THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC21-000825

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear ~~Senator~~ Helen

I refer to correspondence dated 4 February 2021 from Mr Glenn Ryall, Committee Secretary, regarding the Senate Scrutiny of Bills Committee's (the Committee) request for information on matters identified in Scrutiny Digest No.2 of 2021 regarding the Industrial Chemicals Environmental Management (Register) Bill 2020 and related bills.

I have considered the Committee's requests and detailed my responses in the enclosed.

Yours sincerely

SUSSAN LEY

Enc.

Response to Senate Scrutiny of Bills Committee Scrutiny Digest 2 of 2021 Industrial Chemicals Environmental Management (Register) Bill 2020
Response to Senate Scrutiny of Bills Committee Scrutiny Digest 2 of 2021 Industrial Chemicals Environmental Management (Register) Charges bills

Delegated legislation not subject to parliamentary disallowance

Committee comments:

1.28 The committee requests the minister's more detailed advice regarding:

- **why it is considered necessary and appropriate to leave [establishing a register for scheduling decisions for industrial chemicals; determining principles to be complied with in making, varying or revoking scheduling decisions; and making rules under clause 76] to delegated legislation which is exempt from parliamentary disallowance and sunsetting, with particular reference to the details of the intergovernmental agreements that are established by the bill; and**
- **whether the bill could be amended to provide that these matters are subject to the usual parliamentary disallowance and sunsetting processes.**

Response:

The Industrial Chemicals Environmental Management (Register) Bill 2020 (ICEMR Bill) facilitates the establishment and operation of an intergovernmental scheme involving the Commonwealth and the states and territories and authorises the Principles, the Register, and the Rules to be made for the purposes of the scheme.

The Principles, Register and Rules are exempt from disallowance and sunsetting because of the operation of the subsections 44(1) and 54(1) of the *Legislation Act 2003* (the Legislation Act) respectively. This is an automatic exemption that applies by force of law for instruments that are made under legislation that facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories and that authorises the instrument to be made for the purposes of the scheme. The explanatory memorandum for the Legislative Instruments Bill 2003, which enacted section 44, describes the rationale for its inclusion as being that 'the Commonwealth Parliament should not, as part of a legislative instruments regime, unilaterally disallow instruments that are part of a multilateral scheme'. Similarly, the same explanatory memorandum explains the need for subsection 54(1) as being that instruments that are part of a multilateral agreement 'should therefore not be subject to a unilateral sunsetting process which would cause them to cease to exist in only one of the jurisdictions that are party to the agreement'.

The intergovernmental scheme established by the ICEMR Bill is the National Standard for environmental risk management of industrial chemicals (the National Standard). In 2015, Australian environment ministers reviewed options for establishing the National Standard in a Council of Australian Governments Decision Regulation Impact Statement. They agreed to *establish [the National Standard] under Commonwealth legislation with automatic adoption under jurisdictional legislation for implementation and compliance.* The ICEMR Bill delivers on this approach agreed by environment ministers to provide a consistent, nation-wide approach to managing the risks that industrial chemicals may pose to the environment.

The Principles

The Principles are a key component of the National Standard. Scheduling decisions for industrial chemicals are required to comply with the Principles, and cannot be made unless the Principles are in force. The intergovernmental agreement provides for the Commonwealth and

each State and Territory to adopt, implement and enforce the scheduling decisions in their jurisdiction. This is designed to drive national consistency in the management of industrial chemicals through a more streamlined, transparent, efficient and predictable approach to environmental risk management.

The Principles will be developed in collaboration with the states and territories, and in consultation with stakeholders. They will be a technical document, based on the most recent scientific findings regarding the properties of industrial chemicals and their potential environmental impacts. It is appropriate that the Principles be set out in delegated legislation to allow for them to be amended as necessary in response to evolving scientific knowledge. Any time the Principles are made or varied they will be subject to the mandatory consultation processes with states and territories and the public that is set out in the ICEMR Bill.

