Ms Elizabeth Lee

Chair

Standing Committee on Justice and Community Safety

ACT Legislative Assembly

GPO Box 1020

CANBERRA ACT 2601

Dear Ms Lee

I write in response to issues raised by the Standing Committee on Justice and Community Safety (the Committee) in Scrutiny Report 21 of 11 September 2018 in relation to the *Government Procurement (Secure Local Jobs) Amendment Bill 2018* (the Bill).

Right to Privacy and Reputation

I note that the Committee is concerned that the Explanatory Statement for the Bill did not address the potential infringement of human rights under s12(a) of the *Human Rights Act 2004* (HR Act) in relation to the disclosure of information for the purposes of allowing an entity to exercise any right of entry they may have under a law in force in the ACT (s22M(3)) and the ability of the registrar to request relevant information under s22S.

In relation to s22S and for the benefit of the Committee, I have attached a discussion of human rights in relation to this section, Attachment A.

In terms of the discussion of human rights in relation to the disclosure of information under s22M(3) for the purposes of allowing an entity to exercise any right of entry they may have under a law in force in the ACT, I note that the Explanatory Statement did include this when discussing the potential for s22M to engage s12(a) of the HR Act.

In particular, in each section of the human rights discussion, both the collection of information under s22M is considered as well as the disclosure of information under s22M. As such the justification for the reasonableness of the limitation with respect to engaging s12(a) of the HR Act is considered to be justified on the grounds outlined in the Explanatory Statement, namely it:

* will only apply to a limited class of entities;
* the *Information Privacy Act 2014* will apply to the collection and use [disclosure] of the information by the registrar;
* entities who choose to contract with the Territory will be expected to know about their obligations and requirements under the Code; and
* no criminal sanction will apply in circumstances where the information is not provided.

Non-Reviewable Decision

I note that the Committee has also drawn attention to the fact while most decisions under the Bill by the registrar are reviewable by the ACT Civil and Administrative Tribunal (ACAT), a decision under s22P is not. These decisions relate to a very narrow set of circumstances where compliance with the code would result in an entity not complying with a Commonwealth law. In essence, an error in decision making under this provision would only be an error of law and therefore, appropriately reviewable as a question of law under the *Administrative Decisions (Judicial Review) Act 1989*.

I thank the Committee for its careful consideration of the Bill and hope that the above response and attached information will assist the Committee.

Yours sincerely

Rachel Stephen-Smith MLA

Human Rights in relation to s22S of the Government Procurement (Secure Local Jobs) Amendment Bill 2018

This attachment provides an overview of the human rights which may be engaged by s22S of the *Government Procurement (Secure Local Jobs) Amendment Bill 2018* (the Bill), together with a discussion of the reasonableness of any possible limitations.

Section 28(1) of the *Human Rights Act* 2004 (HR Act) provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

1. the nature of the right affected;
2. the importance of the purpose of the limitation;
3. the nature and extent of the limitation;
4. the relationship between the limitation and its purpose; and
5. any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

***Rights to privacy –* s 12(a)**

Section 12(a) of the HR Act provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

*The nature of the right affected*

The Bill introduces s22S which allows the registrar appointed under the Bill to request relevant information from an entity that holds a secure local jobs code certificate (code certificate). Relevant information may be sought in the following circumstances:

1. when the registrar is considering imposing a condition on an entity’s code certificate – s22S(1)(a);
2. when the registrar is responding to a complaint in relation to an entity that holds a code certificate – s22S(1)(b);
3. when the registrar has appointed an auditor to audit an entity who holds a code certificate – s22S(1)(c);
4. when the registrar is considering an application from an entity to surrender their code certificate – s22S(1)(d); or
5. if the registrar believes that an entity is not complying with the secure local jobs code (the Code) – s22S(1)(e).

*The importance of the purpose of the limitation*

The purpose of s22S, as evidenced by the circumstances in which the registrar may request relevant information, are regulatory in nature. Specifically, it is about gathering information/evidence to support or not, the imposition of a code certificate condition, dealing with complaints in relation to code certificate entities, auditing a code certificate entity, considering the surrender of a code certificate or in relation to suspected non-compliance with the Code. These are all matters which relate to the business conduct of the entity and its compliance with the pre-conditions to contracting with the Territory for Territory funded work.

The importance of incorporating an ability for the registrar to request information in the Bill is clear. The Bill places conditions on those entities that wish to contract with the Territory for Territory funded work. To ensure the integrity of the Bill it is also necessary to ensure that the conditions that are applied to such work are complied with. Compliance with the Bill is what will enable the Territory to achieve its objective in doing what it can to ensure that the Territory contracts only with those entities that meet the highest ethical and labour standards.

*The nature and extent of the limitation*

The ability for the registrar to request information under s22S is only used for the purposes listed in that section. In other words, it only applies in circumstances where the registrar is seeking information to substantiate a compliance decision, for example, placing a condition on a code certificate, auditing an entity or investigating a complaint about an entity.

Furthermore, s22S is limited to those entities that hold a code certificate, being those entities that wish to contract with the Territory to carry out work that is funded by the Territory and ultimately, the Canberra community.

Given the importance of obtaining information to support these decisions being made by the registrar it is appropriate that there be sanction for not complying with such a request. While most entities might comply with such a request, schemes of a regulatory nature often must consider scenarios where a legislative requirement is not complied with. It is noted however, that the sanctions in this case are not criminal in nature, rather, they are economic and affect only the entity’s ability to contract with the Territory.

*The relationship between the limitation and its purpose*

The ability of the registrar to request information under s22S is directly linked to and supports the functions of the registrar to ensure that entities who hold a code certificate comply with the Bill and in particular, any code made under s22M in relation to the workplace standards and related requirements. These are the standards by which the Territory is able to ensure that it contract only with those entities that meet the highest ethical and labour standards.

*Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve*

While this limitation may engage s12(a) of the HR Act, the limitation under s22S of the Bill is considered to be appropriate and justified. It is the least restrictive means of ensuring that the registrar appointed is able to make informed and considered decisions about an entity’s compliance, having regard to the information that is provided by the entity on which compliance action is being contemplated.

actchiefminister