



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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STANDING COMMITTEE ON PUBLIC ACCOUNTS

Mrs Elizabeth Kikkert MLA (Chair), Mr Michael Pettersson MLA (Deputy Chair),  
Mr Andrew Braddock MLA

## Submission Cover Sheet

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

**Submission Number: 01**

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**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY



**Office of the Legislative Assembly**


Mr Samuel Thompson  
Secretary  
Standing Committee on Public Accounts  
Legislative Assembly for the ACT  
London Circuit ACT 2602

**Financial Management Amendment Bill 2021 (No 2)**

Dear Mr ~~Thompson~~ <sup>Samuel</sup>,

In response to a request from the Chair of the Standing Committee on Public Accounts on 9 December 2021, please see attached my submission to the committee's inquiry into the Financial Management Amendment Bill 2021 (No 2).

Yours sincerely,

  
Tom Duncan  
Clerk

20 December 2021



# Submission on Financial Management Amendment Bill 2021 (No 2)—Clerk of the Legislative Assembly

1. Thank you for the opportunity to make a submission to the committee's inquiry into the Financial Management Amendment Bill 2021 (No 2).

## Overview

2. My short submission addresses itself to clause 4 of the Bill; in particular, the combined effects of:
  - proposed new section 126(1)(d), which seeks to provide that, for the part, a 'public sector entity' means the Office of the Legislative Assembly (the Office);
  - proposed new section 127(2)(d), which seeks to provide that, for the section, the 'responsible chief executive officer' is the Clerk of the Legislative Assembly who would be required to ensure that the entity (including the Office) complies with the part;
  - proposed new section 128, which seeks to provide that the Chief Minister must determine an 'insourcing framework' for evaluating whether services or works required by a public sector entity (including the Office) should be provided by the public sector or an external provider;
  - proposed new section 129, which seeks to provide that public sector entities (including the Office) must evaluate certain matters in accordance with the insourcing framework determined by the Chief Minister; and
  - proposed new section 129A, which seeks to provide that the Chief Minister may give a direction to a public sector entity (including the Office).
3. 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)*.
4. I also have concerns about the fact that the Office was not consulted in the drafting of the Bill and about the fact that the Bill seeks to utilise notifiable instruments, rather than disallowable instruments, as a means by which to put into place the relevant framework and associated directions.

## Consultation

5. The explanatory statement to the Bill states that:

*A number of ACT Government Directorates and independent agencies were consulted on the amendments in the Financial Management Amendment Bill 2021 (No 2).*

***The proposed amendments reflect comments and feedback received from these stakeholders.*** [emphasis added]

6. Notwithstanding that the Office has been included within the ambit of the Bill and is therefore a key stakeholder, the Office has not been consulted on the proposed amendments.
7. I note that Officers of the Legislative Assembly to which the Financial Management Act applies (i.e. the Auditor-General, the Electoral Commissioner, and the Integrity Commissioner) are also caught by provisions of the Bill and it may be of interest to the committee whether any of these independent officers were consulted prior to the presentation of the Bill.
8. It strikes me a highly unsatisfactory that a Bill of this kind, which has potentially far-reaching implications for the institutional integrity of the Office, was not communicated to the Office for comment or discussion prior to its presentation in the Assembly.

## Issues

### Separation of powers and statutory independence

9. I take no issue with the policy grounds that may be advanced by the government in establishing an insourcing framework for the regular public service.
10. However, for good reason, the Office of the Legislative Assembly is not a part of the regular public service.
11. It is an independent statutory agency that has been established with the sole purpose of supporting and advising the legislative branch of government in the Territory. It is not—and should not be—responsible or accountable to the government of the day, nor to any minister, for the performance of its statutory functions.
12. The structure of government in the Territory as set out in the *Australian Capital Territory (Self Government Act) 1988* (Cth)—the effective constitution of the ACT—recognises the separate and distinct functions performed by the Executive and Legislative branches of government. The separate and distinct roles that are set out for these branches under the Self-Government Act are not, of course, the result of passing fashions or public policy trends but rest on centuries of democratic theory and practice.
13. Perhaps most famously espoused by French political philosopher Charles de Montesquieu in *The Spirit of the Laws*, the separation of powers doctrine rests on the simple premise that the diffusion of power within a system of government is a critical means by which to avoid absolutism. In Montesquieu's words, '... power should be a check to power'.<sup>1</sup>

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<sup>1</sup> T. Evans (1777), *The Complete Works of M. de Montesquieu*, accessed from <https://oll.libertyfund.org/title/montesquieu-complete-works-vol-1-the-spirit-of-laws>. For a useful summary, see Graham Spindler, 'The Separation of Powers: Doctrine and Practice' in *Legal Date*, March 2000 accessed from <https://www.parliament.nsw.gov.au/about/Pages/Origins-of-the-Doctrine.aspx> on 14 December 2021.