It is also appropriate that the Principles be exempt from disallowance and sunsetting. The Principles will reflect years of collaboration and input from the states and territories and industry. They will be subject to further public consultation and consultation with state and territory environment ministers before they are made, as required under the ICEMR Bill. Were they to be subject to disallowance and sunsetting, the collaborative interjurisdictional effort that went into the development of the National Standard as a whole, and the Principles in particular, could be undermined. Similarly, the certainty and consistency they provide for scheduling decisions would be jeopardised.

Furthermore, while it is appropriate that the Principles be updated as necessary to reflect scientific and technological advancements, it would undermine the certainty and predictability of scheduling decisions if the whole framework of the Principles were subject to sunsetting. The sunsetting of the Principles would also have the potential to destabilise the rest of the cooperative scheme for the National Standard, as they are a central component of it.

For these reasons, and consistently with Parliament's rationale for including subsections 44(1) and 54(1) in the Legislation Act, it is appropriate that the Principles not be subject to disallowance or sunsetting.

The Register

The Register will record the scheduling decisions made in respect of industrial chemicals and their uses under the ICEMR Bill. It is intended that one or more scheduling decisions will be made for all industrial chemicals considered under the scheme, and that these will be updated as appropriate. Scheduling decisions will be made regularly and may be varied or revoked in response to scientific advancements or technological innovations. For this reason it is appropriate that they be recorded in an instrument that can be readily updated and amended without the need to amend primary legislation.

Recording the scheduling decisions in the Register will also allow States and Territories (and the Commonwealth) to easily adopt those decisions (by adopting the Register as it exists from time to time) so that they can be implemented and enforced by each jurisdiction, as agreed in the intergovernmental agreement.

If the Register were subject to disallowance and sunsetting, this would undermine the certainty that the scheme provides for industry and governments implementing the scheduling decisions made under the ICEMR Bill. Disallowance of the Register would affect the content of State and Territory legislation, which would be inconsistent with the intergovernmental agreement.

Sunsetting would give rise to similar problems in relation to undermining the intergovernmental agreement. In addition, the potential for the hundreds of scheduling decisions that will be recorded in the Register to sunset at the same time would create significant disruption and uncertainty for governments and industry. It would also create significant administrative burden for the Australian Government. In turn, this would increase costs for industry, as the scheme will be fully cost recovered. Provisions in the ICEMR Bill allow for scheduling decisions in the Register to be reviewed and varied or revoked as necessary. It is more appropriate that this be undertaken as needed on a chemical-by-chemical basis in response to relevant technological and scientific advancements, and subject to the rigorous consultation requirements of the ICEMR Bill, rather than *en masse* as a result of sunsetting.

For these reasons, and consistently with Parliament's rationale for including subsections 44(1) and 54(1) in the Legislation Act, it is appropriate that the Register not be subject to disallowance or sunsetting.

Rules

The Rules will represent a key aspect of the legislative framework that will give effect to the intergovernmental scheme. The purpose of the Rules is to detail additional matters related to processes, functions and relevant information for day-to-day operation of the intergovernmental scheme, including additional matters that should be considered by the Minister when making scheduling decisions, such as relevant international agreements or matters that have arisen in the course of scientific advancements or consultation with other jurisdictions.

The rules require the flexibility to adapt to an evolving scientific landscape to provide continued certainty and relevant up to date information to industry and governments implementing the scheme. Further, it is intended that any rules will reflect the agreed intergovernmental scheme and will be subject to consultation with states and territories, as they will affect the content of scheduling decisions which, in turn, will affect the content of State and Territory laws that adopt and implement the scheduling decisions. If they were subject to disallowance and sunsetting, this could, for the same reasons as for the Principles and the Register, undermine the effectiveness of the broader scheme.

For these reasons, and consistently with Parliament's rationale for including subsections 44(1) and 54(1) in the Legislation Act, it is appropriate that the Rules not be subject to disallowance or sunsetting.

On this basis, I consider it appropriate that the matters described above are legislative instruments and are not subject to usual parliamentary disallowance and sunsetting processes.

