Legislative Assembly for the
Australian Capital Territory

Food Amendment Bill 2011

Explanatory Statement

Circulated by the authority of
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Food Amendment Bill 2011

This explanatory statement relates to the Food Amendment Bill 2011 as introduced to the Legislative Assembly.

Overview

This Bill's purpose is to amend the *Food Act 2001* (the Act) to increase transparency in food regulation in the ACT, enhance consumer knowledge and emphasise safe food practices. The amendments to the Act will do the following:

- require the display of a 'closure notice' that informs the community that the food business has received a prohibition order that requires the registered proprietor to not use the premises
- require a food business to display their current certificate of registration so that members of the public can be assured that the food business is registered
- require food businesses to have a trained food safety supervisor at the premises
- update the provision for publishing a notice about a food business convicted of an offence against the Act, allowing this information to be placed on a public register.

While each amendment deals with a discrete issue in food safety, together the amendments should enhance food safety, increase food regulation transparency and assist in reducing the social and economic cost of food borne illnesses.

The Bill also includes a schedule to harmonise the offences in the Act to the principles of the *Criminal Code 2002*. Harmonisation of the offences to the principles of the Criminal Code is required to ensure the Act can operate within the Code environment. . For the offences to operate effectively and as intended, it is important for all of the offences contained in the Act to be structured to conform to the general principles contained in the Criminal Code. The provisions are included in a schedule to clearly distinguish between the four proposed changes above and the harmonised offences.

Human Rights Assessment

It is a requirement that compatibility with the *Human Rights Act 2004* (the HRA) be addressed in explanatory statements to Bills proposed to the Legislative Assembly.

Four measures are proposed in the Bill that will affect registered food businesses in the ACT. A food business may be registered by individuals, including a partnership, or in the name of a company. The HRA provides by section 6 that only individuals have human rights. It should be kept in mind, therefore, that for many food businesses that the question as to whether human rights is engaged will not arise if the registered proprietor of a food business is a company.

Section 12 of the HRA provides that everyone has the right "*not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily"* and "*not to have his or her reputation unlawfully attacked*". It is possibly arguable that this right is engaged with respect to two of the four measures proposed in the Bill. They are the display of a closure notice in relation to a prohibition order and the publication of convictions. In relation to the display of a registration certificate, it is not considered that section 12 arises at all because it is merely a statement that a business has done as required and registered with the appropriate authority.

The last measure, the requirement to have a food safety supervisor, is not considered to engage any right protected by the HRA. As such, this assessment focuses on the question whether section 12 is engaged only in relation to the display of a closure notice in relation to a prohibition notice and the publication of convictions.

In order to usefully assess the human rights implications of the measures, it is appropriate to first explain what is a prohibition order and the current provision in the Act relating to the publication of a notice of conviction.

<u>What is a prohibition order?</u>

The Act provides a number of enforcement tools. Part 7, in particular, provides powers to respond to issues of concern found during inspections or in response to complaints - improvement notices and the prohibition orders.

The service of an improvement notice allows the Health Protection Service to give directions to a food business to improve equipment or conditions in the premises. A period of time is given to the food business to comply with the directions. If there is a failure to comply with this notice, then the Health Protection Service may consider moving to serving a prohibition order.

A prohibition order can be issued if the circumstances found in a food premises warrants an order. It is not restricted as to what a prohibition order can be

served on – it can be on the premises or a particular piece of equipment; it can be a direction to not handle food in a particular way or for a particular purpose; or anything else. It can be because of unclean or insanitary conditions or otherwise unfit for purpose. It can be because the Act, including the Australia New Zealand Food Standards Code, has been, is being or will be contravened or because of non-compliance with a relevant food safety program.

A prohibition order served on premises could be a direction to cease handling food on the premises because one or more of the grounds for an order existed. This has the effect of directing that the premises close until such time that the issues giving rise to the order are addressed. It is a serious step that is taken and can only be taken when an authorised officer has formed a belief on reasonable grounds that service of the order is necessary "to prevent or mitigate a serious danger to public health" (section 82(b)(ii)). It is proposed that in circumstances where an order requires premises not to be used, e.g. unfit for purpose or a concern that handling food could endanger public health, that the display of a closure notice will occur.

