SOCIAL POLICY SCRUTINY COMMITTEE

Public Hearing – 20 February 2019

Public Information Legislation Amendment Bill 2018

DEPARTMENT OF THE CHIEF MINISTER'S RESPONSE TO WRITTEN QUESTIONS FROM THE COMMITTEE

1. **The Committee understands that 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. The Auditor-General raised concern that proposed sub section 6(2)(f) and accompanying note are likely to cause ambiguity and differing interpretation by users of the legislation.**

   a. ***Can you clarify for the Committee why the Bill does not require that the source of the information is specifically referenced within the public information?***

   b. ***How would it impact on the operation of the legislation if the Bill was amended to require that the source of the information is referenced within the public information?***

   c. ***How would it impact on the operation of the legislation if proposed* sub section 6(2)(f) was removed from the Bill?**

1. The proposed amendments consolidate obligations that are currently spread across the *Public Information Act* (the Act) and Public Information Regulations (the Regulations) to ensure all obligations are contained in a single section of the Act, effectively strengthening the obligations.

2. Under proposed subsection 6(2)(f), it will be a contravention of the Act if:

   information fails to specify the source, or a means for identifying the source, or a means for identifying a source, of any facts (including comparisons), statistics or data.

3. 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.

4. The proposed subsection is based on existing Regulation 4(c) which requires public authorities to ensure:

   the source of all data is indicated or a means for identifying the data source is provided.

5. The note for subsection 6(2)(f) has been included to provide guidance for public authorities as to the "means for identifying" requirement. The note specifies that the requirement to source data or a means for identifying the data can be met by referencing a website or a contact person to provide the data source.

6. This clarification has been provided as it is not practical or desirable to source all data in all publications and a requirement to do so would be an additional obligation not previously contemplated in the Act or Regulations. For example:

    a. Due to size restrictions in online and digital placements, it is not possible for all source data to be listed. In such cases, a reference to a website that lists all relevant source data is required.

    b. It would also be impractical to reference sources in short burst communication, such as radio advertising, as these formats do not have the same ability to include references as written/visual communications do.

    c. Visual communications, such as a TV advertisement, require a targeted message with a call to action to engage with an audience. To meet the current requirements of the legislation, communication using these mediums are developed with a short and unambiguous reference to a website, original source of information or point to additional sources information. Referencing all sources of information in a TV advertisement, for example, would create a cluttered and / or longer visual presentation.

7. Requiring public authorities to reference the source of all information within the public information is also likely to incur additional publication costs, for example, printing and newspaper and radio advertising costs, which increase with additional content. It would also interfere with readability and risk diminishing the effectiveness of the communication where referencing could distract the reader from the desired concise and clear message.

8. 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 public information be the subject of a review.

9. There is no practical difference in the outcome achieved whether there is an obligation to "source" the information directly in the communication material or to be able to identify the source.

10. As outlined in the Second Reading Speech, to support the implementation of, and compliance with, the amended legislation, the Department of the Chief Minister will develop guidelines and training material that will inform public authorities when preparing public information.

11. Removing proposed subsection 6(2)(f) in its entirety would have the effect of weakening the legislation and reducing transparency and integrity as there would no longer be a requirement for public authorities to source, or provide a means for identifying the source, of information.

2. The Auditor-General noted that, since the legislation was introduced in 2010, amendments have progressively broadened its application resulting in findings that, whilst correct from a strict interpretation of the legislation, are likely to have gone beyond the original intent of the legislation.

To clarify the purpose, interpretation and administration of the legislation, the Auditor-General suggested that the Bill consider the initial intent of the legislation which 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 is one or more of the types of information listed in proposed section 6(2).

a. In developing the Bill, what consideration was given to the initial intent of the legislation, namely to prevent public authorities from using money or other property of the Territory to produce public information that promotes party political interests?

b. Would the approach proposed by the Auditor-General achieve the objects of the Bill? If not, why?

c. Can you identify any potential issues with the approach proposed by the Auditor-General?

12. The core driver of the proposed amendments is to return focus to the original intent of the legislation by focusing on simplicity and bringing all operative provisions into a single section. In developing the proposed amendments, consideration was given to the original Act and Second Reading Speech, which addressed the intent of the Government of the day when it introduced the legislation in 2010. The proposed amendments are designed to provide clarification, reduce confusion and contemporise the Act.

13. The Bill amends the Act and Regulations by strengthening existing provisions so that the interpretation and application of the provisions is in alignment with the policy objective of preventing the use of public money or other resources to prepare and publish information that promotes party political interests.

14. The proposed amendments are consistent with and maintain that policy objective. The amendments to section 6(2) establish the basis for determining whether information can be published by a public authority and reinforce that it is a contravention of the Act to publish information that promotes particular party political interests.