Matters relating to the calculation of charges

Committee comments:

1.32 The committee requests the minister's advice as to:

- **whether guidance in relation to the method of calculation of these charges and/or maximum charge can be specifically included in each bill; or**
- **whether the bills could at least be amended to specify that, before the Governor-General makes regulations prescribing an amount of charge, the minister must be satisfied that the amount of charge is set at a level that is designed to recover no more than the Commonwealth's likely costs in connection with the administration of the framework established by the Industrial Chemicals Environmental Management (Register) Bill 2020.**

Response:

The *Australian Government Charging Framework* and the *Australian Government Cost Recovery Guidelines* require that there must be alignment between the expenses of an activity (in this case, the costs of the administration of the scheme) and corresponding revenue (income generated through charges in relation to the scheme).

The explanatory memorandum for the Industrial Chemicals Environmental Management (Register) Charge (General) Bill 2020, the Industrial Chemicals Environmental Management (Register) Charge (Excise) Bill 2020, and the Industrial Chemicals Environmental Management (Register) Charge (Customs) Bill 2020 (collectively referred to as the ICEMR Charges Bills) provides that any charges set out in the regulations will be consistent with the *Australian Government Charging Framework* and the *Australian Government Cost Recovery Guidelines*. This was intended to provide assurance that the amounts charged would reflect the likely costs to the Commonwealth of services provided in relation to industrial chemicals under the ICEMR Bill, such as matters relating to assessing industrial chemicals (and their uses) for the purposes of making, varying or revoking scheduling decisions.

Consistent with Australian Government policy, the amount of any applicable charge will be determined through a Cost Recovery Implementation Statement (CRIS). All government cost recovered activities must be documented in a CRIS before charging regulations are made and charging can begin. The CRIS will be released for public consultation and include the method of calculation of the charges which will be discussed with stakeholders. Therefore, the method of calculation of charges or the maximum charge will not be able to be included in the bills themselves before this process is completed.

In addition, the Department of Finance must be satisfied that the charge is set at a level that is designed to recover no more than the full and efficient costs of the administration of the framework. The Finance Minister must also agree to the final CRIS. Financial performance of the cost recovery arrangement will be monitored on an ongoing basis and the CRIS may be updated annually as required to show the actual expense and cost recovery revenue.

On this basis and considering the rigorous processes already in place to ensure the appropriateness of cost recovered charges, I do not consider it necessary to amend the bills.

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC21-003076

Senator Helen Polley
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Dear ~~Senator~~

I am writing in response to the Senate Scrutiny of Bills Committee's request for advice on the Regulatory Powers (Standardisation Reform) Bill 2020 (the Bill), as set out in its *Scrutiny Digest 1 of 2021*.

The Committee sought advice regarding:

- the justification for expanding the application of the monitoring powers in the *Regulatory Powers (Standard Provisions) Act 2014*

- the justification for the proposed amendment to section 93 of the *Fisheries Management Act 1991*, to provide that the offence will be a strict liability offence, with reference to the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*

- in relation to the use of force in proposed amendments to the *Defence Force Discipline Act 1982* (DFDA), *Education Services for Overseas Students Act 2000* (ESOS Act) and *Tobacco Plain Packaging Act 2011* (TPPA)
    - the training, qualifications or experience of the various 'authorised officers' who are authorised to use force against things under the bill
    - why it is necessary to confer powers to use force against things on any 'other person' to assist an authorised person, and
    - whether the bill can be amended to require that all person authorised to use force must have appropriate expertise and training, and

- in relation to investigatory powers in proposed amendments to the DFDA, ESOS Act, *Tertiary Education Quality and Standards Agency Act 2011, Tobacco Advertising Prohibition Act 1992* and *TPPA*
    - why it is necessary and appropriate to allow any 'other person' to assist an authorised person in exercising monitoring and investigatory powers, and
    - whether the Bill can be amended to require that any person assisting an authorised person have the expertise appropriate to the function or power being carried out.

