



**Legislative Assembly for the
Australian Capital Territory**
Standing Committee on Public Accounts

Inquiry into the Financial Management Amendment Bill 2021 (No 2)

Legislative Assembly for the Australian Capital Territory
Standing Committee on Public Accounts

Approved for publication

Report 6

10th Assembly
February 2022

About the committee

Establishing resolution

The Assembly established the Standing Committee on Public Accounts on 2 December 2020.

The Committee is responsible for the following areas:

- ACT Auditor-General
- ACT Ombudsman
- Office of the Legislative Assembly
- Accounts of the receipts and expenditure of the ACT and its authorities
- All reports of the Auditor-General which have been presented to the Assembly
- Treasury including taxation and revenue.

You can read the full establishing resolution [on our website](#).

Committee members

Mrs Elizabeth Kikkert MLA, Chair

Mr Michael Pettersson MLA, Deputy Chair

Mr Andrew Braddock MLA

Secretariat

Mr Samuel Thompson, Committee Secretary

Ms Lydia Chung, Administrative Assistant

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About this inquiry

The Financial Management Amendment Bill 2021 (No 2) was presented in the Assembly on 1 December 2021. It was then referred to the Standing Committee on Public Accounts as required by clause 5 of the establishing resolution. This clause allows committees to inquire into and report on bills within two months except for those bills introduced in the last sitting week of the calendar year, such as this one, where the committee shall report in three months of their presentation.

The Committee decided to inquire into the bill on 8 December 2021.

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Acronyms

Acronym/ Abbreviation	Long form
ACT	Australian Capital Territory
AM	Member of the Order of Australia
CMTEDD	Chief Minister, Treasury and Economic Development Directorate
CSC	Conspicuous Service Cross
EGM	Executive Group Manager
Hon	Honourable
MLA	Member of the Legislative Assembly
QC	Queen's Counsel
WCAG	Workforce Capability and Governance

Recommendations

Recommendation 1

The Committee recommends that the bill clause 4, proposed sections 128 and 129A, be amended so as to omit 'notifiable instrument' and substitute 'disallowable instrument'.

Recommendation 2

The Committee recommends that the bill be amended so as to state in the *Financial Management Act 1996* that the Office of the Legislative Assembly and Officers of the Legislative Assembly may consider the framework and not be subject to any executive directions in making a decision to which proposed part 9A would apply.

Recommendation 3

The Committee recommends that the ACT Government provide a copy of the draft framework to the Committee as soon as possible.

Recommendation 4

The Committee recommends that the ACT Government meaningfully consult with Officers of the Legislative Assembly and the Office of the Legislative Assembly on the draft framework if it is to apply to them in any way.

Recommendation 5

The Committee recommends that the ACT Government make the two discussion papers on the framework mentioned in its submission publicly available before the bill is debated.

Recommendation 6

The Committee recommends that outsourcing be minimised by the ACT Government.

1. Conduct of the inquiry

Referral and decision to inquire

- 1.1. The Financial Management Amendment Bill 2021 (No 2) was presented to the Legislative Assembly on 1 December 2021 by the Minister for Industrial Relational and Workplace Safety Mr Mick Gentlemen MLA.
- 1.2. In accordance with the resolution of establishment of the Standing Committee on Public Accounts (the Committee), the bill was referred to the Committee for examination.
- 1.3. On 8 December 2021 the Committee resolved to undertake an inquiry into the bill.
- 1.4. On 9 December 2021 the Committee's Chair wrote to the Speaker, informing Madam Speaker of the Committee's decision to inquire into the bill.

