

The Senate

**Standing
Committee for the
Scrutiny of Bills**

**Guidelines
2nd Edition**

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Introduction

Role of the committee

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against a set of non-partisan accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny.

The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament to determine whether it:

- trespasses unduly on personal rights and liberties;
- makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- makes rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegates legislative powers; or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

The committee may also assess Acts of Parliament against its scrutiny principles.

Other legislative scrutiny committees

The Scrutiny of Bills Committee is one of three legislative scrutiny committees in the Commonwealth Parliament.

The committee's scrutiny functions are undertaken alongside those of the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Parliamentary Joint Committee on Human Rights.

Purpose of the guidelines

These guidelines are intended to set out the committee's expectations in relation to its technical scrutiny principles. Scrutiny issues identified by the committee will often fall within more than one principle. This document is intended as a guide only and should not be taken as either comprehensive or definitive.

Committee contact details

If you have any feedback or questions relating to the committee's role, expectations or functions please contact the committee secretariat on (02) 6277 3050 or by email at scrutiny.sen@aph.gov.au.

Further information is also available on the [committee's website](#).

Part I — Committee work practices

Committee work practices

Scrutiny approach

The committee operates on a non-partisan, apolitical and consensual basis to consider whether a bill complies with the scrutiny principles.

The policy content of a bill or act provides context for the committee's technical scrutiny of that bill or act. However, policy content is not a primary consideration for the committee.

Work practices

The committee examines all bills that come before the Parliament against the five principles set out in Senate standing order 24(1)(a) and typically meets each sitting week to consider them.

Where a concern is raised about possible inconsistency with scrutiny principles, the committee's usual approach is to write to the responsible minister or other proposer seeking further information or requesting that consideration be given to amending the relevant provision. In some circumstances the committee may report its scrutiny concerns to the Senate without seeking further information from the minister or other proposer.

The committee sets out its scrutiny concerns in the *Scrutiny Digest* which is published on the committee website.

A high-level summary of the committee's scrutiny concerns is subsequently published in the *Scrutiny News*. Please contact the secretariat if you wish to subscribe to *Scrutiny News*.

Late responses

Senate standing order 24(1) provides that any senator may ask a minister for an explanation of why the minister has not provided a response to the committee. Subsequently, a senator may, without notice, move a motion relating to the consideration of a bill or that the Senate take note of an explanation or the failure of a minister to provide an explanation.

The committee publishes on its website a list of bills or acts on which it has sought advice but has either not yet received a response or has received a response but not yet finally reported.

Part II — Scrutiny principles

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;
- contain coercive powers (for example, use of force or entry, search and seizure powers);
- confer immunity from liability;
- provide for the collection, use and disclosure of personal information;
- commence or apply retrospectively;
- reverse the legal or evidential burden of proof;
- contain offences of strict or absolute liability; and
- contain significant penalties (in primary legislation).

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.

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:

- 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*.¹

¹ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011.

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.

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 disclose 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).

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.

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*.

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*.

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*.

Explanatory memorandum checklist

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

- | | |
|--|---|
| <input type="checkbox"/> Abrogation of privilege against self-incrimination | Where a bill abrogates the privilege against self-incrimination, the explanatory memorandum should explain: <ul style="list-style-type: none">• why it is appropriate to abrogate the privilege against self-incrimination; and• whether there is a use <i>and</i> derivative use immunity provided and if not, why not. |
| <input type="checkbox"/> Coercive powers | Where a bill seeks to confer coercive powers, the explanatory memorandum should explain: <ul style="list-style-type: none">• 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 <i>Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i>. |
| <input type="checkbox"/> Immunity from liability | Where a bill provides immunity from liability, the explanatory memorandum should explain: <ul style="list-style-type: none">• why it is appropriate to provide immunity from liability. |
| <input type="checkbox"/> Privacy | Where a bill contains provisions for the collection, use and disclose of personal information, the explanatory memorandum should explain: <ul style="list-style-type: none">• 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 <i>Privacy Act 1988</i> applies). |
| <input type="checkbox"/> Retrospectivity | Where a bill commences or applies retrospectively, the explanatory memorandum should explain: <ul style="list-style-type: none">• 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. |
| <input type="checkbox"/> Reversal of the burden of proof | Where a bill reverses the burden of proof, the explanatory memorandum should explain: <ul style="list-style-type: none">• 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*.

