



17th Legislative Assembly of the Northwest Territories

Standing Committee on Government Operations

Report on the Review of Bill 37: *Financial Administration Act*

Chair: Mr. Daryl Dolynny

MEMBERS OF THE STANDING COMMITTEE ON GOVERNMENT OPERATIONS

Daryl Dolynny
MLA Range Lake

Wendy Bisaro
MLA Frame Lake
Deputy Chair

Alfred Moses
MLA Inuvik Boot Lake

Michael M. Nadli
MLA Deh Cho

Norman Yakeleya
MLA Sahtu

COMMITTEE STAFF

Gail Bennett
Committee Clerk

April Taylor
Committee Analyst

June 1, 2015

SPEAKER OF THE LEGISLATIVE ASSEMBLY

Mr. Speaker:

Your Standing Committee on Government Operations is pleased to provide its Report on the Review of Bill 37, *Financial Administration Act* and commends it to the House.



Daryl Dolynny
Chairperson

**STANDING COMMITTEE ON
GOVERNMENT OPERATIONS**

**REPORT ON THE 2014 REVIEW OF THE
*OFFICIAL LANGUAGES ACT***

TABLE OF CONTENTS

Introduction	1
Background	1
Review Process	2
Consultant's Report	2
Stakeholder Submissions	2
Collaboration.....	3
Issues.....	3
Addressing Potential Conflict with <i>ATIPP Act</i>	4
Limiting the Impact of Bill 37 on Public Agencies.....	4
Limiting the Impact of Bill 37 on Public Agency Budgets	4
Education Surpluses.....	5
The Workers' Protection Fund of the Workers' Safety and Compensation Commission (WSCC).....	5
Addressing the Overlap of Authorities between the Financial Management Board (FMB) and the Minister of Finance	6
Planning and Accountability Framework	6
Fiscal Responsibility Policy	7
Forgiveness of Debts and Obligations	7
Deemed Appropriations	8
Authority of the Commissioner	9
Reporting Requirements under Bill 37	9
Conclusion	9
Appendix A: Voytilla Report	
Appendix B: Stakeholder Submission	
Appendix C: Reporting Requirements under Bill 37	

STANDING COMMITTEE ON GOVERNMENT OPERATIONS

REPORT ON THE REVIEW OF BILL 37: *FINANCIAL ADMINISTRATION ACT*

INTRODUCTION

The Standing Committee on Government Operations (“the Standing Committee”) is pleased to report on its review of *Bill 37: Financial Administration Act (FAA)*.

Bill 37, sponsored by the Department of Finance, is intended to provide a legislative framework for the effective and efficient stewardship of government resources. It also sets out reporting requirements designed to ensure government accountability and transparency in the management and use of those resources.

Bill 37 received second reading in the Legislative Assembly of the Northwest Territories and was referred to the Standing Committee on Government Operations on November 4, 2014. From the date of second reading, the Rules of the Legislative Assembly allow 120 calendar days for the Standing Committee to complete its review. Given the complexity of the Bill, the Standing Committee requested an extension of the 120-day review period, as permitted by the Rules.

BACKGROUND

The last review of the FAA took place in 1987. Since that time, there have been substantial changes in the operating environment of the Government of the Northwest Territories (GNWT). These include changes in technology, public expectations for accountability and transparency, management and accounting standards, and business relationships between the GNWT, other governments and third parties. Over the years, many issues and suggestions for improvement to the GNWT’s financial management legislative framework have been identified by Members of the Legislative Assembly, the Office of the Auditor General, and GNWT staff. As well, most other Canadian jurisdictions have undertaken major reviews or made significant changes to modernize their financial administration legislation.

In 2005 and 2006, the Government developed a discussion paper and undertook initial consultations with senior GNWT staff and MLAs, including the Standing Committee on Accountability and Oversight. This was followed by an initial legislative proposal for a new FAA in 2011 and a revised legislative proposal in

2012. Bill 37, based on this revised legislative proposal, was developed as a consultation draft in July 2014, which was used by the Department of Finance as the basis for consultations with GNWT departments, boards and public agencies and the Office of the Auditor General.

REVIEW PROCESS

When reviewing a Bill, a Standing Committee has the latitude to structure the process so that it is conducive to ensuring the most effective review, given the nature of the Bill, the subject matter, and the degree of public interest. Bill 37 is a fairly complex and technical piece of legislation. For this reason, the Standing Committee made the decision to retain a consultant to provide technical advice on certain aspects of the Bill.

Consultant's Report

The Standing Committee retained the services of Mr. Lew Voytilla, FCGA, to provide advice to assist the Committee in its deliberations on Bill 37. Mr. Voytilla has extensive experience with GNWT financial operations, and specifically with the *Financial Administration Act*, having served in a number of key senior management positions over a period of thirty years, including GNWT Comptroller General, Deputy Minister of the Financial Management Board Secretariat and Secretary to the Financial Management Board. As a management consultant and Chairman of the Board of Directors of the NWT Power Corporation, Mr. Voytilla obtained direct experience regarding the impact of the FAA on public agencies. Mr. Voytilla's knowledge and experience proved a valuable asset to the Standing Committee during the review and the Committee thanks Mr. Voytilla for his input. A copy of the report that Mr. Voytilla submitted to the Standing Committee was shared with the Department of Finance during the course of the review and is attached to this report as Appendix A.

Stakeholder Submissions

The Standing Committee sought the input of key stakeholders and members of the public with respect to Bill 37, through letters and newspaper advertisements inviting input.

One written submission was received from Ms. Elaine Keenan Bengts, the Information and Privacy Commissioner for the Northwest Territories. Ms. Keenan Bengts provided the Standing Committee with her observations on Bill 37, as it regards matters related to access to information and the protection of privacy under the NWT's *Access to Information and Protection of Privacy (ATIPP) Act*. This submission was shared with the Minister of Finance and

resulted in a motion to amend Bill 37, to clarify which act has paramountcy in the event of a conflict. A copy of this submission is attached to this report as Appendix B.

The Standing Committee held a public hearing on Bill 37 on May 26, 2015. No members of the public made submissions at that hearing. However, the Standing Committee allowed an opportunity for additional input from members of the public before the beginning of its clause-by-clause review of the Bill on May 29, 2015. The Standing Committee received a verbal submission from Ms. Noeline Villebrun, a member of the public, at its meeting on May 29, 2015.

The Standing Committee would like to take this opportunity to thank the stakeholders who took the time to provide their input on Bill 37.

Collaboration

The Standing Committee wishes to comment on the high degree of collaboration and cooperation that took place between the Standing Committee and the Minister and Department of Finance during the course of the review of Bill 37.

The Committee thanks Minister Miltenberger, his staff, and officials from the Department of Justice for making themselves readily available to discuss the Bill. Minister Miltenberger met with the Standing Committee on a number of occasions, and his staff met with the Standing Committee's staff and consultant to review several aspects of the Bill.

As a result, this review was marked by an unprecedented degree of collegial work, which buoyed the Committee and reminded Members that our consensus system of government can work well when participants have a spirit of collaboration. In the view of the Standing Committee, this cooperative approach has produced a final revised Bill which notably improves upon the draft originally submitted to the Standing Committee.

ISSUES

During the course of the review, the Standing Committee raised a number of concerns and issues with Bill 37. Some of these were articulated in the consultant's report and some were raised by Committee members. Some resulted in amendments to the Bill and others required clarification and/or resolution outside of the Bill itself. These issues are summarized below:

Addressing Potential Conflict with *ATIPP Act*

As previously indicated, the Standing Committee received a submission from the NWT Information and Privacy Commissioner which focused on access to information and protection of privacy matters under Bill 37. Ms. Keenan Bengts' submission pointed out that there is a conflict between S. 3 of Bill 37 and S. 4 of the *ATIPP Act*. Both sections provide that each Act applies where there is a conflict. If the wording of Bill 37 remained unchanged, a conflict arising between the two Acts would be subject to interpretation by the courts. The Standing Committee discussed with and received the concurrence of the Minister to a motion to amend the Bill, for greater legislative certainty, revising the wording of Bill 37 such that in the event of a conflict between the two Acts, the *ATIPP Act* will prevail to the extent of the conflict.

Limiting the Impact of Bill 37 on Public Agencies

The consultant's report pointed out the potential of Bill 37 to have a significant impact on the workloads of the Office of the Comptroller General and the Internal Audit Bureau in the Department of Finance, as a result of added responsibilities for public agencies under the Bill, and on those public agencies who would be required to respond to these offices when they exercise their new authorities.

The Standing Committee considered options for addressing this concern, including the possibility of exempting certain public agencies from the requirements of Bill 37. In discussions with the Minister and Department of Finance it became apparent that Finance shared the Committee's concern about the potential impacts of Bill 37 on the capacity of the Department and public agencies. As a result, the Bill has been amended to make the authority of the Comptroller General and the Internal Audit Bureau discretionary with respect to public agencies, rather than compulsory.

