to those who are within my direct responsibility—namely, the executive and ministerial staff—and they operate under the Ministerial Code of Conduct and consistent with the guidelines, in terms of their interaction with the public service, which the Head of Service outlines in that process.

The proposed guidelines for the 2024 election were prepared independently of me—with my input, but I did not sign off on them. They were an instrument of the Head of Service. They were brought to cabinet so that all ministers had visibility—to cabinet for noting, not for decision-making. The submission was part of one of the final cabinet meetings of the term—that these were the guidelines that would guide the interaction between ministers and the public service during the caretaker period. That was a submission for noting by cabinet, not a submission that cabinet could alter. That is the appropriate balance that was struck. Mr Rattenbury is nodding that he was in the room when that paper came through. That is standard practice at the end of each term.

My last official meeting was, in fact, also with Mr Rattenbury, as we were the outgoing shareholders, as it turned out, of Icon Water. We had their AGM as our last official responsibility before the caretaker period commenced.

THE CHAIR: Those were the days!

Mr Barr: Indeed. Through the caretaker period, there were no cabinet meetings. This was, of course, somewhat different to the COVID experience four years earlier. I would say that the 2024 process would be more how you would anticipate the caretaker period to operate, as opposed to 2020 when I even attended national cabinet meetings as an observer so that we were up to date on what was happening at the national level.

MR WERNER-GIBBINGS: I will come back to that guidance document. Speaking as a fresher, are MLAs and ministers provided information on caretaker conventions? Where do they—

Mr Barr: Yes. The document is published. Previous documents are available as well, so very keen members of the Assembly can even observe the slight wording changes or things that have moved in and out over time.

Regarding the discussion earlier about how these things would evolve, obviously, technology has impacted some issues. The guidance that was given to public servants perhaps in the pre social media era is very different to what happens now, in terms of what is appropriate political engagement for the public service, for example. Equally, for ministerial staff, there are briefing sessions. For some staff, it was their first caretaker period. Those briefings were offered and taken up by ministerial staff ahead of that time, and I think that is useful. I would recommend that sort of thing continues in advance of caretaker periods so that ministerial staff know what is an appropriate request and what is not, and also how to manage some of the trickier issues, particularly around correspondence, for example, where there is an expectation from some constituents that ministers will drop everything to respond to their particular issue. There is obviously very strong electoral motivation for ministers to do that, but sometimes some issues would require detailed consideration or may, in fact, commit an incoming government to a course of action, so it is not appropriate for ministerial officers and ministers to prepare correspondence and respond to constituents.

We would do so—and there was a very clear delineation in doing so—on behalf of the party we represent rather than the government. There would be examples where correspondence was dealt with, where I would give a commitment that, if the Labor Party were part of a future government, we would agree to do things or we would pursue issues, but I could not commit an incoming government if we were not part of it. That was quite clear. It is important for ministerial staff and public servants to understand that process, so the guidelines are useful in that regard.

MR WERNER-GIBBINGS: During the caretaker period in 2024, did the public service have interactions with non-executive MLAs or candidates? Does that happen? Did anyone reach out?

Mr Barr: There would have been some requests through ministerial offices that would have been facilitated. There were some processes in the lead-up, particularly from Treasury, around the election commitments costing process and, consistent with that process, they were at arm's length from the Treasurer's office, but they were facilitated. I think comments were sought and received, in fact, during that process as well.

I have been around for long enough to remember the origins of that requirement, and that we actually have a costings process. During the first election cycle after that occurred, everyone was getting gold stars for submitting all of their costings right on time. The Greens party were so good that they stopped making any announcements about 10 days out from the election, because they were not going to get back a Treasury costing. Those were the days of adherence to these sorts of things. More recently, parties have had the choice to participate or not in those processes, but they were all there and, I think, well understood by everyone.