Conduct of inquiry

- 1.5. On 8 December 2022 the Committee resolved to write to the Office of the Legislative Assembly, the independent Officers of the Legislative Assembly, the Community and Public Sector Union, and the relevant Minister to call for submission to its inquiry into the bill.
- 1.6. On 2 February 2022 the Committee met to consider the six submission it received and resolved to conduct a public hearing to take evidence from the submitters.
- 1.7. On 18 February 2022 the Committee heard evidence from the Office of the Legislative Assembly, the ACT Ombudsman, the ACT Integrity Commission, the ACT Auditor-General, the ACT Electoral Commission, and the Minister for Industrial Relations and Workplace Safety.
- 1.8. On 22 February 2022 the Committee met to consider the Chair's draft report on its inquiry.
- 1.9. On 24 February 2022 the Committee adopted the Report on its inquiry for presentation to the Legislative Assembly.

2. Bill background and contents

- 2.1. This chapter provides a brief summary and explanation of the bill's provisions along with highlighting Legislative scrutiny of the bill.

Substantive clauses of the bill

Clause 1 (Name of Act)

- 2.2. Clause 1 of the bill provides that the name of the bill, if enacted, be the *Financial Management Amendment Act 2021 (No 2)*. Given the bill would, if passed, not in fact be enacted in 2021 the Committee notes this name would change.

Clause 2 (Commencement)

- 2.3. Clause 2 of the bill provides that the bill would, if enacted, commence by written notice on a date fixed by the Minister. Standard notes for commencements of this type have been included in the bill.

Clause 3 (Legislation amended)

- 2.4. Clause 3 provides that the bill amends the *Financial Management Act 1996*. There are no rider amendments in the bill.

Clauses containing proposed amendments

Clause 4 (New part 9A)

- 2.5. Clause 4 would, if enacted, insert a new part to the *Financial Management Act 1996*, proposed part 9A (Insourcing framework). The proposed part consists of 5 proposed sections as dealt with below.

Proposed section 126 (Meaning of Public Sector Entity—pt 9A)

- 2.6. Proposed subsection 126 (1) defines 'public sector entity' to mean a directorate, a body established under an Act, an officer of the Assembly, the Office of the Legislative Assembly, and allows that the Executive may prescribe further entities by regulation.
- 2.7. Proposed subsection 126 (2) explicitly excludes from the definition of 'public sector entity' territory-owned corporations and subsidiaries of a territory owned corporations, and allows that further exclusions be made by the Executive by regulation.

Proposed section 127 (Responsible chief executive officer to ensure compliance with this part)

- 2.8. Proposed subsection 127 (1) provides that the responsible chief executive officer for a public sector entity must ensure that the entity complies with the proposed part.

2.9. Proposed subsection 127 (2) defines the term ‘responsible chief executive officer’ as follows:

- for a directorate—the responsible director-general; and
- for a body established under an Act—the person responsible for 15 managing the affairs of the body; and
- for an officer of the Assembly—the officer; and
- for the Office of the Legislative Assembly—the clerk of the 18 Legislative Assembly; and
- for an entity prescribed by regulation—the person responsible 20 for managing the affairs of the entity.

Proposed section 128 (Insourcing framework)

- 2.10. Proposed subsection 128 (1) requires that the Chief Minister determine a framework, being the ‘insourcing framework’ a defined term for the section, for evaluation of whether services or works required by a ‘public sector entity’ (as defined in proposed section 126) should be provided by the public sector or an outsourced.
- 2.11. Proposed subsection 128 (2) enables the framework to set out how the likely cost of services or works should be calculated, if a regulation prescribes a threshold for the application of the insourcing frameworks under proposed section 129 (1) (b).
- 2.12. Proposed subsection 128 (3) would have the insourcing framework be determined by notifiable instrument. Notifiable instruments are defined in the *Legislation Act 2001* section 10. Notably, notifiable instruments, unlike disallowable instruments, are not presented to or subject to disallowance by motion in the Assembly.¹

Proposed section 129 (Insourcing evaluation for services or works)

- 2.13. Proposed subsection 128 (1) applies the section if a public sector entity requires services or works and allows that a regulation one day may prescribe a threshold amount after which the section would apply to the services or works.
- 2.14. Proposed subsection 129 (2) disapplies the section to services and works provided by another State government or the Commonwealth government.
- 2.15. Proposed subsection 129 (3) requires a public sector entity, as defined, to evaluate whether services or works should be provided by the public sector or outsourced in line with the insourcing framework.
- 2.16. Proposed subsection 129 (4) is a signpost definition of ‘insourcing framework’ directed at proposed subsection 128 (1).

