



## Principle (h): Personal rights and liberties

### Overview

Senate standing order 23(3)(h) requires the committee to scrutinise each instrument as to whether it trespasses unduly on personal rights and liberties. Under this principle, the committee will typically be concerned with instruments which:

- abrogate the privilege against self-incrimination;
- apply retrospectively or have a retrospective effect;
- confer immunity from liability;
- contain offences of strict or absolute liability;
- contain coercive powers (for example, use of force or entry, search and seizure powers);
- exclude or limit procedural fairness;
- provide for the collection, use and disclosure of personal information; and
- reverse the legal or evidential burden of proof.

The following discussion summarises the committee's expectations regarding key issues arising under principle (h).

### Abrogation of privilege against self-incrimination

The common law privilege against self-incrimination provides that a person cannot be required to answer questions or produce material which may incriminate them. This is a key component of the common law right to be presumed innocent. Accordingly, where an instrument abrogates the privilege against self-incrimination, the committee generally expects the following safeguards:

- 'use' **and** 'derivative use' immunity, to prevent information obtained directly or indirectly from being used in criminal proceedings against them; and
- restrictions on the sharing of information obtained with law enforcement agencies.

The explanatory statement to the instrument should also justify the abrogation of the privilege, and explain the scope of any safeguards provided for by the instrument.

### Privacy: collection, use and disclosure of personal information

Provisions which enable the collection, use and disclosure of personal information may trespass on an individual's right to privacy, and should generally be included in primary legislation, rather than delegated legislation. Where an instrument nevertheless contains such provisions, the explanatory statement should explain:

- the nature and scope of the provisions (including the nature and extent of the information that maybe disclosed and the persons and/or entities to whom disclosure is permitted);
- why the provisions are considered necessary and appropriate; and
- what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the *Privacy Act 1988* applies).

## **Coercive powers**

Provisions which contain coercive powers have the potential to seriously trespass on personal rights and liberties and should not be included in delegated legislation. These include provisions which authorise persons to enter, search, seize or destroy property or to use force against others. Where an instrument nevertheless contains such provisions, the explanatory statement to the instrument should explain:

- why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument;
- the nature and scope of the provisions, including any constraints or conditions on the grant and exercise of the powers, and the circumstances in which the powers will be exercised;
- who may exercise the powers, and whether they are required to possess specific skills or qualifications;
- whether compensation is available for any property seized or destroyed in the exercise of the powers;
- whether independent review is available of decisions made, and actions taken, in connection with the exercise of the powers; and
- whether the provisions comply with Chapters 7 and 8 of the *Guide to Framing Commonwealth Offences*.

## **Immunity from liability**

Provisions which confer immunity from liability or extend existing immunities (for example, by providing that criminal or civil proceedings cannot be brought against specified persons or bodies) limit the common law right to bring an action to enforce legal rights. Accordingly, where an instrument includes such provisions, the explanatory statement to the instrument should explain:

- the nature and scope of the immunity;
- why the breadth of the immunity is considered necessary; and
- why the immunity is necessary for each specific class of person to whom it applies.

## **Procedural fairness**

The common law right to procedural fairness is underpinned by the fair hearing rule and the rule against bias. The fair hearing rule requires a person who is adversely affected by a decision to be given an adequate opportunity to put their case before the decision is made. Under the no bias rule decision-makers must not be biased and must not appear to be biased. Where an instrument limits or denies the right to procedural fairness (for example, by restricting or excluding disclosure of adverse information to the person affected by a decision), the explanatory statement should provide a comprehensive justification for the relevant exclusion or limitation.

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## Retrospective commencement or effect

The common law has long recognised the right to protection against retrospective laws. Such laws undermine legal clarity and certainty. Retrospectivity will arise where an instrument commences retrospectively or commences prospectively but has a retrospective effect. For example, an instrument may have a retrospective effect where it attaches new conditions or requirements to processes which had commenced under a previous legal framework, via the application of transitional provisions. Where an instrument commences retrospectively, or has a retrospective effect, the explanatory statement to the instrument should explain:

- the nature and scope of the relevant provisions;
- why the retrospectivity is considered necessary and appropriate; and
- whether any person has been, or may be disadvantaged by the retrospectivity and, if so, what steps have been taken or will be taken to avoid such disadvantage and ensure procedural fairness for affected persons.

The committee may also raise retrospective commencement under scrutiny principle (a), compliance with legislative requirements, in ascertaining whether the instrument complies with section 12 of the [Legislation Act 2003](#).