With respect to the Internal Audit Bureau, the Bill has been amended to limit the powers of the Internal Audit Bureau to the government only, except where requested to exercise its powers in respect of a public agency by the Minister Responsible for that public agency, or where requested by the Comptroller General to conduct investigations or post-investigation audits into allegations of fraud, negligence or other impropriety.

Limiting the Impact of Bill 37 on Public Agency Budgets

As observed in the consultant's report, "Bill 37 imposes much tighter control on public agency financial management," (p. 5) and, as a result, requires public agencies "to treat their Ministerial approved budgets as if they were voted appropriations" (p.4). The Standing Committee was concerned that this might

have consequences, perhaps unintended, for public money administered and controlled by public agencies.

Education Surpluses

Some education authorities derive some of their revenues from school taxes. The Standing Committee sought and received reassurances from the Department of Finance that any budget surpluses generated by these public agencies would not be returned to the GNWT's Consolidated Revenue Fund at the end of a given fiscal year.

The Standing Committee was informed that Section 136(5) of the *Education Act* provides that an education authority does not require Ministerial approval for that portion of its budget that "relates directly to funds acquired by the education body through the taxation of property". The Standing Committee also learned that the *Education Act* provides for the Minister of Education, Culture and Employment (ECE), with the approval of the Minister of Finance, to give direction concerning the financial procedures and activities of an education body. The Minister of Finance currently provides this direction through the Finance and Administration Manual for Education Authorities (FAMEA). FAMEA allows that surpluses may be used to cover operating deficits in subsequent periods, or as the education authority sees fit.

The Standing Committee is reassured that the continued intent of the direction provided to Education Bodies with respect to surplus retention is to keep the funding within the education system.

The Workers' Protection Fund of the Workers' Safety and Compensation Commission (WSCC)

Section 78(4) of the *Financial Administration Act* (RSNWT 1988, c. F-4) currently in force contains a provision to the effect that a Ministerial Directive, issued by the Minister of Finance, "is of no effect to the extent that it affects the disposition of any funds in the Workers' Protection Fund continued under the *Workers' Compensation Act*".

This provision, the purpose of which is to protect the Workers' Protection Fund from use by the government, was not included in Bill 37. For this reason, and because of the potential impacts of Bill 37 on public agency budgets noted in the consultant's report, the Standing Committee was concerned that Bill 37 might permit the GNWT to access the funds in the Workers' Protection Fund for other purposes.

The Standing Committee sought to ensure that the Workers' Protection Fund would continue to enjoy the protections that it has under the current *Financial*

Administration Act. As a result, an amendment to Bill 37 was made to re-introduce the limitation on the Workers' Protection Fund noted above which is in the current FAA.

Addressing the Overlap of Authorities between the Financial Management Board (FMB) and the Minister of Finance

In its review of the powers and authorities granted under Bill 37, the consultant's report noted (p.9) the potential for overlap between the authorities granted to the Financial Management Board and those granted to the Minister of Finance.

After some discussion between the Standing Committee and the Minister and Department of Finance, agreement was reached to amend Section 13 of Bill 37 to address overlap of authorities between the FMB and the Finance Minister as set out in this section and S. 7(1)(a) by clarifying that FMB approval is required for the 'Fiscal Responsibility Policy' and the "policy respecting the management, collection and control of money, other than public money, held in trust or administered by Government or public agencies."

The consultant's report also raised a concern (p. 9) with respect to the authority granted to the Finance Minister to determine annual expenditure targets. The Minister of Finance confirmed with the Standing Committee that the intent of Bill 37 was to leave these authorities as they are currently exercised, i.e. that the FMB retains the authority to set departmental expenditure targets. Consequently, a motion to amend Bill 37 was passed that achieves this end by including the word "aggregate" before the word "targets", thereby indicating that the Minister of Finance has the authority to set an overall spending target for government, but that the authority to set individual departmental expenditure targets remains with the FMB.

Planning and Accountability Framework

One of the ways that Bill 37 increases the focus on fiscal accountability is by providing the authority for the Financial Management Board to establish a framework for planning by and accountability of government and public agencies. As originally drafted, Bill 37 required that this planning and accountability framework be tabled in the Legislative Assembly at the earliest opportunity after being established and after any amendments. The Standing Committee was concerned that this approach did not allow for the Legislative Assembly or its Standing Committees to have input into this important accountability framework while it was still in the draft stages. The Minister of Finance acknowledged this concern and agreed to a motion to amend Bill 37 which ensures that the Legislative Assembly or one of its Standing Committees is consulted before the FMB approves or amends the 'Planning and Accountability Framework'.

Fiscal Responsibility Policy

The GNWT introduced the 'Fiscal Responsibility Policy' during the 16th Legislative Assembly. This policy is composed of the 1400 Section of the 'Financial Administration Manual' and contains key rules that the government is bound by when borrowing money. Despite the significance of the policy, and the GNWT's commitment to be bound by it, the policy was never formally approved by the Commissioner in Executive Council or signed by the Premier. For this reason, it exists outside of the 17th Legislative Assembly's process convention for the Standing Committee review of proposed policy initiatives and implementation plans. This means that the policy was brought into effect and can be amended without input from regular Members of the Legislative Assembly.

The Standing Committee is pleased to see that Section 13 of Bill 37 acknowledges the existence of the 'Fiscal Responsibility Policy' by providing authority to the Minister of Finance to develop and implement this policy. However, as was the case with the 'Planning and Accountability Framework', the Standing Committee was concerned that there is no allowance in Bill 37 for the Legislative Assembly or its Standing Committees to have input into this important policy before it is amended.

The Minister and Department of Finance clarified for the Standing Committee their interpretation that Section 13(2)(d) of Bill 37 requires the Minister of Finance to bring the 'Fiscal Responsibility Policy' forward for formal approval before the coming into force date of Bill 37, set for April 1, 2016. In addition to providing this reassurance, the Minister of Finance concurred with an amendment to Bill 37 to ensure that the Legislative Assembly or one of its Standing Committees is consulted before the Financial Management Board approves or amends the 'Fiscal Responsibility Policy'.

Forgiveness of Debts and Obligations

Under Section 25 of the current *Financial Administration Act*, the GNWT must have the authorization of an Act in order to forgive a debt or obligation owed to the government which exceeds \$1000. The Standing Committee normally reviews these forgiveness of debts bills and, as part of that process, the Committee has been accustomed to receiving detailed briefing materials from the Department of Finance explaining the circumstances giving rise to the decision to forgive a debt. Although this material is provided and reviewed in confidence, it provides important information that allows the Standing Committee to fulfill its oversight role.

Under Bill 37, the Financial Management Board may write off a debt or obligation owing to the government or a public agency without the authority of an Act,

provided that where the debt is owed to a public agency they do so on the recommendation of the governing body of a public agency. Instead of requiring the authority of an Act, Bill 37 requires that any debt or obligation forgiven pursuant to the Act, be reported in the annual report of the public agency [S. 62(6)] or in the public accounts in the case of government [S. 65(1)(b)]. Because the Standing Committee will no longer be reviewing forgiveness of debts Bills, the Standing Committee sought reassurances from the Minister of Finance that the briefing materials that were once provided to the Standing Committee to substantiate the decision to forgive particular debts or obligations would continue to be provided to the Standing Committee for future reviews of the public accounts. The Minister of Finance provided the Standing Committee with written confirmation of this commitment and assurances that an arrangement to this effect would be formalized.

Section 62 of Bill 37 provides the authority for the Financial Management Board to forgive a debt owed to government or a public agency. The consultant's report contained a recommendation to the Standing Committee that this section of Bill 37 be amended to include qualifiers which would, in effect, describe the circumstances under which debts owed to the government or public agencies could be forgiven. After discussion with the Minister and Department of Finance, it was agreed that a motion would be made to amend Bill 37 such that debts owed to the government or public agencies may be forgiven by the Financial Management Board if the Board considers that the collection of the debt is unreasonable or unjust or if the Board believes that it is otherwise in the public interest to forgive the debt. The wording for this amended provision is based on similar wording contained in the federal *Financial Administration Act*.

Deemed Appropriations

The consultant's report (p. 12) points out what may have been a drafting error in Bill 37, with respect to Section 77. This section, as drafted, provides for the Comptroller General to charge an expenditure to an appropriation, even if that results in the appropriation being exceeded. Section 77 provides that the excess shall be a deemed appropriation. As the consultant notes: "This is a very significant departure from previous provisions in this area that restricted such authority to the recording of year-end expenditure accruals, and made provision that any overage was an interim appropriation, rather than a deemed one." The consultant goes on to question whether or not this was the government's intent, noting that "the new section 77 is not restricted to year end accruals but would allow the Comptroller General to exceed an appropriation at any time of the year and for any purpose and such excess would be a deemed appropriation".

