



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Social Policy Scrutiny Committee

**Inquiry into the Public
Information Legislation
Amendment Bill 2018**

March 2019

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Chair's Preface

This report details the Committee's findings regarding its examination of the Public Information Legislation Amendment Bill 2018. This Bill amends the *Public Information Act 2010* and associated Regulations to provide for a strengthened and simplified approach to ensuring that public monies are used appropriately when providing information to the public. In presenting the Bill, the Chief Minister, the Hon Michael Gunner MLA, noted that recent rulings by the Auditor-General and feedback from Government agencies indicated a need to provide further clarification and guidance to ensure compliance with the legislation.¹

The Committee received one submission to its inquiry from the Auditor-General for the Northern Territory. While seeking clarification on the anticipated operation of the provisions of the Bill, the Auditor-General also questioned the extent to which the Bill is unambiguous and drafted in a sufficiently clear and precise manner. Given the impact of the proposed amendments to the legislation on the role of the Auditor-General in the review of public information, the Committee was concerned to learn that the Auditor-General had not been consulted in the development of the Bill. This concern gave rise to dissenting views as to whether the Committee should recommend that the Assembly pass the Bill.

While the Committee has recommended that the Assembly pass the Bill, it has proposed four amendments as set out in recommendations two to five. To avoid unintended technical breaches of the legislation, recommendation two proposes that the definition of 'advertisement', which is cast very broadly, be amended to clarify that it includes the purchase of media placements on social media platforms, other digital communication channels and signage associated with Government funded construction projects. Recommendation three proposes that the Bill be amended to clarify the role of the Auditor-General in the review of public information, with particular reference to proposed section 6(2)(f). Recommendations four and five propose minor amendments to proposed section 6(2) and Regulation 3 to address grammatical errors in the drafting of these provisions.

On behalf of the Committee, I would like to thank the Auditor-General for her submission and for appearing before the Committee at its public hearing. The Committee also thanks the Department of the Chief Minister for their advice. I also thank my fellow Committee members for their bipartisan commitment to the legislative review process.



Ms Ngaree Ah Kit MLA

Chair

¹ Hon Michael Gunner MLA, Chief Minister, Parliamentary Record, Debates Day 3 – Thursday 29 November 2018, <http://www.territorystories.nt.gov.au/jspui/handle/10070/305255>, p.4

Committee Members

	Ms Ngaree Ah Kit MLA Member for Karama	
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	Sessional:	Social Policy Scrutiny
	Chair:	Social Policy Scrutiny
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	Parliamentary Position:	Acting Deputy Speaker
	Committee Membership	
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	Sessional:	Social Policy Scrutiny
	Select:	Northern Territory Harm Reduction Strategies for Addictive Behaviours
Chair:	Public Accounts	
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Acknowledgements

The Committee acknowledges the individuals and organisations that provided written submissions or oral evidence at public hearings.

Terms of Reference

Sessional Order 13

Establishment of Scrutiny Committees

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints the following scrutiny committees:
 - (a) The Social Policy Scrutiny Committee
 - (b) The Economic Policy Scrutiny Committee
- (3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.
- (4) The functions of the scrutiny committees shall be to inquire and report on:
 - (a) any matter within its subject area referred to it:
 - (i) by the Assembly;
 - (ii) by a Minister; or
 - (iii) on its own motion.
 - (b) any bill referred to it by the Assembly;
 - (c) in relation to any bill referred by the Assembly:
 - (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
 - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (B) is consistent with principles of natural justice; and
 - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and
 - (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (F) provides appropriate protection against self-incrimination; and
 - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

- (H) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (I) provides for the compulsory acquisition of property only with fair compensation; and
 - (J) has sufficient regard to Aboriginal tradition; and
 - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
 - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
 - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Public Information Legislation Amendment Bill with the proposed amendments set out in recommendations 2 to 5.

Recommendation 2

The Committee recommends that the definition of *advertisement* in proposed section 6(7) be amended to clarify that, in addition to traditional forms of paid advertising, it includes the purchase of media placements on social media platforms, other digital communication channels and signage associated with Government funded construction projects.

Recommendation 3

The Committee recommends that the Bill be amended to clarify whether it is the role of the Auditor-General to assess whether information is factually accurate; to assess the adequacy of a source; or simply to note that a source has been cited for any claim of fact and leave any qualitative assessment of its veracity to the public.

Recommendation 4

The Committee recommends that proposed section 6(2) be amended to include the word 'the' after the word 'satisfied', and all instances of the words 'the information' in paragraphs (a) to (f) be replaced with the words 'information that'.

Recommendation 5

The Committee recommends that proposed Regulation 3 be amended to include 'ing' on the end of the first word in paragraphs (a) to (k).

1 Introduction

Introduction of the Bill

- 1.1 The Public Information Legislation Amendment Bill 2018 (the Bill) was introduced into the Legislative Assembly by the Chief Minister, the Hon Michael Gunner MLA, on 29 November 2018. The Assembly subsequently referred the Bill to the Social Policy Scrutiny Committee for inquiry and report by 12 March 2019.²

Conduct of the Inquiry

- 1.2 On 30 November 2018 the Committee called for submissions by 30 January 2019. The call for submissions was advertised via media release, the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.
- 1.3 As noted in Appendix 2, the Committee received one submission to its inquiry from the Auditor-General for the Northern Territory. The Committee held a public briefing with the Department of the Chief Minister on 3 December 2018 and public hearings with six witnesses in Darwin on 20 February 2019.

Outcome of Committee's Consideration

- 1.4 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:
- (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
 - (iv) whether the bill has sufficient regard to the institution of Parliament.
- 1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with proposed amendments as set out in recommendations 2 to 5.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Public Information Legislation Amendment Bill with the proposed amendments set out in recommendations 2 to 5.

² Hon Michael Gunner MLA, Chief Minister, Parliamentary Record, Debates Day 3 – Thursday 29 November 2018, <http://www.territorystories.nt.gov.au/jspui/handle/10070/305255>, pp.3-5

Report Structure

- 1.6 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Background to the Bill

2.1 In presenting the Bill, the Chief Minister, the Hon Michael Gunner MLA, noted that in 2016 the Government amended the *Public Information Act 2010* to:

set clearer and more transparent standards on appropriate expenditure of Government advertising and information. The key amendments sought to strengthen the Act by inserting standards that were once available under public information guidelines. These guidelines were revoked by the previous Government in November 2013.³

2.2 However, recent rulings by the Auditor-General⁴ and feedback from government agencies indicated a need to provide further clarification and guidance to ensure compliance with both the Act and the Regulations. Consequently, the proposed amendments are intended to:

create greater certainty in how certain provisions are applied in practice. The proposed amendments will not change the intent or weaken the Act, but provide clarification, lessen confusion, and contemporise the Act so it captures a broader definition of modern forms of information.⁵

Purpose of the Bill

2.3 As highlighted in the Explanatory Statement, the Bill amends the *Public Information Act 2010* and associated Regulations to provide for a strengthened and simplified approach to ensuring that public monies are used appropriately when providing information to the public. As such, the Bill seeks to:

- a) consolidate obligations spread across the Act and Regulations to ensure all obligations are contained in a single section of the Act;
- b) strengthen requirements in relation to information containing facts, statistics and data by removing any inconsistencies created by using different terminology across the Act and Regulations;
- c) increase consistency in application across Government by redrafting commonly misinterpreted obligations, including incorporating the obligation to distinguish a statement of facts from a statement of comments (which raises complex academic and theoretical matters such as subjectivity versus objectivity, fact versus fiction, reality versus belief, and assessments versus assertions) into other more definitive obligations;
- d) remove unintended prohibitions on the use of images of a Minister by introduction of a contemporary and technology-neutral definition of advertisement that means published by the purchase of media placement under a commercial arrangement;

³ Hon Michael Gunner MLA, Chief Minister, Parliamentary Record, Debates Day 3 – Thursday 29 November 2018, <http://www.territorystories.nt.gov.au/jspui/handle/10070/305255>, p.4

⁴ Auditor-General for the Northern Territory, *August 2018 Report to the Legislative Assembly*, Northern Territory Auditor-General's Office, Darwin NT, August 2018, pp. 168-182; Auditor-General for the Northern Territory, *November 2018 Report to the Legislative Assembly*, Northern Territory Auditor-General's Office, Darwin NT, November 2018, pp. 166-170

⁵ Hon Michael Gunner MLA, Chief Minister, Parliamentary Record, Debates Day 3 – Thursday 29 November 2018, <http://www.territorystories.nt.gov.au/jspui/handle/10070/305255>, p.4

- e) insert a restriction on the use of images of a Minister in information other than advertising by requiring that a Minister must have a connection with the content of the information (specified to be either the Chief Minister, whose responsibility extends across all portfolios, or the Minister with responsibility under the Administrative Arrangements Order);
- f) expand the operation of the Act to prohibit the use of a Minister's message in the same circumstances where it would be a contravention to use the image of a Minister; and
- g) improve the practicality and useability of the Act by introducing a public purpose test for the content of public information to replace the requirement for compliance only with criteria specified in the Regulations.⁶

⁶ Explanatory Statement, Public Information Legislation Amendment Bill 2018 (Serial 77), <https://parliament.nt.gov.au/committees/spsc/77-2018>, p.1

3 Examination of the Bill

Introduction

3.1 The Committee received one submission to its inquiry from the Auditor-General for the Northern Territory. The Auditor-General sought clarification on a number of the proposed amendments to the *Public Information Act 2010* and associated Regulations. In addition, the Auditor-General questioned the extent to which the Bill, is unambiguous and drafted in a sufficiently clear and precise manner.⁷ The following discussion considers the main issues of concern raised by the Auditor-General, and the subsequent advice provided by the Department of the Chief Minister (the Department).

Development of the Bill

3.2 As noted by the Department, the majority of amendments to the Public Information legislation proposed in the Bill relate to section 6(2) of the Act which:

sets out contraventions of the Act and is used by public authorities when preparing public information, as well as by the Auditor-General when reviewing pieces of public information.⁸

The Committee heard that, although communication directors across government were consulted during the development of the Bill, “to ensure the independence of the Auditor-General”⁹ she was not consulted.

3.3 While acknowledging that it is not the role of the Auditor-General to establish policy, the Auditor-General pointed out to the Committee that:

both my predecessor, Mr Frank McGuinness, and I have previously been afforded the opportunity to comment on the original legislation and subsequent amendments to the legislation. Our feedback included explaining challenges experienced in interpreting the legislation. I am appreciative of the consideration given to our feedback on those previous occasions.¹⁰

3.4 The Auditor-General also raised concern that the failure to consult with her office was counter to the Department’s guidelines regarding the development of legislative proposals. The Committee heard that the Department’s *Legislation Handbook*, May 2018, Version 3, states that:

3.22 Agencies are to consult with Independent Statutory Officers (ISOs) as/if relevant during the development of legislative proposals. ISOs include the Ombudsman, Auditor-General, Anti-Discrimination Commissioner, Information Commissioner, Commissioner for Public Interest Disclosures, Health and Community Services Complaints Commissioner and Children’s Commissioner.

3.23 Cabinet Submissions are generally not circulated to ISOs for comment, but Agencies should discuss legislative proposals with these Officers as

⁷ Auditor-General for the Northern Territory, Submission No. 1, p.1

⁸ Committee Transcript, Public Hearing, 20 February 2019, p.9

⁹ Committee Transcript, Public Briefing, 3 December 2018, p.4

¹⁰ Auditor-General for the Northern Territory, Submission No. 1, p.3

appropriate and incorporate the views of those Officers in the Cabinet Submission.¹¹

- 3.5 By way of clarification, Ms Maria Mohr (Deputy Chief Executive Officer: Department of the Chief Minister) advised the Committee that while the provisions in the Legislation Handbook are considered to be ‘good practice’, it is not a requirement that Independent Officers be consulted in the development of legislative proposals and is not always undertaken.¹² Ms Mohr further noted that:

The department acknowledges the concerns raised by the Auditor-General about the lack of consultation and we apologise for this oversight. However, we were under the genuine belief that we did not wish to compromise the independence of the Auditor-General’s role.¹³

Committee’s Comments

- 3.6 Given the nature of the proposed amendments to the legislation and the impact of such on the role of the Auditor-General in reviewing public information, the Committee was concerned to learn that the Auditor-General was not consulted in the development of the Bill. While acknowledging the Department’s apology for this oversight, the Committee notes that the decision not to consult the Auditor-General is at odds with the Department’s guidelines regarding the development of legislative proposals.
- 3.7 Noting that the Auditor-General’s office has previously been afforded the opportunity to comment on both the original legislation and subsequent amendments, the Committee is of the view that a number of the issues considered in this report may well have been resolved prior to the introduction of the Bill if the Auditor-General had been invited to provide feedback on the draft legislation.

Definitions

- 3.8 Proposed section 6(7) introduces two new definitions of ‘advertisement’ and ‘relevant minister’. The Auditor-General expressed the view that it would be appropriate if these new definitions were included in section 3 (Definitions) along with the pre-existing definitions in the Act rather than being embedded in section 6 of the legislation.¹⁴
- 3.9 The Department advised the Committee that, as noted by the Office of the Parliamentary Counsel, the Bill has been drafted in accordance with Australian drafting conventions:

Under the conventions, when a term that needs to be defined is only used in one provision of an Act, the definition is only included in that section of the Act. In this instance, the terms ‘advertisement’ and ‘relevant minister’ are defined in section 6, as they are only used in section 6. ... should the definitions be included in section 3 as opposed to section 6 (as proposed in the Bill), there would be no practical impact on the operation of the legislation. However, this approach would

¹¹ Auditor-General for the Northern Territory, Submission No. 1, p.3

¹² Committee Transcript, Public Hearing, 20 February 2019, p.11

¹³ Committee Transcript, Public Hearing, 20 February 2019, p.9

¹⁴ Auditor-General for the Northern Territory, Submission No. 1, p.2

represent a departure from Australian drafting conventions and create inconsistencies within the Northern Territory statute book.¹⁵

Committee's Comments

3.10 The Committee is satisfied with the Department's response.

Advertisement

3.11 The term 'advertisement' is defined in the Bill as 'an advertisement published by the purchase of media placement under a commercial arrangement.' As noted in the Explanatory Statement accompanying the Bill, this definition is designed to further clarify the operation of proposed section 6(2)(c) and (d):