¹ *Legislation Act 2001*, ch 7.

Proposed section 129A (Chief Minister may give directions)

- 2.17. Proposed subsection 129A (1) allows the Chief Minister to give a direction to a public sector entity, as defined, in relation to its obligations under proposed section 129 and other matters for proposed part 9A.
- 2.18. Proposed subsection 129A (2) would have directions be made by notifiable instrument.

Clause 5 (Dictionary, new definition of *public sector entity*)

- 2.19. Clause 5 would insert a new definition of 'public sector entity' for part 9A into the dictionary of the *Financial Management Act 1996* signposting to proposed section 126.

3. Legislative Scrutiny of the bill

- 3.1. The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) addressed the Financial Management Amendment Bill 2021 (No 2) in *Scrutiny Report 12*, tabled February 2022. This chapter seeks to highlight its key considerations.

Legislative Scrutiny Committee Comments

- 3.2. The primary question asked by the Scrutiny Committee with respect to the bill was about whether any of the provisions of the bill insufficiently subject the exercise of legislative power to parliamentary scrutiny.² In addressing this issue the Scrutiny Report focuses in on the use of a notifiable instrument in the making of the framework in proposed section 128. About this issue the Scrutiny report states:

The framework will be a notifiable instrument. ... There are no criteria set out in the Bill limiting the content or substantive effect of the framework or even considerations involved in its determination. The explanatory statement accompanying the Bill suggests the Bill is intended to give effect to policy commitments relating to preventing the outsourcing or privatisation of public sector jobs, and implementing a whole of government policy that government services will not be contracted out where they could be performed by public servants. However, these objectives are not referenced in the Bill, and there is no requirement in the Bill that the framework encourage greater use of public servants in the carrying out of services or works. The Committee also notes that the Financial Management Act provides for the Treasurer to make financial management guidelines for the Act which are disallowable instruments.³

- 3.3. The expressing concern over the use of a notifiable instrument for determining the framework and dealing with the government's explanation for this, the Scrutiny Report goes on to state:

The Committee is concerned that there is limited justification for why the framework should be determined by a notifiable rather than disallowable instrument. The explanatory statement accompanying the Bill states that the use of notifiable instruments will provide the required flexibility to update or modify the framework as required. However, it is not clear to the Committee why a disallowable instrument would not provide sufficient flexibility while ensuring scrutiny by this Committee and the Assembly.⁴

² Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report 12*, February 2022, p 4.

³ Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report 12*, February 2022, p 4.

⁴ Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report 12*, February 2022, p 4.

- 3.4. The second issue which is raised in the Scrutiny Report deals with potential inconsistencies between the proposed provisions in the bill and existing territory law, initially raised with Scrutiny Committee by the Clerk of the Legislative Assembly. The Scrutiny Report states as follows:

On 7 December 2021, the Committee received a letter from the Clerk of the Legislative Assembly raising objections to the application of the Bill to the Office of the Legislative Assembly. The letter references the potential inconsistency between the Bill and section 8 of the *Legislative Assembly (Office of the Legislative Assembly) Act 2012* which provides 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. The Committee also notes similar provisions relating to the independence of the Auditor-General, Integrity Commission and Electoral Commission. In the Committee's view, the potential of the Bill to act inconsistently with these provisions provides a further justification for the framework to be disallowable.⁵

- 3.5. The Scrutiny Report calls on the Minister for respond to its concerns over the bill prior to the bill being debated.⁶

⁵ Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report 12*, February 2022, pp 4–5.