MR WERNER-GIBBINGS: This might be a question for the Head of Service. With respect to the *Guidance on caretaker conventions* that is provided—I read it some time ago, so forgive me—does that impose any obligations on ministers or is it a matter of

having obligations and constraints on the activities of the public service?

Ms Leigh: Caretaker is fundamentally about what ministers restrain from doing. Of course, that then impacts on the behaviour of the public service. The caretaker conventions talk about what governments do not do during caretaker, which, of course, means ministers. When you ask whether it imposes, as we have discussed before these are conventions that have evolved through past practices of ministers.

MR WERNER-GIBBINGS: The ACT *Guidance on caretaker conventions* is for members of the public service, and ministers and ministerial staff. It is a general guidance; it is not a public service specific document?

Ms Leigh: That is correct.

Mr Barr: By way of an update, I took a question on notice earlier. My office have very helpfully provided information that the weekly report to me was for the week commencing 7 October, so it was after the long weekend. It has been released under FOI. It did, consistent with what the health minister advised earlier, indicate increased activity, and it said:

The winter season is likely to have impacted this increased activity. Canberra Health Services will continue to monitor demand and trends across the coming months.

That information is FOI released.

MR WERNER-GIBBINGS: With the guidance, because the ministerial obligations under the convention should be reasonably well known—they are, quite simply, 1, 2 and 3—what about the public service arc of activity? Has that ever been broadened during the updates? Has their scope ever loosened, or does it generally get tighter and more restrictive?

Ms Leigh: I am not sure I can answer in those terms. The impact on the public service is a consequence of the constraints that ministers exercise. Clearly, outside caretaker, ministers operate with advice and support from the public service and, if there are things that it is not appropriate for ministers to do during caretaker, clearly, the public service will not be providing advice and support in relation to those things.

With major contracts, for example, the public service would not be preparing major contracts for consideration, either by the public service or as part of a decision-making process by ministers during caretaker, because that is something that governments restrain from doing during caretaker. It has consequences for the work of the public service, even though it is primarily directed at what governments do not do—as in ministers.

Mr Barr: It probably stands in marked contrast to what you see at the end of the term of a US President, where there is a flurry of executive orders in the final week with pardons and all the rest of it. One of the things with having a very codified and strict set of arrangements is that you go through the pantomime of what we saw at the end of the Biden administration and the start of the Trump one. Our political systems are

somewhat different, but we do not have that arrangement, mostly because of caretaker conventions. They only work because, on all sides of the political process, they are honoured; we do not make decisions that commit future governments.

An interesting observation, of course, is that, having been around through six elections now, with the “you can’t make a decision” time frame, if someone is opposed to it, it almost tends to begin two weeks after the election you have just won, and carries on, and certainly peaks in any election year. I distinctly remember being told in 2016 that we could not make any decisions at all, almost, in relation to light rail because there was an election at the end of the year. Mr Rattenbury would remember that, too. All of a sudden, four-year terms become three-year terms, apparently, because you cannot make any decisions. Political arguments will be made on these all the way through.

THE CHAIR: One of our earlier submitters made that point quite well. Mr Fletcher, in his submission, articulated that discussion. Let us move on.

There is a section in the ACT government submission at page 9 on symmetry of information during post-election negotiations. When you read this section, it focuses on the election costings process and the PEBU as being the source of that symmetry of information, if you like. Whilst these are important processes, there are obviously limits to them. For example, they do not cover the additional health information that has been discussed today, and that has been, perhaps, the genesis of this inquiry.

Ms Leigh, what engagement does the Head of Service have with the Chief Minister during these post-election negotiations?

Ms Leigh: They are political negotiations, so very little. What I would be doing during that post-election period is providing any practical information about administrative arrangements that might be made, but the negotiations are political negotiations.

THE CHAIR: What is the nature of that practical information that is provided to the Chief Minister during this period?

