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Dear Mr ~~Cain~~ *Peter*

Thank you for your letter about the *Biosecurity Bill 2023* (the Bill) which I presented to the Legislative Assembly on 12 May 2023.

I am writing to you regarding the Standing Committee on Justice and Community Safety (Committee) Scrutiny Report 29 (Report) comments on the Bill. The Report includes a request for further information on provisions of the Bill as set out in the Explanatory Statement against the following sections of the *Human Rights Act 2004* (HRA):

- Right to privacy and reputation (section 12 HRA)
- Right to a fair trial (section 21 HRA)
- Rights in criminal proceedings (section 22 HRA)

I have responded to this request in Attachment 1 using the framework specified in section 28 of the *Human Rights Act 2004*. The Biosecurity Bill package provided to the Legislative Assembly will include additional information reflecting the issues raised by the Committee's comments prior to the Bill being debated.

The ACT biosecurity system forms part of Australia's integrated national biosecurity system which protects our economy, environment and community from the detrimental and often devastating impacts of pest animals, pest plants and animal and plant diseases. It enables bio-secure trade, market access and people movement to support the quality of life and lifestyle that all Australians are accustomed to, and helps protect Australia's native fauna, flora and biodiversity. The

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Response to Standing Committee on Justice and Community Safety
Legislative Assembly for the Australian Capital Territory
Scrutiny Report 29 – Biosecurity Bill
Consistency with *Human Rights Act 2004*

This response relates to the content of the Biosecurity Bill 2023 specifically dealing with the following sections of the *Human Rights Act 2004* (HRA):

- A. Section 12 – Right to privacy and reputation
- B. Section 21 – Right to a fair trial
- C. Section 22 – Rights in criminal proceedings

The response is drafted using the framework set out under section 28 of the HRA.

A. HRA Section 12 – Right to privacy and reputation

Extract Scrutiny Report 29 – Biosecurity Bill 2023 comments:

1.5 *As discussed above, the Bill will allow an authorised person to enter residential premises without consent 'if the authorised person believes on reasonable grounds that the risk is so serious and urgent that immediate entry to the premises without the authority of a search warrant is necessary' (proposed paragraph 173(1)(g)). The Committee is concerned that it is not sufficiently clear what risks this provision is referring to. Paragraph 173(1)(a) refers to a biosecurity risk, which in turn is defined in section 13 as the risk of a biosecurity impact.*

1.6 *The Committee notes that there are various other provisions of the Bill which may potentially limit the protection of privacy and reputation provided by section 12 of the HRA. Proposed section 224 authorises a certifier authority or auditor authority to disclose to the director-general any information obtained in exercising a function under the Act. Proposed section 223 authorises the director-general to disclose information they obtained under the Act to another entity where it is necessary for that entity to exercise a function relating to managing a biosecurity risk and disclosure to that entity is appropriate. Giving information about a biosecurity matter honestly and without recklessness to the director-general is not a breach of confidence (proposed section 226). There is also explicit provision for the court to order a person to publicise an offence they have been convicted of, and for the director-general to carry out that order if the person fails to do so (proposed section 211).*

1.7 *The Committee requests further information from the Minister on why these potential limitations should be considered reasonable using the framework set out in section 28 of the HRA, and consideration be given to amending the explanatory statement to include that information.*

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

Section 12 (a) of the HRA recognises that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and section 12 (b) recognises the right not to have his or her reputation unlawfully attacked.

The following sections of the Bill provide for powers of entry to premises, search, compelling of information, inspection and external treatment of people or recording of oral responses:

s 44 Emergency declarations - measures about treatment of people	Provides for limited external treatments to be carried out on people in a biosecurity emergency
s 45 Emergency declarations - measures about inspection of people	Provides for visual inspection of the exterior of a person's clothing, accessories and shoes, and to shake or move the person's hair in a biosecurity emergency
s 150 Biosecurity directions – treatment of people	In an emergency, provides for a direction to require an external treatment measure on a person.
s 151 Biosecurity directions - inspection of people	In an emergency, provides for a direction to visually inspect a person, and shake or move the person's hair, for biosecurity matter, a carrier or a potential carrier.
s 173 Power to enter premises	Provides for an authorised person to enter premises if the authorised person believes on reasonable grounds that there is a biosecurity risk at the premises and the authorised person is carrying out functions under the Bill.
s 176 General powers on entry to premises	Specifies the scope of actions an authorised person can do under this Bill in relation to the premises or anything at the premises, upon entering a premises under this part.
s 177 Power to require information, documents, etc	Authorises an authorised person acting under this part to require the occupier or anyone else at the premises to give information and copies of documents that the person has access to, and to give assistance to exercise a function under this part.
s 179 Power to obtain, inspect and copy records	Provides for an authorised person to obtain, inspect or copy information, documents or anything else that a person has access to that is reasonably required by the authorised person for this Bill.
s 180 Power to require answers to questions	Provides for an authorised person to require a person to answer questions in relation to a matter under this Bill.
s 181 Evidence may be recorded	Provides for an authorised person to record information given orally under this division provided the person is given notice of the intention to record.
s 185 Direction to give name and address	Provides for an authorised person on reasonable grounds to request name and address of a person who has committed or is committing or is about to commit an offence under the Bill.

s 211 Publication orders	Provides for a court to order a person guilty of an offence against the Bill to publicise information related to the offence if necessary.
s 223 Disclosure of information – director-general	Provides for the director-general to disclose information to authorised people and entities to undertake their functions under the Bill.
s 224 Disclosure of information – certifier and auditor authorities	Provides for authorised certifier and auditor authorities to disclose information to the director-general pertinent to the management and response of a biosecurity risk.
s 226 Protection of others from liability	Provides protection against civil and criminal liability to others for information given to the director-general in relation to biosecurity risk under the Bill if done honestly and without recklessness.