15. The drafting approach, which was settled through the Office of the Parliamentary Counsel, is in accordance with drafting conventions and meets the policy objective.

16. Under the proposed amendments, it will be a contravention of the Act to provide public information that is one or more of the types of information as listed in proposed section 6(2). The Act, once amended as proposed, has the effect of prohibiting the use of money or other property or resources of the Territory to provide information to the public which is not in the public interest.

17. Section 6(2) establishes the mechanism for determining whether specific public information is prohibited, that is, whether it contravenes the Act. The Department of the Chief Minister has considered and acknowledges the approach proposed by the Auditor-General.

18. A similar phrase to "prohibit the use of money or other property or resources of the Territory" as proposed by the Auditor-General, is already incorporated in the Act in the existing threshold test for "public information" as defined in section 4 of the Act. Existing and proposed section 6 of the Act then provides for a process to review and assess whether the public information contravenes the prohibited matters, which is not a feature of the Auditor-General's proposed approach.

19. Section 6 also sets out the process for requesting and reviewing particular instances of public information.

20. The requirements are further strengthened by:

    a. consolidating obligations that are currently spread across the Act and Regulations in a single section of the Act;

    b. strengthening 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. inserting 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; and

    d. expanding 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.

3. **At the public briefing, the Department advised the Committee that the proposed amendments seek to contemporise the legislation to include social and digital communication channels.**

   a. ***Can you clarify for the Committee how the Bill addresses the potential for government property and resources, for example computers, smart phones and costs attributable to public sector employees, to be used in the communication of public information on social media platforms such as Facebook and Instagram?***

21. Government property and resources are used to prepare and publish information, whether via social and digital communication channels, including websites and social media placements and boosts, or more traditional mediums, such as newspaper advertisements.

22. Social and digital communications include channels such as Facebook, Instagram and LinkedIn channels, which are used for both paid and unpaid placements, and YouTube and Twitter, which are used for unpaid placements only. In addition, there are a range of contemporary digital applications, such as search engine optimisation, which are used for 'target specific advertising'. Government resources, including computers, laptops and smart phones, are used to produce and place both paid and unpaid social and digital placements.

23. Proposed section 6(2), outlines the circumstances under which the Auditor-General may determine whether information has contravened the Act. These circumstances extend to providing information via social and digital communication channels and apply irrespective of whether costs are incurred in their publication.

4. **The Auditor-General expressed the view that it would be more appropriate for the new definitions of 'advertising' and 'relevant minister' to be included in section 3 along with the pre-existing definitions in the Act rather than embedded in section 6 of the proposed legislation.**

    a. ***Can you explain why these definitions are not included in section 3 in a manner similar to the pre-existing definitions of 'Assembly member' and 'working day'?***

    b. ***How would it impact on the operation of the legislation if the new definitions were included in section 3 rather than the proposed section 6(7)?***

25. The Office of the Parliamentary Counsel has advised that the definitions of 'advertisement' and 'relevant minister' have been included in section 6 in the Bill in accordance with Australian drafting conventions.

26. 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.

27. Based on the above, 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 represent a departure from Australian drafting conventions and create inconsistencies within the Northern Territory statute book.

5. **Proposed Regulation 3(h) 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. Noting that broadening the Regulations with the introduction of this paragraph introduces a new level of complexity, the Auditor-General expressed the view that in addition to causing ambiguity in relation to interpretation, it introduces a risk of politicising the role of the Auditor-General.**

    a. ***If communicating information that informs the public of new, existing or proposed government programs, policies or projects does not have a purpose that meets those already presented in the existing Regulations, can you clarify for the Committee what reason/s would remain for the public information to be in the public interest?***

    b. ***How would it impact on the operation of the legislation if paragraph 3(h) was removed from the Regulations?***

28. 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.

29. Regulation 3 contains an extensive list including the use of the 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.

30. As an additional criterion, as opposed to a new regulation, the proposed amendment is designed to be assessed by the Auditor-General in the same manner as all other criteria for public information outlined in the proposed Regulation.

31. Removing proposed Regulation 3(h) would have the impact of not addressing the gap outlined above and prohibit public information that is not expressly captured by one of the remaining criteria. This would not address the ambiguity created by the current Regulations.

32. The requirement for public information to be "in the public interest" applies to all public information, the criteria for which is outlined in proposed Regulation 3. If the public information has a purpose that includes one of the criteria outlined in (a) to (k) of proposed Regulation 3, the Auditor-General may consider the information to be "in the public interest".

33. 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".

34. This approach is also applied in other jurisdictions. The "public interest" test found in Regulation 3(h) is similar to the approach found in Victoria's *Public Administration (Public Sector Communication) Act 2017*. 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 interest purpose includes informing the public of new, existing or proposed public sector policies or projects or Victorian legislation. This approach was considered in the preparation of the Northern Territory's Public Information Legislation Amendment Bill 2018.