In other circumstances where a prohibition order has been served, including for not complying with an improvement notice, a closure notice is not proposed. As noted above, an improvement notice is intended to provide a business with the opportunity to improve equipment or conditions in the premises. If, as a result of non-compliance with the improvement notice conditions significantly worsened or it is considered that grounds apply to direct the premises to cease handling food on the premises, then a prohibition order may result and a closure notice may be required to be displayed.

At present, the fact that a prohibition order (or an improvement notice) has been served on a food business is not authorised to be disclosed under the Act. A registered proprietor who is served with a prohibition order requiring that they not use the premises usually opts not to disclose that their business is closed because a prohibition order has been served on their business. Some place a sign saying "closed for renovations" or "closed for family illness" on the door. The effect of this is that members of the public are not aware that a business has been served with a prohibition order at the time of the order having been served.

In February 2011, the *Canberra Times* ran a series of articles suggesting that the Health Protection Service was holding back information about food businesses that had been served with an improvement notice or a prohibition order. The articles followed a request under the *Freedom of Information Act 1989* where some information had been released but not the names and addresses of the premises that had notices and orders served because it could unreasonably affect the business affairs of registered proprietors[1]. The

[1] The *Canberra Times* subsequently exercised its right to review of the decision.

subsequent community response suggested that this was information that the community thought should be disclosed.

The Bill proposes to provide that a closure notice be placed at the entrance of a food business in only very certain circumstances to inform the community that a prohibition order has been served on the business. A closure notice will provide information about the business and the fact that a prohibition order has been served that has resulted in the closure of the business until such time that it has been re-inspected and a clearance certificate issued. A notice is proposed rather than the display of the order itself.

Does a closure notice engage section 12?

Lord Bingham in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52)[2] expressed Article 8 of the European Convention on Human Rights (a comparable provision to HRA section 12(a)) purpose as being:

> ... to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose.[3]

Reputation is not included in Article 8 of the European Convention on Human Rights (ECHR) but is referred to in Article 10(2) as one of the "legitimate aims ...warrant[ing] a proportionate restriction'"[4] of the exercise of the right to freedom of expression. It does appear that reputation has been considered by the European Court of Human Rights to form part of the Article 8 right to privacy. As there appears to be little jurisprudence on the separate right to reputation reflected in section 12, reputation is considered in conjunction with the right to privacy in this assessment.

Food businesses, as a matter of principle, are not the 'private sphere' of an individual. Food businesses operate to serve food to the public and are a regulated activity. While a food business may prefer that it not be public knowledge that their premises were unclean or not up to the standard required under the Act or the Food Standards Code, it cannot and should not be able to be argued that the operation of a food business is a private activity.

However, for the purpose of this assessment, the proposition that a right to privacy exists is accepted. Therefore, as section 12 is engaged, the measure needs to be justified under section 28 of the HRA. To use the words of Lord Bingham, is there a "good reason"?

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[2] Pursuant to section 30(1), the judgements of foreign and international tribunals may be considered when working out the nature and extent of a right in the HRA.
[3] [2007] UKHL 52 at paragraph 10.
[4] http://inforrm.wordpress.com/2010/10/26/is-there-a-right-to-reputation-part-1-heather-rogers-qc/, accessed 18 October 2011.

Some assistance is provided by Article 8(2), which specifies limitations that can legitimately operate on the right. Article 8(2) provides that there may be:

> no interference by a public authority except in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The limitations considered directly relevant are "public safety" and the "protection of health or morals". It has been discussed above the grounds that may lead to the service of a prohibition order. It has long been known that safe hygiene practices in food premises reduces the incidence of illnesses. It is for this reason that food businesses are regulated for the protection of public health. It is an "interference" in accordance with the law.

When considering Article 8, there must also be an assessment as to whether the interference was "necessary in a democratic society", a similar test to section 28(1) of HRA - is it "demonstrably justified in a free and democratic society". The Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69 at 80 said a way of assessing this was to consider:

> The means used to impair the right or freedom are no more than is necessary to accomplish the objective.

