



Statement of compatibility with human rights

Prepared in accordance with the Thirteenth Assembly Sessional Orders (part 12.3) as adopted on 24 August 2017.

Public Information Legislation Amendment Bill 2018

Serial No. 77

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

OVERVIEW OF THE BILL

The *Public Information Act* (the Act) was introduced in 2010 to 'establish a transparent and accountable mechanism for the review of public information produced by public authorities'.¹ The policy objective behind establishing such a review mechanism is to discourage the misuse of public funds to produce public information that is misleading, politicised, or otherwise not in the public interest. For example, an advertisement in a newspaper that states a political opinion as a fact.

This Bill amends the Act and the Public Information Regulations (the Regulations) by strengthening existing provisions so that the interpretation and application of the provisions is in alignment with the policy objective. This includes amendments to: include additional instances where the Act is contravened; update key definitions for clarity and consistency; remove technical loopholes; and improve the expression and wording of certain provisions. The rationale behind these amendments is to ensure that the provisions are contemporaneous and targeted, supporting the Auditor-General's role in determining when the Act is contravened.

The amendments set out in the Bill will provide the following benefits:

- consolidate obligations spread across the Act and Regulations to ensure all obligations are contained in a single section of the Public Information Act;
- strengthen requirements in relation to information containing facts, statistics and data by removing any inconsistencies created by using different terms across the Act and Regulations;
- increase consistency in application across Government by redrafting commonly misinterpreted obligations including incorporating the obligation to distinguish a statement of facts from 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
- remove unintended prohibitions on the use of images of a Minister by introducing a contemporary and technology neutral definition of advertisement to mean published by the purchase of media placement under a commercial arrangement;
- provide additional restriction on the use of images of a Minister in information other than advertising to require that a Minister must have a sufficient connection with the content of the information (specified to be either the Chief Minister, whose responsibility extends across all portfolios, or the Minister with allotted responsibility under the Administrative Arrangement Order);

¹ Second Reading Speech, Public Information Bill 2010.

- 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
- improve the practicality and usability 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.

HUMAN RIGHTS IMPLICATIONS

1. *Right to freedom of opinion and expression*

It may be argued that the Act, as a whole, raises considerations relevant to Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) on the right to freedom of expression. In particular, the Article 19(2) right to 'impart information and ideas of all kinds [...] through any media of his choice'.² However, the focus of the Act is bringing transparency to the use of public funds in giving information to the public and not criminal or civil liability. The Act requires a review and report to be conducted (section 6, 7) and tabled in the Legislative Assembly. A public authority still maintains the right to publish information that would contravene the Act, and the discretion to reject any recommendations received from the Auditor-General (section 8(4)). Subjecting public information to review, reporting and recommendations is therefore compatible with Article 19, while promoting accountability for public authorities and transparency for members of the public.

It is important to note that any limitation on the right to freedom of expression only applies to a public authority to the extent it is using public funds. There is no impact on the right to freedom of expression to persons in other capacities, for example as individuals, members of other organisations (including of registered political parties or organisations), and in the case of Members of the Legislative Assembly where using an electoral allowance or other funding source.

The current Regulations state that a permitted criteria for the content of public information is to 'communicate on matters of social cohesion, civic pride, community spirit or tolerance' (regulations 3(b)(iii)). This aligns with the concept and principles behind Article 20(2) of the ICCPR, which holds that incitement to discrimination, hostility or violence should be legally prohibited.

This Bill amends section 6(2A) of the Act to provide the Auditor-General may determine particular information contravenes the Act if it is not for the purpose of the public interest. The Bill retains all permitted criteria for the content of public information listed in the current Regulations, however reframes the criteria as matters that the Auditor-General may consider to be in the public interest. An additional purpose to 'inform the public of new, existing or proposed Government programs, policies or projects' (regulations 3(h)) is also added to the Regulations. It should be noted that communications that are adverse to the public interest are already covered by pre-existing criminal and civil penalties (e.g. anti-discrimination legislation). Therefore the public interest purposes in the Regulations set a positive standard that should be met by public authorities. The rationale behind including public interest criteria, rather than limiting the Act to misleading or politicised statements, is to hold that public information should be for a clear and defensible purpose so that public funds are not misused for irrelevant communications.

2. *Right to take part in public affairs*

Article 25(a) of the ICCPR is the right to take part in the conduct of public affairs, directly or through freely chosen representatives. As discussed at point 1, the Act does not provide compulsory requirements or legal prohibitions and therefore does not pose a limitation on political communications which may reasonably fall under the scope of 'public affairs'.

² United Nations Human Rights Office of the High Commissioner, *International Covenant on Civil and Political Rights* <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>>.

Further to this, sections 6 to 8 of the Act require the Auditor-General to conduct a review of public information in response to a written request from a Member of the Legislative Assembly. The Auditor-General may also initiate a review in the absence of such a written request. Procedural fairness (and hence, the ability to take part in the conduct of public affairs) is afforded to the relevant public authority who is provided with written notice of the reasons held in the review prior to the report being finalised, with the opportunity to provide comments to the Auditor-General (section 8(2)(b)).

CONCLUSION

As outlined, this Bill is compatible with human rights as it does not directly engage with any of the applicable rights or freedoms. In areas where the Bill raises issues related to human rights, the Bill is supportive of the overall realisation of those rights and freedoms and related common law principles, including procedural fairness.