I have enclosed additional information in response to the matters raised by the Committee, which I trust will be of assistance.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

Response to the Senate Standing Committee for the Scrutiny of Bills – Digest 1/21

Regulatory Powers (Standardisation Reform) Bill 2020

The Bill will amend the *Defence Force Discipline Act 1982* (DFDA), *Education Services for Overseas Students Act 2000* (ESOS Act), *Fisheries Management Act 1991* (FMA), *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act), *Tobacco Advertising Prohibition Act 1992* (TAPA) and *Tobacco Plain Packaging Act* 2011 (TPPA), to trigger the standard provisions of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). The Bill will also amend the Regulatory Powers Act.

The following responses have been prepared in consultation with the Department of Agriculture, Water and the Environment, the Department of Defence, the Department of Education, Skills and Employment, the Department of Health, the Australian Fisheries Management Authority and the Office of Parliamentary Counsel.

Privacy; coercive powers – whether the bill trespasses unduly on personal rights and liberties

The Committee has requested advice as to the justification for expanding the application of the monitoring powers in the Regulatory Powers Act to allow them to be exercised in relation to 'a matter'.

Currently, monitoring powers under the Regulatory Powers Act are confined to determining compliance with a provision or the correctness of information given in compliance with a provision. The proposed change would allow Regulatory Powers Act monitoring powers to be exercised in relation to other matters. As the Regulatory Powers Act only has effect where Acts are drafted or amended to trigger its provisions, this expanded scope will only apply where provisions in triggering Acts nominate particular matters subject to monitoring. As such the amendments have no automatic effect in existing regulatory regimes.

The power to monitor matters supports the operation of effective, robust monitoring schemes as it extends monitoring beyond direct compliance with particular legislative provisions, to facilitate better regulator awareness of developing situations and potential risks. The expansion would allow for the monitoring of whether a circumstance exists, for example adherence to performance standards or incidents or patterns of incidents that may indicate a failure to comply with regulatory obligations. The ability to monitor circumstances or matters that may indicate non-compliance with underlying legislative requirements supports effective and robust regulatory action by ensuring the efficient direction of resources and allowing early intervention and graduated enforcement to support continued compliance.

The only matter that will become subject to monitoring on passage of the Bill is set out in the proposed amendments to the ESOS Act. Item 12 of Part 1 of Schedule 3 of the Bill inserts new section 130 into the ESOS Act. New subsection 130(3) provides that determining whether a registered provider might not be able to continue to meet its obligations to accepted students is a matter subject to monitoring under Part 2 of the Regulatory Powers Act.

The "matter" referred to here relates to the key objective of the tuition protection scheme in the ESOS Act. The tuition protection obligations that providers are subject to, and the

powers that the Tuition Protection Director has, under the ESOS Act are triggered when a provider "defaults". A provider defaults (section 46A) where the provider fails to start to provide a course to a student at a location on the agreed starting day, or the course ceases to be provided to the student at the location at any time after it starts, but before it is completed, and the student has not withdrawn. Under section 46D of the ESOS Act, providers, on default, are obliged to arrange for an alternative course or to provide a refund. Providers are likely to default due to financial difficulty, but could also default for other reasons.

Where a provider does not discharge its obligations, the Tuition Protection Director has powers (sections 49 and 50A) to arrange for a replacement course or to call on a special account administered by the Director to arrange a refund.

Noting this, the matter that is subject to monitoring in proposed subsection 130(3) is designed to ensure that the relevant ESOS agency is able to exercise monitoring powers in circumstances where it is likely that a provider will default. This recognises the importance of ensuring providers meet their obligations upon default and enables effective tuition protection, consistently with the existing objectives of the tuition protection scheme in the ESOS Act.

Any further expansion of Regulatory Powers Act monitoring powers to matters will require legislative amendment to define the matters in question, and should be accompanied by appropriate explanation and justification in the accompanying explanatory memoranda.

Strict liability offences – whether the bill trespasses unduly on personal rights and liberties

The Committee has requested advice as to the justification for the proposed amendment to section 93 of the FMA, to provide that the offence will be a strict liability offence, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.