14. Beyond the terms of the Self-Government Act, the Assembly has further recognised the importance of the doctrine and the need for an independent parliamentary support agency—one that owes no particular obligation of attentiveness to the policy demands of the government of the day—through its endorsement on 11 December 2008<sup>2</sup> of the *Commonwealth (Latimer House) Principles on the Three Branches of Government*.<sup>3</sup>
15. Agreed to on 19 June 1998, by Representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates’ and Judges’ Association, the Commonwealth Lawyers’ Association and the Commonwealth Legal Education Association meeting at Latimer House in the United Kingdom on Commonwealth countries (and endorsed by Commonwealth Heads of Government Meeting in 2003), the Latimer House Principles state that:
- Parliament should be serviced by a professional staff independent of the regular public service.*<sup>4</sup>
16. In order for the parliamentary service to be independent of the regular public service, it is a precondition that neither the government of the day, nor public servants whose responsibility is to serve the government of the day, in any way direct or influence how the parliamentary service sets about performing its work. In the Territory, the principle of administrative independence is reified by s 8 of the OLA Act, 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’.
17. This statutory provision is a powerful recognition, by the legislature, that parliamentary officials must be free to tend to the institution of parliament and to support and advise MLAs—as they consider and pass laws, hold the government to account and represent the interests of the ACT community—without interference by Executive government.<sup>5</sup>

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<sup>2</sup> Also amended and endorsed by the Assembly on 23 February 2012 and 30 March 2021.

<sup>3</sup> See [Assembly continuing resolution 8A](#)

<sup>4</sup> *Commonwealth (Latimer House) Principles on the Three Branches of Government*, p 22.

<sup>5</sup> It is worth noting that the Government’s State of the Service 2020-2021 annual report indicates that there are **21,777 (FTE) staff** within the ACT public sector spread across nine directorates. Each of these staff and directorates are responsible for delivering various government services and advising and supporting ministers and the ACT Executive. In contrast, for the period 2020-2021, the ACT’s parliamentary support agency—the Office of the Assembly—employed **55 (FTE) staff**. These 55 staff, headed by the Clerk, are responsible for providing impartial advice and support to the Legislative Assembly and committees and members of the Assembly, including by—

- providing advice on parliamentary practice and procedure and the functions of the Assembly and committees;
- reporting proceedings of the Assembly and meetings of committees;
- maintaining an official record of proceedings of the Assembly;
- providing library and information facilities and services for members;
- providing staff to enable the Assembly and committees to operate efficiently;
- providing business support functions, including administering the entitlements of members who are not part of the Executive;
- maintaining the Assembly precincts; and
- providing public education about the functions of the Assembly and committees.

18. The provision was a central and unifying feature of the Legislative Assembly (Office of the Legislative Assembly) Bill 2012 (OLA Bill), which was unanimously supported by MLAs from across the political spectrum. In introducing the OLA Bill, then Speaker Rattenbury stated:

*The separation of powers doctrine has a long history in the democratic form of government and in political philosophy, exercising the minds of the great political philosophers ranging from Plato and Aristotle through to John Locke, Baron de Montesquieu and James Madison...*

*The effective constitution of the Australian Capital Territory—the Australian Capital Territory (Self-Government) Act 1988—recognises and gives effect to the separation of powers doctrine by establishing a democratic polity within the ACT. Through parts IV, V and VA of the self-government act, the three separate branches of government, each with their own specific functions and powers, are established.*

*The bill gives full effect to the relevant Latimer House guideline contained in the Commonwealth (Latimer House) Principles on the Three Branches of Government—namely, that the parliament should be “serviced by a professional staff independent of the regular public service”...*

*Given that the legislature relies so heavily on the advice and support given by the parliamentary support agency it is only appropriate that a legislative framework, which codifies its functions and asserts its independence from executive interference, is appropriate. To date, this has not occurred. This bill seeks to remedy that situation.<sup>6</sup>*

19. Then Chief Minister, Katy Gallagher MLA, stated that:

*The bill appropriately places limits on the involvement of the executive in the affairs of the office of the [then] Secretariat in a number of areas, including procurement, annual reporting and the role of the Commissioner for Public Administration in relation to the operations of the Office of the Legislative Assembly. This recognises that the staff in the Secretariat work in a different operating environment from staff in the broader public service who, generally speaking, serve the executive arm of government. These limitations will not diminish the accountable and transparent way that the Assembly staff perform their duties. Instead, they change the relationship of accountability to be one with the entire parliament rather than the executive. This is a more accurate articulation of the accountability relationship...*

*I consider that this bill is another important step in continuing to establish robust arrangements for the governance of the territory. And what could*

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<sup>6</sup> Assembly Debates, 23 February 2012, pp 784-785.