2. Legitimate purpose (s28(b))

The legitimate purpose of these measures is to manage biosecurity risks arising from biosecurity matter, dealings with biosecurity matter, carriers or other activities involving biosecurity matter or carriers that may pose a biosecurity risk to the environment, the economy or the community.

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

The provisions in the Bill which may impact the right to privacy of a person are directly linked to biosecurity risk management activities related to the function of the Bill and are reasonable and justifiable to achieve the legitimate purpose of the Bill.

For the purposes of biosecurity legislation, it is important that authorised people have adequate powers to ensure that biosecurity risks can be appropriately managed in a timely and efficient manner. For this reason, the following powers are authorised under the Bill.

An emergency declaration, or a biosecurity direction given in an emergency, may require an authorised person to carry out an external treatment measure on a person. This would be authorised in instances where it is necessary to safeguard the person from being a carrier of biosecurity matter, or to prevent contamination or the spread of contamination, and/or prevent spread of the biosecurity risk. An example of an external treatment measure is sterilising footwear in a treatment dip prior to entering or leaving a biosecurity event site (s 44).

An emergency declaration, or a biosecurity direction given in an emergency, may require an authorised person to visually inspect a person, and/or shake or move the person's hair. This would be authorised in instances where it is necessary to safeguard the person from being a carrier of biosecurity matter, or to prevent contamination or the spread of contamination, and/or prevent the spread of the biosecurity risk. An example of when a visual inspection and hair shaking may be required would be if the person has been in contact with a beehive infected with varroa mite and it is necessary to check for fugitive bees on the person. A visual inspection in this case would help capture the bees and prevent the person from being stung and/or prevent a bee from being carried further from the site to spread the biosecurity risk (s 45).

Entry to premises is required in a biosecurity event as biosecurity matter and carriers of biosecurity matter are physical things. Therefore, in order to undertake functions under the Bill, it is necessary

for authorised people to be able to access parts of a premises relevant to managing a biosecurity risk. Authorised people in managing a biosecurity risk will need to physically treat, cordon off/confine, seize, move or destroy the biosecurity matter or carrier as well as ensure the safety of people present on the premises. Biosecurity matter, pests and other things believed to pose a biosecurity risk, including vehicles, could play a significant hazardous role as sources of biosecurity contamination with the potential to exacerbate the situation, or as vectors of biosecurity matter in the case of diseased animals or plants.

References to “risk” in the Bill, including in s 173, relate specifically to biosecurity risk. An authorised person undertaking functions under the Bill when responding to a biosecurity event also needs to be able to assess the risk including its distribution, intensity, scale and scope. For example, the extent and degree of disease symptoms on affected plants. To obtain this information and then to be able to appropriately respond to the risk, an authorised person, in addition to being able to access the premises, also needs to be able to use appropriate measures to gather the necessary details about the biosecurity risk. Typical actions an authorised person may be required to undertake in such an event include for example, being able to inspect things for the presence of biosecurity matter, or to take images of diseased animals or plants as a record for diagnostic or analytical purposes, or to confine, detain or isolate an infected herd to prevent the spread of the biosecurity risk. They may also need to erect signage, for example, to prevent entry into a biosecurity confinement area in which contaminated biosecurity matter is being held. In addition, copies of documents may also be required, for example for traceability and reporting purposes (ss 173, 176, 177 and 179).

Authorised people are given powers to compel information because, if biosecurity matter which poses a biosecurity risk is present at the premises, individual people associated with the biosecurity risk may be the only source of information, or be best placed to provide information, that authorised people may need to investigate and respond to a biosecurity event (s 180).

Information gathering and questioning by authorised people are only permitted if they relate to the management of the biosecurity event, and if it is reasonably believed at the time that this information is material to the management operation of said event. For example, personal contact details of a person may be requested as there may be a likelihood that they may be a carrier of biosecurity matter or have information that may assist with investigating or managing the biosecurity risk, or to disseminate information to them at a later stage in relation to the biosecurity event or risk, or if follow-up action may be required specific to the biosecurity event. If a person provides information orally, for the purposes of ensuring there is an accurate record of the information, the Bill authorises an authorised person to record information given orally provided that the person giving the information is given warning that it will be recorded. For example, it may be easier to record evidence provided by a farmer orally of what happened to a sick pig and what symptoms were observed rather than an authorised person having to note down all the details of the progressive symptoms, etc that the farmer observed (s 181).

When it is reasonably believed there has been or is likely to be an offence against this Bill, an authorised person is authorised under the Bill to obtain the name and address of a person. This is to ensure that should there be any biosecurity risk that ensues, the person can be contacted and further information or action to support the management of the risk can be quickly accessed. Given that biosecurity risk mitigation responses are often time critical, and the focus of the Bill and the biosecurity system is on early intervention and harm and loss minimisation, being able to access information quickly is critical to effective risk management (s 185).

The Bill provides for information relating to a biosecurity offence to be publicised. This provision is consistent with corresponding law in other states and territories and recognises the need to ensure that information about the management of a biosecurity event is made available to all stakeholders that may be impacted by such an event. This will enable the broader industry to stay informed about the scale and distribution of the risk and adopt the appropriate biosecurity protocols as the risk is progressively managed. The provision also allows for the director-general to undertake the required biosecurity measures if the person convicted of the offence does not carry out the order. This requirement ensures that a biosecurity response can be carried out as soon as required, noting that timeframes are critical in the management of biosecurity risks (s 211).

The Bill makes provision for the director-general to disclose information to authorised people and entities to undertake their functions under the Bill. Timely access to relevant information is critical to quickly responding to a biosecurity event when carrying out functions under the Bill (s 223).