It is submitted that the means adopted is no more than is necessary to accomplish the objective of providing limited information to the public. By authorising closure notices and their display, it would become lawful for information to be disclosed that a prohibition order was served on a particular premises. The scope of the information is that a food business has been served a prohibition order resulting in that business not having permission to essentially operate the food business until a re-inspection occurs and a clearance certificate is given.

<u>Publication of details of food businesses related to offences</u>

Section 146 of the Act authorises the Chief Health Officer to publish details of a food business when they are convicted of an offence against the Act in relation to the handling of food intended for sale or the sale of the food. The offences are contained in divisions 3.2 and 3.3 of the Act. The explanatory statement to this section stated that publication:

> . . .should encourage food businesses to strive for good food safety performance, in order to protect their 'good name'. It will also assist the community to be aware of problems with specific premises.

The section provides that the notice be published in a newspaper circulating in the ACT and that its publication can only be within 21 days after the time for an appeal against the conviction expires. If an appeal is made, then the notice may be published if the conviction is confirmed on appeal and the time passes for making a further appeal.

Section 146(3) provides that the notice may contain a person's name, the business name under which the food business was conducted at the time of the offence, the address of the food business, a description of the offence, the decision of the court and the penalty. The Chief Health Officer may also include any other information in relation to the safety of the food concerned that he or she considers appropriate. It should be noted that registration details, e.g., a person's name or company details, business name and the address of the food business, are available for inspection at any time under section 106 of the Act. Any person, though, can be convicted of an offence under the Act.

Publishing details of businesses convicted in court for breaching the Act is a transparency measure that has been exercised by the Chief Health Officer. A similar, though not exact, provision exists in section 72 of the *Dangerous Substances Act 2004,* which provides for the publication of the disciplinary action taken against a licence holder under that Act.

The Bill proposes to amend section 146 to increase the transparency of the information. It is proposed to authorise the notice being placed on a public register. In time this public register will take the form of a register accessible on the internet. Updating the section to provide for a register will increase the accessibility of the information. However, it may be argued that increasing the information's accessibility from a one-time publication in a newspaper to inclusion on a public register engages section 12 of the HRA.

Does a public register of convictions engage section 12?

It could be argued that a public register impinges on privacy and reputation because it is publishing information about a conviction of a person, affecting their right to privacy. However, a newspaper or television news program may also publish information about a conviction. This is because the information is disclosed in open court, in the course of proceedings conducted according to law. Publication by a newspaper can occur within days of a conviction but the safeguards of section 146 requires the Chief Health Officer to wait a minimum 28 days in case an appeal against conviction is lodged with the Supreme Court before being authorised to publish a notice. It is not being argued that because a newspaper may have infringed section 12 (which is unlikely) that this serves to authorise an infringement by the Chief Health Officer. It is merely being pointed out that the information is in the public domain.

While an individual's privacy or reputation may be impugned by its inclusion on a register, it is not proposed to do it in a manner that is unlawful or arbitrary. There will still be a requirement for a conviction to have occurred and the appeal period expired before the information can be placed on the register.

A shift from a one-time notice to a register, that is, information being published for a longer period of time (the Bill proposes two years), could be said to increase the impact of the information being published. This is not doubted, however, a conviction for a breach can and does demonstrate a disregard for safe food practices. It is information that the public is entitled to know and consider in making an assessment about visiting a food business.

It is submitted that the means adopted is no more than is necessary to accomplish the objective of providing information to the public in a manner more convenient than a newspaper. An additional amendment is proposed for inclusion in the Bill to give the Chief Health Officer the power to correct any mistake, error or omission in the register or any other detail to keep the register up to date. This will assist to ensure that the register provides only information that is necessary to achieve the objective of informing the community and making them as much a part of safe food regulation in the ACT.

Criminal Code Harmonisation and Strict Liability

As flagged in the overview the Bill proposes a schedule that will harmonise the offences in the Act to the Criminal Code. New sections 84C and 98A are also offences that are proposed to be strict liability.

