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Mr Peter Cain MLA

Chair

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 No. 32 (the Report) on 22 August 2023 and the Standing Committee on Justice and Community Safety's (the Committee) comments raised on the *Health Infrastructure Enabling Regulation 2023* (the Regulation).

I thank the Committee for its consideration of the Regulation and offer the following comments in relation to the Committee's concerns that there may be significant matters addressed in the Regulation rather than in the *Health Infrastructure Enabling Act 2023* (the Act).

The Act contains key enabling provisions about the acquisition, the process leading up to the acquisition and the transition. The Regulation serves to facilitate the acquisition and transition by providing a mechanism to determine compensation payable to Calvary Health Care ACT Limited (Calvary) on just terms to acquire the land and terminate the Calvary Network Agreement. It also provides a mechanism to transition Calvary Public Hospital Bruce employees, assets, and services to the Territory.

The Act and Regulation are a bespoke scheme and were deliberately structured in that way to allow 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. As an example, the *Health Infrastructure Enabling Amendment Regulation 2023 (No 1)* amended the Regulation to provide greater clarity, progress Government obligations on providing just terms under the Act, and to respond to tentative concerns expressed by the ACT Supreme Court during the hearing of Calvary's challenge to the validity of the Act and Regulation.

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The validity of the Act was upheld by the Full Court of the Supreme Court, and Calvary has since sought the Court's leave to discontinue the remaining part of the proceeding relating to its challenge to the Regulation.

The Act provides that regulations may be made to address how claims for compensation are made and dealt with, or how any dispute about compensation is resolved. The Act further permits regulations relating to the arrangements for the transition of employees and other contractual matters necessary for the operation of the public hospital.

Specifically, s 28 of the Act is a regulation-making power. It gives the Executive a discretion to make regulations "for [the] Act" but does not require any regulations to be made. The scope of that power is set out in s 44(1) of the *Legislation Act 2001* and has two limbs:

- to make regulations in relation to any matter "required or permitted to be prescribed by the" Act (relevantly here, the matters set out in ss 10(3) and 14(2) of the Act); and
- to make regulations that are "necessary or convenient ... for carrying out or giving effect to the" Act.

Even though the regulation-making power is a discretionary power, as observed by the Full Court of the Supreme Court, the Act contemplates the making of regulations about several matters.

I trust the information provided has been of assistance.

Yours sincerely



Rachel Stephen-Smith MLA
11 September 2023