Ms Leigh: The Chief Minister, obviously, needs to consider the ministry, because they are going to be sworn in quickly, after the Chief Minister is voted in, and that is then the end of caretaker. The Chief Minister needs to have thought through the appointment of ministers and the allocation of responsibilities to ministers, and that is, of course, formalised in the administrative arrangements.

There is always review of administrative arrangements to pick up minor things that could be improved. There might be the opportunity to ask me, “Are there minor things that we should add into this while we are making those changes to the administrative arrangements?” There might be consideration of a different mix of allocations and some practical questions about, “Which legislation would therefore flow to which portfolio if we reorganise the portfolios in this way?” It is very much those types of practical arrangements.

Mr Barr: For the benefit of transparency for everyone, that meeting that I had with Ms Leigh was in early November, so it was just before. We had reached a point in our negotiations where the one remaining question was whether or not there would be

Greens ministers, and you were taking some time, Chair, with your colleagues to determine that process. But it was clear from two weeks of negotiating; with the outcome that transpired, as you said, you were true to your word in that regard, as I respect and as I expected. At that point I felt it was appropriate to ask the Head of Service for that meeting, but that did not take place until November, nearly 2½ weeks after the election.

THE CHAIR: From a public service point of view, in terms of the symmetry of information, clearly, at some point, information was starting to go around about this increase in health costs. Obviously, it then has an impact on how political parties might talk to each other, in terms of available budget, and ability to agree to commitments in that political process. How does the public service ensure symmetry of information in a context like that?

Ms Leigh: First of all, in dealing with the actual fact situation that you are referring to, my understanding is that this was very early in the financial year. It was the first two months of data. It was not analysed. The cause of that increase was not understood. It was not, therefore, clear whether or not that increase would continue. The actual practical implications were, at that point, unclear. There was insufficient information to be formulating advice to ministers, even if we were at a point where we had ministers to provide that advice to. I wanted to bring you back to that factual situation, because I think it is hard to answer the question you asked without taking that into account.

THE CHAIR: Section 3(e) of the guidelines discusses ministerial attendance at intergovernmental meetings. It notes that “it is appropriate for officials to brief ministers on the matters discussed and outcomes reached at such meetings during the caretaker period”, which, on the face of it, is a perfectly reasonable observation. Taking an example of where this might occur, how would the public service then ensure symmetry of information during post-election negotiations if a matter arose out of some intergovernmental meeting that was material? The minister would be briefed but the other political party in those negotiations might not be.

Ms Leigh: Again, most of the time, these ministerial meetings are not taking decisions that have that sort of consequence. The practical reality is that there are no real dilemmas that arise. If there was some negotiation of a funding agreement, that would require a decision, and the question is, “Does the decision need to be taken during caretaker?” and usually it does not. You would just wait until after caretaker, and whoever was the minister then could decide whether or not they were happy with the proposed funding arrangement.

Mr Barr: A practical reality is that, with the timing of two other state and territory elections, because we have the Northern Territory and Queensland elections in close proximity, they will not hold ministerial councils. If they were being mean to the poor territories, they might go ahead without us, but they certainly would not go ahead without Queensland—a jurisdiction of that size. Queensland’s election period is—

THE CHAIR: A week or two after us.

Mr Barr: A week after us, yes.

THE CHAIR: I have one last question in this thread. Based on your experience in recent years, Ms Leigh, do you have any views on how the conventions might be amended to accommodate the scenario of multiparty governments? Given the history of the Assembly, obviously, leaving aside my own particular views on this, we have a long history of not having majority governments—just the one. Seemingly invariably, we end up in circumstances where there are a range of parties—or groups, individuals—trying to work it out. Invariably, one party probably has far better access to information than the others in that context. How might the caretaker conventions or the processes of information sharing in that post-election period better address that?

Ms Leigh: That is a very complex question, and I do not think it is one that I should answer off the top of my head.

THE CHAIR: Do you want to take it on notice, reflect on it later and respond to the committee?