The Standing Committee discussed the consultant's observation with the Minister and Department of Finance and learned that the intent of the Bill was not to grant the Comptroller General broad authority to exceed an appropriation at any time

for any reason. Accordingly, a motion was passed during the clause-by-clause review restricting the authority of the Comptroller General (to book an expenditure that exceeds an appropriation and record the excess as a deemed appropriation) to that it only extends to year-end accruals.

Authority of the Commissioner

Section 111 is another section in Bill 37 which contains what may be considered a drafting error. In this section, Bill 37 appears to grant broad authority to the Commissioner of the Northwest Territories to “do any act and exercise any power necessary for the purpose of fulfilling the obligations and enforcing the rights of Government”.

In discussions with the Minister and Department of Finance, the Standing Committee learned that this authority was intended to be specific to borrowing authority granted under Section 110 of Bill 37. A motion was subsequently approved limiting the Commissioner’s authority to the borrowing referenced in Section 110 of the Bill.

Reporting Requirements under Bill 37

With its focus on modern financial management practices and increased accountability, Bill 37 changes a number of reporting practices that exist under the current *Financial Administration Act*. During the course of the review, the Standing Committee asked the Minister and Department of Finance to provide details on all reports that will be required under Bill 37. The Standing Committee reviewed this material and added to it additional reporting requirements revealed as a result of its own research. This list is attached to this report as Appendix C.

CONCLUSION

The Standing Committee on Government Operations’ Review of Bill 37 is the result of a highly collaborative process. The Standing Committee wishes to thank everyone involved in the review of this Bill for their assistance and input.

During the clause-by-clause review, the Standing Committee and the Minister of Finance agreed to sixteen motions to amend Bill 37. Those motions resulting in substantive changes to the Bill were detailed in this report.

Following the clause-by-clause review, a motion was carried to report Bill 37, *Financial Administration Act*, as amended and reprinted, as ready for consideration in Committee of the Whole.

This concludes the Standing Committee’s review.

APPENDIX A: VOYTILLA REPORT

Report on **Bill 37 – Financial Administration Act**

1 INTRODUCTION

The Government of the Northwest Territories (GNWT) has introduced into the Legislative Assembly of the Northwest Territories Bill 37, an extensive rewrite of the *Financial Administration Act*. The Bill has had two readings and has been submitted to the Standing Committee on Government Operations (SCOGO) for review. In the process of its review SCOGO determined that it required an expert consultant to examine and comment on specific areas of the Bill, especially where these areas impact on the authority of the Legislative Assembly or represent a significant departure from the way in which the GNWT has administered its finances until now.

In the Terms of Reference (TOR) for the review and in its initial meeting with the consultant contracted to carry out the review, the Committee clarified that it did not want an overarching review of the Bill, rather it wanted an assessment of the practical and operational impact of Bill 37, specifically:

- I. An assessment of the degree to which the financial administration practices incorporated into this bill are consistent with modern public sector financial administration “best” practices in other Canadian jurisdictions;
- II. An assessment of how the authority of the Legislative Assembly is impacted by Bill 37 and the implications of these changes;
- III. An assessment of the new sections of the Bill relating to the principles of responsible fiscal management and accountability and what the potential impact of these sections is on government operations;
- IV. An assessment of the expanded authorities for the Minister of Finance, Financial Management Board, the Comptroller General and any other expanded authorities the Consultant wishes to comment on;
- V. As assessment of the approach taken in the Bill with respect to indemnities, guarantees and deemed appropriations;
- VI. An assessment of the treatment of public agencies in Bill 37, the impact of the Bill on public agencies, and whether or not the reporting requirements under the Bill will create a greater workload for public agencies;
- VII. An assessment of the treatment of non-governmental organizations in Bill 37, the impact of the Bill on NGOs and whether or not the reporting requirements under the Bill will create a greater workload for NGOs;
- VIII. An assessment of whether or not the appropriate subject matters are addressed in the Bill versus the proposed regulations and any recommendations for improvement;
- IX. The Consultant’s views on whether and how this bill is compatible or incompatible with the values and principles of consensus government;

- X. Advice on whether there are any financial administration practices, provisions and/or approaches that are not included in the Bill, but which should be considered for inclusion and the reasons why;
- XI. Any substantiated recommendations for amendments to the Bill; and,
- XII. Any other observations that the Consultant wishes to bring to the attention of the Standing Committee.

To carry out the review, SCOGO contracted Mr. Lew Voytilla, FCGA. Mr. Voytilla has thirty years of GNWT financial management experience (1976 to 2006) in both regional and headquarters settings and has served as:

- Secretary of the Financial Management Board (FMB) (1991 to 2006);
- Comptroller General (concurrent with duties as Secretary FMB - 1993 to 2006); and
- Chairman of the NWT Power Corporation (2006-2010 – part time function).

Over the past nine years (2006-2015) Mr. Voytilla has undertaken consulting work for businesses, NGOs, aboriginal governments and GNWT departments. He is knowledgeable with regard to both past and current GNWT and public agency financial management practices and issues.

Following is Mr. Voytilla's Report on the review of Bill 37.

2 REPORT STRUCTURE

The Report is structured to address the twelve topics or tasks identified in the Terms of Reference, but not necessarily in the sequence presented in the Terms of Reference. As the priority of the Committee was to assess the practical impact of the proposed changes in financial administration contained in Bill 37, this Report has been structured to address areas of more significant impact first. In addition, several tasks were common to most of the topics identified and the research, analysis and conclusions associated with these tasks has been woven into the discussion throughout the Report. These common topics are:

- I. An assessment of the degree to which the financial administration practices incorporated into this bill are consistent with modern public sector financial administration "best" practices in other Canadian jurisdictions;
- II. An assessment of how the authority of the Legislative Assembly is impacted by Bill 37 and the implications of these changes;
- VIII. An assessment of whether or not the appropriate subject matters are addressed in the Bill versus the proposed regulations and any recommendations for improvement;
- IX. The Consultant's views on whether and how this bill is compatible or incompatible with the values and principles of consensus government.

Note: With respect to task IX regarding the values and principles of consensus government, any assessment requires an accepted understanding of what the values and principles of consensus government are. In 2009 the MLAs adopted a set of 10 principles to describe consensus government in the NWT. These are reproduced in Appendix A. In reference to the stated principles of consensus government, the consultant looked at any changes in Bill 37 that would impact the participatory approach reflected in the existing processes regarding legislation, major policies, proposed budgets and other significant financial management matters.

Based on the approach outlined above, the substantive body of the Report is presented with the following structure:

- ❖ Public Agencies and Other Reporting Bodies;
- ❖ Powers and Authorities;
- ❖ Indemnities, Guarantees, and Deemed Appropriations;
- ❖ Principles of Responsible Fiscal Management;
- ❖ Write-offs, Compromise Settlements and Forgiveness;
- ❖ Other Matters; and
- ❖ Recommendations.

3 METHODOLOGY

Prior to this review, Bill 37 had already undergone significant analysis by SCOGO, Committee Researchers and the Law Clerk. Several meetings had been held between the Minister and SCOGO and both written and oral questions had been posed and responses offered. In undertaking the review, care was exercised to avoid, wherever possible, duplicating work that had already been done. Saying that, even a targeted review of a piece of legislation as complex and expansive as the Financial Administration Act (FAA) requires rigor and thoroughness to understand and assess the inter-relationships between the legislative sections as well as their cumulative effect.

The following methodology was followed:

- Review the current FAA and Bill 37 in their entirety to identify and assess significant changes and flag potential issues and questions for follow-up, with a specific focus on the tasks and topics identified in the TOR;
- Review all analysis done to date by Committee Researchers and the Law Clerk as well as all formal questions and responses provided by the Minister;
- In the TOR topic areas, research and document select provincial/territorial financial management legislation of a government-wide nature (this included the provincial equivalents of the NWT FAA and directly related financial legislation such as British Columbia's *Budget Transparency and Accountability Act*, Alberta's *Fiscal Management Act* and Saskatchewan's *Crown Corporations Act*);

- In the TOR topic areas, assess and analyze the legislative changes in Bill 37, compare and contrast the provisions of Bill 37 against the common and best practice in provincial legislation;
- In the TOR topic areas, Identify the operational implications of the changes proposed in Bill 37 based on the experience and judgment of the consultant and identify areas requiring further clarification;
- Brief the Committee Researchers and Law Clerks on initial findings and questions;
- Meet with Department of Finance officials to seek clarifications and discuss impacts;
- Compile and write a draft Report communicating findings and recommendations and present and discuss with SCOGO;
- Finalize Report.

Limitations on the review of provincial legislation

Neither time nor budget allowed an exhaustive search of all potentially relevant provincial legislation. The basic provincial FAA-type legislation was reviewed as well as directly related legislation that was identified in the main FAA or in the provincial Public Accounts. No effort was made to research the establishing legislation of provincial SUCH sectors (Schools, universities, colleges and hospital) or the hundreds of establishing statutes for provincial corporations/public agencies. The interpretation of the legislation reviewed was performed by the consultant without the benefit of legal counsel and opinion. As not all provincial legislation is clearly written there is potential for interpretative errors on the part of the consultant. Saying that, the consultant has extensive experience in interpreting and implementing financial administration legislation and feels the interpretations presented in the analysis will be reasonably accurate for the purposes of contrasting Bill 37 to common provincial practice.