Section 6(2)(c) provides that an advertisement that includes an image of a minister or a minister's message will be a contravention. ... Section 6(2)(d) provides that for public information that is not an advertisement, an image of a minister or minister's message can only relate to a minister with sufficient connection to the content of the Information. Such ministers are the Chief Minister whose responsibility extends across all portfolios, or a relevant Minister.¹⁶

3.12 However, concern was raised regarding the extent to which the definition of 'advertisement' captures paid placements on social media platforms and digital communication channels.¹⁷ Mr Tom McCrie (Principal legal Policy Officer: Department of the Chief Minister) advised the Committee that:

The new definition [of advertisement] refers to a media placement under a commercial arrangement to ensure that it is cast as broadly as possible, however it is paid and wherever the media happens to be placed. ... the definition of 'advertising' includes social media boosting and is broad enough to capture new forms of advertising that we may not be contemplating at this point in time.¹⁸

3.13 Nevertheless, noting that fence bunting and hoarding is often used to communicate public information, the Auditor-General pointed out that it may prove difficult to ascertain whether or not it is classified as paid advertising:

There is perhaps an argument that if the bunting is absorbed in the cost of the contract, whether it is building a car park, road or whatever it might be, it is not necessarily that clear on whether that is paid advertising or a paid construction contract and that is an add-on. ... You are probably aware that previously when bunting was used by construction companies it was for their own advertising purposes. Having branded bunting – is it part of the contract or is paid advertising?¹⁹

3.14 By way of clarification, the Department advised the Committee that:

when a government agency enters into a contract for a construction project a portion of the project budget is allocated to deliver Communications and Marketing (project signage/fencing). This would be considered to be paid advertising and, as such, the Minister's image could not be used.

¹⁵ Department of the Chief Minister, *Responses to Written Questions*, 19 February 2019, <https://parliament.nt.gov.au/committees/spsc/77-2018>, p.6

¹⁶ Explanatory Statement, *Public Information Legislation Amendment Bill 2018 (Serial 77)*, <https://parliament.nt.gov.au/committees/spsc/77-2018>, p.2

¹⁷ Committee Transcript, Public Hearing, 20 February 2019, pp.15-16

¹⁸ Committee Transcript, Public Hearing, 20 February 2019, p.16

¹⁹ Committee Transcript, Public Hearing, 20 February 2019, p.5

To support a consistent approach, existing NT Government guidelines relating to construction projects will be updated and disseminated across government agencies (following passage of the Bill). This will include advice to agencies that Ministerial images may not be used in public information associated with Government-funded construction projects, such as signage on fences.²⁰

Committee's Comments

- 3.15 The Committee notes that the definition of 'advertisement', when read in conjunction with the Explanatory Statement and the subsequent advice provided by the Department, is clearly designed to capture paid advertising on social media platforms and digital communication channels. As advised by the Department, it will also extend to public information associated with government funded construction projects such as signage on fences.
- 3.16 Notwithstanding the Department's advice that it will develop guidelines and training materials to guide and inform public authorities in the preparation of public information to ensure compliance with the amendment legislation²¹, the Committee questioned whether the definition, as drafted, is so broad as to make it open to differing interpretation which may lead to unintended technical breaches of the legislation.
- 3.17 To clarify the operation of the legislation, the Committee is of the view that the definition of 'advertisement' should be amended to make it clear that, in addition to traditional forms of paid advertising, it includes the purchase of media placements on social media platforms, other digital communication channels and signage associated with Government funded construction projects.

Recommendation 2

The Committee recommends that the definition of *advertisement* in proposed section 6(7) be amended to clarify that, in addition to traditional forms of paid advertising, it includes the purchase of media placements on social media platforms, other digital communication channels and signage associated with Government funded construction projects.

Review of Public Information

- 3.18 Proposed section 6(2) seeks to clarify core obligations in relation to public information and, in paragraphs (a) to (f), specifies the types of information the Auditor-General may determine contravene the Act. The Committee heard that, in doing so, the proposed amendments to this section:

consolidate obligations that are currently spread across the *Public Information Act* (the Act) and Public Information Regulations (the Regulations) to ensure all

²⁰ Mogridge, G., (Director, Federal Policy and Strategic Coordination: Department of the Chief Minister), *Email Query re Public Information Act*, unpublished, 4 March 2019, p.1

²¹ Committee Transcript, Public Hearing, 20 February 2019, p.10

obligations are contained in a single section of the Act, effectively strengthening the obligations.²²

3.19 Proposed section 6(2)(f) introduces an obligation similar to that currently contained in Regulation 4(c) whereby the Auditor-General may determine that information that ‘fails to specify the source, or a means for identifying the source, of any facts (including comparisons), statistics or data’ contravenes the Act. The accompanying note for this section says that a ‘means for identifying the source may include providing a contact person or a website that can provide references for the source of any fact, statistic or data included in the public information.’

3.20 Acknowledging that a number of contraventions of the legislation in recent times have been due to “public information not clearly distinguishing a statement of facts from a statement of comments primarily because the source of the information is not referenced within the public information”²³, the Department advised the Committee that:

the focus of this amendment is transparency and clarity. Rather than requiring a complex assessment of what is a comment or opinion, and what is required to distinguish a comment or opinion, the new obligation is a straightforward and intuitive approach to source facts, statistics and data.²⁴

3.21 However, the Auditor-General suggested that rather than clarifying the existing provision, the proposed amendment and accompanying note is “likely to continue to cause ambiguity and differing interpretation by users of the legislation.”²⁵ As the Auditor-General pointed out to the Committee:

Referencing the public information to a website or a contact person may not necessarily be specific enough to enable a reader of the public information to verify the factual accuracy of the content.²⁶

A concern I have with the existing legislation is not vastly different to the concern I have with the proposed amendments. Specifying a source – the proposed amendments suggest that nominating a source or nominating a contact person is basically as good as referencing an individual, referencing to a generic web page. If I interpret that as being sufficient then that is fine, but I have gone on to a lot of web pages as references where it is not immediately clear where the factual information is to back something up.

It is always going to be an area of interpretation and it is always going to be challenging. What I have put in my submission is merely because something is on a website does not make it fact. The process to say “*is this information factual?*” would still need to occur if it was referred to my office. That is, through a certain process to confirm that it is factual.²⁷

3.22 In response to the Auditor-General’s concern, the Department advised the Committee that:

²² Department of the Chief Minister, *Responses to Written Questions*, 19 February 2019, <https://parliament.nt.gov.au/committees/spsc/77-2018>, p.1

²³ Auditor-General for the Northern Territory, Submission No. 1, p.3; see also Auditor-General for the Northern Territory, *August 2018 Report to the Legislative Assembly*, Northern Territory Auditor-General’s Office, Darwin NT, August 2018, pp. 168-182; Committee Transcript, Public Hearing, 20 February 2019, pp.8-9

²⁴ Department of the Chief Minister, *Responses to Written Questions*, 19 February 2019, <https://parliament.nt.gov.au/committees/spsc/77-2018>, p.1

²⁵ Auditor-General for the Northern Territory, Submission No. 1, p.1

²⁶ Committee Transcript, Public Hearing, 20 February 2019, p.2

²⁷ Committee Transcript, Public Hearing, 20 February 2019, pp.4-5

Under the proposed amendments, public authorities will be required to provide details of the source of information if requested – contact persons listed in public information will therefore be required to have information source(s) available to members of the public if and when requested. Accountable Officers will be responsible for ensuring that information relating to sources is available to the public and to the Auditor-General should a particular piece of information be the subject of a review.²⁸

3.23 As highlighted by the Auditor-General, the Department also acknowledged that:

The existence of the source does not make it a fact, it will and can assist in looking at whether it is accurate or misleading.²⁹

If the information was presented as being factual because it has a website reference, but in the end that information was misleading, it would, in effect be a contravention of the Act. It is not a matter of just having a reference, ultimately you have to be able to provide and substantiate the information.³⁰

Committee's Comments

3.24 As currently drafted, the Committee understands that if the Auditor-General received a complaint that public information included statements that were misleading or facts, statistics or data that were not presented accurately, the onus would be on the Auditor-General to determine whether or not this was the case by considering the source of the information.

