

2021

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

FINANCIAL MANAGEMENT AMENDMENT BILL 2021 (NO 2)

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
Mick Gentleman MLA
Minister for Industrial Relations and Workplace Safety**

FINANCIAL MANAGEMENT AMENDMENT BILL 2021 (NO 2)

The Bill **is not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

This explanatory statement relates to the *Financial Management Amendment Bill 2021 (No 2)* as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly. The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

OVERVIEW OF THE BILL

The Bill amends the *Financial Management Act 1996* to provide for an Insourcing Framework.

CONSULTATION ON THE PROPOSED APPROACH

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.

SUMMARY OF AMENDMENTS

The Bill seeks to implement two of the Government's policy commitments in the Parliamentary and Governing Agreement for the 10th Legislative Assembly of the ACT (PAGA):

- a. 'Legislate to prevent the outsourcing or privatisation of public sector jobs' (PAGA Item 77); and
- b. 'Implement a whole of government policy that government services will not be contracted out where they could be performed by public servants' (PAGA Item 88).

The Bill amends the *Financial Management Act 1996* to require an evaluation be completed prior to the outsourcing and/or privatisation of public sector jobs (the Insourcing Framework).

The Bill includes a requirement that proposed services or works with an estimated value equal to or greater than an amount that may be prescribed by regulation be evaluated in accordance with the Insourcing Framework.

The Bill proposes the Insourcing Framework be determined by the Chief Minister through a Notifiable Instrument. The Chief Minister is nominated due to his responsibility for the ACT Public Service in the Administrative Arrangements 2021 (No 1). The use of a Notifiable Instrument will provide the required flexibility to update or modify the framework as required.

The Bill gives the Chief Minister the power to make directions in relation to the Insourcing Framework by way of a Notifiable Instrument.

The operation of the Insourcing Framework will commence on a day fixed by the Chief Minister, or if not yet commenced, automatically commence on the first day 6 months after the passing of the Bill.

CONSISTENCY WITH HUMAN RIGHTS

The Bill may both promote and limit the right to work. The right to work is promoted by the Insourcing Framework's aim of delivering secure work through formal employment in the ACT Public Service.

The right to work may also be limited for some people outside of the ACT Public Service who would have previously engaged in contract or labour hire work through ACT Government procurement processes which outsource work. Any limitation of the right to work in this circumstance may be reasonably justified as promoting the legitimate aim of promoting secure and equal working conditions, and the measures are reasonable, necessary and proportionate to that aim as the legislation will allow for any workers previously benefiting from outsourcing to work within the ACT Public Service.

Rights engaged

The Bill engages and may promote the following rights under the *Human Rights Act 2004* (HRA) and is discussed under Rights Promoted in detail:

- Section 27B – Right to work and other work-related rights

The Bill engages and may limit the following rights under the HRA and is discussed under Rights Limited in detail:

- Section 27B – Right to work and other work-related rights

Rights Promoted

The amendments to the *Financial Management Act 1996* promote the right to work and other work-related rights. The right to work is promoted by the Insourcing Framework's aim of delivering secure work through formal employment in the ACT Public Service.

Rights Limited

The preamble to the HRA notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HRA contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

Section 28 of the HRA requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*.^[2] A party must show that:

[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".^[3]

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

The right to work is set out at section 27B of the Act.

Subsection 27B(1) particularly sets out that every has the right to work, including the right to choose their occupation or profession freely.

Subsection 27B(2) sets out that everyone has the right to the enjoyment of just and favourable conditions of work.

Subsection 27B(5) sets out that everyone is entitled to enjoy the rights set out at section 27B without discrimination.

The right to work may be limited by the operation of the Act for some people outside of the ACT Public Service who would have previously engaged in contract or labour hire work through ACT Government procurement processes which outsource work.

2. Legitimate purpose (s 28(2)(b))

Any limitation of the right to work in this circumstance may be reasonably justified as promoting the legitimate aim of promoting secure and equal working conditions, and the measures are reasonable, necessary and proportionate to that aim as the

legislation will allow for any workers previously benefiting from outsourcing to work within the ACT Public Service.

3. Rational connection between the limitation and the purpose (s 28(2)(d))

The Bill provides for the establishment of an Insourcing Framework that will evaluate whether services or works required by a public sector entity should be provided by the public sector or an external provider. The Bill can be read as supporting the freedoms set out in 27B(1), being the right to choose their occupation or profession freely by delivering the possibility of employment with the ACT Public Service, which delivers the right set out at subsection 27B(2), being the right to the enjoyment of just and favourable conditions of work. The ACT Public Service has previously insourced work conducted by the private sector, with the effect being more just and favourable work conditions.

4. Proportionality (s 28(2)(e))

The Bill provides for the establishment of an Insourcing Framework that will evaluate whether services or works required by a public sector entity should be provided by the public sector or an external provider.

The impact of this Bill on the right to work as outlined at 27B is proportional. The Insourcing Framework established by the Bill will evaluate whether work should be undertaken inside or outside the ACT Public Service. Work that has always been conducted by the ACT Public Service will not be affected by the operation of the Bill. Work that was conducted externally may be brought within the ACT Public Service under the operation of the Bill. Given the rights and entitlements provided to members of the ACT Public Service the impact of the Bill on the section 27B right to work can be reasonably considered to be proportional.

FINANCIAL MANAGEMENT AMENDMENT Bill 2021 (NO 2)

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Financial Management Amendment Bill No 2**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Part 1 Preliminary **Clause 1 Name of Act**

This clause is a formal provision setting out the name of the Act as the *Financial Management Amendment Bill 2021* (the Act).

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act will commence on a day fixed by the minister by written notice. If the Act has not commenced within 6 months beginning on the day the Act is notified, the Act automatically commences on the first day after that period.

Clause 3 Legislation amended

This clause is a formal provision identifying that the Act amends the *Financial Management Act 1996*.

Clause 4 Insertion of new part 9A

This clause introduces a new Part 9A into the *Financial Management Act 1996*. Part 9A establishes the Insourcing Framework in the Act.

Section 126 defines public sector entities.

Section 127 outlines that responsible public sector entity chief executive officers are to ensure compliance with Part 9A, and outlines who the chief executive officers are in the public sector.

Section 128 outlines that the Chief Minister must determine the Insourcing Framework which is to evaluate whether services or works required by a public sector entity should be provided by the public sector or an external provider. It also outlines that the determination of the Insourcing Framework is to be achieved through a Notifiable Instrument.

Section 129 outlines the circumstances in which a public sector entity must evaluate whether their required services or works are to be evaluated by the Insourcing Framework.

Section 129A provides that the Chief Minister may give a direction to a public sector entity in relation to that public sector entity's obligations under section 129 and any other matter under Part 9A. Directions under section 129A are to be notifiable instruments.

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

This clause inserts into the dictionary of the *Financial Management Act 1996* a definition for public sector entity, which refers to new section 126.