⁶ Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report 12*, February 2022, p 5.

4. Key issues considered by Committee

Notifiable instrument mentions

- 4.1. Throughout the Committee's inquiry it received evidence recommending that the mentions of notifiable instruments contained in proposed sections 128 and 129A in proposed part 9A be replaced with mentions of disallowable instruments. One source explicitly recommending this change is the submission of the Office of the Legislative Assembly which address the matter in some detail, stating in part that:

In its current form, the Bill (through ss 128, 129A) is merely a statutory hook by which an as-yet-undeclared framework and associated compliance directions will be established across the entire ACT public sector through the unreviewable stroke of a pen.⁷

- 4.2. As noted, *Scrutiny Report 12* also addresses this issue, stating as follows:

The [Scrutiny] Committee is concerned that there is limited justification for why the framework should be determined by a notifiable rather than disallowable instrument⁸

- 4.3. The Committee is of the view that, considering the powers the bill would give the Executive, the determination in proposed section 128 and the direction in proposed section 129A should be subject to disallowance by the Assembly. The Committee is of the view that the basis for arguing that the determination or any directions issued under proposed part 9A be made as notifiable instruments is, in this case, insufficient.

Recommendation 1

The Committee recommends that the bill clause 4, proposed sections 128 and 129A, be amended so as to omit 'notifiable instrument' and substitute 'disallowable instrument'.

Application of framework and directions to Office and Officers of the Legislative Assembly

- 4.4. Throughout its inquiry the Committee received evidence detailing concerns held by independent statutory office holders, that the bill constituted or may constitute an encroachment of the part of the Executive, which undermined their office's independence in the exercise of its respective functions.

⁷ Office of the Legislative Assembly, *Submission 1*, pp 7–8.

⁸ Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report 12*, February 2022, p 4.

4.5. The submission by the Clerk of the Legislative Assembly states the following about the application of the framework to the Office:

In short, I consider that provisions in the Bill, which purport to subject the Office of the Legislative Assembly to the direction of the Chief Minister and to determinations made by the Chief Minister about the deployment of financial resources in support of its statutory functions, are inconsistent with long standing institutional norms and the separation of powers doctrine as well as being contrary to the letter and spirit of the Legislative Assembly (Office of the Legislative Assembly) Act 2012 (OLA Act).⁹

4.6. The ACT Ombudsman, a function currently performed by the Commonwealth Ombudsman, provides context to some of concerns as follows:

The Office recognises it has obligations under ACT legislation and follows ACT government processes... However, the insourcing requirement in this Bill presents a particular difficulty for the Office because of its dual roles in the ACT and Commonwealth.

The insourcing requirement would likely conflict with Commonwealth government procurement and resource management legislation and rules. For example, the Commonwealth Procurement Rules relating to open tenders require an open approach to market, but if we also need to comply with an insourcing framework, there may need to be restrictions on potential suppliers. Likewise, the capacity of the Chief Minister to direct the Office in how it fulfils insourcing requirements has the potential to result in conflicting responsibilities for the Office.¹⁰

4.7. The Integrity Commissioner highlights two key issues with the bills operation in respect the Commissions functions and recommends that a care out be made in the bill with respect to his office. The Commissioner states as follows:

In my view, two issues arise for the Commission.

The first is that the Bill would appear to encroach upon the Commission's independence in a broad sense. The Commission's independence from government is enshrined in section 22 of the *Integrity Commission Act 2018* ('Act'), which provides that the Commission 'has complete discretion in the exercise of [its] functions'. This discretion is limited in only two ways: by the remaining terms of the Act, and because it is 'subject to...other territory laws'.

...the second issue... concerns the ability of the Chief Minister, pursuant to clause 128(1) to 'determine a framework ... for evaluating whether services or works required by a public sector entity should be provided by the public sector or an external provider'.

⁹ Office of the Legislative Assembly, *Submission 1*, p 2.