3.25 While the Department acknowledged that a reference to a Ministerial media release would not necessarily be considered to be “a strong piece of source information, depending on what that is referred to”³¹, the Committee notes that there is nothing in the legislation that would prohibit a Ministerial media release being cited as the source document. This is potentially problematic given that Ministerial media releases are not subject to the provisions of the Act and could well include information that is not readily verifiable.

3.26 The Macquarie Dictionary defines a ‘fact’ variously as “1. what has really happened or is the case; truth; reality” and “3. something said to be true or supposed to have happened.”³² However, the Committee notes that it is unclear which meaning of fact is meant in the Bill.

3.27 It is notable that section 6(2)(b) of the Act currently makes statements ‘that are misleading or factually inaccurate’ in contravention of the Act. While the Bill maintains ‘misleading’ it omits the term ‘factually inaccurate.’ Instead, proposed section 6(2)(e) provides that the Act is contravened if the Auditor-General is satisfied ‘the information includes facts (including comparisons), statistics or data that are not presented accurately.’

²⁸ Department of the Chief Minister, *Responses to Written Questions*, 19 February 2019, <https://parliament.nt.gov.au/committees/spsc/77-2018>, p.2

²⁹ Committee Transcript, Public Hearing, 20 February 2019, p.14

³⁰ Committee Transcript, Public Hearing, 20 February 2019, p.13

³¹ Committee Transcript, Public Hearing, 20 February 2019, p.14

³² The Macquarie Dictionary Online, *Definition of ‘Fact’*, https://www.macquariedictionary.com.au/features/word/search/?word=fact&search_word_type=Dictionary

- 3.28 The Department advised the Committee that while section 6(2)(e) has been re-phrased “there is still an obligation for it [the information] to be accurate.”³³ However, the Committee notes that there is a distinct difference in meaning between ensuring that information is factually accurate and ensuring that information is presented accurately.
- 3.29 If, ‘fact’ means “what has really happened or is the case; truth, reality’, then the role of the Auditor-General is to test the veracity of the source and find a true basis for the public information. If, however, ‘fact’ means “something said to be true or supposed to have happened”, then the role of the Auditor-General is to check the reference and ensure that the statement in the public information accurately reflects what was said to be true by the source.
- 3.30 By not defining the meaning of ‘fact’ or giving a standard of what may constitute a source, the Committee notes that the Auditor-General may be placed in the invidious position of needing to bring her personal judgement to bear on what quality of source is required when contestable statements of truth are made.
- 3.31 In summarising the key elements of the Bill, Ms Maria Mohr (Deputy Chief Executive Officer: Department of the Chief Minister) advised the Committee that:

The overarching aim of the proposed amendments is to assist public authorities in their compliance with requirements under the legislation and to reduce unintended or technical breaches that are not within the spirit of the Act”³⁴

Given this, and taking into consideration the preceding discussion, the Committee considers that it is particularly important to ensure that the Bill makes it clear whether it is the role of the Auditor-General to assess whether information is factually accurate; to assess the adequacy of a source; or simply to note that a source has been cited for any claim of fact and leave any qualitative assessment of its veracity to the public.

Recommendation 3

The Committee recommends that the Bill be amended to clarify whether it is the role of the Auditor-General to assess whether information is factually accurate; to assess the adequacy of a source; or simply to note that a source has been cited for any claim of fact and leave any qualitative assessment of its veracity to the public.

Purpose of Public Information to be in the Public Interest

- 3.32 Proposed section 6(2A) provides that the Auditor-General may also determine that the Act has been contravened if satisfied that the content of public information is not for the purpose of the public interest. As noted in the Explanatory Statement, Regulation 3 then provides that:

for the purposes of section 6(2A), without limiting the meaning of public interest, the Auditor-General may consider particular information to be in the public

³³ Committee Transcript, Public Hearing, 20 February 2019, p.14

³⁴ Committee Transcript, Public Hearing, 20 February 2019, p.9

interest if the information has a purpose including any of the matters listed in Regulation (3)(a) to 3(k). ... In addition to reinserting the matters previously listed in Regulation 3, a new purpose of informing the public of new, existing or proposed government programs, policies or projects is inserted in Regulation 3(h).³⁵

- 3.33 The Auditor-General raised concerns that inclusion of the additional clause may lead to ambiguity in relation to interpretation and introduce a risk of politicising the role of the Auditor-General:

Broadening the Regulations to include Part 2(3)(h) as proposed by the Public Information Legislation Amendment Bill 2018 introduces a new level of complexity as it provides that the Auditor-General may consider if the provision of “*information relating to new, existing or proposed government programs, policies or projects is in the public interest.*” It is arguable that information may be in the public interest if it meets the purposes already presented in the existing Regulations, consequently the additional clause is circular and confusing. ... The inclusion of the clause may also lead to the misconception that the Auditor-General is forming a view as to whether the government programs, policies or projects are in the public interest.³⁶

- 3.34 In response to the concerns raised by the Auditor-General, the Department advised the Committee that:

In reviewing the current Act and Regulations, it was identified that new, existing or proposed government programs, policies or projects were not captured in the criteria for public information. To address this gap, the additional criterion at proposed Regulation 3(h) has been included.