The Bill provides for information pertinent to the management of a biosecurity risk to be disclosed to the director-general by an authorised certifier and auditor authority as it relates to the carrying out of a function under the Bill. Timely access to relevant information is critical to quickly responding to a biosecurity event when carrying out functions under the Bill. Certifier and auditor authorities are an intrinsic part of the ACT biosecurity system and the provision of information to authorised people within the system as accorded by the Bill is a conventional aspect of the operation of any such system (s 224).

The Bill provides protection against civil and criminal liability to people who give information to the director-general in relation to a biosecurity risk under the Bill, provided the giving of information is done honestly and without recklessness. Biosecurity operations and management are heavily reliant on efficient information dissemination. This provision supports timely access to relevant information which is critical to expeditious management of biosecurity risks when carrying out functions under the Bill (s 226).

4. Proportionality (s28 (e))

Any imposition on a person's right to privacy is subject to the specific conditions and requirements of a biosecurity event. Biosecurity events are highly variable in scope, scale and impact and no two biosecurity events can be said to be identical as there are numerous factors at play. Biosecurity impacts could range from small scale losses and harm to individuals to multi-billion-dollar industry wide impacts. Biosecurity events are also often time critical and can have significant negative impacts on the environment, community and economy. The Bill requires an adequate range of powers to be available to authorised people so they can respond effectively under this broad spectrum of plausible biosecurity management scenarios.

Proportionality of powers of authorised people

Biosecurity events and the measures required to appropriately manage them are situationally specific for the reasons cited in the above paragraph. While division 12.2 of the Bill provides for the necessary powers for authorised people to undertake required functions under the Bill appropriate to a biosecurity event, the Bill also provides for safeguards and protocols to ensure that measures are commensurate with need, powers are not misused, and a person's right to privacy is impacted to the least extent possible. Key provisions that are relevant include:

Section 173 Power to enter premises

The Bill includes safeguards to minimise the impact on the right to privacy accorded by the power to enter premises. It prescribes the limited circumstances under which an authorised person may enter premises and sets out clear protocols for how it may be done. An authorised person can only enter premises for the purposes of carrying out a function under the Bill. The authorised person must seek consent to entry, or be operating under the authority of a warrant, before entering premises, except in the case of a biosecurity emergency.

Section 231 limits the powers of entry into residential parts of a property. The power to enter premises that are solely used for residential purposes can only be done with consent, with a warrant, or at any time if the authorised person believes on reasonable grounds that the risk is so serious and urgent that immediate entry is necessary, such as during a biosecurity emergency. Biosecurity emergencies are notified and have recourse to limited, prescriptive measures that are considered appropriate and necessary to the specific event and are the subject of an emergency declaration (ss 41, 42 and 231).

Section 174 Production of identity card

When seeking entry to premises, authorised people are required to provide proof of identity. This safeguard clause protects an occupier of premises from having their right to privacy arbitrarily impacted. It provides for an occupier of premises to ask for the identity card of an authorised person or person accompanying an authorised person. If the person does not comply, the person (other than a police officer) must leave the premises immediately.

Section 175 Consent to entry

This safeguard clause stipulates the manner in which an authorised person may seek consent to entry from an occupier, and requires that an authorised person must produce proof of identity for him/herself and any people accompanying the authorised person to the occupier, inform the occupier of the purpose of the entry and that anything found and seized under this chapter may be used in evidence in court, and that consent may be refused.

Section 176 General powers on entry to premises

This clause limits the powers of an authorised person upon entry to premises to specific actions pertaining to the function of the Bill as it relates to managing the biosecurity event at hand.

Proportionality of measures permissible under emergency declarations, control declarations and biosecurity directions

While these powers are granted under the Bill to enable authorised people to investigate, manage and respond to biosecurity events to minimise harm, loss and impact, and to protect the community, environment and economy, they are limited by what is appropriate, justifiable and reasonable under the circumstances.

Whether a biosecurity event can be managed under the provisions of a biosecurity direction, control declaration or emergency declaration is based on a granular scale determined by the level of biosecurity risk. Powers authorised under biosecurity directions, control declarations and emergency declarations reflect this granularity and are proportionate to the level of risk and impact. In all these cases, there are clear and transparent limitations and protocols assigned to the powers available to authorised people to ensure that these powers are not abused.

Most biosecurity events would be dealt with through biosecurity directions. As the risk level rises or where early intervention or preventative measures are available, a control declaration may be used by the Minister. A control declaration is a notifiable instrument. These scenarios are appropriate when it is not an emergency situation, for example where the risk can be managed within a less time-restricted timeframe a control declaration could be used to manage the risk. And for less urgent risks, biosecurity directions are applied and authorised people work with affected parties to appropriately manage the risks.

Notably, a biosecurity emergency represents the most significant risk and possibly catastrophic impacts. For example, the detection of foot and mouth disease and the urgency to contain and manage the risk before it can impact trade and market access within the multi-million dollar Australian meat and livestock industry. For this reason, powers under an emergency declaration are greater. For example, in such an emergency, if there is reason to believe that prohibited biosecurity matter is present in a part of the residential property only used as a residence, it may be critical that it is seized to mitigate the risk.

An emergency declaration, or a biosecurity direction given in an emergency may authorise an authorised person to enter premises, including parts of the premises used only for residential purposes, only insofar as is necessary and only for the purposes and subject to the measures specified by the emergency declaration. Emergency declarations can only be declared within strict parameters as specified by the Bill, and only in the case of a significant biosecurity risk which requires an expeditious response (part 3).

