

Statement of Compatibility with Human Rights

*Prepared in accordance with the Thirteenth Assembly Sessional Orders (Part 12.3)
as adopted on 20 March 2018.*

Water Amendment Bill 2019

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cwlth).

Overview of the Bill

The Bill amends the *Water Act* (the Act) by inserting into Part 2 a new Division 3 including sections 17A, 17B, 17C and making other consequential amendments to the Act to ensure that disposal of hydraulic fracturing waste to surface water and groundwater is prohibited under the Act.

The Bill also introduces new offence and penalty provisions for the prohibitions that align with existing penalties within the Act and comply with Part IIAA of the Criminal Code.

Human rights implications

This Bill engages the right conferred under Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The right to presumption of innocence is also a fundamental common law principle.

Strict liability and absolute liability, when applied to an offence, can be considered a limitation of the presumption of innocence because the defendant can be found guilty, or an element of the offence proven, without the prosecution being required to prove fault.

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When strict liability or absolute liability applies to an offence, the prosecution is only required to prove the physical elements of an offence, beyond reasonable doubt, not the fault elements, in order for the defendant to be found guilty. The defence of honest and reasonable mistake of fact is available to the defendant (see section 43AX of the Criminal Code) where strict liability applies.

Use of strict liability or absolute liability may be justified in circumstances where there is public interest in ensuring that regulatory schemes are observed and it can reasonably be expected that a person will be aware of their duties and obligations in relation to the offence. Strict and absolute liability provisions are not considered to be inconsistent with the presumption of innocence if they pursue a legitimate objective and are reasonable, necessary and proportionate to achieving that objective.

Whether a strict liability or absolute liability provision impermissibly limits the right to the presumption of innocence will depend on the circumstances of the case and the particular justification for an offence or an element of an offence carrying strict or absolute liability.

Strict liability offences

Clause 7 of the Bill provides for a new section 17A of the Act, which provides the offences of engaging in conduct that results either directly or indirectly with hydraulic fracturing waste contacting water. The offences vary in severity depending on whether it was intentional, the resultant level of environmental harm and whether the action was reckless. Strict liability applies to subsection 5 of this offence, meaning that the prosecution does not have to prove fault on the offender's part in engaging in an activity that allows waste to contact water. It is sufficient to prove that waste contacted water because of something that was done, which does not impact on the presumption of innocence to the detriment of the defendant.

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It is a defence to a prosecution under section 33C if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The current maximum penalties for the offence in accordance with the *Environmental Offences and Penalties Act* are: 77 penalty units for a natural person and 385 penalty units for a body corporate.

The application of strict liability to the offence at new section 17A(5) is not a significant limitation on the presumption of innocence.

Summary

Where strict liability applies, the need to prove fault is not required, but the prosecution must prove the physical elements of the offence beyond reasonable doubt. The strict liability offences in this are those which are straight-forward and for which it is reasonable to expect that a person is aware of their duties and obligations. Notwithstanding, the defence of mistake of fact is available to the accused in addition to the defence of having taken reasonable steps and exercised due diligence to prevent the commission of an offence that is provided throughout the *Water Act*.

The single strict liability offence in the Bill will act as a deterrent to behaviour that would compromise the integrity, sustainability and opportunity for beneficial uses of water resources that are vital to the continuing well-being and unique environmental standing of the Territory. They are compatible with Article 14(2) of the ICCPR, as they pursue a legitimate objective of deterring unauthorised or aberrant activities that put water resources at risk and they are reasonable and proportionate in pursuit of that objective.

Conclusion

The Bill is compatible with human rights.