4 PUBLIC AGENCIES AND OTHER REPORTING BODIES

4.1 OVERVIEW

Some of the most substantive changes in Bill 37 are those affecting public agencies and other reporting bodies. Through Bill 37 the GNWT is imposing much greater control over public agency financial management. Public agencies will now be required:

- ✓ to follow GNWT accounting policies and practices;
- ✓ to treat their Ministerial approved budgets as if they were voted appropriations;
- ✓ to account for all public agency revenues as “public money” subject to GNWT procedures for management and control of public money;
- ✓ to adhere to standard GNWT controls on contracting, guarantees, indemnities, write-offs, compromise settlements, debt forgiveness, borrowing, and most other aspects of financial management;
- ✓ to function within a GNWT imposed planning and accountability framework that has yet to be developed; and
- ✓ to accept the oversight and direction of the GNWT Comptroller General and the Internal Audit Bureau.

The administrative and management impact of these changes may be significant for many public agencies, particularly those that have been more independent in the past. Public agencies have always been governed and held accountable through the provisions of the legislation that established them and by specific provisions of the FAA (the old Part IX). However, public agencies had a degree of administrative flexibility based on the nature of their operations. Bill 37 imposes much tighter control on public agency financial management. Whether this is a desirable outcome likely depends on the reasons why a public agency was created in the first place.

The creation of a public agency suggests there is some value in establishing a separate management and administrative structure for a particular group of programs and services. Sometimes this is done to:

- make the programs and services more responsive to local or unique needs and priorities (e.g. school boards);
- create some decision making independence from the Government (e.g. the NWT Business Development and Investment Corporation);
- meet the requirements of external financiers (e.g. the NWT Housing Corporation and the old financing programs of the Canada Mortgage and Housing Corporation);
- permit self-sufficient services to operate on a business basis (e.g. Northwest Territories Power Corporation (NTPC) and Workers' Safety and Compensation Commission (WSCC)); or
- conform to standard program models and delivery structures found in other jurisdictions.

Whatever the original reason for creating a public agency, the bottom line is that the programs and services being delivered by the public agency must benefit from not being delivered through a government department. Otherwise, why create a public agency at all. If the justification for greater management and administrative flexibility inherent in the decision to create a public agency is weak or no longer exists, then the logical course of action is to wind-up the public agency and return the programs and services to a government department.

Bill 37 pulls all public agencies much closer into government management and accounting policies and practices. If this change is based on a thorough re-evaluation of the merits of having public agencies or is targeted to address specific identified problems with the current operations of public agencies, then it may very well be appropriate. **But that evaluation, along with the implications of the changes for public agencies and affected government departments, should be disclosed to enable an informed policy debate.**

In discussions with Department of Finance officials, they made it clear that one of the purposes of Bill 37 is to increase GNWT control of public agencies and the revenues they manage whether they are social program delivery agencies (e.g. school and health boards) or government business enterprises (e.g. WSCC or NTPC).

There is no doubt that the new requirements in Bill 37 will have an impact on public agency management and administration. Public agencies likely do not have excessive administrative capacity. If the additional administrative workload associated with Bill 37 is significant, public agencies may struggle to comply. There may also be operational implications. For example, Ministerial approved budgets will now have the force and effect of voted appropriations. It will be illegal to exceed them.

Although it will be permissible to seek Ministerial approval of a budget change, such approval cannot be presumed and may take some time to receive. If NTPC is faced with a downed power line or damaged generator and must burn more diesel fuel and make substantive emergency repairs the decision to do so must be made within hours. If this results in a budget being exceeded the FAA will be violated; the law broken. How will these operational realities work in the context of the Bill 37 provisions?

The administrative impacts of Bill 37 are not restricted to the public agencies themselves. Bill 37 extends the responsibilities of the Comptroller General and the Audit Bureau to encompass all public agencies. These are not permissive powers and responsibilities, they are very prescriptive. In other words, Bill 37 provides that the Comptroller General and Audit Bureau “shall” exercise oversight and control of public agency financial administration and handling of public money. These provisions dramatically increase the scope of responsibilities by these GNWT offices and it is hard to imagine how these added responsibilities can be accommodated without additional staff resources. Without additional resources the overall effectiveness of the Comptroller General and Audit Bureau functions may be degraded.

Appendix B provides a detailed commentary on the implications of all significant changes in Bill 37 that affect public agencies and other reporting bodies.

4.2 JURISDICTIONAL PRACTICES

Appendix C is a compilation of provincial general legislative provisions relevant to financial management of public agencies by the parent government. Five provinces are included in the compilation; British Columbia (BC), Alberta, Saskatchewan, Manitoba, and Ontario. The practices of these five jurisdictions provide a reasonable base upon which to draw comparisons. The compilation includes the provincial equivalent of the FAA as well as relevant provisions of the British Columbia *Budget Transparency and Accountability Act (BTAA)*, the Alberta *Fiscal Management Act (FMA)* and the Saskatchewan *Crown Corporations Act (CCA)*. However, the comparison does not include any provisions from the specific legislation that established the public agency (e.g. legislation establishing SUCH sector public agencies or specific provincial corporations).

The provincial comparison is organized into the following sections:

- Definitions
- Application of Acts
- Power to Issue Directives
- Accounting and Controls
- Budgets and Estimates
- Reporting and Audit
- Guarantees and Indemnities
- Write-offs and Forgiveness
- Banking and Investments
- Loans and Borrowing

- Provisions for Capital Acquisition
- Insurance
- Assignment and Set-off

The range of provincial practice in each of the above sections is discussed in Appendix B as an element of the “Impact of Change” analysis, however, there are several general highlights that need to be specifically identified.

Application of the Act - either in the body of the legislation or through regulation many public agencies are excluded from application of the provincial Act. For example, although BC is one of the most inclusive provinces, BC does exclude the BC Ferry Authority in the definitions section of the BC FAA. The *BTAA* also excludes many public agencies through regulation including the BC Workers’ Compensation Board. However, BC does include most SUCH sector organizations. Alberta takes a less inclusive approach and in the definitions and application sections of its FAA excludes most public agencies under the *Regional Health Authorities Act*, the *Mental Health Act*, the *Alberta Mortgage and Housing Corporation Act*, the *Investment Companies Act*, and the *Post-secondary Learning Act*. Alberta also excludes many public agencies from application of specific sections of the FAA through the *Funds and Agencies Exemption Regulations*. The *Alberta Fiscal Management Act* excludes the Alberta Workers’ Compensation Board.

The reason for highlighting application of the provincial FAAs is to illustrate that provinces take different approaches but do exclude certain public agencies when circumstances make such an exclusion reasonable.

Degree of Control – all jurisdictions gives Treasury Board and/or the Minister of Finance authority to issue financial management directives to public agencies, particularly with respect to accounting policies and practices and public accounts. All jurisdictions make provision for access to public agency records. Only BC and Alberta require corporate plan type documents and no jurisdictions exercise overt control over public agency spending through their FAA (e.g. treat public agency budgets as if they were appropriations). The provincial FAAs do exercise control over public agency borrowing and investing. It is apparent from the provincial legislation that although control over public agencies is exercised it is selective control (e.g. public agencies are not treated exactly the same as government departments).

Best Practices - If there are best practices of note they are likely provisions for managing investments through one provincial entity, requiring all public agency borrowing to be from the provincial government and pooling insurance requirements.

4.3 IMPACT ON THE AUTHORITY OF THE LEGISLATIVE ASSEMBLY

Bill 37 actually increases the public agency reporting to the Legislative Assembly. The responsible Minister must now table public agency budgets (s.28) and amendments (s.29.(2)(b)), as well as public agency annual reports (s.32.(2)). In addition, public agency borrowing (if any) must be disclosed in the annual borrowing plan for the government reporting entity that the Minister of Finance must now prepare and table with the Estimates (s.107.(2)).

4.4 LEGISLATION VERSUS REGULATION

There is an accepted hierarchy in government authoritative statements; legislation, regulation, policy, directive. It is also normal that these authoritative statements move from the more general to the more specific or detailed as you progress from legislation down to directive. However, this is far from a fast rule. Often legislation includes very detailed provisions on particular matters deemed of high importance by the Legislature of the day. In this hierarchy, only legislation requires Legislative Assembly approval. As a result, only matters of lesser policy importance, matters of procedural detail and matters subject to frequent change usually get addressed through regulation. Generally speaking, the degree of specificity in Bill 37 is high compared to most provincial jurisdictions, but this is not necessarily a bad thing, as long as the provisions are of high importance and are intended to have a long shelf life (e.g. will remain appropriate for a long period of time even in changing circumstances).