There are also stringent parameters for determining if a biosecurity event represents an emergency. For example, in the case of emergency declarations, these are notifiable instruments. They include specific details (s 38) including the area or premises where the emergency measures apply (emergency zone). They have a limited timeframe, which unless otherwise specified in the declaration notice, is 6 months, and they can only be extended in 6 month increments. Additionally, the Minister must give public notice of both an emergency declaration and its extension and is required to take reasonable steps to ensure people who are likely to be affected by the declaration or its extension are made aware of it (s 40). There is also an in-built proportionality test to the emergency measures that can be declared. In deciding the emergency measures to include in an emergency declaration, the Minister must ensure that an emergency measure is no more onerous than the Minister considers necessary, considering the nature of the biosecurity emergency (s 41).

In any biosecurity event, a control declaration or emergency declaration proposed by the Minister will only prescribe measures that are proportionate to the biosecurity risk. The Bill also includes a safeguard which places limits on certain powers in relation to humans and residential premises proportional to biosecurity risk (s 231).

If entry to premises is required in a biosecurity event other than under an emergency declaration, entry is not authorised to parts of the residence used solely for residential purposes unless consent is obtained from the occupier, or a warrant has been issued (s 173).

Proportionality of the measures that allow an authorised person to require the answer to questions/compel information/require the giving of name and address

Information gathered and how it is gathered is proportionate to the biosecurity risk and the available timeframes for a biosecurity response. Only information relevant to the biosecurity event

and its investigation, management and response under the Bill is authorised to be required of a person, and only if the person is reasonably believed to have access to the said information, and that information is provided honestly and without recklessness. The information can only be provided to authorised people, such as the director-general, who are bound by strict professional and legal codes of conduct.

Section 182 provides for abrogation of privilege against self-incrimination, and section 183 requires that a person is given a warning so they are aware of a direction or duty that may be required of them.

While allowing for public disclosure of information to enable biosecurity operations to be effectively managed, the Bill limits these powers to information that is necessary and appropriate in relation to managing the specific biosecurity event (s 211).

Information that is provided by the director-general to authorised authorities must satisfy the requirements that the information is necessary for the entity to exercise a function relating to managing a biosecurity risk, and the disclosure of the information to the entity is appropriate. Authorised authorities are rigorously vetted before they are given the authority to operate as part of the ACT biosecurity system. The Bill also provides protection for officials from liability for anything done or omitted to be done honestly and without recklessness in the exercise of a function under the Bill, or in the reasonable belief that the act or omission was in the exercise of a function under the Bill (ss 223 and 225).

Section 224 of the Bill limits disclosure of information by an authorised certifier or auditor authority to the director-general to the necessary function of the Bill in the management of biosecurity risk. The Bill provides protection from liability for people when they share information with the director-general (s 226). While the section 224 does remove some safeguards that might prevent someone from disclosing private information (for example under privacy laws and professional codes, the provision is considered reasonable given that the Bill specifies that:

- the person must be honest and not reckless in giving the information; and
- the director-general would only be able to act on the information if it was necessary under the Bill; and
- there are restrictions on how that information can be used by the director-general; and
- the director-general would only need to act on it if it related to a function in the Bill (s 226).

As an added safeguard against misconduct by an organisation, the Bill provides for criminal liability of executive officers for offences against the Bill, recklessness and misconduct (s 227).

B. HRA Section 21 – Right to a fair trial

Extract Scrutiny Report 29 – Biosecurity Bill 2023 comments:

1.13 *The Committee is concerned that limitations on courts or tribunals issuing interim orders in relation to emergency declarations may limit the right to a fair trial under section 21 of the HRA. Under Part 3 of the Bill, where the Minister reasonably suspects a biosecurity risk is likely to happen that may have a significant biosecurity impact, the Minister may declare a biosecurity emergency. An emergency declaration can include a variety of emergency measures, including restricting movement of people, providing for external treatment and inspection of individuals, and providing for destruction of things. An authorised person can be authorised to enter premises and take action to rectify a failure to comply with an emergency declaration. It is also an offence to fail to comply with an emergency declaration.*

1.16 *By removing the ability, particularly of a court, to issue an interim order protecting against the destruction of property or other action which may not be adequately compensated for or otherwise remedied through final orders, the Bill may limit the right to a fair trial in section 21 of the HRA. The Committee requests information on why it was considered necessary to restrict the ability of courts and tribunal to make interim orders to protect emergency actions, and consideration be given to amending the explanatory statement to include this justification.*

1.17 *The Bill provides for authorised persons to destroy something if they reasonably suspect it is, or carries, prohibited biosecurity matter, is a declared pest, infected or infested and cannot be treated, or authorised by emergency or control declarations. Proposed section 202 of the Bill provides that generally 24 hours written notice must be provided to the owner or person in charge of the thing before it is destroyed. There are a variety of circumstances in which 24 hours' notice is not required, including where the authorised person reasonably believes that the thing must be destroyed without delay to manage a biosecurity risk and it is not practicable to give notice, or delaying the destruction of an animal will cause the animal pain and suffering.*

1.18 *The provision will also excuse the lack of notice where 'the authorised person considers that, in the circumstances, the destruction must be carried out without delay or prior notice to the owner or person in charge'. It is not clear to the Committee why this exception is required, particularly to the extent it authorises destruction of property in circumstances unrelated to biosecurity risks that might arise if action is not taken immediately.*

1.19 *By providing for the destruction of property without prior notice and without adequate justification, the provision may limit procedural fairness rights, including those protected within the right to a fair trial under section 21 of the HRA. The Committee therefore requests further information on why this exception to the provision of notice was considered necessary, and consideration be given to amending the explanatory statement accompanying the Bill to include this justification.*

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

Section 21 of the HR Act recognises that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing. It also recognises that each judgment in a criminal or civil

proceeding must be made public unless the interest of a child requires that the judgment not be made public.

The following sections of the Bill may limit the right to a fair trial. They provide for powers to destroy or dispose of hazardous biosecurity matter or things if required as part of a biosecurity emergency response and ensure that pronouncements of interim court actions do not jeopardise emergency operations.