Significant penalties in primary legislation

Where a bill seeks to impose significant penalties, the explanatory memorandum should explain:

- 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*.

Strict and absolute liability offences

Where a bill seeks to create a strict or absolute liability offence, the explanatory memorandum should explain:

- 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*.

Principle (ii): Insufficiently defined administrative powers

Overview

Scrutiny principle (ii) requires the committee to scrutinise each bill as to whether it makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. Insufficiently defined administrative powers are of concern to the extent that they may be exercised arbitrarily or inconsistently; such powers may impact on the predictability and guidance capacity of the law, undermining fundamental rule of law principles. Under this principle, the committee will typically be concerned with bills which:

- allow for broad delegation of administrative powers and functions; and
- confer broad discretionary powers.

The following discussion summarises the committee's expectations regarding key issues arising under principle (ii). The issues identified are not exhaustive.

Broad delegation of administrative powers or functions

Bills that provide an official with a range of powers and functions generally contain the ability for these powers to be delegated to other officials. When a bill allows for the delegation of these administrative functions or powers, the committee generally expects that any delegation will be limited to nominated office holders or members of the Senior Executive Service. Where a bill allows for broad delegation of administrative powers and functions, the committee expects the explanatory memorandum to the bill to address the following matters:

- the purpose and scope of the delegation power, including why it is considered necessary;
- an explanation of who will be exercising the delegated powers and functions, including whether they possess the appropriate training, qualifications, skills or experience;
- if a delegation extends beyond nominated office holders or members of the Senior Executive Service—why this is appropriate, what safeguards are in place to ensure that any powers are appropriately delegated, and whether these safeguards are contained in law or policy; and
- if a delegation extends beyond members of the Australian Public Service—why this is appropriate, what safeguards are in place to ensure that powers are delegated only to appropriate persons and whether there will be any impact on an individual's right to judicial or merits review if decisions are made by persons who are not government officials.

Broad discretionary powers

Many administrative powers are granted to decision makers on a discretionary basis. This means that the decision maker is not required to exercise the relevant power in a particular way but has a range of options open to them. The committee's scrutiny concerns will be heightened where provisions exempt a decision maker from the requirement to consider whether or not to even exercise a power at all. Where a bill contains a discretionary power, the committee expects the explanatory memorandum to the bill to address the following matters:

- the purpose and scope of the discretion, including why it is considered necessary;
- whether there are appropriate criteria or considerations that limit or constrain the exercise of any power, including whether they are contained in law or policy;
- whether the decision maker is required to exercise the power and, if not, whether this will limit a person's right to an effective judicial review remedy; and

- an explanation of who will be exercising the discretion, including whether they possess the appropriate training, qualifications, skills or experience.

Explanatory memorandum checklist

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

- | | |
|--|---|
| <input type="checkbox"/> Broad delegation of administrative powers or functions | Where a bill allows for broad delegation, the explanatory memorandum should explain: <ul style="list-style-type: none">• the purpose and scope of the delegation power, including why it is considered necessary;• who will be exercising the delegated powers and functions, including whether they possess the appropriate training, qualifications, skills or experience;• if a delegation extends beyond nominated office holders or members of the Senior Executive Service—why this is appropriate, what safeguards are in place to ensure that any powers are appropriately delegated, and whether these safeguards are contained in law or policy; and• if a delegation extends beyond members of the Australian Public Service—why this appropriate, what safeguards are in place to ensure that powers are delegated only to appropriate persons and whether there will be any impact on an individual's right to judicial or merits review if decisions are made by persons who are not government officials. |
| <input type="checkbox"/> Broad discretionary powers | Where a bill contains a discretionary power, the explanatory memorandum should explain: <ul style="list-style-type: none">• the purpose and scope of the discretion, including why it is considered necessary;• whether there are appropriate criteria or considerations that limit or constrain the exercise of any power, including whether they are contained in law or policy;• whether the decision maker is required to exercise the power and, if not, whether this will limit a person's right to an effective judicial review remedy; and• who will be exercising the discretion, including whether they possess the appropriate training, qualifications, skills or experience. |

Principle (iii): Inadequate review of decisions

Overview

Scrutiny principle (iii) requires the committee to scrutinise each bill as to whether it makes rights, liberties or obligations unduly dependent upon non-reviewable decisions. Under this principle, the committee will typically be concerned with bills which:

- do not provide for independent merits review where appropriate;
- exclude or limit judicial review;
- provide for automated decision making; and
- exclude or limit procedural fairness.