In the case of harmonisation, some offences have been restructured to clearly separate out the elements to be proven and the fault element that applies. For other offences, strict liability has been expressly stated where a number of factors, including the nature of the offence, the language employed and the level of penalty infers a legislative intent for strict liability. In this case of the Food Act, the explanatory statement to the Food Bill 2001 indicated an intention for strict liability.

The application of strict liability has been accepted in the Territory as engaging the right to be presumed innocent (section 22(1) of the HRA). It becomes necessary, therefore, to justify strict liability offences under section 28 of the HRA. The presumption of innocence is, in its simplest form, that a person be treated as not having committed any offence until the State, through a prosecution, adduces sufficient evidence to satisfy an independent and impartial tribunal that the person is guilty. That is, a court should not begin proceedings with the preconception that the person has committed the offence.

Strict liability offences are considered to engage the presumption of innocence because the burden of proof is shifted to the defendant in that the person may have to raise a defence to prove their innocence. Generally the principle is that a defendant is not obligated to offer a defence. It is for the prosecution to prove, beyond a reasonable doubt, the person is guilty. This is because, unlike a fault element offence, for a strict liability offence the prosecution is only required to prove that a person had committed the physical element of the offence.

Some of the first strict liability offences were in England in the late 19th century when English courts applied strict liability to statutory offences of serving liquor to intoxicated persons[5] and dealing with adulterated milk[6]. The consequences for the community has long been a consideration for the imposition of strict liability. Consequently, strict liability offences are usually employed where it is necessary to ensure the integrity of a regulatory scheme, such as those relating to public health and safety, the environment, protection of the revenue and the maintenance of industry and professional standards. Where strict liability is proposed, it is usually desirable that a defendant can reasonably be expected, usually because of his or her professional involvement, to be aware of the requirements of the law.

The explanatory statement to the Food Bill 2001 distinguished between offences in division 3.2 and division 3.3, stating that knowledge applies to division 3.2 and for division 3.3 that the "element of intent is removed". This has been interpreted, among other factors, that the offences in the division are in code language negligence and strict liability. For the purpose of harmonisation, negligence and strict liability has been stated for the offences in division 3.3, provided their application is appropriate. However, in relation to section 26, this is a fault element offence, with strict liability applying to all but one element of the offence.

The Act provides a defence of appropriate diligence at section 30 for the offences contained in part 3. Appropriate diligence, also known as due diligence, provides a defendant with the opportunity to prove that they took all reasonable precautions and exercised all appropriate diligence to prevent the commission of the relevant offence. The Act currently provides under section 33 that the defence of mistaken and reasonable belief is not available for the offences in division 3.3. The inclusion of these two sections further lent weight to the assessment that it was intended for the offences in division 3.3 to be strict liability. It should be noted that the Bill repeals section 33 of the Act as the Criminal Code requires section 36, the defence of the mistake of fact, to be available for an offence to be strict liability.

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[5] *Cundy v Le Cocq* (1884) 13 QBD 207.

[6] *Parker v Alder* [1899] 1 QB 20 – the milk had been watered down without the knowledge of the seller. It was held, though, that food had been sold not of the nature, substance or quality demanded.

Another factor that can be considered is the penalty. There are only monetary penalties stated for division 3.3, in the range of 400 and 500 penalty units. While high, these are maximum penalties. It is for a court to decide the penalty within the range of a maximum penalty. The high penalties, though, reflect the seriousness of protecting the public's safety. In this case, the Act is regulating across an industry with small to large food businesses. Disregard for safe food practices can have serious consequences for the community, including death, and so the penalty has obviously been set to reflect this.

It is noted that the Guide for Framing Offences issued by the Justice and Community Safety Directorate, version 2, published April 2010, provides that the maximum penalty for strict liability is "usually limited to a monetary penalty (maximum 50 penalty units)". The Standing Committee on Justice and Community Safety also endorses the view that the maximum penalty should be at the lower end of the scale for strict liability offences and seeks a justification where a higher penalty is proposed. The NSW Legislation Review Committee, in a 2006 discussion paper, noted that it has taken the view:

> that in some circumstances higher penalties may be appropriate. An example of this might be an offence that would have very serious public health or safety consequences, such as polluting waterways and where a higher penalty is needed as a disincentive for committing the offending behaviour. [7]

The committee further noted that it may be more appropriate to assess the appropriateness of a monetary penalty for a strict liability offence on a case by case base rather than adopt an "arbitrary cap".