*be more central to this than the appropriate and separate establishment of the Office of the Legislative Assembly which this bill provides for?*<sup>7</sup>

20. Then Leader of the Canberra Liberals, Zed Seselja MLA, stated:

*The Canberra Liberals will be supporting this bill today.*

*The bill will more clearly codify the roles, functions and independence of the office responsible for providing advice and support to the legislative branch of government in the ACT... Taken as a whole, this bill will clarify the administrative and legislative framework that applies to the support agency of the legislature and enshrine in law its independence from the executive...<sup>8</sup>*

21. Then Parliamentary Leader of the ACT Greens, Meredith Hunter MLA, stated:

*It is appropriate that the Office of the Legislative Assembly is a separate statutory agency. Certainly, in the Westminster model there is a blurring of the executive and the legislature. However, that does not mean that there needs to be a blurring of the office of the parliament and the executive. They are separate functions. The Greens strongly support the aim of the bill to clearly separate the office of the Assembly and the rest of the executive.*

*The Greens believe that the separation of powers is very important and that even within the Australian model of government it is possible and appropriate to separate the executive from parliament. This bill is a very good example of the application of a better separation and is consistent with the Latimer House principles that this Assembly adopted as a continuing resolution earlier in this parliamentary term.<sup>9</sup>*

22. Against this background, I submit that any legislation, which inadvertently or otherwise, seeks to reduce the statutory independence of the Office is a retrograde step that undermines the appropriate separation of powers within the Territory.

23. The most straightforward means by which to remedy these defects is to remove references to the Office and the Clerk in the Bill so that the neither the insourcing framework, nor the Chief Minister's directions, apply.

## **Scope of the scheme**

24. Beyond the concerns that I have expressed about the general principle that the Executive and its ministers ought not to be able to direct the Office in the exercise of its statutory functions, there is much about the 'insourcing framework' that is not known.

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<sup>7</sup> Assembly Debates, 10 May 2012, p 2345.

<sup>8</sup> Assembly Debates, 10 May 2021, p 2346.

<sup>9</sup> Assembly Debates, 10 May 2012, pp 2347-2348.

25. Without knowing precisely what the government has in mind in terms of the determination that it intends to introduce, it is difficult to predict how the Assembly's and the Office's operations might be impacted. However, questions do arise as to the potential effects that an insourcing framework might have of the Assembly's functions. For instance, what effect might an insourcing framework have on the:
- engagement, by the Office, on behalf of the Standing Committee on Public Accounts, of an independent budget adviser;
  - engagement of independent legal advisers to the Standing Committee on Justice and Community Safety (Legislative Scrutiny role); and
  - engagement of consultants by MLAs (while MLAs are not covered by the Financial Management Act, the Clerk is subject to the Act and is the officer responsible for signing contracts between non-executive members and consultants/contractors—funds are disbursed from the Office's Territorial appropriation);
26. Given that the Bill before the committee does not contain sufficient detail about the operation of the proposed insourcing scheme (i.e. the Bill makes clear that all of the detailed policy requirements and obligations are to be established by way of a notifiable instrument), the committee may wish to seek from the government an exposure draft of the relevant determination and any associated directions that are to be issued pursuant to proposed ss 128, 129A.

## **Directions are made by notifiable instrument**

27. The committee will note that proposed new section 128 of the Bill will, if passed, require that the Chief Minister make a determination by way of notifiable instrument for an 'insourcing framework'. The insourcing framework is to be used to evaluate whether services or works required by a public sector entity should be provided by the public sector or an external provider.
28. The committee will also note that s 129A permits the Chief Minister to give a direction to a public sector entity in relation to:
- the entity's obligations under s 128; and
  - any other matter (for the part).
29. In its current form, the Bill (through ss 128, 129A) is merely a statutory hook by which an as-yet-undeclared<sup>10</sup> framework and associated compliance directions will be established across the entire ACT public sector through the unreviewable stroke of a pen (i.e. by notifiable instruments made by the Chief Minister).
30. The committee is strongly advised to seek a copy of the government's proposed 'insourcing framework' (for the purposes of s 128) and any proposed directions (pursuant to s 129A) before concluding a view on the adequacy of the proposed statutory amendments.

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<sup>10</sup> Presently, there is no specific details (of which the Office is aware) as to the proposed scope and form that these policy requirements, directions and determinations are likely to take.



31. The committee is also strongly advised to recommend that the Bill be amended so that all directions and determinations must be made by way of disallowable instrument, rather than by notifiable instrument. Such an approach ensures that the full legislative prerogatives of the Assembly—to consider, amend and pass/disallow instruments, once formally proposed—are retained.

## Proposed recommendations

32. I submit that it would be appropriate for the committee to recommend that:
- (a) the Financial Management Amendment Bill 2021 (No 2) be amended in order that the Clerk and the Office of the Legislative Assembly are not subject to any of the arrangements for which provision is made under the Bill;
  - (b) sufficient care and attention are paid by government in developing bills which seek to advance government policy in relation to the regular public service so as to ensure that the Office is not—inadvertently or otherwise—caught by such provisions;
  - (c) the government commits to always consult with the Clerk of the Assembly where it proposes to legislate in a manner which may affect the Office's powers, functions, or independence;
  - (d) it receives a draft copy of the government's planned 'insourcing framework' for its review and consideration prior to debate on the Bill; and
  - (e) to ensure that the Assembly's legislative prerogatives are not diminished in relation to the ambit of any insourcing scheme, proposed new ss 128, 129A be amended so that any direction or determination must be made by disallowable instrument, rather than notifiable instrument.

  
Tom Duncan  
Clerk

21 December 2021