The following discussion summarises the committee's expectations regarding key issues arising under principle (iii). The issues identified are not exhaustive.

Availability of independent merits review

If a bill empowers a decision-maker to make decisions which have the capacity to affect rights, liberties or obligations, those decisions should ordinarily be subject to independent merits review.

Where a bill contains such a decision, the committee expects the explanatory memorandum to the bill to address the following matters:

- whether independent merits review is available; and
- if independent merits review is not available, the characteristics of the relevant decision/s which justify the omission of merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merit review?*²

Availability of judicial review

The exclusion of judicial review of administrative action removes a fundamental right of persons who are affected by administrative decisions to challenge the legality of those decisions in the courts. Any exclusion or limitation of judicial review, including an exclusion or limitation of the operation of the simplified and enlarged scheme of review provided for by the *Administrative Decisions (Judicial Review) Act 1977*, requires a clear and substantial justification.

Section 75(v) of the Constitution provides for an entrenched minimum provision of judicial review. Provisions of a bill which attempt to exclude this jurisdiction will be scrutinised closely by the committee.

The committee will also closely scrutinise provisions which may undermine the efficacy of judicial review. For example, judicial review may be limited by way of a no-invalidity clause. No-invalidity clauses provide that the breach of statutory requirements attached to a particular decision or act do not result in the invalidity of that act or decision. The consequence of these clauses is to remove the basis for judicial remedies which would enforce those limits on power. Other provisions which indirectly restrict the efficacy of judicial review include non-compellability clauses (which remove duties on the decision-maker to consider whether to exercise a power) and secrecy clauses (which limit the access of courts to relevant information).

2 Attorney-General's Department, [*What decisions should be subject to merit review?*](#), January 1999.

Where a bill contains an exclusion or limitation of judicial review, the committee expects the explanatory memorandum to the bill to address the following matters:

- the nature and scope of the exclusion or limitation; and
- why it is considered necessary and appropriate to restrict a person's access to judicial review.

Automated decision-making

Administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error.

In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

Where a bill includes a provision which enables decisions to be made through an automated process, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is considered necessary and appropriate to provide for automated decision-making of the particular decisions in question;
- how default administrative law principles and requirements (such as considering relevant matters, flexible application of policy, and legal reasonableness) will be maintained in the making of automated decisions;
- what safeguards are in place to ensure that automated decisions will be made appropriately and will not be subject to legal error, and whether these safeguards are contained in law or policy; and
- if a broad power to allow automated decision-making is included in bill—why it would not be appropriate to limit the power to particular decisions.

Procedural fairness

Procedural fairness is a fundamental common law right that ensures fair decision-making. Amongst other matters, this requires decision-makers to be free from bias and the appearance of bias (known as the 'no bias rule') and to ensure that people who are adversely affected by a decision are given an adequate opportunity to put their case before the decision is made (known as the 'fair hearing rule'). The fair hearing rule includes not only the right of a person to contest any charges against them but also to test any evidence upon which any allegations are based.

Where a bill limits or excludes the right to procedural fairness the committee expects the explanatory memorandum to the bill to address the following matters:

- the nature and scope of the exclusion or limitation; and
- why it is considered necessary and appropriate to restrict a person's right to procedural fairness.

Explanatory memorandum checklist

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

- | | |
|---|---|
| <input type="checkbox"/> Availability of independent merits review | Where a bill contains a discretionary decision that has the capacity to affect rights, liberties, or obligations, the committee expects the explanatory memorandum to the bill to address the following matters: <ul style="list-style-type: none">• whether independent merits review is available; and• if independent merits review is not available, the characteristics of the relevant decision/s which justify the omission of merits review, by reference to the Administrative Review Council's guide, <i>What decisions should be subject to merit review?</i>. |
| <input type="checkbox"/> Availability of judicial review | Where a bill contains an exclusion or limitation of judicial review, the committee expects the explanatory memorandum to the bill to address the following matters: <ul style="list-style-type: none">• the nature and scope of the exclusion or limitation; and• why it is considered necessary and appropriate to restrict a person's access to judicial review. |
| <input type="checkbox"/> Automated decision-making | Where a bill includes a provision which enables decisions to be made through an automated process, the committee expects the explanatory memorandum to the bill to address the following matters: <ul style="list-style-type: none">• why it is considered necessary and appropriate to provide for automated decision-making of the particular decisions in question;• how default administrative law principles and requirements (such as considering relevant matters, flexible application of policy, and legal reasonableness) will be maintained in the making of automated decisions;• what safeguards are in place to ensure that automated decisions will be made appropriately and will not be subject to legal error, and whether these safeguards are contained in law or policy; and• if a broad power to allow automated decision-making is included in bill—why it would not be appropriate to limit the power to particular decisions. |
| <input type="checkbox"/> Procedural fairness | Where a bill limits or excludes the right to procedural fairness the committee expects the explanatory memorandum to the bill to address the following matters: <ul style="list-style-type: none">• the nature and scope of the exclusion or limitation; and• why it is considered necessary and appropriate to restrict a person's right to procedural fairness. |