The Act is a regulatory regime designed to ensure that the serious public health risk from unsafe food practices are managed appropriately by a food business. It does this through offences, the bulk of which are in division 3.3. There are three serious offences relating to food in division 3.2. The penalties for those offences are 1000 penalty units or imprisonment for two years. For the offences in division 3.3, 750, 500 and 400 penalty units currently apply. The offences in the Act provide for penalties that are higher than the usual maximum penalty adopted for offences in the ACT. The intention, therefore, is to send the message that food safety must be managed proactively and in accordance with the Act and Food Standards Code. A reduction in the penalty for offences in division 3.3 as a result of harmonising the offences to clearly state strict liability, would undermine this message. As the potential consequences for an accused person is only a financial penalty, of which the final amount is at the discretion of the court, it is submitted that a higher than the "usual limit" is appropriate for the strict liability offences in this Bill.

[7] Parliament of New South Wales Legislation Review Committee, Strict and Absolute Liability Discussion Paper, 2006, page 9.

Defences

It is noted above that there is a defence of appropriate diligence at section 30 of the Act. Other defences provided for in the Criminal Code also apply, including intervening conduct or event. The Code requires that the burden that is borne by a defendant be clear. For the defences in the Bill this is an evidential burden, that is the defendant has to present or point to evidence that suggests a reasonable possibility for that the defence. A prosecution then has the burden of disproving the defence beyond reasonable doubt.

A review was also conducted where an existing offence included the defence of reasonable excuse. These are sections 43, 51(2), 53(4), 54, 99 and 149(4). The Guide for Framing Offences provides that the defence of reasonable excuse is essentially inappropriate if the excuses it intends to cover are already covered by a generic defence in the Criminal Code or it can be articulated as a specific defence to the proposed offence. Each offence has been considered against the possible excuses that was intended to be covered, having regard to the defences in the Criminal Code. It has been concluded that for each offence mentioned, that the defences in the Criminal Code sufficiently cover the possibilities.

Clauses

Clause 1 declares the name of the Act to be the Food Amendment Act 2011.

Clause 2 provides for the commencement of the Act. The Act will commence sections 3 to 5, 7 to 9, and 12 and the schedule 1 the day after the Act's notification day. Commencement of Schedule 2.1 is delayed to the commencement of the amendment to the relevant Act.

Commencement will be by written notice by the Minister in relation to section 7 and 11 of the Act. Commencement by written notice for the food safety supervisor provisions is to allow for consultation with industry on the training and other aspects of implementation. Section 79 of the *Legislation Act 2001* has been displaced to allow for a longer postponement in relation to new part 9A of the Bill. Subsection (3) provides that if part 9A is not commenced within 18 months then it will commence automatically after this date.

Clause 3 provides that the Act amends the *Food Act 2001*.

Clause 4 provides for the display and contents of closure notices when a registered proprietor has been served with a prohibition notice under section 82. It also provides that it will be an offence for a person to interfere with the notice.

The purpose of a closure notice is to provide the community with the information that a food business has had enforcement action taken against it by way of a

prohibition order that has resulted in the closure of the business until such time that it has been re-inspected and a clearance certificate is given under the Act. A notice is proposed rather than the display of the order itself. An order can run up to several pages in length as section 83 requires the provision of the Act or Food Standards Code that is not being complied with to be stated. While many in the community might be interested in knowing the full details of the issues that led to the service of a prohibition order, a closure notice provides the essential detail to inform the community. That is, that the food business has been ordered not to use the premises because of the food safety risk that it posed to the community.

An offence of interfering with a closure notice will ensure that the closure notice is not moved, obscured or defaced in some manner after it has been placed at the premises by an authorised officer. A food business that is required to have a closure notice displayed will be informed that it will be an offence for them to attempt to interfere with the notice.