Section 42 (2) (n) - Emergency declarations— scope of emergency measures	Provides for the destruction, disposal or eradication of any biosecurity matter or other thing that is required for managing a biosecurity emergency
Section 50 Emergency declarations – protection of emergency actions	Restricts a court or tribunal from pronouncing interim actions which may compromise biosecurity management measures during the period of the emergency declaration.

2. Legitimate purpose (s28(b))

The legitimate purpose of these measures is to manage biosecurity risks arising from biosecurity matter, dealings with biosecurity matter, carriers or other activities involving biosecurity matter or carriers that may pose a biosecurity risk to the environment, the economy or the community.

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

The provisions of the Bill for emergency declarations in part 3 are reasonable and justifiable to achieve the legitimate purpose of the Bill. Biosecurity emergency operations are usually always time critical and may include the need to destroy hazardous biosecurity matter or things to contain, control and eradicate a biosecurity risk, and minimise harm and costs to the environment, community and/or economy. Measures adopted under emergency operations are consistent with industry and national standards and protocols and provide a sound basis for maintaining Australia’s biosecurity status which underpins global market access and trade opportunities.

Under certain emergency responses it may be necessary to prevent a tribunal or court from issuing an interim order protecting against the destruction of property or other action, as such a ruling may jeopardise an emergency response. Actions undertaken as part of emergency operations are strictly guided by scientific methods which ensure the effective management of biosecurity risks to protect against harm and losses to the environment, community and economy. The ACT Government is a signatory to national agreements such as the Emergency Animal Disease Response Agreement, Emergency Plant Pest Response Deed and National Environmental Biosecurity Response Agreement which recognise that major animal and plant health and environmental emergencies are of national significance. Destruction of things is a measure used only in instances where there is no other means of mitigating the biosecurity risk effectively. For example, if beehives are contaminated with Varroa mite, the only way to eradicate the risk is to destroy the infected beehives. In the case of Varroa mite, the treatment measures are part of a nationally agreed response plan.

The national deeds mentioned above provide the framework for compensation in biosecurity events. These deeds provide mechanisms for participating jurisdictions and affected industries to share costs associated with eradication of specified incursions proportionate to each jurisdiction’s relative exposure and risk. All Australian jurisdictions and many industry bodies are signatories to these deeds.

Failure to provide a robust and comprehensive legal framework for biosecurity in the ACT could undermine the ACT biosecurity system, and have significant local, regional and/or national consequences for the community, environment and economy. The ACT biosecurity system operates within the paradigm of the national biosecurity system and additionally relies on inter-operability with the NSW biosecurity system. In developing Bill provisions, these broader systems requirements were given due consideration.

4. Proportionality (s28 (e))

In the Bill, powers of entry and search are limited to parts of premises not used for residential purposes only, except in the case of an emergency. In the case of an emergency, additional powers may be needed by authorised people to enable quick and effective management of prohibited biosecurity matter to minimise loss, harm and impact. Emergency declarations are only notified in situations where the Minister has substantiated reasons to believe that there is a significant biosecurity risk. Therefore, the risk to limiting the right to a fair trial is Notifications under the *Emergencies Act 2004* take precedence over, and have greater powers than, the Bill.

The director-general has recourse to seek additional compensation in the event of loss on a case by case basis subject to Expenditure Review Committee agreement.

Any information that may incriminate a person that is collected under the provisions of the Bill cannot be used against the person outside of the scope of the Bill.

C. Section 22 – Rights in criminal proceedings

Extract Scrutiny Report 29 – Biosecurity Bill 2023 comments:

Strict liability offences

The Bill includes 22 strict liability offences which may limit the right to be presumed innocent protected as a right in criminal proceeding in section 22 of the HRA. Several of these offences include various defences or exceptions for which the evidential burden is placed on the defendant. These strict liability offences are recognised in the explanatory statement along with a statement on why they should be considered reasonable using the framework set out in section 28 of the HRA. That statement notes that strict liability offences are subject to the defence of a mistake of fact and are limited to monetary penalties of 50 penalty units. Subject to the following comments the Committee refers that statement to the Assembly.

Proposed section 27 of the Bill creates a strict liability offence for failing to comply with a duty to notify a biosecurity event. A biosecurity event includes the presence of prohibited biosecurity matter in any part of the ACT. Prohibited biosecurity matter is declared by the Minister if they are satisfied the matter poses a significant biosecurity risk to any part of the ACT. A person who becomes aware or reasonably suspects that a biosecurity event is likely to happen has a duty to immediately notify the event in the way prescribed in regulations. The duty applies to owners of the premises, a carrier (such as an animal) or other thing that relates to the event, anyone who becomes aware of or suspects the biosecurity event in their professional capacity, or is a person prescribed in regulations.

Similarly, proposed section 31 of the Bill creates a strict liability offence of failing to comply with a duty to notify the presence of notifiable biosecurity matter. A Minister can declare notifiable biosecurity matter if satisfied that the matter poses a biosecurity risk. Owners, occupiers or

possessors of premises, carriers or things, or persons who become aware of or suspect notifiable biosecurity matter in their professional capacity, or are a person prescribed in regulations, have a duty to immediately notify in the way prescribed in regulations.

Each of these strict liability offences may arise immediately upon the Minister declaring prohibited or notifiable biosecurity matter, where the owner, occupier or possessor of premises, carriers or related objects may be aware of the matter but not be aware that the matter has been declared by the Minister. Unlike for offences relating to dealing with biosecurity matter, defences including taking all reasonable precautions or having a reasonable excuse are not available. Declarations of prohibited and notifiable biosecurity matter will be notifiable instruments. However, the Committee remains concerned that the owner of premises or things may be subject to an offence of failing to notify the presence of matter which the owner is not aware poses any biosecurity risk.