Principle (iv): Inappropriate delegation of legislative powers

Overview

Scrutiny principle (iv) requires the committee to scrutinise each bill as to whether it inappropriately delegates legislative powers. Under this principle, the committee will typically be concerned with bills which:

- include an exemption from disallowance;
- enable delegated legislation to modify the operation of primary legislation or exempt persons or entities from the operation of primary legislation;
- allow delegated legislation to create offences or civil penalties;
- include significant matters in delegated legislation; and
- allow delegated legislation to set the rate of a tax or fee.

The following discussion summarises the committee's expectations regarding key issues arising under principle (iv). The issues identified are not exhaustive.

Exemption from disallowance

The usual parliamentary disallowance process allows a House of the Parliament to disallow (or veto) delegated legislation within 15 sitting days of it being tabled in that House. While Parliament may exempt delegated legislation from disallowance, the committee's consistent scrutiny view is that exemptions from disallowance are only justified in exceptional and limited circumstances. This view is also reflected in a recent resolution of the Senate.³

Disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the executive. Exempting an instrument from disallowance directly interferes with democratic oversight of Commonwealth law and with the constitutional role of Parliament as the source of the executive's law-making power. Exemptions from disallowance therefore have significant implications for both the system of responsible and representative government established by the Constitution and for the maintenance of Parliament's constitutionally conferred law-making functions.

Where a bill exempts delegated legislation from disallowance, the committee expects the explanatory memorandum to the bill to explain the exceptional circumstances that justify the exemption, including why other measures could not have been taken to deal with those exceptional circumstances and why it is necessary to inhibit Parliament's fundamental scrutiny role.

Further discussion on the committee's position on this issue is contained in Chapter 4 of [*Scrutiny Digest 7 of 2021*](#) and Chapter 4 of [*Scrutiny Digest 1 of 2022*](#).⁴

3 See [*Journals of the Senate*](#), 16 June 2021, pp. 3581–3582. The Senate noted that exemptions from disallowance should be limited to cases where exceptional circumstances can be demonstrated and resolved that exemptions from disallowance will be subject to rigorous scrutiny.

4 See, in particular, [*Scrutiny Digest 1 of 2022*](#), pp. 76-78 for a statement of the committee's 'default position' on this issue.

Modifications of or exemption from primary legislation

Provisions authorising delegated legislation to modify the operation of, or make substantive amendments to, primary legislation may limit parliamentary oversight and subvert the appropriate relationship between Parliament and the executive. These provisions are sometimes referred to as 'Henry VIII clauses'.

Where a bill authorises delegated legislation to amend, modify the operation of, or exempt persons or entities from the operation of primary legislation, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to include provisions that allow delegated legislation to modify the operation of primary legislation; and
- whether there are legislative safeguards in place to ensure that such provisions are used appropriately.

Offences and civil penalties in delegated legislation

Allowing delegated legislation to create an offence or civil penalty involves a significant delegation of legislative power. Serious criminal offences and significant civil penalties should ordinarily be included in primary, rather than delegated legislation. This is to ensure appropriate primary oversight of the scope of the offence or civil penalty.

Where a bill allows delegated legislation to create an offence or civil penalty, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to leave the creation of an offence or civil penalty to delegated legislation; and
- whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*,⁵ and an explanation where provisions deviate from the principles set out in the Guide.

Significant matters in delegated legislation

A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill. The committee considers that leaving significant elements of a legislative scheme to delegated legislation may considerably limit the ability of Parliament to exercise appropriate oversight of legislative schemes. Certain matters should therefore generally be included in primary legislation.