Ms Leigh: I am happy to take it on notice. I am not sure to what extent I will be able to assist you, but I am happy to reflect on that.

THE CHAIR: Part of the reason I asked the question is that there has obviously been a particular political context that Ms Castley has been prosecuting around why we are here today. Also, the committee is looking to make sure that, going forward, the ACT adopts best practice. We would certainly welcome any guidance that you might want to offer us in that context.

Mr Barr: Again, the most comprehensive whole-of-government fiscal information update would come with the first quarter report that is required 45 days after 30 September. It falls in mid-November. I do not want to harp on about my neat, elegant solution to this, but it would give everyone the same level of information. The problem is that the timing of post-election negotiations occurs when PEBU is then five weeks old. Most of the time, not a lot of things have changed.

In terms of PEBU, too, there are certain demand-driven programs. The other one that was in the second appropriation that no-one has talked about throughout this whole process was the increase in funding for out-of-home care. It is not as sexy to talk about that, and you cannot beat the government up as much. It is not as headline-grabbing, obviously, in terms of media fodder, but that was a part of the second appropriation bill as well. That and a few other areas are very demand-driven.

THE CHAIR: I am conscious of the time and, as the chair, I must not be indulgent. I will flag that I will put on notice some questions, as I have run out of time.

Interestingly, section 5 of the Public Sector Management Act specifically refers to supporting the executive as an object of the Public Service Management Act. No other jurisdiction that I have seen specifically makes that reference. All others tend to refer to supporting the community, the parliament and the government of the day. I will ask for some reflections on that. I will do so on notice, in order to allow my colleagues some time to ask questions before we have to finish.

Mr Wright: We have had a bit of a look into that, and most of the Public Sector

Management Act equivalents in other states and the commonwealth reference “government” rather than the “executive”. We view those terms as being interchangeable in their nature.

THE CHAIR: We will discuss that further later, but I take your point, Mr Wright. What I find interesting, from having a look at this, is that the ACT act refers specifically to supporting the executive but it does not refer to the community or the parliament, which seems to be quite a substantive difference. Do you have any reflections on why that is the case, and perhaps its history?

Ms Leigh: I do not think there is the significance in it that you are seeing. The public service support the government of the day, which are the ministers; that is, the executive. The executive, of course, are part of the legislature. The public service, as we are here, has an obligation to appear before committees and to provide full, honest information, but we do that in our capacity as a public service, and the public service exists to support the government to deliver whatever it promised to the electorate and what the electorate expects of it.

Similarly, of course, the public service deliver for the community, but they deliver whatever the government has said to the community that it will deliver. It is in that context that the public service support the executive, and the executive has been elected by the community and is delivering commitments to the community. I do not see it as a diametrical difference. It is simply a matter of thinking through the role that we all play in a democracy and how that operates.

Mr Barr: It was written in 1994, so—

THE CHAIR: Sure. This is one of the questions, as we look forward: will the committee consider whether that needs to be refreshed?

Mr Wright: There is a reference to “community” in section 5(b).

THE CHAIR: Thank you.

Mr Barr: Yes, it does:

(b) establish and maintain a public service that assists the Executive to meet the needs of the community and serves the community on behalf of the Executive ...

Ms Leigh: Which is exactly the point I was just making.

THE CHAIR: That has taken us pretty much to the end of the hearing. On behalf of the committee, I would like to thank the Chief Minister and the officials for your attendance at the committee hearing today. There have been some questions taken on notice. Could you please provide your answers to the committee secretary within five business days of receiving the uncorrected proof *Hansard*, as is the usual procedure.

On behalf of the committee, I would like to thank our witnesses who have assisted the committee through their experience and knowledge. We also thank broadcasting and

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Hansard for their support. If members wish to put any questions on notice, please upload them onto the parliamentary portal as soon as possible, and no later than five business days from today. The meeting is now adjourned.

The committee adjourned at 4.59 pm.