With respect to public agencies, Bill 37 pulls them in much closer to government control and treats them as quasi-departments. Based on the analysis presented in 4.1 above, I have questioned whether this shift will have unintended consequences. If closer control over public agencies is deemed necessary, it may be better to pursue control selectively through regulations and/or directives that are focused on the public agencies or areas of public agency financial administration that most need additional government control and oversight.

4.5 VALUES AND PRINCIPLES OF CONSENSUS GOVERNMENT

As noted in 4.3 above, Bill 37 increases the disclosure to the Legislative Assembly on public agency budgets, annual reports and borrowing. This enhanced disclosure is consistent with the stated principles of consensus government.

There is one area of Bill 37 affecting both departments and public agencies that is proposed as policy or regulation that may be of high interest to the Legislative Assembly. This is the proposed planning and accountability framework in section 21. It is contemplated in Bill 37 that this framework may be contained in regulation (145.(g)). Although section 21 provides for the framework to be tabled in the Legislative Assembly, this is after the fact. Given the potentially high impact of this framework, it may be appropriate for section 21 to include some provision for prior consultation with the Legislative Assembly, perhaps through the standing committee system. Consistent with consensus government, there is a protocol between the Legislative Assembly and Cabinet respecting consultation on major policies but a specific provision in section 21 would recognize the high importance of the proposed framework.

5 POWERS AND AUTHORITIES

5.1 OVERVIEW

In looking at FAA based powers and authorities three areas were focused on; the Financial Management Board (FMB), the Minister of Finance and the Comptroller General (CG). In general, Bill 37 includes greater specificity respecting the powers of the FMB, Minister of Finance and CG but, with a few notable exceptions, does not enhance them. Bill 37 makes a concerted effort to accurately capture and describe in greater detail the powers and authorities historically and currently exercised by the three functions. Appendix D presents a more detailed examination and commentary on the changes in Bill 37 affecting these areas of powers and authorities but the following highlights are discussed here.

Section 10.(2) provides the power to FMB to issue directives to public agencies and other reporting bodies without prior consultation. The current FAA only allows directives to be issued to public agencies by the Minister of Finance where the appropriate Minister and Executive Council are of the opinion that it is in the public interest and prior consultation with the affected public agency has occurred. The changes to FAA provisions affecting public agencies have already been discussed in 4.1 above so those issues will not be repeated here, but for consistency it is being flagged.

Although powers and authorities presented in Bill 37 are largely consistent with practice, there are several areas of concern. The first is with the powers and authorities of the FMB in comparison to the powers and authorities of the Minister of Finance. In several instances the powers of the Minister of Finance appear in conflict with the powers of the FMB. Specifically:

- ❖ section 7.(1)(f) versus 13.(1) – where the FMB and Minister of Finance’s powers respecting public money appear to overlap; and
- ❖ section 7.(1)(a) and 13.(2)(a) versus 13.(2)(d) – where the FMB and Minister of Finance’s powers respecting fiscal policy appear to overlap.

These overlaps could be readily addressed by clarifying that the Minister of Finance’s powers in this areas are subject to FMB authority, similar to what was done with section 13.(2)(a) and (b).

A second area of concern, or perhaps clarification, is with section 13.(2)(f); the power of the Minister of Finance to set annual expenditure targets. In the past, departmental expenditure targets were set by FMB. Granting a single Minister the power to completely control the allocation of scarce resources gives that Minister almost unilateral authority over government priorities and direction. If this is not the intent of 13.(2)(f), the wording should be altered to make the intent clear. I would note that of the provincial jurisdictions surveyed only one other gave the power to set expenditure targets to the Minister of Finance and this was restricted to “aggregate” (government-wide) expenditure targets.

The final area of concern is with the expansion of the Comptroller General’s (CG) responsibilities to encompass public agencies, including their handling of the expanded definition of public money (now includes all money held by public agencies). Bill 37 gives the CG the same responsibilities previously held for only government departments to now include all public agencies (e.g. NTPC, WSCC, Arctic

College, school boards, health board, etc.). This is in addition to the control exercised over public agencies through their establishing legislation. For example, the Education Act has provisions respecting school board financial management in areas such as banking, borrowing, audit and public reporting, with the Minister of Education having fairly extensive power to issue instructions and take corrective action. Regardless of the justification for Bill 37's expansion of the CG's responsibilities, it is unclear where the Office of the Comptroller General is going to get the resources to carry out the expanded duties. The wording of Bill 37 respecting CG powers and responsibilities is not permissive, rather it is prescriptive, stating that the CG "shall" exercise his/her responsibilities with respect to public agencies. This increase in responsibility could significantly increase the workload of the CG.

5.2 JURISDICTIONAL PRACTICES

Appendix E is a compilation of all provincial FAAs and the Yukon's FAA respecting the powers of their equivalent to FMB (often Treasury Board), the Minister of Finance and the Comptroller General (often the Controller). Although other jurisdictions are often less specific than Bill 37 in describing these powers and authorities, they are all similar. There is variance in which powers are ascribed to Treasury Board versus the Minister of Finance (often termed the responsible Minister), or between Treasury Board and Cabinet, but the full range of powers addressed is fairly consistent. It is notable that many jurisdiction also empower Treasury Board to deal with government organization, compensation policy and collective bargaining.

The largest difference among jurisdictions is with respect to the powers and responsibilities of the Comptroller General. A number of provincial FAAs are silent in this area or simply state that there shall be a position of this nature. It is not uncommon for some of the CG's authorities to extend to public agencies, such as authority related to access to records or direction respecting production of public accounts information. Several jurisdictions give more expansive authority to the CG with respect to public agencies but this often requires specific direction from Treasury Board (e.g. BC). Finally, most CG powers respecting public agencies are permissive; the CG "may" undertake some function respecting public agencies rather than prescriptive; the CG "shall" undertake the function. This is in contrast to Bill 37.

5.3 IMPACT ON THE AUTHORITY OF THE LEGISLATIVE ASSEMBLY

As Bill 37 assigns FMB, the Minister of Finance and the Comptroller General powers and authorities that substantively reflect current practice and are, with a few exceptions, consistent with provincial norms, there is little in these changes that impacts on the authority of the Legislative Assembly.

5.4 LEGISLATION VERSUS REGULATION

Although Bill 37 is more specific in relation to powers and authorities than many other jurisdictions, there is nothing that stands out as inappropriate for inclusion in legislation.

5.5 VALUES AND PRINCIPLES OF CONSENSUS GOVERNMENT

With the exception of the matters highlighted in 5.1, the powers and authorities of FMB, the Minister of Finance and the Comptroller General that are presented in Bill 37 essentially reflect current practice. As such, there would be very little, if any, impact on the current role of the legislature versus that of the Government. The Legislative Assembly governs and the Cabinet manages. The powers and authorities documented in Bill 37 are of a management nature.

6 INDEMNITIES, GUARANTEES AND DEEMED APPROPRIATIONS

6.1 OVERVIEW

The changes in Bill 37 to the controls over guarantees and indemnities are not significant and do not affect the authority of, or reporting to, the Legislative Assembly. Of most note is the removal of the Government's ability to approve a guarantee over \$500,000 without an act (before it just required notice to the Legislative Assembly), and the provision for the acceptance of incidental indemnities (s. 127.(1)). Incidental indemnities are those where the granting of an indemnity is not the primary purpose of the transaction. These are very common when signing routine contracts and are a requirement of doing business. It would be very rare that an incidental indemnity would be activated. The reality is that contracts with these types of incidental indemnities have always been entered into but now the FAA would recognize this. This is standard practice in other jurisdictions.

With respect to the provisions in Bill 37 governing special warrants, there are substantive changes.

- First, the criteria for justifying a special warrant has been strengthened - In addition to the previous requirements, now there must also be potential for significant monetary loss for Government or the public, significant loss of or damage to public or private property or significant personal loss. These additional criteria go beyond what most other jurisdictions require. Bill 37 also makes provision for waiving the normal prohibition on special warrants during the 14 days before the Legislative Assembly resumes sitting. This waiver is only valid when there is a public emergency or natural disaster. I expect this may contemplate forest fire suppression or other similar emergencies.
- Second, Bill 37 designates a special warrant a deemed appropriation and no longer requires special warrants to be submitted in the form of an after-the-fact supplementary appropriation. To ensure accountability for special warrants, Bill 37 requires the Minister of Finance to table a report for each sitting of the Legislative Assembly on special warrants issued since the last sitting. In this way the Legislature does not have to wait for the Public Accounts to debate special warrants.