Regulation 3 contains an extensive list including the use of specific terminology including ‘government products and services’ and ‘new or amended laws’. While proposed Regulation 3(h) is similar to existing regulations, it ensures that no inference is drawn that activities more appropriately categorised as ‘programs, policies or projects’ are intentionally excluded. It also removes any uncertainty as to whether policy development and project or program delivery are a government service.³⁷

The proposed amendments contemplate a similar approach to determining whether information is “in the public interest” to that applied to an assessment as to whether public information “promotes particular party political interests.” The extensive (although not exhaustive) list in Regulation 3 provides additional guidance as to what is in the public interest which limits the breadth (and risks) of discretion in interpreting “in the public interest.”³⁸

- 3.35 Noting that a similar approach is also applied in other jurisdictions, the Department further advised that in drafting the proposed amendment consideration was given to the ‘public interest’ test found in the *Public Administration (Public Sector Communication) Act 2017* (Vic):

Section 97B of that Act states that a public sector body that publishes public sector communication must ensure that publication is in the public interest. Regulation 4(a) to the Victorian Act specifically notes that a prescribed public

³⁵ Explanatory Statement, *Public Information Legislation Amendment Bill 2018 (Serial 77)*, <https://parliament.nt.gov.au/committees/spsc/77-2018>, p.3

³⁶ Auditor-General for the Northern Territory, Submission No. 1, p.2

³⁷ Department of the Chief Minister, *Responses to Written Questions*, 19 February 2019, <https://parliament.nt.gov.au/committees/spsc/77-2018>, p.7

³⁸ Department of the Chief Minister, *Responses to Written Questions*, 19 February 2019, <https://parliament.nt.gov.au/committees/spsc/77-2018>, p.8

interest purpose includes informing the public of new, existing or proposed public sector policies or projects or Victorian legislation.³⁹

Committee's Comments

- 3.36 The Committee is of the view that the Auditor-General would appear to have misinterpreted this provision. Inclusion of the additional criterion at Regulation 3(h) does not require the Auditor-General to determine 'if the provision of information relating to new, existing or proposed government programs, policies or projects is in the public interest' as noted in her submission.
- 3.37 Rather, as clarified by the Department, the Bill makes it clear that the Auditor-General may consider that a particular piece of public information is in the public interest if it has a purpose that includes one of the criteria outlined in Regulation 3, which now includes at 3(h) information that informs the public of new, existing or proposed government programs, policies or projects.
- 3.38 As such, the Committee is satisfied that the proposed amendment to the Regulations is neither ambiguous nor introduces a risk of politicising the role of the Auditor-General.

Drafting Errors

- 3.39 The Committee identified two instances where proposed amendments have not been drafted in a sufficiently clear or precise manner. As currently drafted, proposed section 6(2) is grammatically incorrect and when read in conjunction with the subsequent paragraphs (a) to (f) does not make sense. It is suggested that the preamble include the word 'the' after the word 'satisfied' and all instances of 'the information' in the subsequent paragraphs be replaced with the words 'information that', to read as follows:
- 6(2) The Auditor-General may determine this Act is contravened in relation to particular public information if the Auditor-General is satisfied *[the]* information is one or more of the following:
- (a) ~~the~~ information *[that]* promotes
 - (b) ~~the~~ information *[that]* includesetc.
- 3.40 Similarly, the preamble in Regulation 3 when read in conjunction with subsequent paragraphs (a) to (k) is grammatically incorrect. It is suggested that 'ing' should be added to the end of the first word in each paragraph, to read as follows:
- 3 For section 6(2A) of the Act if the information has a purpose that includes one of the following:
- (a) maximise*[ing]* compliance with ...
 - (b) achieve*[ing]* awareness of ... etc.

³⁹ Department of the Chief Minister, *Responses to Written Questions*, 19 February 2019, <https://parliament.nt.gov.au/committees/spsc/77-2018>, p.8

- 3.41 Following consultation with the Office of Parliamentary Counsel, the Department advised that it accepted the Committee's comments and proposed drafting amendments since they serve to clarify the provisions without changing the legal meaning of such.⁴⁰

Committee's Comments

- 3.42 Given the advice received from the Department following their consultation with the Office of Parliamentary Counsel, the Committee is of the view that proposed section 6(2) and proposed Regulation 3 ought to be amended to ensure that, in accordance with clause (4)(c)(iii)(K) of the Committee's Terms of Reference, they are unambiguous and drafted in a sufficiently clear and precise manner.

Recommendation 4

The Committee recommends that proposed section 6(2) be amended to include the word 'the' after the word 'satisfied', and all instances of the words 'the information' in paragraphs (a) to (f) be replaced with the words 'information that'.

Recommendation 5

The Committee recommends that proposed Regulation 3 be amended to include 'ing' on the end of the first word in paragraphs (a) to (k).

⁴⁰ Jean Doherty (Executive Director, Federal Policy and Strategic Coordination: Department of the Chief Minister), *Email re Drafting of Proposed Section 6(2)*, unpublished, 4 December 2018, p.1; and Jean Doherty (Executive Director, Federal Policy and Strategic Coordination: Department of the Chief Minister), *Email re Drafting of Proposed Regulation 3*, unpublished, 5 December 2018, p.1

Appendix 1: Submissions Received

Submissions Received

1. Auditor-General for the Northern Territory

Note

Copies of submissions are available at: <https://parliament.nt.gov.au/committees/spsc/77-2018>

Appendix 2: Public Briefing and Public Hearings

Public Briefing – 3 December 2018

Department of the Chief Minister

- Hayley Richards: Acting Deputy Chief Executive Officer
- Karen Vohland: Executive Director Strategic Communications and Engagement
- Tom McCrie: Principal Legal Policy Officer

Public Hearing – 20 February 2019

- Julie Crisp: Auditor-General for the Northern Territory
- Maria Mohr: Deputy Chief Executive Officer, Department of the Chief Minister
- Jean Doherty: Executive Director Federal Policy and Strategic Coordination, Department of the Chief Minister
- Karen Vohland: Executive Director Strategic Communications and Engagement
- Genevieve Mogridge: Director Federal Policy and Strategic Coordination
- Tom McCrie: Principal Legal Officer, Department of the Chief Minister

Note

Copies of hearing transcripts and tabled papers are available at:

<https://parliament.nt.gov.au/committees/spsc/77-2018>

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Public Information Regulations

Statement of Compatibility with Human Rights, *Public Information Legislation Amendment Bill 2018 (Serial 77)*, <https://parliament.nt.gov.au/committees/spsc/77-2018>

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Dissenting Report by Mrs Lambley

From Robyn Lambley, Member for Araluen

Deputy Chair of the NT Parliament Social Policy Scrutiny Committee

8th March 2019

The Social Policy Scrutiny Committee was forwarded the Public Information Legislation Amendment Bill by the Chief Minister on 29th November 2018, to be scrutinized by 12th March 2019. A Public Hearing was conducted on 20th February 2019.

The Public Information Act 2010 was first enacted to ensure appropriate use of public funds when providing information to the public. This includes ensuring that the public information is factual and free from political bias. The act establishes a transparent and accountable mechanism for the review of public information produced by public authorities.

The Social Policy Scrutiny Committee has recommended that the Bill be passed by the Legislative Assembly with some relatively minor considerations.

I do not support the recommendations made to the Legislative Assembly by the Social Policy Scrutiny Committee. The following is a [Dissention Report](#) outlining my reasons for not supporting the recommendations of the Committee.

Points of Dissention

1. Inadequate Consultation

a) The Auditor General was not consulted

The Department of Chief Minister did not consult at all with the NT Auditor General, despite the fact that the Auditor General is the statutory officer responsible for making determinations under the Public Information Act.

This is a significant omission and is in breach of the procedures outlines in the NT Chief Minister's Legislation Handbook relating to best practice consultation.

b) Consultation limited to "Communication Officers"

A Departmental Official who acted as a witness at the Public Hearing on 20th February 2019 said:

We spoke broadly with communication officers from across agencies about the difficulties they were experiencing in applying the intent, purpose and principles, and lining that up with the act and their interpretation.

No detail about the number of communications officers consulted was provided or the exact consultation process used. Given there are a relatively small number of "communications officers" employed by the NT Government, it can be assumed this consultation process was very limited.