While it is not possible to provide an exhaustive list of matters more appropriate for parliamentary enactment, the committee has generally considered that the following matters are not appropriate for inclusion in delegated legislation:

- the appropriation of money;
- the imposition of taxes or levies (see below);
- key elements of new policies or fundamental changes to existing policies;

⁵ Attorney-General's Department, [*Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*](#), September 2011.

- matters which may have a significant impact on personal rights and liabilities, including the exercise of coercive or intrusive powers or the imposition of significant penalties;
- provisions which may impose obligations to undertake or desist from certain activities; and
- procedural matters that go to the essence of a legislative scheme.

The committee also has significant scrutiny concerns with framework provisions, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme.

The committee's scrutiny concerns will be heightened where matters are included in delegated legislation that is not subject to disallowance.

Where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to include the relevant matters in delegated legislation; and
- whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation.

The committee has generally not accepted a desire for administrative flexibility, or consistency with previous arrangements to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. However, the committee may accept a need for flexibility in circumstances where it is expected that there may be significant technological or other unforeseen developments that require immediate or prompt changes to legislation. This information should be comprehensively included in the explanatory memorandum. Whether this justification is acceptable will depend on the circumstances of the case at hand, including the apparent significance of the matter which is being left to delegated legislation.

Taxes and fees in delegated legislation

One of the most fundamental functions of the Parliament is to impose taxation. Consequently, it is for the Parliament, rather than the makers of delegated legislation, to set rates of tax. At a minimum, some guidance in relation to the amount of tax that may be imposed in delegated legislation should be included in the enabling Act.

Where a bill leaves the setting of the rate of a tax (however described) to delegated legislation, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to leave the setting of the rate of a tax to delegated legislation; and
- if there is no limit on the amount of tax that may be imposed—why it would not be appropriate to include such a limitation on the face of the bill.

In addition, where an instrument allows delegated legislation to set the rate of a fee the committee expects that the bill will include a provision clarifying that the fee must not be such as to amount to taxation.

Explanatory memorandum checklist

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

- Exemption from disallowance** Where a bill allows delegated legislation to be made that will be exempt from disallowance, the explanatory memorandum should explain:
 - the exceptional circumstances that justify the exemption from the usual disallowance process, including why it is necessary .
- Modifications of or exemption from primary legislation** Where a bill includes provisions authorising delegated legislation to modify the operation of primary legislation, the explanatory memorandum should explain:
 - why it is appropriate to include provisions that allow delegated legislation to modify the operation of primary legislation; and
 - whether there are appropriate legislative safeguards in place to ensure that such provisions are used appropriately.
- Offences and civil penalties in delegated legislation** Where a bill leaves allows delegated legislation to create an offence or civil penalty, the explanatory memorandum should explain:
 - why it is appropriate to leave the creation of an offence or civil penalty to delegated legislation; and
 - whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*.
- Significant matters in delegated legislation** Where a bill includes significant matters in delegated legislation, the explanatory memorandum should explain:
 - why it is appropriate to include significant matters in delegated legislation; and
 - whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation.
- Taxes and fees in delegated legislation** Where a bill leaves the setting of the rate of a tax to delegated legislation, the explanatory memorandum should explain:
 - why it is appropriate to leave the setting of the rate of a tax to delegated legislation; and
 - if there is no limit on the amount of tax that may be imposed—why it would not be appropriate to include such a limitation on the face of the bill.

Principle (v): Insufficient parliamentary scrutiny

Overview

Scrutiny principle (v) requires the committee to scrutinise each bill as to whether it insufficiently subjects the exercise of legislative power to parliamentary scrutiny. Under this principle, the committee will typically be concerned with bills which provide for:

- Commonwealth grants to states and territories;
- deferral of or exemption from sunsetting;
- documents which are not required to be tabled in the Parliament;
- incorporation of external materials existing from time to time; and
- standing appropriations.

The following discussion summarises the committee's expectations regarding key issues arising under principle (v). The issues identified are not exhaustive.

Commonwealth grants to states and territories

Section 96 of the Constitution gives Parliament the power to make grants to the states and to determine terms and conditions attached to them. While the Parliament has largely delegated this power to the Executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of Senators in representing the people of their state or territory.

A bill providing for grants under section 96 of the Constitution should include provisions that limit or specify the terms and conditions on which the money will be distributed, allowing for effective parliamentary scrutiny before the bill is passed. The committee also expects that any written agreements between the Commonwealth and states and territories about these grants will be required to be tabled in the Parliament and published online.