Dropping the requirement to include special warrants in after-the-fact supplementary appropriations is, in my view, appropriate. I base this on a belief that the Legislature should not have decisions placed before it that have no force and effect. In other words, the Legislative Assembly should not be asked to “rubber stamp” decisions already made that cannot reasonably be reversed. When a special warrant is issued, the associated expenditures are, by definition, urgently required. This means that by the time a special warrant is placed before the Legislative Assembly the money should have been spent or contractually committed. The Legislative Assembly is not left with a meaningful decision to make. However, the Legislative Assembly is able to hold the Government accountable for the special warrant decisions it has made. The special warrant report tabled in accordance with s.78.(7) can be moved into Committee of the Whole and publicly debated.

Another action that gives rise to a deemed appropriation is the transfer of appropriation authority among activities. Bill 37 is actually more restrictive than the current FAA when it comes to inter-activity transfers as it allows only permanent transfers for a limited number of purposes. This is progressive in that it eliminates any ability to have “budgets chase actuals” and thereby disguise over-expenditures. However, one of the allowed reasons for inter-activity transfers is to reflect a permanent change in Government priorities. As the original activity appropriations were accepted by the Legislature on the basis of the priorities existing at the time the Budget was approved, changing those activity appropriations on the basis of Government priorities alone may presume on the Legislative Assembly unless prior consultation is required.

There is one final Bill 37 highlight in this section of the Report. Section 77 appears to make provision for the Comptroller General to charge an expenditure to an appropriation even if that results in the appropriation being exceeded. Section 77 provides that the excess shall be a deemed appropriation. This is a very significant departure from previous provisions in this area that restricted such authority to the recording of year-end expenditure accruals and made provision that any overage was an interim appropriation, rather than a deemed one. The new section 77 is not restricted to year end accruals but would allow the Comptroller General to exceed an appropriation at any time in the year and for any purpose and such excess would be a deemed appropriation. I frankly wonder if this was really the Government’s intent or if some error has been made in Bill 37. It is my view that Section 77 needs to be revised to restrict the Comptroller General’s authority to year end expenditure accruals. The change from resulting overages being interim appropriations to being deemed appropriations with full accountability is reasonable, and is based on the same logic as discussed under special warrants.

Appendix F provides a clause by clause analysis of the changes in Bill 37 in this area.

6.2 JURISDICTIONAL PRACTICES

Appendix G provides a summary of provincial practices respecting guarantees, indemnities, inter-activity transfers, special warrants, year-end accounting and net-voting. All jurisdictions exercise tight control over guarantees and indemnities although there is a range of practice between jurisdictions. Bill 37 provisions respecting guarantees and indemnities are very consistent with the sampled jurisdictions and, in some cases, even more restrictive.

With respect to inter-activity transfers most sampled jurisdictions are less restrictive than Bill 37.

Provincial practices regarding special warrants are similar to Bill 37 provisions with a few notable differences. With the exception of Alberta, the basis for approving a special warrant in the sampled jurisdictions is less restrictive than proposed in Bill 37. In Alberta, my reading of their legislation is that it now prohibits a special warrant except for public emergencies and disasters (see Alberta's FAA s.26.1). British Columbia, Alberta and Saskatchewan still require special warrants to be submitted through the next appropriation or supply bill, whereas Manitoba and Ontario do not. All require reporting of special warrants.

Provincial provisions respecting year end expenditure accruals are mixed. All provincial FAAs provide for the recording of unpaid liabilities at year end but have different treatments of any over-expenditure. In British Columbia, Alberta and Saskatchewan the over expenditure becomes a first charge on the following year's appropriation. Manitoba's provision is too vague to tell, whereas Ontario's provisions appear to allow the accrual but only if a transfer can be made from an underspent appropriation to cover the overage (see Ontario FAA s.1.0.8).

Bill 37 does not contemplate net-voting. Net-voting is when estimated revenues or recoveries are deducted from expenditures to determine the net appropriation required. This practice has been discouraged over the years as it has been viewed as taking away from rigorous disclosure and review of total expenditures. However, most of the sampled provincial jurisdictions allow limited net-voting, primarily when there is an estimated recovery of some of the authorized expenditures and the actual recovery exceeds the estimate. As Bill 37 does not propose any net-voting, and it may be of limited concern to Government, I raise it here only for the purposes of information.

6.3 IMPACT ON THE AUTHORITY OF THE LEGISLATIVE ASSEMBLY

Bill 37 increases the Legislative Assembly control over guarantees exceeding \$500,000 as they now require an Act rather than just notice, and is neutral respecting indemnities.

The ability of Government to make permanent inter-activity transfers to reflect changes in Government priorities may be seen as too much of an intrusion on the authority of the Legislative Assembly, unless there was a requirement for prior consultation in some form.

The proposed special warrant criteria are more restrictive than in the past which also adds to Legislative Assembly control. The Bill does remove the requirement for after-the-fact appropriations for special warrants but replaces this with an equivalent opportunity to publicly debate the justification for the special warrant.

If s.77 on the recording of expenditures that exceed an appropriation is not revised to restrict this to year end accruals, the authority of the Legislative Assembly would be compromised.

6.4 LEGISLATION VERSUS REGULATION

There is nothing in Bill 37 respecting guarantees, indemnities, special warrants or year-end accounting that would be better housed in a regulation.

6.5 VALUES AND PRINCIPLES OF CONSENSUS GOVERNMENT

The proposed provisions regarding guarantees, indemnities, and special warrants are consistent with the principles identified in Appendix A, in that accountability to the Legislature is maintained and in some cases enhanced. It is my view that the new deemed appropriation approach to special warrants is more respectful of the Legislature while still providing for open public debate and accountability. As noted previously, neither the ability to make inter-activity transfers to effect changes in Government priorities, nor the current form of s.77, adequately respect the prerogative of the Legislative Assembly respecting appropriations nor the principles of consensus government and need to be changed.

7 PRINCIPLES OF RESPONSIBLE FISCAL MANAGEMENT

A special charge of the Review Terms of Reference was to assess the new sections of Bill 37 relating to the principles of responsible fiscal management and accountability and what the potential impact of these sections is on government operations. For ease of reference I reproduce the relevant clauses below:

5. *Government and public agency policy objectives must be pursued in accordance with principles of responsible fiscal management, including the following principles:*
 - (a) *the net public debt should be maintained at prudent levels, taking into consideration the impact of the debt on the sustainability of programs and services for the future;*
 - (b) *fiscal and financial risks should be managed prudently;*
 - (c) *financial investment portfolios should be managed in a sound and efficient manner;*
 - (d) *policies should be pursued that are consistent with the achievement of a reasonable degree of predictability about the level and stability of tax rates and programs and services for future years;*
 - (e) *a fiscal decision making system that is rational, fair, efficient, credible, transparent and accountable should be maintained.*

9. The responsibilities of the Board must be carried out in a manner that promotes and supports fiscal responsibility and the accountability and transparency of Government operations

One of the purposes of a statement of principles is to publicly declare what an organization's values and beliefs are. Such a statement provides guidance to the members of the organization in the conduct of their duties or can be used to hold the organization to account if any party feels those principles have been compromised. Although of limited legal enforceability, they can provide important context in matters that come before the courts. Similar to a code of ethics, a statement of principles can be used to orient new organizational members or explain behavioral expectations or organizational policies.

Statements of principle are not often found in provincial FAAs. In fact, only Nova Scotia's FAA has such a statement and Bill 37 has drawn heavily on the Nova Scotia wording. Ontario does have a similar statement of fiscal policy principles in its *Fiscal Transparency and Accountability Act*.

Even though statements of principle are rare in provincial FAAs that is not to say they detract from or negatively impact the other provisions of the Bill. In fact, they can provide the Legislature with another line of questioning when challenging and holding Government accountable. Whether statements of principle are included or not is a matter of choice.

8 WRITE-OFFS, COMPROMISE SETTLEMENTS AND FORGIVENESS

Although not a specific element of the Review Terms of Reference, the changes in Bill 37 respecting write-offs, compromise settlements and forgiveness were examined and relevant provincial practices researched. Appendix H provides a clause by clause impact assessment and Appendix I provides the practices of the five sample provincial jurisdictions.

The big change with write-offs and forgiveness is that the requirement for advance legislation has been replaced with a reporting requirement in the Public Accounts. Although this may appear to be a significant erosion of the authority of the Legislative Assembly it is, in reality, not.

Write-offs are a recognition of fact. Either a debt is collectible or it is not. Either a physical asset has useable value or it does not. Generally Accepted Accounting Principles do not allow assets to be carried at more than their realizable value or their remaining utility. To require these accounting adjustments to be presented as decision items to the Legislative Assembly is really asking the Legislature to "rubber stamp" a reality that cannot be changed. It is much more appropriate to record write-offs and report them for accountability purposes.