The Social Policy Scrutiny Committee recommended that the Bill be passed without the required threshold of consultation being met. I do not agree with this decision.

It is my view that the Committee should not have recommended the passing of the Bill and instead should have recommended the Bill be sent back for a proper consultation process.

2. The Changes to the Bill do not serve to strengthen or improve the intent of the Bill

Considering all the evidence provided to the Social Policy Scrutiny Committee, particularly the evidence provided by the NT Auditor General, it is my view that these proposed changes to the Public Information Act are unnecessary and do not serve to improve or strengthen the intent of the Bill.

The suspicious exclusion of the Auditor General from the consultation process and the lack of detail around exactly who was consulted and how the consultation was conducted, creates the impression that the proposed amendments to the Public Information Act are primarily politically motivated.

The officials from the Department of Chief Minister referred to “unintended breaches” of the Public Information Act. This legislation has been used effectively for over 9 years. After 9 years one could assume that continuing breaches of the Public Information Act are intentional or due to incompetency.

The fact that successive Governments have been found to be in breach of the Public Information Act means that it has effectively provided checks and balances, and regulation of the use of public money in Government advertising. It has served its purpose of holding all Governments to account.

Contrary to the Chief Minister’s comments that this Bill will “set clearer and more transparent standards” there is no evidence that the amendments will provide greater clarity, nor will they provide greater protection to NT tax payers that their public money will not be used to promote politicians.

In summary, in dissent from the Social Policy Scrutiny Committee’s recommendation, it is my view:

There is no evidence that the proposed amendments will improve the intent or application of the original 2010 Public Information Act.

The Bill removes the discretion of the Auditor General to determine fact and opinion, which currently provides strong rationale for decisions made in regard to the nature and use of public information. Removing this appears to erode clarity, rather than providing greater clarity as is claimed.



**Robyn Lambley MLA
Member for Araluen**

Dissenting Report by Mrs Finocchiaro

I INTRODUCTION

The *Public Information Legislation Amendment Bill 2018* represents an erosion of the intent of the legislation to ensure that public monies are not used to advance party political interests. The weakening of the *Public Information Act 2010* through this Bill may serve the interests of the Labor Government today, but will only serve to further lower public confidence in the Parliament as a whole.

The content, timing and lack of consultation concerning this Bill lead to the conclusion that this is nothing more than an attempt by the government of the day to further utilise Territorian's tax dollars for political ends. As such, this legislation should not be passed and I hereby dissent from the report of the Social Policy Scrutiny Committee.

II BACKGROUND

The *Public Information Act* currently allows the Auditor-General, on the written request of a Member of the Legislative Assembly, to determine whether the Act has been contravened. Contravention of the Act may generally be found when 'public information' (information that is provided to the public using monies or other property of the Territory): '(a) promotes particular party political interests; or (b) includes statements that are misleading or factually inaccurate; or (c) does not clearly distinguish a statement of facts from a statement of comments; or (d) is an advertisement that includes an image of the holder or occupier of the office of a minister'.¹ Information that is not in the public interest, which is specified by regulation, may also be found to violate the Act.²

When it was originally passed in 2010, the Act was intended to ensure that public monies would not be used to advance partisan goals. As the then-Chief Minister, Hon Paul Henderson, stated in his second reading speech on 16 February 2010:

The primary purpose of the Public Information Bill is to establish a transparent and accountable mechanism for the review of public

¹ *Public Information Act 2010* s 6(2)(a)-(d).

² *Public Information Act 2010* s 6(2); *Public Information Act Regulations 2017* reg 3.

information produced by public authorities. This review process will ensure public funds are used appropriately to provide the public with information which does not promote party political interests, and clearly differentiates between facts and opinion.³

The Chief Minister went on to conclude his second reading speech by highlighting how important the Bill was to ensure that the public had confidence in the government of the day and provide a mechanism to hold governments accountable:

I am confident this bill provides an independent and transparent mechanism to review public information. It will allow a government to continue to connect with the public to provide information about programs which their taxes fund, but will also increase accountability and provide the public with confidence that the public information is objective, factual and free from political bias.⁴

The then-Leader of the Opposition, Terry Mills, supported the legislation, adding explanation to his comments:

I applaud the government's introduction of this bill. I will explain why it is supported: because we need these much-needed controls over the indiscriminate promotion of Labor Party politics using public funds.⁵

These comments reflect a sentiment that is now near-universally held by all Territorians—that public funds should not pay for information that promotes party interests in any way, shape or form. Said differently, information that is paid for out of the public purse should be objectively factually accurate, free of bias and apolitical.

The amendments in the Bill that have been presented to the Social Policy Scrutiny Committee completely undermine these principles, as discussed below.

III THE AMENDMENTS TO THE ACT ARE CONTRARY TO THE INTENT OF THE ACT AND THE WISHES OF TERRITORIANS

³ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 16 February 2010, 4671 (Hon Paul Henderson, Chief Minister).

⁴ *Ibid* 4672.

⁵ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 29 April 2010, 5385 (Terry Mills, Leader of the Opposition).

The Bill alters the Act in three primary ways. First, the Bill provides that the dissemination of factually inaccurate and opinion-based public information will not violate the Act, so long as that information is accompanied by a ‘source, or a means for identifying a source, of any facts (including comparisons), statistics or data.’ Second, the Bill reverses changes made by the Labor Government in October of 2016 which disallowed the use of the image of a minister on information disseminated to the public. Third, the Bill alters the public interest exemption regulations, so as to allow un-funded partisan election commitments to be communicated using public funds.

A No contravention of the Act for factually inaccurate information or information that is an opinion

Section 6(2)(b) and (c) of the Act currently prohibits public information that contains ‘statements that are misleading or factually inaccurate’ or fail to ‘clearly distinguish a statement of facts from a statement of comments’.

The amendments proposed by the Bill remove this prohibition against presenting ‘factually inaccurate’ or opinion-based government information to the public. First, current section 6(2)(c) is removed entirely. Second, the term ‘factually inaccurate’ is specifically omitted from new section 6(2)(b) of the Bill. And third, the Bill adds a new section 6(2)(f), which provides that a contravention of the Act will only lie where ‘the information fails to specify the source, or a means for identifying the source, of any facts (including comparisons), statistics or data’.

The Bill provides, in a note to new section 6(2)(f) that a ‘source’ would include, among other things, ‘providing a contact person or a website that can provide references for the source of any fact, statistic or data included in the public information’.

The logical implication of the changes proposed in the Bill is that information, no matter how ‘factually inaccurate’ or opinion-based will ever be found to be in contravention of the Act, so long as a ‘source’—no matter how unreliable—is provided for the information.

This much was confirmed during the Committee Hearing which took place on 20 February 2019, where a representative of the Department of Chief Minister confirmed that a media release, for example, would suffice as a ‘source’ under new section 6(2)(f). The DCM representative stated that it would not be a ‘strong piece of source information’, implicitly conceding that

it would qualify as a source under the amendments contemplated by the Bill.⁶

The fact that a government media release, penned by a government minister, could serve as ‘source’ for a subsequent advertisement paid for by public dollars completely undermines the intent of the Act. If, for example, a government minister prepared a patently false media release stating that the sky was pink, rather than blue, public monies could be spent to convince Territorians that the sky was, indeed pink. In fact, a full media campaign could be constructed and paid for with Territorian’s tax dollars to convince us of that fact—simply because a ‘source’ document stated that this was the case.