## Reverse burden of proof

The right to be presumed innocent is a fundamental principle of the Australian legal system. Normally, the right to be presumed innocent requires the prosecution to prove all elements of an offence. Consequently, this right is undermined by provisions which require the defendant to raise evidence about a matter (reverse evidential burden), or positively prove a matter (reverse legal burden). In practice, this issue usually arises in the context of 'offence-specific defence' provisions, which establish a defence to an offence by requiring the defendant to raise evidence about a matter, or prove a matter. If an instrument contains such provisions, the explanatory statement should explain:

- the nature and scope of the relevant provisions;
- why it is considered necessary and appropriate to reverse the burden of proof, noting that a much stronger justification is necessary to justify reversing the legal burden;
- whether the provisions satisfy the following two-limbed test set out in the Attorney-General's Department's [Guide to Framing Commonwealth Offences](#) [4.3]:
  - whether the relevant matter is peculiarly within the knowledge of the defendant; and
  - whether it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter; and
- if the provision reverses the legal burden of proof (requires the defendant to prove or disprove a matter), why this is considered necessary, rather than reversing the evidential burden.

## Strict and absolute liability

The requirement for the prosecution to prove fault on the part of a defendant is an important aspect of the common law right to be presumed innocent. The application of strict and absolute liability undermines this right by removing the requirement to prove fault in relation to one or more physical elements of an offence. Accordingly, where an instrument includes offences of strict or absolute liability, the explanatory statement should explain:

- the nature and scope of each offence, including what penalty attaches to each offence; and
- why it is considered necessary and appropriate to apply strict or absolute liability to the offence, by reference to the principles set out in the Attorney-General's Department's [Guide to Framing Commonwealth Offences](#) [2.2.6].

The explanatory statement should include a particularly robust justification for imposing absolute liability, as this not only removes the fault element but also excludes the defence of honest and reasonable mistake of fact.

## Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

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|--------------------------|---|---|
| <input type="checkbox"/> | <b>Abrogation of privilege against self-incrimination</b>               | Where an instrument abrogates this privilege, the explanatory statement should justify the abrogation and explain the nature and scope of all relevant safeguards, including the availability of 'use' and 'derivative use' immunity.   |
| <input type="checkbox"/> | <b>Collection, use and disclosure of personal information (privacy)</b> | <p>Where an instrument provides for the collection, use or disclosure of personal information, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• the nature and scope of the provisions (including the nature and extent of the information that maybe disclosed and the persons and/or entities to whom disclosure is permitted);</li> <li>• why the provisions are considered necessary and appropriate; and</li> <li>• what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the Privacy Act 1988 applies).</li> </ul>   |
| <input type="checkbox"/> | <b>Coercive powers</b>  | <p>Where an instrument includes entry, search and seizure powers, provides for the confiscation or destruction of personal property, or authorises the use of force, the explanatory statement should explain:</p> <ul style="list-style-type: none"> <li>• why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument;</li> <li>• the nature and scope of the provisions, including any constraints or conditions on the grant and exercise of the power, and the circumstances in which it is envisaged that the power will be exercised;</li> <li>• who may exercise the power, including whether they are required to possess specific skills or qualifications;</li> <li>• whether compensation is available for the confiscation or destruction of property; and</li> <li>• the availability of independent review of decisions made and actions taken in connection with the exercise of the power.</li> </ul> |

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- Immunity from liability** Where an instrument confers immunity from liability, the explanatory statement should explain the nature and scope of the immunity, justify the breadth of the immunity, and explain why the immunity is necessary for each class of person to whom it applies.
- Procedural fairness** Where an instrument excludes or limits the right to procedural fairness, for example, by breaching the fair hearing rule or no bias rule, the explanatory statement should comprehensively explain why it is necessary to limit procedural fairness.
- Retrospective commencement or effect** Where an instrument commences retrospectively, or commences prospectively but has a retrospective effect, the explanatory statement should explain:
- the nature and scope of the relevant provisions;
  - why the retrospectivity is considered necessary and appropriate; and
  - whether any person has been, or may be disadvantaged by the retrospectivity and, if so, what steps have been or will be taken to avoid such disadvantage.
- Reverse burden of proof** Where an instrument reverses the evidential or legal burden of proof by requiring the defendant to raise evidence about a matter (evidential burden) or to positively prove a matter (legal burden), the explanatory statement should explain:
- the nature and scope of the relevant provisions; and
  - why it is necessary and appropriate to reverse the burden of proof;
  - whether the provisions satisfy the following two-limbed test set out in the Attorney-General's Department's [Guide to Framing Commonwealth Offences](#):
    - whether the relevant matter is peculiarly within the knowledge of the defendant; and
    - whether it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish; and
  - if applicable, why it is considered necessary to reverse the legal burden of proof, rather than only the evidential burden of proof.
- Strict and absolute liability** Where an instrument contains offences of strict or absolute liability, the explanatory statement should explain:
- the nature and scope of each offence, including what penalty attaches to each offence; and
  - why it is considered necessary and appropriate to apply strict or absolute liability to the offence, by reference to the principles set out in the Attorney-General's Department's [Guide to Framing Commonwealth Offences](#) [2.2.6].