



Speaker

Mr Peter Cain MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
Legislative Assembly for the ACT
Canberra City ACT 2601

Scrutiny Report 18—Integrity Commission Amendment Bill 2022

Dear Mr Cain,

Please see attached my response to the committee's *Scrutiny Report 18* in relation to the Integrity Commission Amendment Bill 2022.

I wish to thank the committee for its judicious consideration of the relevant matters, and I trust that the attached responses address the matters raised in its report.

Yours sincerely,



Joy Burch MLA
Speaker

~~October~~ 2022

27/9/2022

Integrity Commission Amendment Bill 2022—Response to Scrutiny Report 18

Assembly information

1. In its report, the committee raised a concern that the bill may result in a situation where an individual is required to ‘... deal with Assembly information in a particular way in circumstances where they are not aware it is Assembly information’.
2. By way of example, the committee noted that ‘... a head of a public sector entity... may be asked to disclose information to the Commission which, in substance if not form, has also been disclosed to an Assembly committee during an inquiry into an unrelated matter. The bill would restrict the Commission from asking for that information’.
3. The scenario contemplated by the committee is an unintended consequence of the necessarily broad ambit of the term ‘Assembly information’ and, to address the committee’s concerns, I propose to introduce an amendment to further circumscribe the kinds of information that fall within its meaning (see paragraphs 7-8 below).
4. The chief mischief that the bill attempts to address is that, under the existing provisions of the Act and, due to the particular data storage arrangements within the Territory’s administration (i.e. data belonging to the Assembly and members is stored on servers under the control of the ACT Public Service), there is a real prospect of information belonging to the Assembly and its members being disclosed to the Commission otherwise than in accordance with s 177 of the Act or the standing orders and resolutions of the Assembly.¹
5. The Assembly’s contempt power may be enlivened in such a circumstance. For example, where:
 - (a) a member is not given the opportunity to make a claim relating to parliamentary privilege in accordance with applicable orders or resolutions of the Assembly (see continuing resolution 4A); or
 - (b) the Assembly determines that disclosure of certain information to the Commission amounts to an improper interference in the proceedings of the Assembly or one of its committees, or an improper interference in a member’s free performance of their duties as a member.

¹ The existing law is clear enough on the ‘use immunity’ that arises under the rubric of parliamentary privilege. Through s 24 of the *Australian Capital Territory (Self-Government Act) 1988* (Cth), the Assembly, its committees and its members are already covered by s 16 of the *Parliamentary Privileges Act 1987* (Cth), which affirms and amplifies the scope and operation of parliamentary privilege, and the prohibition on impeaching or questioning ‘proceedings in Parliament’. The bill does not seek to add to or derogate from the law of parliamentary privilege.

6. The term 'Assembly information' needs to be drawn in such a way as to be readily understood and applied by those responding to/faced with the exercise of a power by the Commission (e.g. heads of public sector entities or their delegates). It also needs to avoid any impression of affecting the law of parliamentary privilege itself (i.e. 'Assembly information' is to be a distinct class of information—i.e. information of a kind over which claims of parliamentary privilege might reasonably be made but that is not drawn in precisely the same terms).
7. Against this background, and noting the committee's concerns outlined at paragraph 1 above, the following two amendments are directed towards narrowing the ambit of the term 'Assembly information'.

1

Clause 6

Proposed new section 85A Page 3, line 6—

omit

created for or by, or received by—

substitute

created for and received by, or created by—

2

Clause 6

Proposed new section 85A Page 3, line 12—

omit

created for or by, or received by

substitute

created for and received by, or created by

8. It is anticipated that this narrower definition of 'Assembly information' would address the matters raised by the committee while at the same time providing a sufficiently broad definition to have ready and practical application.

Section 89(4) immunity

9. The committee queried whether the immunity provided for at s 89(4) of the Act would apply in the event that an individual disclosed information to the Commission otherwise than in accordance than proposed provisions for handing Assembly information under the bill.

10. There is no specific immunity from the operation of the Assembly's contempt power provided for under the existing provisions of the Act, nor the proposed amendments arising under the bill.² Indeed, s 7 of the Act provides that the Act does not affect privileges of the Assembly (with the exception of 178, which expressly waives privilege in relation to declarations of members' interests).
11. The Assembly's contempt power is, however, limited by s 24 of the Self Government Act in that it cannot fine or imprison a person.

Restricting the ability of the Commission to issue confidentiality notices

12. The committee noted that the proposed amendments restricting the Commission's ability to prohibit certain kinds of permitted disclosure do not extend to other amendments relating to disclosure of Assembly information, including:
 - (a) the requirement for the Speaker to pass on a request for Assembly information to a current or former member; and
 - (b) dealing with a request for Assembly information under the proposed s 89.
13. The committee sought further information on the different approach.
14. It is considered that the two matters raised above fall within the meaning of permitted disclosure as provided for at clause 5, which inserts at s 81 a new paragraph (ea) to the effect that a permitted disclosure means a disclosure of restricted information that is 'reasonably necessary for a claim of parliamentary privilege to be made or dealt with by the Legislative Assembly'.
15. While the effect of clause 5 would be limited to part 3.2 of the Act (i.e. 'Commission—confidentiality notices'), that part is exhaustive of provisions relating to confidentiality notices, restricted information and prohibited disclosures. The proposed amendment is intended to cover the circumstances noted at paragraph 12(a)-(b) above and any other circumstances where provisions relating to confidentiality notices, restricted information and prohibited disclosures may be enlivened.

Rights issues

16. The committee identified the potential for proposed amendments in the bill to enliven rights issues under the *Human Rights Act 2004*.
17. In particular, the committee observes that the disapplication of s 80(2) in respect of information that is reasonably necessary for a claim of parliamentary privilege to be made or dealt with by the Legislative Assembly may limit procedural fairness and fair trial rights under s 21 of the Human Rights Act.

² Express provision is required to abrogate the Assembly's privileges, including the operation of the Assembly's contempt power.

18. The proposed provisions at clauses 4 and 5, the subject of the committee's concerns, do nothing more than reflect the existing general law in that it is not currently within the power of the Integrity Commission—nor any other body—to prevent the disclosure of information in a way that would interfere with the making of, or dealing with, a claim of parliamentary privilege.
19. These matters fall within the jurisdiction of the Assembly to determine, and that jurisdiction remains undiminished by the Integrity Commission Act (indeed additional fortification of that jurisdiction is provided for at s 177 of the Act).
20. Clauses 4 and 5 merely ensure that there is no *appearance* of any statutory footing by which the Commission could *purport* to prevent the disclosure of information in such a way as to prevent a member making a claim in relation to parliamentary privilege or the Assembly dealing with such claims.
21. There is no requirement for either the Commission or any other person to disclose information that would imperil procedural fairness or fair trial rights, only that relevant provisions may not be used in such a way as to interfere with the exercise of rights by members and the exercise of jurisdiction by the Assembly.
22. While there is little doubt that the law of parliamentary privilege would protect the Assembly in exercising its jurisdiction or the Speaker or others in sharing information in accordance with relevant orders and resolutions of the Assembly (e.g. continuing 4A), ensuring that relevant statutory provisions are clear on this point are necessary to guard against inadvertent contempts against the Assembly.
23. It is the least restrictive means by which to ensure that members, the Speaker and others involved in dealing with claims have a sufficient state of knowledge by which to fulfill obligations under s 177 of the Act and applicable standing orders and resolutions of the Assembly.