The Committee notes that the Bill imposes a general biosecurity duty on persons who deal with biosecurity matter and who know, or reasonably ought to know, that the matter poses a biosecurity risk. The explanatory statement accompanying the Bill sets out the limited class of persons who are likely to be affected by this duty, including persons who deal with biosecurity matter in their professional capacity. In rural and peri-urban areas, information relating to biosecurity risks is readily available through established community networks, and community and volunteer groups are also informed about biosecurity risks. However, it is not clear to the Committee that these sources of information are sufficient to ensure that persons who may become subject to duties to immediately notify the presence of declared biosecurity matter will in all cases be sufficiently informed of that duty.

The Committee also notes that the Bill includes provision for public notice of emergency declarations and control declarations, and the defences available for failing to comply with these declarations where the person was not made aware of the declarations, including through public notice.

The Committee therefore requests further information on how information relating to declarations of prohibited and notifiable biosecurity matter will be communicated throughout the community to ensure that persons possibly subject to notification duties will be reasonably aware of their obligations under the Bill.

Privilege against self-incrimination or exposure to a civil penalty

Proposed section 182 of the Bill abrogates the privilege against self-incrimination or exposure to a civil penalty in relation to being compelled to produce information or otherwise respond to questions by authorised persons when enforcing obligations under the Bill. This abrogation is subject to a limited use immunity, with any information or thing obtained, directly or indirectly, not being admissible in evidence other than in a proceeding for an offence arising out of the false or misleading nature of the information provided. A warning must also be given, including the effect of the abrogation of privilege, before any offence for refusing to provide information that may incriminate arises.

The privilege against self-incrimination and exposure to a penalty is also abrogated in relation to the duty to notify a biosecurity event in proposed section 27, and in relation to the duty to notify the presence of notifiable biosecurity matter in proposed section 31. Both of these sections provide that any information, document or thing obtained, directly or indirectly, in complying with the respective duties to notify is not admissible in civil or criminal proceedings other than an

offence against the duty to notify itself or offences arising out of the false or misleading nature of the information, document or thing.

*By requiring the provision of information which may tend to incriminate the person or expose the person to a penalty, the Bill may limit the right against self-incrimination included as a right in criminal proceedings under section 22 of the HRA, as well as the common law protection against exposure to a civil penalty. The limited use immunity and, under proposed section 182, availability of a warning may ameliorate any limitation of these rights. However, any abrogation should be recognised in the explanatory statement accompanying the Bill. **The Committee therefore asks that consideration be given to amending the explanatory statement to include recognition of the abrogation of the privileges and why any limitation of section 22 of the HRA should be considered reasonable using the framework in section 28 of the HRA.***

The Committee draws these matters to the attention of the Assembly and asks the Minister to respond prior to the Bill being debated.

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

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. The Bill makes provision for strict liability offences notably in the following sections:

Section 27 Offences-fail to comply with duty to notify biosecurity event	Provides for enforcement of the Bill where a person has a duty to notify a biosecurity event under s 26 and fails to comply.
Section 31 Offences-fail to comply with duty to notify presence of notifiable biosecurity matter	Provides for enforcement of the Bill where a person has a duty to notify the presence of notifiable biosecurity matter under s 30 and fails to comply.
Section 36 Offences-engage in prohibited dealing	Provides for enforcement of the Bill where a person engages in a prohibited dealing.
Section 49 Offences – fail to comply with emergency declaration	Provides for enforcement of the Bill if a person fails to comply with an emergency declaration.
Section 61 Offences – fail to comply with control declaration	Provides for enforcement of the Bill where a person fails to comply with a control declaration.
Section 73 Offences – fail to comply with permit condition	Provides for enforcement of the Bill when a biosecurity permit holder fails to comply with his/her permit conditions.
Section 86 Offences – fail to comply with group exemption condition	Provides for enforcement of the Bill when a person acting under the authority of a group exemption fails to comply with the conditions of the group exemption.

Section 90 Offence – engage in regulated dealing without registration	Provides for enforcement of the Bill when a person engages in a regulated dealing without a registration to do so.
Section 100 Offence – fail to comply with registration condition	Provides for enforcement of the Bill when a registered person fails to comply with the conditions of his/her registration.
Section 112 Offences – false or misleading biosecurity certificate	Provides for enforcement of the Bill when a person issues a false or misleading biosecurity certificate.
Section 113 Offences – false representation about biosecurity certificate	Provides for enforcement of the Bill when a person falsely represents that a biosecurity certificate has been issued.
Section 138 Offences – fail to comply with approval condition	Provides for enforcement of the Bill when an approval-holder fails to comply with the conditions of his/her approval.
Section 156 Offences – fail to comply with biosecurity direction	Provides for enforcement of the Bill when a person fails to comply with a biosecurity direction.
Section 166 Offences – fail to comply with biosecurity undertaking	Provides for the enforcement of the Bill when a person who has given a biosecurity undertaking fails to comply with the requirements of the biosecurity undertaking.
Section 169 Offences – failure to return an authorised person’s identity card	Provides for enforcement of the Bill where an authorised person fails to return their identity card.
Section 176 General powers on entry to premises	Provides for enforcement where a person interferes with a sign, device or any other equipment placed by an authorised person.
Section 177 Power to require information, documents, etc	Provides for enforcement of the Bill where a person fails to take reasonable steps to comply with a requirement to give information, documents, etc.
Section 179 – Power to obtain, inspect and copy records	Provides for enforcement of the Bill where a person fails to take reasonable steps to comply with a requirement made of the person to give information, documents etc.
Section 180 – Power to require answers to questions	Provides for enforcement of the Bill where a person fails to comply with a requirement to answer questions
Section 182 - Abrogation of privilege against self-incrimination	Provides for evidence against a person in a civil or criminal proceeding not to be admissible if obtained under the Bill.
Section 184 – Power to seize things	Provides for enforcement of the Bill where a person interferes with a seized thing without approval.
Section 186 – Offences – fail to comply with a direction to give name and address	Provides for enforcement of the Bill where a person fails to comply with a direction to give their name and address
Section 188 – Offences – fail to comply with a direction to stop vehicle	Provides for enforcement of the Bill where a person fails to comply with a direction to stop vehicle

2. Legitimate purpose (s28(b))

The legitimate purpose of these measures is to manage biosecurity risks arising from biosecurity matter, dealings with biosecurity matter, carriers or other activities involving biosecurity matter or carriers that may pose a biosecurity risk to the environment, the economy or the community.

