



Mick Gentleman MLA

Manager of Government Business
Minister for Planning and Land Management
Minister for Police and Emergency Services
Minister for Corrections
Minister for Industrial Relations and Workplace Safety

Member for Brindabella

Our ref: 23/108330

Dr Marisa Paterson MLA
Acting Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
Email: Scrutiny@parliament.act.gov.au

Dear Dr Paterson 

I refer to Scrutiny Report 35 and thank the Committee for its request for a response in relation to clause 25 of the *Planning (General) Regulation 2023* (the regulation). I respond as follows:

Consistency with Human Rights

During the development of the regulation, due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (HR Act).

An assessment of the clause 25 of the regulation against section 28 of the HR Act is provided below.

Section 28 provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. However, the reasonable limits test may not require the adoption of the least restrictive means identified, but rather that when determining the reasonableness of the relevant limitation, it is sufficient that the means adopted falls within a range of reasonable responses to the problem confronted.

The presumption of innocence

HR Act Section 22 – Minimum guarantees in criminal proceedings

Nature of the right and the limitation (s28(a) and (c))

ACT Legislative Assembly London Circuit, GPO Box 1020, Canberra ACT 2601

 +61 2 6205 0218  gentleman@act.gov.au

 @GENTLEMANMick  MickGentleman  mick.gentleman

Section 22 (1) of the HR Act recognises that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law; and section 22 (2) recognises that anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with anyone else: (a) to be told promptly and in details, in a language that he or she understands, about the nature and reason for the charge; (b) to have adequate time and facilities to prepare his or her defence; and section 22 (2) (i) not to be compelled to testify against himself or herself or to confess guilt.

Strict liability offences may limit the right to be presumed innocent by allowing for the imposition of criminal liability without the need to prove fault.

Clause 25 of the regulation limits the right to the presumption of innocence found in section 22(1) of the HR Act. The regulation introduces a strict liability offence that engages and limits the right to be presumed innocent as there is no requirement for the prosecution to prove a fault element, such as intention or recklessness and the prosecution need only show that the defendant did the prohibited act.

Legitimate purpose

The objective sought by this offence is to support compliance with directions given by Environmental Impact Statement (EIS) inquiry panels to prohibit or restrict the publication of information given to the inquiry, or of matters contained in documents lodged with the inquiry. EIS inquiries must be conducted in public, except in circumstances where the panel decides that confidentiality is required. The offence is intended to protect and prohibit the publication of confidential information.

Rational connection between the limitation and the purpose (s28(d))

Including this offence encourages adherence to the rules and parameters of the regulation and ensures that those rules can be enforced.

The reason this offence is one of strict liability is to allow for straight forward prosecution in the case of people publishing information in breach of a direction given by an EIS inquiry panel. This is an effective means of deterring breaches that would lead to the publication of information given to the inquiry, or of matters contained in documents lodged with the inquiry.

Proportionality (s28 (e))

The right to presumption of innocence before the law has been recognised by the common law and is codified in section 22 of the HR Act. The courts have held, however, that the right to presumption of innocence may be subject to limits, particularly where those who might be affected by an offence would be expected to be aware of its existence.

The limitation on the right to be presumed innocent is justified in these instances. The risk of inadvertent breach of clause 25 is low.

An inherent safeguard against the limitation on the right to the presumption of innocence is the availability of the defence of mistake of fact. This would allow anyone charged with an offence under clause 25 to challenge the offence.

In relation to the proportionality of the offence the strict liability provisions contained in clause 25 has a maximum penalty amount of 10 penalty units (PUs). This maximum amount is significantly lower than the maximum amount for a strict liability offence set out in the Guide to Framing Offences (50 PU's).

For all strict liability offences, although an evidential onus would be less restrictive on the right to be presumed innocent found in section 22, it would not be as effective. This is because strict liability offences provide that the defendant's act alone should dictate the offence, rather than the reasons that the defendant acted in that way.

I trust this response addresses the comment raised by the Committee.

Yours sincerely



Mick Gentleman MLA
Minister for Planning and Land Management

30/10/2023