This may seem like an absurd example, but if we replace the colour of the sky with crime figures, information concerning the Territory budget or other government information the danger of allowing factually inaccurate information to be presented to taxpayers become clear.

Contact persons and websites, which are specifically referenced as acceptable ‘sources’ in the note for new section 6(2)(f) in the Bill are just as problematic. We all know that there is a person or website out there to back up almost any idea, no matter how bizarre or far-fetched. What’s more, “fake news” gets far more attention on the internet than does factually accurate news. For instance, a 2018 MIT study published in *Science* concluded that fake news, falsehoods, hoaxes and rumours—in other words ‘factually inaccurate’ information—is much more likely to reach more people, penetrate deeper into public consciousness and spread faster than accurate stories on the internet:

We investigated the differential diffusion of all of the verified true and false news stories distributed on Twitter from 2006 to 2017. The data comprise ~126,000 stories tweeted by ~3 million people more than 4.5 million times. We classified news as true or false using information from six independent fact-checking organizations that exhibited 95 to 98% agreement on the classifications. Falsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of

⁶ Social Policy Scrutiny Committee, Northern Territory Legislative Assembly, Darwin, 20 February 2019, 14 (Tom McCrie, Principal Legal Policy Officer, Department of Chief Minister).

information, **and the effects were more pronounced for false political news** than for false news about terrorism, natural disasters, science, urban legends, or financial information.⁷

Simply because a website, media release, contact person or other inherently unreliable ‘source’ parrots some piece of information that **does not make that information factually accurate**—and as the MIT study findings suggest, factually inaccurate political news proliferates farther and faster than any other category.

The motivation for the change contained in the Bill is apparent. On 29 May 2018, the Opposition referred an email from the Chief Minister to the whole of the public service to the Auditor-General for breach of section 6(2)(a) and (b) of the Act. The referral alleged that a statement in the Chief Minister’s email stating that the Territory had ‘\$800 million a year cut from [its] GST allocation’ was politically motivated and factually inaccurate. The Auditor-General concluded that the email may have presented misleading or factually inaccurate information, but because that breach was not ‘deliberate’, it did not contravene section 6(2)(b) of the Act. Instead, the email breached section 6(2)(c) by failing to differentiate between facts and opinion.⁸

In the same August 2018 Auditor-General Report to the Assembly, three additional violations of section 6(2)(c) of the Act were found. All three were blast emails to public servants and others which were intended to promote government policies.⁹ For instance, in a 4 July 2018 email entitled “Uber arrives in the Territory” the Auditor-General concluded that a statement about the benefits that Uber would provide for Territorians expressed a political opinion, unseparated from objective fact.¹⁰ That same email was found to breach the Act for promoting party political interests.

The only logical conclusion, taking into consideration the breaches found by the Auditor-General in her August 2018 report, is that this legislation is

⁷ Soroush Vosoughi, Deb Roy, Sinan Aral et al, ‘The spread of true and false news online’. *Science*, Vol. 359, Issue 6380, 1146 (20 March 2018).

⁸ Northern Territory Auditor-General, ‘August 2018 Report to the Legislative Assembly’ (August 2018 Auditor-General Report), 168-70.

⁹ Ibid 171-82.

¹⁰ Ibid 176.

meant to ensure that the opinion of the government of the day should be taken as fact.

However, this is a dangerous precedent and will necessarily allow politically motivated spin to substitute for objectively verifiable factual information. Such a change would undermine the intent of the Act and our democracy, by allowing public dollars to be spent on advertising that may represent nothing more than politically motivated spin and misinformation.

B Reversal of the prohibition on the use of the image of ministers unjustified

One of the first pieces of legislation introduced by the Labor Government in October of 2016 was the *Public Information Amendment Bill (No. 2) 2016*.¹¹

That Bill included a provision, which later became law at the end of 2016, adding section 6(2)(d) prohibiting ‘an advertisement that includes an image of the holder or occupier of the office of a minister’.¹²

The term ‘advertisement’ in that section was appropriately interpreted broadly by the Auditor-General. Read in conjunction with section 6(4)(1) of the Act, the conclusion was reached that public information advertisements included non-paid emails to public servants, media releases, social media posts and other information ‘given by a public authority to the public using money or other property of the Territory’.

In the past year, this provision has been contravened by the Labor Government on a number of occasions. In the August 2018 Auditor-General Report to the Assembly, the Auditor-General found three separate violations of section 6(2)(d), where blast emails from the Labor Government to public servants and others included the image of ministers in self-promotional advertising materials. The recommendation of the Auditor-General in all three instances is that the offending advertisements should be withdrawn or changed to comply with the Act.

Understandably these instances were disconcerting to the Government, but instead of complying with their own legislative determinations, the reaction

¹¹ Indeed, this Bill was premised on a private member’s Bill that was introduced by Hon Nicole Manison, the Member for Wanguri, on 10 February 2016, whilst in Opposition—the *Public Information Amendment Bill 2016*.

¹² Public Information Amendment Bill (No. 2) 2016, cl 6. This provision was also later interpreted by the Auditor-General to include the Leader of the Opposition.

was to change the rules of the game. Under the changes put forth in the Bill, the image of a minister is only prohibited in an ‘advertisement’; however, the term ‘advertisement’ is narrowly defined—meaning that only ‘an advertisement published by the purchase of media placement under a commercial arrangement’.¹³ This will not include media releases, blast emails to public servants and others, social media posts and other communications that are not subject to a strict commercial arrangement.

This about-face by the Labor Government is curious, given that when the changes were brought in to the Act in October of 2016, the Chief Minister stated that prohibition against using the image of ministers on public information would ‘strengthen’ the Act and ‘ensure Government money spent on advertisement [was] done only in the public interest’.¹⁴

Nevertheless, the rationale for now removing the prohibition on using the image of a minister in 2018 is precisely the same. In a media release dated 28 November 2018, the Chief Minister stated that the new changes would ‘improve and strengthen’ the Act and ‘ensure money spent on advertising [was] done so in the public interest’.¹⁵

One of these statements, made just two years apart, cannot possibly be true.

The timing of these changes is also suspicious. In his second reading speech on this Bill on 29 November 2018, the Chief Minister stated that the changes would ‘provide clarity for agencies applying the act (sic)’. However, the Chief Minister again said the exact same thing in a 2016 media release promoting the changes to the Act at that time, stating: ‘The amendments will strengthen and improve the existing legislation and make it clearer to all what is appropriate public information.’

Again, one of these statements cannot be true.

The reality is that we are now just 18 months from an election. Territorians deserve to be told the truth. The reason for these changes is not to provide clarity, to ‘strengthen’ the Act or to ensure that public funds are not spent on political advertising. The changes, including the removal of the prohibition on using the image of a minister on promotional materials, are

¹³ Public Information Amendment Bill 2018, cl 4.

¹⁴ Michael Gunner MLA, ‘Strengthening Public Interest in Government Advertising’ (Media Release, 26 October 2016).

¹⁵ Chief Minister Michael Gunner, ‘Public Information Act Amendments’ (Media Release, 28 November 2018).

politically motivated and intended to weaken the Act to the advantage of the incumbent Labor Government.