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

Strict liability provisions have only been included in the Bill in instances where the significance to response operations is perceived as being critical and could impede efforts to protect the environment, economy or community from exposure or spread of biosecurity matter or contaminants being managed.

Where they are applied to permits, registrations and authorisations, and in relation to a direction or declaration, they are in place to deter non-compliance with these requirements and conditions.

The strict liability offences in the Bill engage the right to be presumed innocent by reversing the onus of proof from the prosecution onto a defendant. In instances in the Bill where there is a reverse onus of proof its purpose is to ensure the effective enforcement of and compliance with the requirements of the Bill by enabling the offences within it to be effectively prosecuted. The limitation on section 22 is aimed at providing the effective promotion of responsible conduct in the face of a biosecurity event which could have significant financial, environmental, economic or community impacts, including compromise Australia's international biosecurity status.

4. 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.

Section 23 (1) (b) of the *Criminal Code 2002* provides a specific defence to strict liability offences of mistake of fact. Section 23 (3) of the Criminal Code provides that other defences may also be available for use for strict liability offences, which includes the defence of intervening conduct or event, as provided by section 39 of the Criminal Code.

As a general safeguard in the Bill, all strict liability offences are limited to a monetary penalty of 50 penalty units, which is in line with the Guide to Framing Offences.

In relation to the proportionality of the use of strict liability offence provisions in the Bill proposed for:

Section 27 Fail to comply with duty to notify biosecurity event

Section 31 Offences-fail to comply with duty to notify presence of notifiable biosecurity matter

A biosecurity event is defined in the Bill and examples of what events would give rise to a biosecurity event are also included. These may include the appearance of unexplained and significant signs or symptoms in animals, including unexplained neurological signs or conditions, and symptoms in plants that are unexplained and significant. These are observable and noticeable events among animal and plant stock.

Similarly, notifiable biosecurity matter is biosecurity matter that the Minister has declared through a notifiable instrument. It is reasonable to expect that any person operating in sectors of the economy where such matter may arise is aware of the notification requirement.

Information is made available to relevant stakeholders using a wide range of processes for information dissemination to alert stakeholders of a biosecurity event or notifiable biosecurity matter. It is important to note that biosecurity events and biosecurity matter relate specifically to the definitions assigned in the Bill as they relate to pest animals, pest plants and plant and animal diseases. The scale and nature of the event and biosecurity matter involved will determine the extent of the communication effort. Standard information dissemination processes include but are not limited to the following: Ministerial media release, information on the ACT Government directorate website and social media platforms, direct contact with relevant industry stakeholders groups in the ACT and their national industry bodies, and information disseminated through mass media news channels, other state and territory governments and industry bodies where there is a regional, national trade and market access or environmental impact, for example in the case of incursions such as Red Imported Fire Ant, or diseases such as Foot and Mouth Disease.

Once the Bill is enacted the ACT Government will also be undertaking a communication campaign to raise stakeholder and public awareness about the new legislation, and its role in keeping our industries, community, environment and economy protected against biosecurity risks. In addition, the ACT Government, Biosecurity and Rural Services team maintains close communication with ACT stakeholders on an on-going basis and provides regular presentations and workshops to ensure that local stakeholders are kept well informed of biosecurity risks and approaches as they emerge and change.

Under both offences, a defendant has recourse to a defence if the defendant proves they believed on reasonable grounds that the biosecurity event was widely and publicly known. A defendant can also prove that they took all reasonable precautions and exercised all appropriate diligence to prevent the commission of the offence.

Section 36 Offences-engage in prohibited dealing

A prohibited dealing is declared by the Minister through a notifiable instrument.

A defendant has recourse to a defence if the defendant proves they had a reasonable excuse to be engaging in a prohibited dealing. The burden of proof rests with the defendant as the defendant would be best placed to provide any proof. For example, that the defendant holds a biosecurity permit to engage in the prohibited dealing. A defendant could also prove that they took all reasonable precautions and exercised all appropriate diligence to prevent the commission of the offence.

Section 49 Offences – Fail to comply with emergency declaration

Section 61 Offences – Fail to comply with control declaration

Directions under an emergency declaration, and control declaration are time critical, coordinated and specific, so that response efforts can be expediently carried out to avert or effectively manage a significant biosecurity risk.

Declarations must be specific about the measures that must be complied with. Furthermore, it is a requirement in the Bill that for this offence to be applicable, at the time the person committed the offence, the person had been made aware of the emergency declaration.

Section 73 – Offences – fail to comply with permit condition

Section 86 – Offences – fail to comply with group exemption condition

Biosecurity permits and Biosecurity Group Exemptions are conditional. They allow for dealings which would otherwise be non-compliant with the Bill. The terms and conditions inherent in these agreements are explicit risk management measures, and are specified to effectively avert and manage potential biosecurity risks associated with the activity. Failure to comply with these terms and conditions would create a biosecurity risk as risk management protocols are not being adhered to. Permit holders should be aware of the conditions on their permits.

