

2008

**THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY**

**PROTECTION OF PUBLIC PARTICIPATION BILL 2008
SUPPLEMENTARY EXPLANATORY STATEMENT**

Presented by
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Attorney General

PROTECTION OF PUBLIC PARTICIPATION BILL 2008

Amendments to be moved by Attorney General

Overview

The amendments moved by the Attorney General amend the Protection of Public Participation Bill 2008 to substitute a number of new provisions. These provisions are designed to protect public participation and provide for a court to impose penalties on plaintiffs who bring certain actions for an improper purpose, while maintaining the integrity of the general body of civil wrongs legislation.

The Government has expressed its support for legislation to protect the right of any person to engage in public participation, but is concerned that legislation should recognise the need to balance the rights of all parties to a dispute who bring their claims before a court for determination.

The Government is also concerned that legislation should avoid undue process and minimise the expenses of parties to litigation.

To address those concerns, the amendments moved by the Attorney General omit all of the substantive provisions of the Bill and substitute a number of new provisions, as follows:

- Clause 5 of the Bill is replaced by a simplified provision that states only the purpose of the Act, and accounts for the removal of clause 9. The amended Bill no longer contains a provision for a declaration by the Magistrates Court.
- Clauses 6 and 7 of the Bill, which define improper purpose and public participation, have been refined.
- Clause 8 of the Bill is removed, as the proposed right is accounted for in the Human Rights Act 2004, and it would be inappropriate to create new human rights outside that Act.
- Clause 9 of the Bill is omitted. It is unnecessary and cumbersome to provide for a declaration about the conduct of the defendant to be made by the Magistrates Court, particularly as it will not bind the Supreme Court.
- Clause 10 of the Bill is omitted. Under a new clause 9, the merits of the plaintiff's case may be considered by the court and, if the proceedings are considered to have been started or maintained for an improper purpose, the court may order the plaintiff to pay a financial penalty to the Territory. The new provision contains a note referring to the power of the court, under the Court Procedures Rules 2006 (see r1752), to order that costs be assessed on an indemnity basis.

The Rules also provide for the striking out of proceedings (rule 425), and for a defendant to apply for summary judgment against a plaintiff (rule 1147).

Part 14.2 of the *Civil Law (Wrongs) Act 2002* provides strong penalties for lawyers who lodge or file pleadings in relation to a claim for damages, if the court determines that the claim or defence has no reasonable prospects of success.

- The new clauses 5 – Purpose of Act, 6 – Meaning of improper purpose, and 7 – Meaning of public participation – rely on a ‘reasonable person’ test.

A new clause 11 of the Bill provides for a review of the Act as soon as practicable after 1 January 2012.

Clause notes

Government Amendment 1: Title

The Government amendment omits the title of the Bill and substitutes a new title that reflects the nature of the Bill as amended.

Government Amendment 2: Clause 5 – Purpose of Act – page 3, line 1

The Government amendment omits clause 5 – Purpose of Act – of the Bill and substitutes a new clause 5 – purpose. The purpose of the Act is to protect public participation and discourage certain civil proceedings that a reasonable person would consider interfere with engagement in public participation. Paragraphs (a) and (b) of clause 5 of the Bill have not been included, as they do not reflect the purpose of the amended Bill.

Government Amendment 3: Clause 6 – Meaning of *improper purpose* – Act – page 3, line 23

The Government amendment omits clause 6 – Meaning of improper purpose – of the Bill and substitutes a new clause 6 – Meaning of improper purpose. A proceeding is started or maintained for an improper purpose if a reasonable person would consider that the main purpose of the proceeding is:

- (a) to discourage the defendant (or another person) from engaging in public participation; or
- (b) to divert the defendant's resources away from engagement in public participation; or
- (c) to punish or disadvantage the defendant for engaging in public participation.

Government Amendment 4: Clause 7 – Meaning of *public participation* – Act – page 4, line 13

The Government amendment omits clause 7 – Meaning of *public participation* – Act – of the Bill and substitutes a new clause 7 – Meaning of *public participation*. The meaning of *public participation* is substantially the same as the omitted provision except that, as amended, it relies on the belief of a reasonable person. The exclusions from that meaning, set out in clause 7(2), are also substantially the same, with the following exceptions:

- paragraph (2)(b) now excludes unlawful vilification under the *Discrimination Act 1991*;
- paragraph (2)(c) now excludes conduct that causes, or is reasonably likely to cause, physical damage or injury to property;
- a new paragraph (2)(e) excludes conduct that constitutes an offence punishable by imprisonment for longer than 12 months;
- paragraph (2)(f) replaces paragraph (2)(e);
- paragraph (2)(g) replaces paragraph (2)(f).

Government Amendment 5: Clause 8 – Right to engage in public participation – page 5, line 10

The Government amendment omits clause 8 – Right to engage in public participation – of the Bill and substitutes a new clause 8 – Application – Act. Clause 8(1) provides that this Act applies in relation to civil proceedings in which the plaintiff may claim damages.

The Act will not apply to an action for defamation, a prescribed proceeding or an action commenced before the commencement of the Act.

Government Amendment 6: Clause 9 – Declaration that certain conduct constitutes public participation – page 5, line 14

The Government amendment omits clause 9 – Declaration that certain conduct constitutes public participation – of the Bill and substitutes a new clause 9 – Civil penalty. The new section will apply if a person commences proceedings to which the Act applies and the court is satisfied that:

- (a) the defendant's conduct is public participation; and
- (b) the proceeding is started or maintained for an improper purpose.

Under clause 9(2), the court may order the plaintiff to pay to the Territory a financial penalty of not more than the prescribed amount. Regulations will also provide for the way in which the penalty is worked out.

An order may be made on application by the Territory, or on the court's own initiative.

Clause 9 contains a note advising that, if a proceeding is for an improper purpose, the court's power to award costs includes the power to order that costs be assessed on an indemnity basis.

Government Amendment 7: Clause 10 – Dismissal of certain proceedings – page 6, line 9

The Government amendment omits clause 10 – Dismissal of certain proceedings – of the Bill and substitutes new clause 10 – regulation-making power – and new clause 11 – Review of Act. Clause 11 provides for the Act to be reviewed as soon as practicable after 1 January 2012.