Subsection 93(1) of the FMA currently provides that a holder of a fish receiver permit must not refuse or fail to give a return or information that the person is required to give under section 92 or under regulations made for the purposes of that section. The fault element of intention applies to the conduct (being the refusal or failure to give the return or information), while strict liability applies to the circumstance that the return or information is required under section 92 or the regulations. Subsection 93(2) provides that subsection (1) does not apply if the person has a reasonable excuse. The offence carries a maximum penalty of imprisonment for 6 months.

The Bill will amend the Act to make section 93 a strict liability offence. The effect of the amendments are to remove all fault elements from the offence, replace the defence of reasonable excuse with the defence of honest and reasonable mistake of fact and replace the penalty of 6 months imprisonment with a pecuniary penalty of 30 penalty units.

The amendments to section 93 in the Bill will support the legislative objective of ensuring the exploitation of fisheries resources is consistent with the principles of ecologically sustainable development (section 3 of the FMA). The return or information required under section 92 or under regulations assists in monitoring catch of fish against the allocated quota of permitted catch. Imposing strict liability in relation to the provision of this information emphasises the positive obligations that apply to those who

undertake commercial fishing in specified fisheries, and encourages active engagement and proactive compliance by holders of fish receiver permits. This upholds the integrity of fishery and maintains the on-going sustainability of fisheries resources.

The amendments also bring section 93 into line with commensurate offences in subsection 95(5) of the FMA. Under subsection 95(5) the breach of a licence or permit condition, involving the provision of certain information, is subject to a pecuniary penalty instead of a penalty of imprisonment and is an offence of strict liability.

The Bill will also align the penalty in section 93 with other Commonwealth legislation where breaches of conditions are offences of strict liability and subject to a pecuniary penalty.

Application of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide)

The amendments in the Bill are consistent with paragraph 4.3.3 of the Guide, which notes that "an offence-specific defence of 'reasonable excuse' should not be applied to an offence" as it is too open-ended and difficult to rely on. Instead, defences of general application in Part 2.3 of the Criminal Code should be used. The Bill would replace the existing defence of reasonable excuse in section 93 with one of reasonable mistake or ignorance of fact – a general defence available under the *Criminal Code Act 1995*. This amendment modernises section 93, to make it consistent with the Guide.

The amendments to the penalty in section 93 are consistent with the Guide's statements on punitive consequences in strict liability offences – in particular, that strict liability offences should not be punishable by imprisonment, and should apply a fine no more than 60 penalty units for an individual (Paragraph 2.2.6). The amendments in the Bill will apply a maximum penalty of 30 penalty units, the standard equivalent to a 6 month imprisonment penalty under subsection 4B(2) of the *Crimes Act 1914*. This lessens the severity of the maximum punishment available for the offence and would make the penalty proportionate to the level of offending and less intrusive on a person's rights and liberties.

Restructuring the offence to be one of strict liability is consistent with the Guide and is appropriate in achieving the policy goals of the FMA. Consistent with paragraph 2.2.6 of the Guide, the amendments support the integrity of the regulatory regime and place the holders of fish receiver permits on notice to guard against the possibility of contravention.

The amendments to section 93 also have the consequence that the offence is one that is appropriate for an infringement notice scheme. The use of infringement notices in this context aligns with paragraph 6.2.1 of the Guide, which provides that infringement notice schemes should only apply to minor offences with strict or absolute liability, and where a high volume of contraventions is expected. This change also satisfies the Regulatory Powers Act requirement that only strict liability offences be made subject to infringement notices.

Use of force – whether the bill makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers

The Committee has requested advice as to:

- the training, qualifications or experience of the various 'authorised officers' who are authorised to use force against things under the Bill;
- why it is necessary to confer powers to use force against things on any 'other person' to assist an authorised person; and
- whether the Bill can be amended to require that all persons authorised to use force must have appropriate expertise and training.

The Bill provides for the use of force during monitoring and/or investigation with regard to the DFDA, ESOS Act, and TPPA. The questions posed by the Committee regarding the use of force are answered with reference to these Acts.