Section 90 – Offences – engage in regulated dealing without registration

Section 100 – Offences – fail to comply with registration condition

Regulated dealings are specific dealings, such as the keeping of bees. They are designated as such due to the biosecurity risks they are susceptible to, their significance within the economy, including potentially in export and trade, and the import/export protocols in place nationally and/or internationally which specify standards and requirements to support bio-secure transactions in these goods and related services or products. These protocols have been agreed and negotiated between governments and industries and meet the United Nations Sanitary and Phytosanitary Agreement requirements for market access and trade. Being registered is a condition of dealing with such matter or things.

Registration allows for traceability in the event of a biosecurity risk, and facilitates being able to contact, work with and disseminate information to relevant stakeholders within the industry. As operational needs of businesses are industry specific, many of the response and risk management support is provided by the industry bodies themselves to safeguard their members' interests and ensure that Australia's reputation as a supplier of the product(s) they trade meet trade compliance requirements. The requirements ensure that biosecurity hazards such as diseases are not spread, and that food and feed supplies are safe and fit for purpose, for example do not exceed agreed maximum residue levels set by trade protocols for biosecurity related contaminants. A person who is engaging in a regulated dealing without a registration therefore represents a significant risk to the industry.

Regulated dealings are prescribed by regulation. A strict liability offence is included under this provision as a person knows if they are registered or not and should be aware of the requirement to be registered. The section also includes a legal burden on the defendant and defence provisions against subsection (1) in recognition of the fact that only the person may have recourse to information which proves that the person had a reasonable excuse for dealing with the prohibited biosecurity matter. For example, the person is registered to engage in the dealing, or they are engaged as the employee or agent of a registered person for the specified regulated dealing.

Registration, like permits and group exemptions, are conditional agreements. When a person registers they are agreeing to the explicit terms and conditions of the registration. Failure to comply is a breach of the agreement and jeopardises the biosecurity of the other members of the industry.

Section 112 – Offences – false or misleading biosecurity certificate

Section 113 – Offences – false representation about biosecurity certificate

Section 138 – Offences – fail to comply with approval condition

A biosecurity certificate is an authorised endorsement of the status and/or condition of biosecurity matter, premises or other thing. For example, foot and mouth disease free livestock. Falsified or misleading information on a biosecurity certificate could negatively impact industry members by spreading a biosecurity risk, tarnishing the industry's reputation nationally and globally, and even could lead to trade restrictions and/or the need for World Trade Organisation dispute resolution.

Two strict liability offence provisions are included. These provisions are justified on the basis that people issuing and receiving biosecurity certificates are aware of the requirements of the scheme. This provision also acts as a deterrent against being open to corruption among providers of biosecurity certificates.

Similarly, approvals of certifiers, auditors and authorities are conditional agreements. Approval holders are required to abide by the explicit standards, terms and conditions for conduct and acceptable practices and protocols in their agreement. Approvals represent an endorsement of accreditation to undertake the activities of the approval held. Approval holders are on notice of the conditions of their approval.

Section 156 – Offences – fail to comply with biosecurity direction

Part 10 of the Bill cites the scope of activities that are appropriate for a biosecurity direction. These activities are directly related to the management of a biosecurity risk by an authorised person. Biosecurity directions can be given in writing or orally and may also be given in an emergency. If the biosecurity direction is given orally, a written confirmation of the direction must be given to the person within 7 days, unless the direction has already been complied with. This gives people captured by the strict liability offence clarity regarding what is required by the direction. Biosecurity directions could include for example the movement of biosecurity matter, the repair of a gate to secure an enclosure which has biosecurity matter in it or the erection of a sign which alerts people on the premises not to enter the enclosure.

A strict liability offence provision is included. The offence includes a legal burden on the defendant and defence provisions against subsection (1) in recognition of the fact that only the person may have recourse to information which proves that the person has a reasonable excuse for failing to comply with the direction.

Section 166 – Offences – fail to comply with biosecurity undertaking

A biosecurity undertaking is a written commitment to the director-general by a person to undertake explicit actions within specified timeframes which are related to managing a biosecurity risk. Failure to follow through with such a commitment would jeopardise the efficacy of the planned risk management response. People who give undertakings are aware of the terms they have agreed to.

Sections 176, 177, 179, 180, 184, 186 & 188 – Offences supporting enforcement powers

There are several strict liability offences that support the enforcement and investigative powers of authorised people. These offences require people to refrain from interfering with signs, devices or other equipment placed by authorised people, co-operate with authorised people by providing

information and documents, answer questions, refrain from interfering with seized things, and to give name and address, and stop vehicles.

These are all important features of biosecurity risk management and the investigation and enforcement of offences under the Bill.

A number of safeguards have been included. It is a defence against the strict liability offences in sections 176 and 182 that the defendant proves they held a reasonable excuse for non-compliance. Section 182 specifically provides for evidence obtained under the Bill not to be admissible in civil or criminal proceedings.

Information gathering and questioning by authorised people are only permitted because they relate to the management of the biosecurity event, and it is reasonably believed at the time that this information is material to the management response of said event. An authorised person must give written notice stating a time and place nominated by the person that is reasonable in the circumstances for the person to attend and answer questions about a matter that the person is reasonably believed to have knowledge about. Before requiring a person to comply with a requirement under section 177, section 179, section 180 (1) and section 186, they must be given a warning that failure to comply constitutes an offence. It is a defence under section 188 that the defendant proves they had a reasonable excuse for failing to comply with the direction.

Section 223 of the Bill also provides protection against civil or criminal liability to people who give information honestly and without recklessness in relation to a biosecurity risk or matter.

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.

ACT Government is proud to do its part in maintaining the necessary standards and protocols to safeguard the Territory and the nation against biosecurity risks.

I hope that the information in Attachment 1 satisfies the Committee's questions on this important Bill.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Vassarotti', written in a cursive style.

Rebecca Vassarotti MLA

14/9/2023