



## Principle (i): Undue trespass on personal rights and liberties

### Overview

Scrutiny principle (i) requires the committee to scrutinise each bill as to whether it trespasses unduly on personal rights and liberties. Under this principle, the committee will typically be concerned with bills which:

- abrogate the privilege against self-incrimination;
- commence or apply retrospectively;
- confer immunity from liability;
- contain offences of strict or absolute liability;
- contain significant penalties (in primary legislation);
- contain coercive powers (for example, use of force or entry, search and seizure powers);
- 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 (i). The issues identified are not exhaustive.

### 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 right to be presumed innocent. Where a bill abrogates the privilege against self-incrimination, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to abrogate the privilege against self-incrimination; and
- whether there is a use *and* derivative use immunity provided and if not, why not.

### Retrospectivity

A basic value of the rule of law is that, in general, laws should only operate prospectively, not retrospectively. Retrospective commencement or application, when too widely used or insufficiently justified, can work to diminish respect for the rule of law and its underlying values. Where a bill commences or applies retrospectively, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to retrospectively commence or apply the legislation; and
- whether any persons are likely to be detrimentally affected by the retrospective commencement or application of the legislation and, if so, to what extent their interests are likely to be affected.

## Immunity from liability

A bill can provide that criminal or civil proceedings cannot be brought against persons for actions or functions performed in accordance with the bill. In most circumstances, the common law right to bring an action to enforce legal rights is therefore removed, unless it can be demonstrated that a lack of good faith is shown. Where a bill provides immunity from liability, the committee expects the explanatory memorandum to the bill address why it is appropriate to provide immunity from liability.

## Strict and absolute liability offences

Under general principles of the criminal law, fault (for example, intention, knowledge, recklessness or negligence) is required to be proved before a person can be found guilty of a criminal offence. When a bill states that an offence is one of strict or absolute liability, this removes the requirement for the prosecution to prove the defendant's fault, therefore undermining fundamental criminal law principles. Where a bill seeks to create a strict or absolute liability offence, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to apply strict or absolute liability in relation to each offence or element of an offence;
- whether the penalty for the offence is appropriate in light of the application of strict or absolute liability; and
- whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.<sup>1</sup>

## Significant penalties in primary legislation

The rationale for the imposition of significant penalties, especially if those penalties involve imprisonment, is expected to be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This promotes consistency and guards against the risk that a person's liberty is unduly limited through the application of disproportionate penalties. Where a bill seeks to impose significant penalties, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to impose significant penalties;
- whether the penalties are broadly equivalent to the penalties for similar offences in Commonwealth legislation and if not, why not; and
- whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

## Coercive powers

Coercive powers are powers that enable government agencies to obtain information and perform certain intrusive functions (such as detaining or searching persons, entering and searching premises and seizing evidential material). This undermines the right of individuals to privacy, bodily integrity, and security of their homes. The committee considers that new coercive powers should only be granted in exceptional circumstances. Where a bill seeks to confer coercive powers, the committee expects the explanatory memorandum to the bill to address the following matters:

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<sup>1</sup> The Guide is available at <https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers>.

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- why it is appropriate for the bill to confer coercive powers;
  - whether there are safeguards and appropriate limitations on the powers included on the face of the bill or other Commonwealth legislation; and
  - whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

## **Privacy**

Bills which enable the collection, use or disclosure of personal information may trespass on an individual's right to privacy. Where a bill contains provisions for the collection, use or disclosure of personal information, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate for the bill to provide for the collection of personal information; 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).

## **Reversal of the burden of proof**

At common law it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right. Where a bill reverses the burden of proof, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to reverse the burden of proof;
- whether the relevant matter is peculiarly within the knowledge of the defendant;
- whether it would be significantly more difficult and costly for the prosecution to disprove the relevant matter than for the defendant to establish the matter;
- if the defendant bears a legal burden rather than an evidential burden, why this is the case; and
- whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

## Checklist

The following checklist summarises the types of information which should be included in explanatory memoranda where a bill may engage scrutiny principle (i).

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| <input type="checkbox"/> <b>Abrogation of privilege against self-incrimination</b> | Where a bill abrogates the privilege against self-incrimination, the explanatory memorandum should explain: <ul style="list-style-type: none"> <li>• why it is appropriate to abrogate the privilege against self-incrimination; and</li> <li>• whether there is a use <i>and</i> derivative use immunity provided and if not, why not.</li> </ul>  |
| <input type="checkbox"/> <b>Retrospectivity</b>                                    | Where a bill commences or applies retrospectively, the explanatory memorandum should explain: <ul style="list-style-type: none"> <li>• why it is appropriate to retrospectively commence or apply the legislation; and</li> <li>• whether any persons are likely to be detrimentally affected by the retrospective commencement or application of the legislation and, if so, to what extent their interests are likely to be affected.</li> </ul>  |
| <input type="checkbox"/> <b>Immunity from liability</b>                            | Where a bill provides immunity from liability, the explanatory memorandum should explain: <ul style="list-style-type: none"> <li>• why it is appropriate to provide immunity from liability.</li> </ul>   |
| <input type="checkbox"/> <b>Strict and absolute liability offences</b>             | Where a bill seeks to create a strict or absolute liability offence, the explanatory memorandum should explain: <ul style="list-style-type: none"> <li>• why it is appropriate to apply strict or absolute liability in relation to each offence or element of an offence;</li> <li>• whether the penalty for the offence is appropriate in light of the application of strict or absolute liability; and</li> <li>• whether the approach taken is consistent with the <i>Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i>.</li> </ul> |
| <input type="checkbox"/> <b>Significant penalties in primary legislation</b>       | Where a bill seeks to impose significant penalties, the explanatory memorandum should explain: <ul style="list-style-type: none"> <li>• why it is appropriate to impose significant penalties;</li> <li>• whether the penalties are broadly equivalent to the penalties for similar offences in Commonwealth legislation and if not, why not; and</li> <li>• whether the approach taken is consistent with the <i>Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i>.</li> </ul>   |
| <input type="checkbox"/> <b>Coercive powers</b>                                    | Where a bill seeks to confer coercive powers, the explanatory memorandum should explain: <ul style="list-style-type: none"> <li>• why it is appropriate for the bill to confer coercive powers;</li> </ul>  |

- whether there are safeguards and appropriate limitations on the powers included on the face of the bill or other Commonwealth legislation; and
- whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

**Privacy**

Where a bill contains provisions for the collection, use and disclose or personal information, the explanatory memorandum should explain:

- why it is appropriate for the bill to provide for the collection of personal information; 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).

**Reversal of the burden of proof**

Where a bill reverses the burden of proof, the explanatory memorandum should explain:

- why it is appropriate to reverse the burden of proof;
- whether the relevant matter is peculiarly within the knowledge of the defendant;
- whether it would be significantly more difficult and costly for the prosecution to disprove the relevant matter than for the defendant to establish the matter;
- if the defendant bears a legal burden rather than an evidential burden, why this is the case; and
- whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.