Much the same can be said for compromise settlements and forgiveness. Compromise settlements are a reality of doing business, particularly if the business involves the extension of credit or the provision of loans. No matter how prudent an organization is, from time to time the full amount of an account receivable will not be collectible. In these cases negotiations with the borrower or debtor along with all other potential creditors (e.g. Canada Revenue Agency, financial institutions and others) will likely be required to maximize the amount of the debt that can be realized. Authority must be available to the Government to enter into these negotiations and agree to a settlement. It would be very unusual for sufficient time to be available to get a bill introduced and passed in the Legislature to allow advance approval of the compromise settlement. Saying that, there must be clear reporting and accountability to the Legislative Assembly

Alberta has almost the same FAA provisions on compromise settlements as Bill 37 but also provides for this authority to be delegated to public agencies (s. 22). Most of the other jurisdictions surveyed dealt with compromises through provisions for forgiveness or remission.

The majority of forgiveness will be due to bankruptcy or some other form of court protection, or compromise settlements. The Government's entitlement to collect the debt owing will usually be long gone by the time a Forgiveness Act could be brought before the Legislative Assembly. There will be a few cases from time to time where the forgiveness is based on avoidance of undue hardship, injustice, great public inconvenience or similar factors. When looking at Manitoba's FAA there was a qualification that remission or forgiveness should be based on public interest and avoidance of hardship or injustice. Most jurisdictions provide similar qualifiers respecting remission and forgiveness citing that collection would be unreasonable, unjust, create great hardship, be of great public inconvenience, or be based on economic conditions. The Government may want to edit s. 62 to add some of these qualifiers.

In conclusion, the changes to write-offs, compromise settlements and forgiveness make practical sense and avoid taking forward legislation over which the Legislative Assembly has little or no actual decision making control. This is neither an erosion of Legislative Assembly authority nor a departure from the principles of consensus government.

9 OTHER MATTERS

There are only a few remaining subject matters that are worthy of highlighting for the SCOGO. These are presented in this section of the Report.

9.1 REGULATION VERSUS LEGISLATION – OTHER

Whether a provision should be captured in legislation or regulation depends to a large extent on:

- ✓ the importance of detail respecting that provision to the Legislative Assembly; and
- ✓ the anticipated frequency with which changes to the provision will be required.

As a result, only matters of lesser policy importance, matters of procedural detail and matters subject to frequent change usually get addressed through regulation. In the discussion on each major area of this Report a discussion on whether aspects of that topic would be better captured in regulations was addressed. For the most part, there was no compelling reason to move any provisions out of Bill 37 and into regulation. Saying that, the provisions in Bill 37 respecting expenditures (s.90 and s.91), disbursements (s.92), contracts (s.95) and accountable advances (s.98 and s.99) are of a detailed nature and some elements of these sections could be candidates for inclusion in regulations if there was a desire to streamline the Bill. Sampled provincial jurisdictions are not consistent in how they have addressed detail in similar areas, but tend to less specificity.

Section 42, Agreements and Accountability is another provision that may better be captured in regulation or even policy as it has been in the past. Its escalation to legislation, however, suggests some issue with past compliance to these terms that the Government wants to address. Inclusion in legislation alone will not ensure better compliance if that is the issue. Whether these agreement requirements are in legislation, regulation or directive will not have a significant impact on compliance if the parties receiving the government funding have no capacity to appropriately administer the funding

provided. The administrative capacity of NGOs and similar organizations, who are often the recipients of government program funding, is usually limited, and the more demanding accountability requirements such as results reporting can exceed that administrative capacity. A practical assessment of a funding recipient's administrative capacity should always be a prerequisite to entering into the contribution arrangements. However, not knowing the issue the Government is trying to address with the inclusion of this section in Bill 37, it would be inappropriate to draw a conclusion on whether this provision should be in regulation.

9.2 INVESTMENT PROVISIONS

Although it is not an area of significant change, s.51.(1) details the permissible investments that the Minister of Finance can make with public money. The list of permissible investments is not inconsistent with the sampled provincial jurisdictions but it is on the conservative end of the spectrum of practice. For example; the Alberta FAA provides that:

43(1) The Minister responsible may make investments on behalf of the funds in subsection (3) and when doing so shall adhere to investment and lending policies, standards and procedures that a reasonable and prudent person would apply in respect of a portfolio of investments to avoid undue risk of loss and obtain a reasonable return.

British Columbia has a similar provision to Alberta:

40(6) When investing any money other than under subsection (4), the Minister of Finance must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

Saskatchewan is a bit more prescriptive:

38(1)The minister may invest any part of the general revenue fund in:

- (a) any class of investments mentioned in The Pension Benefits Regulations;*
- (b) bonds, debentures, notes or other evidences of indebtedness issued by a Crown corporation; or*
- (c) any class of investments, in addition to those described in clauses (a) and (b), that the Lieutenant Governor in Council may authorize.*

I have raised this issue as Bill 37 actually gives more investment discretion to selected public agencies than the Minister of Finance:

52.(3) Notwithstanding subsection (2), each of the following public agencies may, in addition to investing in the securities and other investments referred to in subsection (1), invest in any other securities and investments that the public agency determines to be prudent:

- (a) Northwest Territories Hydro Corporation;*
- (b) Northwest Territories Power Corporation;*
- (c) Workers' Safety and Compensation Commission.*

It seems unusual for the Minister of Finance to have less discretion over investments than that afforded public agencies. It may be appropriate to give consideration to an approach to investments similar to Alberta, BC and Saskatchewan.

10 RECOMMENDATIONS

The following recommendations flow from the discussion in the body of the Report:

1. Bill 37 pulls the financial management of all public agencies much more closely into the practices applied to government departments. The implications of this on public agency operations is unknown and may negatively affect their ability to function effectively and efficiently. The specific issues or problems the Government is trying to address with this change should be clearly identified and discussed. Consideration should be given to a more selective approach with the exemption of those public agencies whose operations are not contributing to the problem or issue.
2. The capacity of the Office of the Comptroller General and the Internal Audit Bureau to carry out their expanded responsibilities with respect to public agencies should be assessed and resource implications identified.
3. Section 21 of Bill 27 provides that the Board shall establish a framework for planning and accountability of Government and public agencies. Although this section makes provisions for laying the framework before the Legislative Assembly at the earliest opportunity, it would be more appropriate in the spirit of consensus government to include a provision for prior consultation with the Legislative Assembly.
4. The overlap of FMB and Minister of Finance authorities in section 7.(1) and section 13.(2) should be clarified.
5. Section 13.(2)(f) should be amended to include the word “aggregate” before the word “targets” so that it is clear that FMB retains the authority to set annual departmental expenditure targets.
6. Section 73.(4)(b) should be removed to prevent Government priorities from overlaying Legislative Assembly appropriations without prior consultation.
7. Section 77 should be re-written to restrict the ability of the Comptroller General to book expenditures that result in a deemed appropriation to situations where year-end accruals are being booked.
8. Section 62 on forgiveness should be edited to qualify that forgiveness should only be provided when the Government no longer has a legal entitlement to collect the debt or collection would not be in the public interest as it would cause undue hardship, injustice, or great public inconvenience.
9. Consideration should be given to making the investment authority of the Minister of Finance equivalent to that proposed for the identified public agencies.

11 APPENDIX A

Consensus Government in the NWT Guiding Principles

1. Consensus government is not defined by the absence of party politics. It is defined by the ability and willingness of all Members of the Legislative Assembly to work together, within their respective roles, for the collective good of the people of the Northwest Territories.
2. Consensus government is a unique combination of the British traditions of ministerial responsibility, cabinet solidarity and legislative accountability and the aboriginal traditions of open dialogue, inclusive decision-making, accommodation, respect and trust.
3. Open and respectful communication between all Members is the most essential feature of consensus government. While it is impossible to reach unanimous agreement on all issues, the opportunity for all Members to have meaningful input into important decisions is fundamental.
4. Effective communication is a “double-edged sword.” For consensus government to work, all Members must agree to respect the confidentiality of information before it is properly made public. Similarly, Members should acknowledge the fact that information was shared in confidence once it has been released.
5. Except under extraordinary circumstances, Members of the Legislative Assembly should be made aware of and have opportunity to discuss significant announcements, changes, consultations or initiatives before they are released to the public or introduced in the Legislative Assembly. Use of the element of surprise is inconsistent with consensus government.
6. The role of the Caucus is fundamental to the effectiveness of consensus government. Caucus provides a venue for all Members to set broad strategic direction for a Legislative Assembly and discuss matters of widespread importance to the Northwest Territories as they arise.
7. The Premier and Cabinet are appointed by the Members of the Legislative Assembly to provide overall leadership and direction in accordance with the broad strategic direction set by the Caucus. Cabinet must have the ability to implement this strategic direction effectively and efficiently but in a way that reflects the concerns of Regular Members and maintains their support.
8. Unlike a party-based parliamentary system, the Regular Members are not a “Cabinet in Waiting.” Their ultimate goal is to support Cabinet in implementing the broad strategic direction set by the Caucus.
9. As with all parliamentary systems of government, a healthy level of tension must exist between Cabinet and Regular Members. While the ultimate goal of the Regular Members is not to defeat or discredit Cabinet, it is their responsibility to review and monitor the leadership and direction of Cabinet and hold it to account.
10. The attendance and participation of all Members of the Legislative Assembly within their respective roles is essential to the effectiveness of consensus government. Formal sessions of the Legislative Assembly and meetings of Caucus, Cabinet and standing and special committees must be a priority for every Member.

