

OFFICIAL

**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY



**Office of the Legislative Assembly**

Mrs Elizabeth Kikkert MLA  
Chair  
Standing Committee on Public Accounts  
Legislative Assembly for the ACT  
London Circuit  
CANBERRA ACT 2600

cc Mr Samuel Thompson  
Secretary

Dear Mrs Kikkert

Please find attached the response to question taken on notice No 1, taken on notice by the Office of the Legislative Assembly during its appearance before the Standing Committee on Public Accounts on 18 February 2022 in relation to the Financial Management Amendment Bill 2021 (No 2).

I would like to take this opportunity to thank the committee for taking the time to hear the Office's evidence and to provide some additional observations in light of the evidence given by the minister and officials at the hearing.

### **Power to direct the Clerk / Office**

1. Government witnesses gave evidence to the effect that the proposed amendments would not operate in such a way as to affect the independent exercise of the Office's or the Clerk's statutory functions.
2. Their evidence was that the Office would only be required to apply the evaluation framework prior to the Clerk making a decision about the procurement of goods or services and that the final decision-making power would rest with the Clerk.

3. However, what was not explored or explained in evidence was why, in addition to the power to make a notifiable instrument about an insourcing evaluation framework with which the Clerk must comply, the Bill gives the Chief Minister the power (under proposed new section 129A) to **give a direction to a public sector entity (including the Office) in relation to:**
  - (a) *the entity's obligations under section 129* [that is, under the requirements that are imposed by the insourcing evaluation]; *and*
  - (b) **any other matter for this part.**
4. No case has been made as to why such provisions are required if there is no intention to interfere with the performance, by the Clerk, of the Clerk's functions (bearing in mind that the Clerk's functions are not limited to those matters listed at s 6 of the *Legislative Assembly (Office of the Legislative Assembly) Act 2012* (OLA Act) but also include the Clerk's general management powers and functions (which necessarily include the management of staff and the procurement of goods and services), pursuant to s 10 of the OLA Act and relevant provisions of the *Public Sector Management Act 1996*).
5. The Government has not explained the circumstances in which it considers that it would be necessary for the Chief Minister to direct the Clerk in these matters. Nor has the Government explained how, in the event that such a direction were to be given, a direction would **not** come in conflict with s 8 of the OLA Act.
6. Section 8 of the OLA Act states, in the most unambiguous terms, that:
 

*The clerk and the office's staff **are not subject to direction by the Executive or any Minister** in the exercise of their functions.*
7. As a simple matter of logic, proposed new section 129A of the Bill giving the Chief Minister the power to direct the Office in respect of its obligations and other matters is plainly at odds with section 8—either a direction to the Clerk is, as a matter of law, permissible, or it is not.
8. Presently, it is not permissible.
9. My initial submission outlines, on the basis of democratic principle, why it ought not be permissible and why the Assembly has previously legislated, unanimously, for such an approach.
10. If this Bill is to be adopted, it is not clear how the two provisions could operate harmoniously and the Government has not addressed—either in evidence or its submission—how the provisions might be reconciled.

### **Confusion about 'conflict of laws'**

11. Government witnesses gave evidence to the effect that the Solicitor General had advised that no 'conflict of laws' issues arise under the Bill. The Government appears to have used this as a basis for suggesting that the Bill is harmonious with other ACT statutes relating to the Office and Officers of the Assembly.
12. The reference to 'conflict of laws' is also mentioned in the Government's written submission with respect to the inclusion of proposed new section 129(2) in the Bill:

*The Bill does not **conflict with any existing laws**, including laws that provide for the exercise of statutory functions by the Officers of the Assembly, the Auditor-General, the Integrity Commissioner and the Electoral Commissioner or the Office of the Legislative Assembly. **In particular**, the inclusion of clause 4, **specifically proposed subsection 129(2)** provides that an evaluation for services or works does not apply to services or works provided by the Commonwealth or a State, or an entity of the Commonwealth or a State, further safeguarding against concerns in relation to **Conflict of Laws**.*

13. In making these submissions, it seems that the Government has conflated two entirely different legal concepts.
14. 'Conflict of laws' is an area of private law which, broadly speaking, relates to the circumstances in which the law of one jurisdiction may come to have application in another jurisdiction (for example, where the facts of a court case straddle different jurisdictions).
15. It has nothing to do with whether or not different statutory provisions in the same jurisdiction are regarded as coming into conflict with one another (which is a question of statutory interpretation).
16. It seems clear enough that drafters have included proposed new s 129(2)<sup>1</sup> so as to make clear that no extraterritorial application of the bill's provisions is intended, thereby putting to bed the prospect of any 'conflict of laws'. It is important to note that s 129(2) (and the Government's assurances that no 'conflicts of laws' issues are enlivened) is simply not relevant to the question of whether or not the Bill's provisions will come into conflict with provisions of other **ACT statutes such as s 8 of the OLA Act**.
17. Against this background, the committee may wish to consider recommending that the Bill be amended in order that:
  - a. references to the Office of the Legislative Assembly, the Clerk, and Officers of the Assembly are removed at proposed new ss 126(1) and 127(2);
  - b. the Office of the Legislative Assembly and Officers of the Legislative Assembly included at the the listing at section 126(2) so that they are explicitly not public sector entities for the purposes of the Bill; and
  - c. a new section is inserted to the effect that the Office of the Legislative Assembly and Officers of the Assembly may consider any insourcing framework made pursuant to section 128 of the Bill in making insourcing and outsourcing decisions but that no obligations arise under the Bill for these officers and no directions may be given.

Yours sincerely



Tom Duncan  
Clerk of the Legislative Assembly

21 February 2022

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<sup>1</sup> The proposed subsection states: '... this section does not apply to services or works provided by the Commonwealth or a State, or an entity of the Commonwealth or a State'. For more information on 'conflict of laws', see