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Mr Peter Cain MLA

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Standing Committee on Justice and Community Safety (Legislative Scrutiny)

Legislative Assembly for the ACT

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Dear Mr Cain *Peter*

Thank you for providing Scrutiny Report 33 and 34, and the Committee's comments raised on the *Health Infrastructure Enabling Amendment Regulation 2023 (No 1)* (the Amendment Regulation) and delineation of matters contained in primary and subordinate legislation.

I would further advise the Committee that the subordinate regulation supports the Act without exceeding or extending the scope or power of the Act.

Response to Scrutiny Report 33

The Amendment Regulation (SL2023-14) was notified on 28 June 2023 and furthered the obligation contained in s 10(1) of the *Health Infrastructure Enabling Act 2023* (the Act). The Amendment Regulation was made to respond to tentative concerns expressed in the ACT Supreme Court proceeding.

As provided in my 22 August 2023 response to the Committee's comments about the *Health Infrastructure Enabling Regulation 2023* (the Regulation) in Scrutiny Report 32, the Act and Regulation are a bespoke scheme and were deliberately structured in that way to allow for appropriate levels of flexibility.

Having the Regulation contain mechanical and process provisions allows for the fine tuning of those provisions, as required, given that the acquisition and transition is a complex exercise. Section 28 of the Act is a discretionary regulation-making power, and the Act contemplates the making of regulations about several matters.

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Paragraph [1.64] of the Scrutiny Report refers to section 13 of the Amendment Regulation, which inserted a new section 33A into the Regulation. The new section 33A of the Regulation makes it clear that nothing in the Regulation excludes the supervisory jurisdiction of a court of competent jurisdiction to determine a question of law (s 33A(a)) or the just terms for any acquisition of property under the Act (s 33A(b)), in circumstances where it is alleged the application of the Regulation does not adequately provide just terms for an acquisition of property under the Act.

Section 33A was inserted into the Regulation by section 13 of the Amendment Regulation for the avoidance of doubt. That is, to make certain and clarify that s 10(1) of the Act retains the Court's jurisdiction to determine just terms for any acquisition of property that is not sufficiently provided for by the Act read with the Regulation. Section 33A makes it clear that nothing in the Regulation impacts on the supervisory jurisdiction of the Court, and if there is an alleged gap in the Regulation, the Court can determine that allegation.

Accordingly, s 33A of the Regulation simply operates to avoid any doubt about the supervisory jurisdiction of the Court to determine, in relation to an acquisition of property by the Act, a legal dispute that might arise in the course of the claims process under the Regulation.

Response to Scrutiny Report 34

The *'ACT Legislation—Developing Legislation and Working with PCO'* (ACT Legislation Guidelines) contains guidance on when legislation and regulations are required (see pp 9-10) similar to the PM&C Legislation Handbook (referred to by the Committee in its report).

The ACT Legislation Guidelines provide guidance on when legislation and regulations may be required. The guideline (citing Pearce and Argument, *Delegated Legislation in Australia*, 5th ed, LexisNexis Butterworths, Australia 2017, p 6) outlines some of the main reasons that regulations or other statutory instruments may be used, including:

- to reduce pressure on parliamentary time;
- legislation is too technical or detailed for parliamentary consideration; and
- legislation needs to deal with rapidly changing or uncertain situations, or should be flexible and responsive to changing needs.

In alignment with the above, and in response to the Committee's request for comment on this matter in Scrutiny Report 34, the Act contains the key enabling provisions about acquisition, the process leading up to transition and the transition. The Regulation provides for "mechanical" and process provisions to support the Act. I consider that the Regulation was and remains appropriate to deal with rapidly changing or uncertain situations and the need to be flexible and responsive to changing needs within a public health environment.

The Regulation appropriately deals with matters ancillary to the acquisition which are of importance to the continued operation of the Calvary Public Hospital Bruce as the North Canberra Hospital, such as offers of employment, novation or assignment of contracts, amendment to the Crown lease and compensation. However, the Regulation does not operate to extend the scope or general operation of the Act and was validly made under s 28 of the Act.

The ACT Legislative Assembly has determined to give the Executive clear scope to make the Regulation under s 28, by enacting ss 10(3) and 14(2) of the Act, and given the operation of s 44(1)(a) of the *Legislation Act 2001* (the Legislation Act). While it remains available, given the operation of s 44(1)(b) of the Legislation Act, the necessary or convenient power included in s 28 of the Act is subsidiary or incidental to the clear scope of the power in s 28 to make the Regulations given by ss 10(3) and 14(2) of the Act and s 44(1)(a) of the Legislation Act.

I note that the Committee refers to criteria in the PM&C Handbook (1.10 (b), (c), (d), (j) and (l)) as examples that “might (possibly) be relevant to determining the appropriate ‘mix’ between primary and subordinate legislation for the Calvary acquisition”. The criteria identified are all matters for which the Act provides and where the Regulation operates simply to support the key provisions in the Act. Specifically, the Act provides for:

- the acquisition of that part of the land on which Calvary Public Hospital Bruce was situated (Block 1 Section 1 Division of Bruce) to construct a new northside public hospital;
- the transition of the operation of the public hospital to the Territory, including by terminating the Calvary Network Agreement;
- the safe and orderly transition of Calvary Public Hospital Bruce employees, assets and services to the Territory;
- the continuity of, and standards of provision for, public hospital services at the hospital both during and immediately following the transition;
- the Territory to manage its obligations and liabilities in relation to the public hospital effectively, including those liabilities arising in relation to the operation of the public hospital before the transition; and
- any interest acquired by the Territory under the Act to be acquired on just terms.

I hope this information is of assistance to the Committee and Assembly.

Yours sincerely



Rachel Stephen-Smith MLA
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