Where a bill provides for Commonwealth grants to states and territories, the committee expects the explanatory memorandum to the bill to address the following matters:

- what limits or terms and conditions will apply to the making of the grants;
- whether any written agreements between the Commonwealth and the states and territories will be tabled in the Parliament and published online; and
- whether information about the amount and recipients of grants will be made publicly available.

Deferral of or exemption from sunsetting

Sunset clauses are important safeguards which facilitate regular parliamentary scrutiny and oversight of primary legislation. In addition, disallowance and sunsetting are the primary means by which the Parliament exercises control over delegated legislation. Where a bill extends or removes a sunset date in primary legislation or exempts delegated legislation from sunsetting, the committee expects the explanatory memorandum to the bill to address why it is appropriate to provide for such an extension or exemption, noting the importance of sunsetting to effective and regular parliamentary scrutiny.

Documents not required to be tabled in the Parliament

The process of tabling reports and other documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online. Where a bill provides for the review of significant matters it should also require the review report to be tabled in Parliament. In addition, removing the requirement for certain information to be tabled in Parliament reduces the scope for parliamentary scrutiny. Where a bill does not include, or removes, tabling requirements, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate that the reports or documents are not to be tabled in Parliament; and
- whether each of the reports or documents will be made available online (including whether other legislative provisions, if any, require the publishing of these reports or documents online).

Incorporation of external materials as existing from time to time

Where provisions in a bill allow the incorporation of legislative provisions by reference to other documents, this raises the prospect of changes being made to the law in the absence of parliamentary scrutiny. Further, the incorporation of external material can create uncertainty in the law and, if relevant information is not publicly available, may mean that members of the public are not able to freely and readily access the terms of the law. Where a bill allows the incorporation of external materials as existing from time to time, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to allow the incorporation of external materials as existing from time to time; and
- whether the incorporated material will be made freely available to all persons interested in the terms of the law.

Standing appropriations

Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Once enacted, the expenditure a standing appropriation bill involves does not require regular parliamentary approval and therefore escapes direct parliamentary control.

Where a bill establishes or expands standing appropriations, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is appropriate to include a standing appropriation (rather than providing for the relevant appropriations in the annual appropriation bills);
- whether the bill places a limitation on the amount of funds that may be appropriated; and
- whether the standing appropriation is subject to a sunset clause and, if not, why such a clause has not been included in the bill.

Explanatory memorandum checklist

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

- | | |
|---|--|
| <input type="checkbox"/> Commonwealth grants to states and territories | Where a bill provides for Commonwealth grants to states and territories, the committee expects the explanatory memorandum to the bill to address the following matters: |
| | <ul style="list-style-type: none">• what limits or terms and conditions will apply to the making of the grants;• whether any written agreements between the Commonwealth and the states and territories will be tabled in the Parliament and published online; and• whether information about the amount and recipients of grants will be made publicly available. |
| <input type="checkbox"/> Deferral of or exemption from sunsetting | Where a bill extends or removes a sunset date in primary legislation or exempts delegated legislation from sunsetting, the explanatory memorandum should explain: |
| | <ul style="list-style-type: none">• why it is appropriate to provide for the extension or exemption, noting the importance of sunsetting to effective and regular parliamentary scrutiny. |
| <input type="checkbox"/> Documents not required to be tabled in the Parliament | Where a bill does not include, or removes, tabling requirements, the explanatory memorandum should explain: |
| | <ul style="list-style-type: none">• why it is appropriate that the reports or documents are not to be tabled in Parliament; and• whether each of the reports or documents will be made available online (including whether other legislative provisions, if any, require the publishing of these reports or documents online). |
| <input type="checkbox"/> Incorporation of external materials as existing from time to time | Where a bill allows the incorporation of external materials as existing from time to time, the explanatory memorandum should explain: |
| | <ul style="list-style-type: none">• why it is appropriate to allow the incorporation of external materials as existing from time to time; and• whether the incorporated material will be made freely available to all persons interested in the terms of the law. |
| <input type="checkbox"/> Standing appropriations | Where a bill establishes or expands standing appropriations, the explanatory memorandum should explain: |
| | <ul style="list-style-type: none">• why it is appropriate to include a standing appropriation (rather than providing for the relevant appropriations in the annual appropriation bills);• whether the bill places a limitation on the amount of funds that may be appropriated; and <p>whether the standing appropriation is subject to a sunset clause and, if not, why such a clause has not been included in the bill.</p> |