



Northern Territory Auditor-General's Office

Auditing for Parliament

Submission to Social Policy Scrutiny Committee Public Information Act Amendment Bill 2018.docx

Secretary
Social Policy Scrutiny Committee
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Ms Ngaree Ah Kit MLA
Chair, Social Policy Scrutiny Committee

24 January 2019

Dear Madam Chair

Social Policy Scrutiny Committee Inquiry into the Public Information Legislation Amendment Bill 2018

Thank you for the opportunity to provide a submission to inform the Committee's inquiry into the Public Information Legislation Amendment Bill 2018. I note the Committee is to report to the Legislative Assembly on:

- a) whether the Assembly should pass the Bill;
- b) whether the Assembly should amend the Bill;
- c) whether the Bill has sufficient regard to the rights and liberties of individuals (including, under Part (4)(c)(iii)(K) of the Committee's Terms of Reference, whether the Bill is unambiguous and drafted in a sufficiently clear and precise way); and
- d) whether the Bill has sufficient regard to the institution of Parliament.

My submission addresses Part (4)(c)(iii)(K) of the Committee's Terms of Reference. In my opinion, the Public Information Legislation Amendment Bill 2018 proposes several amendments to the Public Information Act and Public Information Regulations that present ambiguity when interpreting the proposed legislation and the subordinate legislation.

The Public Information Legislation Amendment Bill 2018 proposes the inclusion of part 6(2)(f) "*the information fails to specify the source, or a means for identifying a source, of any facts (including comparisons), statistics or data*" including "*Note for subsection (2)(f) 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*". This clause and its accompanying note are likely to continue to cause ambiguity and differing interpretation by users of the legislation. The lack of specificity of a web address may also impair a reader's ability to verify the content of the public information. Furthermore, simply because content is published on a website does not, as a matter of course, make that content a 'fact'.

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. If communicating the “new, existing or proposed government programs, policies or projects” does not have a purpose that is to:

- (a) maximise compliance with the laws of the Territory;
- (b) achieve awareness of a new or amended law;
- (c) improve public safety or personal security;
- (d) encourage responsible behaviour;
- (e) preserve order in the event of an emergency;
- (f) promote awareness of rights, responsibilities, duties or entitlements;
- (g) encourages usage of, or familiarity with, government products or services;
- (h) report on performance in relation to government undertakings;
- (i) communicate functions of government; or
- (j) communicate on matters of social cohesion, civic pride, community spirit or tolerance,

then it may be difficult to comprehend what reason/s would remain for the public information to be in the public interest. 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. As a consequence, this requirement, in addition to causing ambiguity in relation to interpretation, introduces a risk of politicising the role of the Auditor-General.

It would be appropriate for the newly introduced definitions of “*advertising*” and “*relevant minister*” to be included within Part 3 Definitions of the legislation rather than being embedded within Part 6 of the legislation. For clarification, and noting a question from a Committee Member during the public hearing on 3 December 2018, I would not consider an assistant minister to be considered a “*relevant minister*” for the purposes of the legislation, however I would consider an Acting Minister to be a “*relevant minister*” for the purposes of the Act. If this interpretation is inconsistent with those drafting the Public Information Legislation Amendment Bill 2018, then it would be appropriate to clearly state within the legislation what the Public Information Legislation Amendment Bill 2018 intends in this regard.

The representatives of the Department of the Chief Minister advised at the public hearing held on 3 December 2018 that the amendments include contemporising the legislation to include social and digital communication channels however it is unclear how the Public Information Legislation Amendment Bill 2018 addresses contemporary issues arising from the release of public information on social media such as Facebook or Instagram or on fence bunting and hoarding. Whilst the use of fence bunting and hoarding to communicate public information clearly has an associated financial cost, communicating via social media may not involve a direct cash payment. Such communication may however involve the use of government property and resources paid for by the government such as computers, smart phones and costs attributable to public sector employees involved in the communication of public information.

As communicated to the Committee at the public hearing on 3 December 2018, representatives of the Department of the Chief Minister made a conscious decision to not consult with my Office when drafting the Bill, notwithstanding the requirements of sections 3.2.2 and 3.2.3 of the Department's Legislation Handbook, May 2018, Version 3, which state:

- 3.2.2 *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.*
- 3.2.3 *Cabinet Submissions are generally not circulated to ISOs for comment, but Agencies should discuss legislative proposals with these Officers as appropriate and incorporate the views of those Officers in the Cabinet Submission.*

Whilst I recognise it is not the role of the Auditor-General to establish policy, 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.

The Explanatory Statement accompanying the Public Information Bill when it was introduced on 16 February 2010, discussed the intent of the legislation, that being to prevent public authorities from using money or other property of the Territory to produce public information that promotes party political interests.

Amendments to the legislation since 2010 have progressively broadened the application of the legislation and resulted in findings that, whilst correct from a strict interpretation of the legislation, are likely to have gone beyond the intent of the original legislation. Many findings relating to contraventions of the legislation have occurred 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.

Had there been an opportunity for me to contribute to the drafting of the Public Information Legislation Amendment Bill 2018, I would have suggested the amendments consider the initial intent of the legislation. This intent could be captured by narrowing the application of the Act to "*prohibit the use of money or other property or resources of the Territory to provide public information that:*

- (a) promotes particular party political interests;*
- (b) includes statements that are misleading;*
- (c) is an advertisement that includes an image of a minister or a minister's message;*
- (d) is not an advertisement and includes an image of a minister or a minister's message other than:
 - (i) the Chief Minister; or*
 - (ii) the relevant minister;**
- (e) includes facts (including comparisons), statistics or data that are not presented accurately."*

Should the Social Policy Scrutiny Committee require further information or explanation in relation to this submission, I can be contacted on (08) 8999 7004.

Yours sincerely,



Julie Crisp
Auditor-General for the Northern Territory