STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

Mrs Vicki Dunne MLA (Chair), Mr John Hargreaves MLA (Deputy Chair), Ms Meredith Hunter MLA

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COMMITTEE OFFICE

Mr Brendan Smyth, MLA
Inquiry Chair
Standing Committee on Public Accounts
ACT Legislative Assembly
CANBERRA ACT 2601

Dear ~~Mr Smyth~~ Brendan

INQUIRY INTO THE EXPOSURE DRAFT OF THE FINANCIAL MANAGEMENT (ETHICAL INVESTMENT) LEGISLATION AMENDMENT BILL 2010 (A.C.T.)

Thank you for your invitation to the Standing Committee on Justice and Community Safety, in its capacity as the Scrutiny of Bills and Subordinate Legislation Committee, to make a submission to the Standing Committee on Public Accounts' inquiry concerning the exposure draft of the Financial Management (Ethical Investment) Legislation Amendment Bill 2010.

The Committee has reviewed the Bill according to the terms of reference against which it reports on bills and subordinate laws.

Could the Bill have an adverse effect on property rights?

The Explanatory Statement states that the Bill does not engage any human rights, in that under section 6 of the *Human Rights Act 2004* "only individuals have human rights". It continues:

> The Bill promotes the application of human rights issues to Territory investment practices and will only affect the activities of the Territory in regard to relevant bodies (as defined) and not individuals.

The matter may not be so simple. The Human Rights Act does not state a right to property, and the limitation on the legislative power of the Assembly in relation to the acquisition of property contained in paragraph 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* ("the Assembly has no power to make laws with respect to: (a) the acquisition of property otherwise than on just terms; ...") could have no application in relation to this Bill.

The Committee has, however, assessed bills in terms of the broader right to property stated in Article 17 of the *Universal Declaration of Human Rights* (the foundational document of the international human rights framework):

> 1. Everyone has the right to own property alone as well as in association with others.
>
> 2. No one shall be arbitrarily deprived of his property.

This provision nevertheless permits a deprivation of property in the public interest and where the deprivation meets the tests of proportionality. There is a similar provision in Article 1 of the First Protocol to the European Convention on Human Rights, and under that treaty it has been held that the payment of contributions to a pension fund may create a property right in a portion of the fund.

The Committee draws attention to this matter given that amendments proposed to the *Territory Superannuation Provision Protection Act 2000* raise the question whether the restraints that would be placed on the chief executive under proposed sections 11A and 11B have any potential to affect the amount that would be payable to a beneficiary of a superannuation fund. An adverse effect might result from restraining the chief executive from being able to make an investment, or requiring her or him to make an investment, that would return less profit to the fund than would be the case if the restraint was not in place.

The Committee does not know whether there is any possibility that any such adverse result could occur. It suggests that this is a matter that might be explored by the Standing Committee on Public Accounts.

Would any clauses of the Bill inappropriately delegate legislative powers?

The Explanatory Statem[illegible]knowledges that the Bill "delegates the ability to the Minister to set additional investment limitations and add additional investment priorities and provides that any such determination is a disallowable instrument. This limited delegation is considered reasonable and proportionate and allows a level of flexibility to respond to contemporary circumstances".

This comment relates to the delegation provisions in proposed subsections 38A(3) and 58A(3) of the *Financial Management Act 1996*, and proposed subsections 11A(3) and 11B(3) of the *Territory Superannuation Provision Protection Act 2000.* These provisions would authorise the Minister to make declarations that an activity (or activities) falls within the range of prohibited or prioritised investments (as the case may be).

First, there is always a question whether the subject matter that may be regulated by the subordinate law (the declarations) is such that it would be more appropriately regulated by the relevant Act. The Committee rarely states a view on this issue, and leaves it to Members of the Assembly to form their own judgement.

Secondly, the Committee notes that ordinarily a subordinate law is disallowable only from the time the motion for disallowance is passed by the Assembly. If there is a possibility that in the interval of time between when the law commences to operate and its disallowance the rights or interests of a person could be affected adversely, or if for any other reason it would be desirable to avoid this interval in which the law would have legal effect, then it is possible to provide in the statute authorising the subordinate law that it should not take effect until approved by resolution of the Assembly.

Whether this is desirable is a matter on which the views of the Standing Committee on Public Accounts would be valuable.

Would any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers?

The Committee is always concerned to examine whether an administrative power or duty is sufficiently defined, and is in particular concerned with powers or duties that are cast in the form of a discretion, or the application of which requires the decision-maker to make a discretionary judgement.

Proposed paragraph 38A(2)(b) of the *Financial Management Act 1996* requires the Treasurer to make a judgement that he or she is "not satisfied on reasonable grounds" of the existence of certain facts. The inclusion of a "reasonable grounds" limitation does limit the Treasurer's freedom to choose to be satisfied or not, and the Committee encourages the use of this qualification. This comments applies also to proposed paragraph 58A(2)(b) of the *Financial Management Act 1996*, and to proposed paragraph 11B(2)(b) of the *Territory Superannuation Provision Protection Act 2000.*

In contrast, proposed subsection 11A(1) of the *Territory Superannuation Provision Protection Act 2000* provides:

> In deciding how to invest an amount in a superannuation banking account under section 11, the chief executive must, **if satisfied** it is prudent, give priority to investing in a defined ethical investment over another investment (emphasis added).

It is difficult to see why the making of the judgement that an investment is (or is not) "prudent" should not also be limited by the requirement that it made on reasonable grounds.

The Committee suggests that this is an issue which could be explored by the Standing Committee on Public Accounts.

Yours sincerely

Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

10 February 2011