¹⁰ ACT Ombudsman, *Submission 2*, p [1].

I submit that sufficient carve-outs be included in the Bill to ensure that it does not impinge upon the Commission's independent discretion in s 22 of the Act. This could be achieved, for example, by inserting an exception or proviso clause 128 to enable the Commissioner to determine whether the provision of the service in question should be provided by a public sector entity, by reference to his or her determination in the particular case of the risk of compromising the functions of the Commission.¹¹

4.8. The Auditor-General submitted to the committee that:

Paragraph 7(2)(b) of the *Auditor-General Act 1996* sets out that the Auditor-General is not subject to direction from anyone in relation to the way in which audits are to be carried out. This principle necessarily applies to the resourcing of audits, i.e. decision-making associated with obtaining external input or expertise for an audit.

... Insourcing services such as those above would compromise the independence of the ACT Audit Office and present conflicts of interest. Further, the ACT Audit Office has a transparent framework for when we need to outsource work, particularly audit work, where we retain the responsibility for the audit reports.

... Any framework that is contemplated by the legislation must not compromise the independence of the Auditor-General.¹²

4.9. The ACT Electoral Commission addresses concerns it has about inconsistencies which may arise between its statutory independence and the proposed framework. In its submission the ACT Electoral Commission states:

The Commission holds significant reservations about the Bill for the following reasons:

- The Insourcing Framework and the requirement to apply an evaluative tool to decision-making processes are yet to be defined and may unduly impact upon the exercise of our discretion in executing the Commission's functions.
- So far, the Commission has not been consulted on the Insourcing Framework and the evaluative tool. This situation may give rise to the potential for direct conflicts with the Commission's independence in arranging services or work central to delivery of elections.¹³

4.10. The ACT Government's submission to the Committee's inquiry offers an alternative point of view to the to the conclusions reached by the Officers and Office of the Legislative Assembly, stating:

¹¹ ACT Integrity Commissioner, *Submission 3*, pp 1–2.

¹² ACT Auditor-General, *Submission 4*, pp [1–2].

¹³ ACT Electoral Commission, *Submission 5*, p 1.

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.¹⁴

... The bill does not impact on the independent and impartial exercise of the statutory functions of Office of the Legislative Assembly and the Officers of the Assembly who are subject to the Financial Management Act, being the Auditor-General, the Integrity Commissioner and the Electoral Commissioner.¹⁵

Recommendation 2

The Committee recommends that the bill be amended so as to state in the *Financial Management Act 1996* that the Office of the Legislative Assembly and Officers of the Legislative Assembly may consider the framework and not be subject to any executive directions in making a decision to which proposed part 9A would apply.

Need for consultative action

- 4.11. The Committee is of the view that circulation of the draft framework for proposed section 128 is required before the bill can be meaningfully debated. Similarly, the Committee is of the view that consultation on the draft framework with the Office of the Legislative Assembly and Officers of the Legislative Assembly, as well as consideration of their respective views, is needed if the provisions of part proposed part 9A are to apply to them. It was of some concern to the Committee that, despite the proposal that the framework be applied to them, not one of the Officers of the Legislative Assembly nor the Office of the Legislative Assembly had been consulted on the proposal prior to the bill's tabling.

Recommendation 3

The Committee recommends that the ACT Government provide a copy of the draft framework to the Committee as soon as possible.

¹⁴ ACT Government, *Submission 6*, p 4.

¹⁵ ACT Government, *Submission 6*, p 5.

Recommendation 4

The Committee recommends that the ACT Government meaningfully consult with Officers of the Legislative Assembly and the Office of the Legislative Assembly on the draft framework if it is to apply to them in any way.

- 4.12. Furthermore, the Committee notes that the two discussion papers mentioned in the ACT Government's submission¹⁶ to the inquiry are not publicly available and were not made available to the Officers of the Legislative Assembly or Office of the Legislative Assembly.