APPENDIX B: STAKEHOLDER SUBMISSION



OFFICE OF THE
INFORMATION
AND PRIVACY
COMMISSIONER

NORTHWEST TERRITORIES

P.O. Box 262
Yellowknife, NT
X1A 2N2

FAXED
April 28/2015

April 28, 2015

Legislative Assembly
Standing Committee on Government Operations
P.O. Box 1320
Yellowknife, NT
X1A 2L9

Attention: Wendy Bisaro
Deputy Chair

Dear Madam:

RE: Bill 37: Financial Administration Act
My file: 15-129-4

Thank you for your letter of April 10th with respect to the above noted matter. I have reviewed the legislation with a focus on access and privacy matters and provide the following observations.

I applaud those sections of the Act which require accountability to the people of the Northwest Territories with the requirements for the production of annual audits and Annual Reports to be tabled to the Legislative Assembly. While I do not believe that these are new requirements, they are welcome and promote pro-active disclosure.

As a preliminary matter, I note that section 3 of the Act is very similar in wording to section 4 of the *Access to Information and Protection of Privacy Act*. Each of the sections essentially states that in the event of a conflict between the Act and any other piece of legislation, that Act prevails. While it is difficult to think of a specific situation in which there might be a conflict between the two Acts, the possibility does exist and such a conflict would cause confusion. It may be appropriate to clarify which of the two would prevail.

I note, as well, that there are a number of sections which provide for the Board, the Minister of Finance, a Deputy Minister, the Comptroller General and the Internal Audit Bureau to collect "any information", or "examine any record" necessary to carry out their respective responsibilities under the Act. Presumably this would include the collection or review of personal information

April 28, 2015

Page 2

and potentially, of very sensitive personal information about residents or others. The *Access to Information and Protection of Privacy Act* dictates that personal information collected by public bodies can, in most cases, only be used or disclosed for the purpose it was collected unless the individual consents to a different use or further disclosure.

I note that section 140 does provide for protection of personal information gathered under the Act to the extent that a person who receives information under the *Financial Administration Act* holds that information under the same restrictions respecting disclosure as the person who provided the information was under. This provides some comfort with respect to the possible further disclosure of personal information. This does not, however, change the fact that the *Financial Administration Act* allows for personal information to be examined (used) in a manner which was not initially contemplated by the individual when the information was provided to the public body.

For those who contract with the GNWT, the issue can be addressed through the contractual process by requiring the consent of the individual to the use and possible disclosure of personal information about their business dealings with the GNWT in accordance with the requirements of the *Financial Administration Act*. This does not, however, address the examination of personal information about individuals who have no commercial dealings with the GNWT other than, for example, being recipients of social assistance payment. In some instances this might be addressed by advising individuals, when their personal information is collected, that it may be used, in limited circumstances, for the purpose of financial audits and oversight. In all cases, the use of personal information for the purposes of planning and oversight of financial matters should be kept to a minimum and there should be clear retention and destruction schedules in place such that once the need for records containing personal information are no longer needed for the purposes of financial oversight, they are destroyed.

I trust these comments will assist in your discussion of the proposed legislation. Should you wish to discuss these matters further, please feel free to contact my office at your convenience.

Yours truly

Elaine Keenan Bengts
NWT Information and Privacy Commissioner
/kb

APPENDIX C: REPORTING REQUIREMENTS UNDER BILL 37

Government Reporting Requirements Under Bill 37

Section of Act	Document Required	Responsible Agency	How Provided	Date Due
21.	Planning and accountability framework	FMB	Tabled	At the earliest opportunity after established and with each amendment
22.	Estimates	Finance Minister	Tabled	Not specified
24.	Appropriation bill	Finance Minister	To Legislative Assembly	Each fiscal year
25.	Financial statements	Governing body of Public Agency		Each fiscal year
26.	Operating budget for following fiscal year	Public Agency	To Resp. Minister	Each fiscal year
27.	Capital budget for following fiscal year	Public Agency that has capital investment expenditures	To Resp. Minister	Each fiscal year
28.	Public agency operating and capital budgets	Responsible Minister	Tabled	Each fiscal year at the earliest opportunity
29.	Amended public agency operating or capital budget	Public Agency	To Resp. Minister	
		Responsible Minister	Tabled with copy to Finance Minister	At earliest opportunity
31.	Public agency audit report (audited accounts)	Auditor	To Resp. Minister	Annually
32.(1)	Public agency annual report (in accordance with planning and accountability framework)	Public Agency	To Resp. Minister	Per public agency's establishing legislation or not later than 90 days after fiscal year end
32.(2)	Public agency annual report	Responsible Minister	Tabled	Earliest opportunity after receipt
34.(1)	Government's public accounts	Comptroller General	To Finance Minister	
35.(1)			Tabled	On or before Dec. 31 st following end of fy or if LA not in session, on or before 5 th day of next sitting.

Government Reporting Requirements Under Bill 37

36.(1)	Government's interim financial report (non-consolidated)	Comptroller General		By Sept. 30 following end of the fiscal year
36.(3)		Finance Minister	Tabled	Earliest opportunity
60.(6)	Public agency write-off of an asset, debt or obligation	Governing body of public agency	Reported in annual report	For the fiscal year in which write-off occurs
62.(6)	Public agency forgiveness of a debt or obligation	FMB on recommendation of governing body of public agency	Reported in annual report	For the fiscal year in which the forgiveness occurs
64.	Record of all amounts written off, forgiven and remitted (ie. taxes, penalties owed to GNWT) in a fiscal year by government under Secs. 60, 62, 63 and other enactments	Comptroller General	Recorded	Per fiscal year
65.			Included in Public Accounts	
66.	Adequate records of public property administered by a department or public agency	Deputy Head	Kept	
72.(3) – (5)	Report that details each case where department expenditures exceeded activity budget	Responsible Minister	To Finance Minister	By June 30 following end of fiscal year
		Finance Minister	To FMB	
72.(6)	Report that details each case where expenditures exceeded activity budget by amount greater than \$250k	Comptroller General [per S. 36(1)]	Included with interim financial report	See S. 36(1)
74.(1) – (2)	Report on the transfer of all funds under S. 73(2) where the cumulative total transfers for each activity exceeds \$250k ; must include explanation of how transfers meet requirements of S. 73. (4) or (5).			At the end of each quarter of the fiscal year
74.(3)		Finance Minister	Tabled	Earliest opportunity

Government Reporting Requirements Under Bill 37

74.(4)	Summary of all funds transferred among activities [under S. 73(2)]		Included in Public Accounts	
75.(3)	Report that details any funds transferred among votes allocated to a department, as required by accounting policies.		Included with interim financial report	
78.(7)	Report that includes information about each special warrant issued prior to the sitting and how each meets the requirements of this section of the act.	Finance Minister	Tabled	Earliest opportunity
80.	Expenditure and disbursement statement detailing: <ul style="list-style-type: none"> • More money expended than appropriated; • Disbursement for a purpose not consistent with appropriation; • Disbursement in contravention of Act or Regs. • Irregular or unlawful disbursement in opinion of CG • CG's decision to prohibit a disbursement is reversed by FMB under S. 93(3) 	Comptroller General	To FMB and Auditor General	September 30 following end of fiscal year
87.(1)	Accounting officer designation report detailing each case where designation not approved, revoked or suspended.	Comptroller General	To FMB	
90.(3)	Department record of expenditure certifications made under S. 90.(1)	Deputy Minister	Kept	
91.(2)	Public agency record of expenditure certifications made under S. 91.(1)	Deputy Head	Kept	

Government Reporting Requirements Under Bill 37

92.(2)	Department record of disbursement certifications made under S. 92.(1)	Deputy Minister	Kept	
91.(3)	Public agency record of disbursement certifications made under S. 92.(1)	Deputy Head	Kept	
95.(3)	Contracts requiring expenditure in same fiscal year - public agency record of certifications made under S. 95.(1) and (2)	Deputy Head	Kept	
104.(a)	Revolving fund balance sheet and statement of operations	Deputy Minister or Deputy Head	To Comptroller General	End of fiscal year
107.(1)	Annual borrowing plan for government reporting entity	Finance Minister	Tabled	Annually with main estimates [in S.22(1)]
126.(4)	Indemnities with maximum liability exceeding \$500k or which cannot be quantified.	Finance Minister	Notice to LA in accordance with Regs.	At least 14 days before FMB recommendation
129.(1)	Report on guarantees and indemnities	Deputy Minister or Deputy Head	To FMB	For fiscal year
129.(2)	Total amount of contingent liability under all guarantees made by government and public agencies		Reported in public accounts	
129.(3)	Total amount of contingent liability under all indemnities made by government and public agencies		Reported in public accounts	