Training, qualifications or experience of authorised officers

DFDA
For the purposes of Part 3 of the Regulatory Powers Act, within Defence authorised officer functions will ordinarily be carried out by trained and qualified Military Police or Inspector General - ADF investigators. The Joint Military Policing Unit will continue to work with civil law enforcement agencies to develop best practice training and accreditation for the exercise of investigative powers.

ESOS Act
For the purposes of Parts 2 and 3 of the Regulatory Powers Act, an authorised officer of the ESOS agency for a registered provider is an authorised person for the purposes of exercising the use of force provisions in the ESOS Act amendments in the Bill.

Section 6A of the ESOS Act sets out who is an authorised officer of an ESOS agency for a registered provider, and the criteria for that must be met for their appointment. This includes criteria that the person is required to have appropriate training, qualifications and experience for the role in which they undertake as an authorised officer.

Where the ESOS agency for a registered provider is the Secretary of the Department, the criteria are:

(a) the person is an APS employee in the Department; and
(b) the person holds or performs the duties of an APS 5 position or higher, or an equivalent position; and
(c) the agency is satisfied that the person has suitable qualifications and experience.

Where the ESOS agency for a registered provider is the Tertiary Education Quality Standards Agency (TEQSA), an authorised officer is a Commissioner (within the meaning of the TEQSA Act), the Chief Executive Officer of TEQSA or an 'authorised officer' appointed under section 94 of the TEQSA Act. Under section 94 of the TEQSA Act, TEQSA must not appoint a person as an authorised officer unless:

(a) the person holds the classification of APS Executive Level 1 or higher, or an equivalent classification; and
(b) TEQSA is satisfied that the person has suitable qualifications and experience to properly exercise the powers of an authorised officer.

Where the ESOS agency for a registered provider is the National VET Regulator (known as the Australian Skills Quality Authority (ASQA)), an authorised officer is a Commissioner (within the meaning of the *National Vocational Education and Training Regulator Act 2011* (NVETR Act)) or an authorised officer appointed under section 89 of the NVETR Act. Section 89 of the NVETR Act describes the criteria to appoint an

authorised officer, and the *ASQA Authorised Officer Requirements 2012* legislative instrument describes the specific experience, training and qualification requirements for authorised officers under the NVETR Act.

If the ESOS agency for a registered provider is another entity, that agency may only appoint a person as an authorised officer if the person is an employee or constituent member of the agency and the agency is satisfied that the person has suitable qualifications and experiences for the appointment.

TPPA
Under subsection 81(2) of the TPPA, the Secretary must be satisfied that a person has suitable qualifications, training or experience to be appointed as an authorised officer.

Generally, the types of qualifications, training or experience required for authorised officers to be appointed will require the officer to hold a Cert IV or Diploma of Government Investigations. In accordance with Australian Government Investigation Standards, the authorised officer leading an investigation or executing a warrant will hold those relevant qualifications. The appropriate use of force and preparation for investigations or warrant executions are taught through the Cert IV of Government Investigation training for field-based officers. This knowledge and applied experience is a basic part of the skill set of investigators, and more specifically, appointed authorised officers.

Conferral on any 'other person' of power to use force against things

DFDA
On occasion, an authorised person exercising investigation powers may encounter an unanticipated need for physical assistance or an unanticipated need for specialist assistance (i.e. IT support, bomb disposal, classified material handling). Situations where such assistance may be required include handling heavy or fragile objects, discovery of dangerous or classified evidentiary material or specialised access of electronic data from a computer server.

ESOS Act
A person assisting the authorised person may be required to use force to access further secure locations within or on the premises (for example, a safe or where access is through a locked door). In these situations, this provision means that the authorised person is able to have the assistance of another person with relevant experience, training or qualifications in using force against things.

For example, a locksmith would be an 'other person' who may be required to assist an authorised person who encountered a locked cabinet or room. Their use of force may be necessary in order to urgently secure documents and things specified under a warrant, and avoid circumstances where evidence may be destroyed if they are required to leave and return at a later time.