Recommendation 5

The Committee recommends that the ACT Government make the two discussion papers on the framework mentioned in its submission publicly available before the bill is debated.

Minimisation of outsourcing

- 4.13. During the course of the Committee's inquiry it received evidence from the ACT Government in relation to the benefits to the broader ACT community which result from the insourcing of works and services by government. The Committee is of the view that outsourcing by government should be minimised in favour of supporting stable employment for people in the public sector.

Recommendation 6

The Committee recommends that outsourcing be minimised by the ACT Government.

¹⁶ ACT Government, *Submission 2*, p [2].

5. Conclusions

- 5.1. The Committee is of the view that its Inquiry into the Financial Management Amendment Bill 2021 (No 2) has identified several areas for improvement within the bill which it sees as needing to be addressed prior enactment.
- 5.2. The Committee's inquiry has highlighted concerns among key stakeholder over the bill, and has heard evidence of insufficient consultation by the ACT Government in development of the bill and its proposed framework.
- 5.3. This report has made six recommendations in relation to the Committee's inquiry.
- 5.4. The Committee would like to thank the Officers of the Legislative Assembly—including the ACT Ombudsman, the ACT Integrity Commissioner, the ACT Auditor-General, and the ACT Electoral Commissioner—and their staff for their efforts preparing submissions and for their appearances as part of this inquiry. The Committee would also like to thank the Office of the Legislative Assembly for its submission and appearance before the Committee, and for those who assisted in the provision of Hansard transcription, broadcasting, and secretarial services for the inquiry.

Mrs Elizabeth Kikkert MLA

Chair, Standing Committee on Public Accounts

25 February 2022

Appendix A: Submissions

No.	Submission by	Received	Published
1	Office of the Legislative Assembly for the ACT	21/12/2021	02/02/2022
2	ACT Ombudsman	25/01/2022	02/02/2022
3	ACT Integrity Commission	25/01/2022	02/02/2022
4	ACT Audit Office	25/01/2022	02/02/2022
5	ACT Electoral Commission	27/01/2022	02/02/2022
6	ACT Government	27/01/2022	02/02/2022

Appendix B: Witnesses

Friday 18 February 2022

Office of the Legislative Assembly for the ACT

- **Mr Tom Duncan**, Clerk of the Legislative Assembly
- **Mr David Skinner**, Senior Director, Office of the Clerk

ACT Ombudsman

- **Ms Penny McKay**, Acting Ombudsman
- **Ms Louise Macleod**, Acting Deputy Ombudsman

ACT Integrity Commission

- **The Hon Michael F Adams QC**, Integrity Commissioner
- **Mr John Hoitink**, Chief Executive Officer

ACT Audit Office

- **Mr Ajay Sharma**, Acting Auditor-General

ACT Electoral Commission

- **Mr Damian Cantwell AM CSC**, ACT Electoral Commissioner

ACT Government

- **Mr Mick Gentleman MLA**, Minister for Industrial Relations and Workplace Safety
- **Dr Damian West**, Deputy Director General, WCAG, CMTEDD
- **Mr Russell Noud**, EGM, Industrial Relations and Public Sector Employment, WCAG, CMTEDD
- **Ms Emma Matthews**, Senior Director, Secure Employment, Industrial Relations and Public Sector Employment, WCAG, CMTEDD

Appendix C: Questions on notice and questions on taken on notice

Questions taken on notice

No.	Date	Asked of	Subject	Response received
1	18/02/22	Clerk of the Legislative Assembly	List of functions outsourced	21/02/22
2	18/02/22	Minister Gentleman	Providing GSO Legal Advice to Committee	Pending
3	18/02/22	Minister Gentleman	Reasons for framework being notifiable instrument in bill	Pending

Questions on notice

No.	Date	Asked of	Subject	Response received
1	23/02/22	Clerk of the Legislative Assembly	Statement by Minister at hearing	24/02/22