C Definition of public interest far too broad

Section 6(2A) of the Act currently includes a provision which allows the Auditor-General to find contravention of the Act where the content generally does not meet a public interest test.¹⁶ In turn, the Act's Regulations provide a quite exhaustive list of criteria for determining the public interest, including information that 'maximise[s] compliance with the laws of the Territory' and so forth.¹⁷

The Bill adds a new clause to the regulations, which provides that public information will be in the public interest so long as it is intended to: 'inform the public of new, existing or proposed government programs, policies or projects'.¹⁸

In her submission to the Social Policy Scrutiny Committee, the Auditor-General stated that the new provision 'introduces a new level of complexity' and that the clause is 'circular and confusing'.¹⁹ The Auditor-General went on to state that the clause would cause 'ambiguity in relation to interpretation [and introduce] a risk of politicising the role of the Auditor-General'.²⁰

The addition—which broadens the public interest exemption to the point of absurdity, as pointed out by the Auditor-General—is probably premised on a change which Victoria made to its equivalent to the Act in 2018.²¹

However, the Victorian regulations include further protections that are not included in the Bill before the Assembly. For example, Regulation 7 states that:

For purposes of section 97E of the Act, it is a prescribed advertising standard that a public sector communication does not directly promote services, activities or infrastructure projects **for which funding for the development, commencement or delivery of**

¹⁶ *Public Information Act 2010*, s 6(2A).

¹⁷ *Public Information Act Regulations 2017*, reg 3(a).

¹⁸ Public Information Legislation Amendment Bill 2018, cl 6.

¹⁹ Northern Territory Auditor-General, Submission 1 to the Social Policy Scrutiny Committee, Inquiry into the Public Information Legislation Amendment Bill 2018, 24 January 2019, 2.

²⁰ *Ibid.*

²¹ *Public Administration (Public Sector Communication) Regulations 2018* (Vic), reg 4.

those services, activities or infrastructure projects has not been provided.²²

Therefore, the Victorian regulation clearly prohibits the use of government monies to promote election commitment or other projects that are unfunded—something which this Bill does not provide for. By choosing one provision of the Victorian regulations, without adopting the other protections included in that subordinate legislation, the Labor Government is greatly weakening the Act.

Essentially the Labor Government is giving itself permission to promote unfunded election promises with public dollars, something which the Act was specifically intended to prohibit.

The Chief Minister has stated that these changes will ‘strengthen the Act’, but the addition of Regulation 3 in the Bill does just the opposite. Territorians deserve to know that their tax dollars are not being used to promote the political interest of any political party—particularly when that party is in power—and these changes to the Act weaken it to the point of uselessness.

IV THERE WAS A COMPLETE LACK OF CONSULTATION WITH THE AUDITOR-GENERAL PRIOR TO INTRODUCTION OF THE BILL

The political nature of the proposed changes to the Act are clearly evidenced by the complete lack of consultation by the Labor Government with the statutory officer charged with interpreting and applying the Act—the Auditor-General.

The Auditor-General is the independent statutory officer charged with the duty of determining contraventions of the *Public Information Act*. The Auditor-General discharges her duties in and renders opinions based on evidence and applicable law, not partisan concerns. In fact, this independence from politics was the basis for giving the Auditor-General the role of arbiter in breaches of the Act. As former Chief Minister, Hon Paul Henderson stated in his second reading speech in 2010, the Assembly relies

²² *Public Administration (Public Sector Communication) Regulations 2018 (Vic)*, reg 7.

on the Auditor-General to provide ‘independent advice that government activities are carried out with the Assembly’s intention’.²³

This being the case, it is even more surprising that the Auditor-General was not consulted on changes to the Act. As the Auditor-General stated in her submission to the Committee:

[R]epresentatives of the Department of Chief Minister made a conscious decision not to consult with my office when drafting the Bill, notwithstanding the requirements of [the Department of Chief Minister’s Legislative Handbook] ... Whilst I recognise it is not the role of the Auditor-General to establish policy both my predecessor, Mr Frank McGuiness, and I have previously been afforded the opportunity to comment on the original legislation and subsequent amendments to the legislation.²⁴

When confronted with the conscious decision not to consult with the Auditor-General during the Committee’s public hearings, a representative of the Department of Chief Minister admitted that fact, as well as their failure to follow normal procedure. When asked whether it was a requirement to consult with the relevant independent statutory officer (here the Auditor-General) when proposing to amend the Act, the Department Responded:

It is not a requirement, It is part of the legislation handbook and is considered good practice, but it is not always undertaken.²⁵

Despite this failure to follow procedure by the Department, when asked whether the Department would be willing to go back to the drawing board on the Bill, with the help of the Auditor-General, a Department representative indicated that decision was not one that the ‘Department of Chief Minister can make’.²⁶

Indeed, this is true. The decision would be that of the relevant minister, here the Chief Minister, or the Executive Council as a whole. The fact that this Bill has not been withdrawn—for example, to engage in further consultation

²³ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 16 February 2010, 4671 (Hon Paul Henderson, Chief Minister).

²⁴ Northern Territory Auditor-General, Submission 1 to the Social Policy Scrutiny Committee, Inquiry into the Public Information Legislation Amendment Bill 2018, 24 January 2019, 3.

²⁵ Social Policy Scrutiny Committee, Northern Territory Legislative Assembly, Darwin, 20 February 2019, 10 (Maria Mohr, Deputy Chief Executive Officer, Department of Chief Minister) 11.

²⁶ *Ibid* 10.

particularly with the Auditor-General—is a clear indication that the Chief Minister and/or Cabinet are not interested in crafting a Bill that is equitable and in the interests of all Territorians.

As the Cabinet Handbook—a guide for ‘Ministers, ministerial staff and public officials involved in the development and progression of Cabinet business’ in the Territory provides:

The principle of collective responsibility can only operate effectively if all members of Cabinet are well informed and well advised (including by their departmental officials) about matters coming before Cabinet for decisions. The Cabinet process is designed to provide Ministers with the opportunity to inform the discussion, bringing to the table his or her portfolio knowledge and political judgement. Good policy requires informed decisions.²⁷

The clear implication from the failure of the Labor Government to follow normal cabinet procedures is that this is **not good policy**. Accordingly, this legislation should not be passed.

V THE BILL ERODES CONFIDENCE IN THE INSTITUTION OF PARLIAMENT

Sessional Order 13 sets forth the terms of reference for the scrutiny committees of this Parliament. Among other things, the committees are tasked with determining whether a bill brought before the Legislative Assembly ‘has sufficient regard to the institution of Parliament’.

As discussed above, the amendments to the *Public Information Act* embodied in the *Public Information Legislation Amendment Bill 2018*, if allowed to take effect, will erode confidence in Parliamentary democracy by allowing the government of the day to use public monies to promote party political interests.

As currently formulated, the *Public Information Act* provides an imperfect, but satisfactory, mechanism for discouraging the expenditure of public funds to advance party political party interests. The further changes to the Act outlined above will severely weaken the legislation, ultimately resulting in a

²⁷ Northern Territory Government Department of Chief Minister, *Cabinet Handbook*, Version 0.1 (August 2017), 6.

deterioration in public confidence in the Government and, by extension, Parliament as whole.



11 March 2019