TPPA
Situations may arise in the exercise of monitoring and investigation powers under the TPPA where professional skilled assistance is required, such as the use of a locksmith for locked doors or IT forensic experts for recovering data from locked electronic devices.

In each case, the person assisting the authorised person may only use such force against things as is necessary and reasonable in the circumstances (new paragraph 101ZAB(12)(b) of the DFDA, new paragraph 130(12)(b) of the ESOS Act, new paragraph 51A(11)(b) of the TPPA) and remains subject, at all times, to directions given by the authorised person (paragraphs 23(2)(d) and 53(2)(d) of the Regulatory Powers Act). The authorised person is responsible for any powers exercised by the person assisting, and any power exercised, or function or duty performed, is taken to be exercised or performed by the authorised person (subsections 23(3)-(4) and 53(3)-(4).

Not allowing for this assistance from other persons would also require the experts mentioned above to be appointed as authorised officers and named on warrants, despite not necessarily being Commonwealth employees and potentially only being required on an ad hoc basis.

Whether the bill can be amended to require that all persons authorised to use force must have appropriate expertise and training

Authorised persons
The potential for use force to be a necessary part of the exercise of their functions is a relevant consideration in determining who should be appointed as an authorised person. As such the requirement that such appointments only be made where the appointer is satisfied that the officers in question have suitable qualifications, training or experience (DFDA new subsections 101ZAD(3)-(4), ESOS Act section 6A, TPPA section 81) necessarily extends to qualifications, training or experience relevant to the use of force.
The use of force authorised by the Bill must always be necessary and appropriate. What is necessary and appropriate will differ across the various policy contexts dealt with by the amended Acts and particular situations that may be encountered in their administration.

Persons assisting
As noted above, a person assisting an authorised person remains subject, at all times, to directions given by the authorised person, and their actions are taken to be those of the authorised person. The assistance may only be provided where it is necessary and reasonable. When determining whether it is necessary and reasonable for an authorised officer to be assisted by other persons in relation to the Regulatory Powers Act, it is intended that regard will be had to any skills, training or relevant experience that should be required of that other person. The authorised person is responsible for any powers exercised by the person assisting, and any function or duty performed is taken to be performed by them. The qualifications, training or experience of the authorised person will provide context and guidance for who they seek assistance from, as well as the directions they give, and the assistance they request from, those other persons.

The assistance required from other persons will often be unanticipated, and limited in duration and purpose to that which the authorised person requires to safely and effectively carry out exercise of their powers. It is not anticipated that other persons will be routinely used or required on an ongoing basis. Prescribing set training requirements and standards of expertise would be impracticable in these circumstances and would limit the flexibility intended to be provided by the 'person assisting' provisions.

Broad delegation of investigatory powers – whether the bill makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers

The Committee has requested advice as to:

- why it is considered necessary and appropriate to allow any 'other person' to assist an authorised person in exercising monitoring and investigatory powers; and
- whether the bill can be amended to require that any person assisting an authorised person have the expertise appropriate to the function or power being carried out.

The Bill provides for assistance from any 'other person' during monitoring and/or investigation with regard to the DFDA, ESOS Act, TEQSA Act, TAPA and TPPA.

As outlined above in relation to the use of force, an authorised person may on occasion encounter a need for additional or specialist assistance in order to effectively and efficiently discharge their functions. The required assistance (whether it be specialist IT support, bomb disposal, classified material handling, opening of locked cabinets and doors or physical and administrative assistance with sorting and transport of evidential material) is likely to be of limited duration and require specialist skills or capacity not available within the administering agency's cohort of authorised persons.

Assistance from other persons supports the exercise of functions and powers under the DFDA, ESOS Act, TEQSA Act, TAPA, and TPPA to be performed efficiently and effectively by those most adept and qualified to do so.

The protections noted above in relation to the selection, expertise and training of persons assisting who may be authorised to use force apply equally to their provision of other forms of assistance including that a person assisting an authorised person remains subject, at all times, to directions given by the authorised person, and any assistance may only be provided where it is necessary and reasonable.