Clause 5 amends section 87 of the Act to increase the penalty for contravention of a prohibition order. This increase is to better reflect the serious consequences that a contravention of section 87 can be, for example where a business continues to operate in contravention of a prohibition order, particularly where a closure notice has also been required. It should be noted that the section has been harmonised with the principles of the Criminal Code, with the offence of contravening an improvement notice now in a separate subsection. This offence retains its maximum penalty of 100 penalty units.

Clause 6 provides for the display of registration certificates. Under many registration and licensing Acts in the ACT it is a requirement to display a registration certificate. The Health Directorate is aware that many food businesses do display their registration along with other licences that they have obtained for the conduct of their business at the point of sale. This provision will provide consistency and provide an additional level of transparency. It will inform the community that the food business has complied with the law and is a registered food business.

Similar to other offences that mandate display, it is a strict liability offence with a maximum penalty of 50 penalty units.

Clause 7 inserts a new part 9A into the Act to provide for food safety supervisors. It will be a requirement for each registered food business to have a designated food safety supervisor (FSS) employed by the business. An FSS will be a person who knows how to recognise, prevent and alleviate hazards associated with food. An FSS is required per registered premises.

New section 117 provides for the requirement to appoint an FSS. A registered proprietor will commit an offence if they fail to appoint or have an FSS. The Act,

however, provides that a newly registered food business will have 30 days in which to appoint an FSS. It should be noted that a registered proprietor can be the FSS themselves, provided that they have undertaken and completed the required training (see the note and new section 118).

New section 119 provides that the Chief Health Officer may approve the training guidelines. The guidelines will govern the approval of a food safety training course. Before a person can be an FSS they must have undertaken a course that has been approved as a course that covers the required competency to be an FSS. Courses will be those provided by registered training organisations that have been registered under the *Training and Tertiary Education Act 2003,* chapter 3 or by a state registering body.

Clause 8 updates section 146 to provide for a public register to be maintained by the Chief Health Officer that publishes the convictions of a food business. Currently section 146 provides only that a Chief Health Officer may publish a notice in newspaper following a conviction of a food business under the Act. To provide greater transparency, this is being updated to allow the Chief Health Officer to maintain a public register that publicises the convictions of a business for 2 years. In time the public register will take the form of a register accessible on the internet. Updating the section to provide for a register will increase the accessibility of the information.

The Chief Health Officer may opt to, if the circumstances and the public interest warrants it, to also publish a notice in a newspaper.

The section gives the Chief Health Officer the power to correct any mistake, error or omission in the register and to keep it up to date. Updating the register may include inserting a note on the register when a food business lodges a change in ownership, etc.

Clause 9 updates the references from ‘the notice’ to ‘a notice’ in subsections (4) and (5) of section 146 of the Act.

Clause 10 inserts the Territory into section 146(6). Section 146(6) provides that liability is not incurred by a person for publishing honestly a notice under this section or a fair report of summary of such a notice. This provision is extended to the Territory, to prevent the Territory being liable for publishing a notice honestly under the section.

Clause 11 inserts a power to make regulations in relation to the food safety supervisor scheme. This includes the requirements for eligibility to become or remain a food safety supervisor. It is proposed that a food safety supervisor be required to refresh their training at five year intervals. This and other matters are proposed to be dealt with in the regulation.

Clauses 12 to 14 amends the dictionary to provide for new definitions as a result of other amendments to the Act.

Schedule 1 amends provisions of the Food Act to bring the Act into line with the *Criminal Code 2002*.

Schedule 2 amends the *Food (Nutritional Information) Amendment Act 2011* to remove section 4. Section 4 inserts a reference stating that other legislation applies, e.g. the Criminal Code, because the Act inserted two new offences subject to the application of chapter 2 of the Code. As the Act will commence after the harmonised provisions of the Food Act will commence, the section in that Act is no longer required.

There is also an amendment to the Magistrates Court (Food Infringement Notices) Regulation 2005. As a particular section, section 26, has been amended in a particular way, it is no longer suitable to be an infringement notice offence. A more comprehensive review of the Regulation will be undertaken, including whether the monetary amount to be paid remain appropriate, after the Bill is considered by the Legislative Assembly.