



Law Council
OF AUSTRALIA

Professor (Emeritus) Sally Walker
Secretary-General

9 November 2012

Ms Fiona Bowring-Greer
Committee Secretary
PO Box 6100
Parliament House
Canberra ACT 2600
Via email le.committee@aph.gov.au

Dear Ms Bowring-Greer

INQUIRY INTO THE REGULATORY POWERS (STANDARD PROVISIONS) BILL 2012

I refer to your letter inviting the Law Council to make a submission to the Parliamentary Joint Committee on Law Enforcement's inquiry into the *Regulatory Powers (Standard Provisions) Bill 2012* (Cth) (the Bill). Your letter was received on 29 October 2012 and called for submissions by 7 November 2012.

While the Law Council welcomes this invitation, it has been unable to prepare a detailed submission within the short time frame allowed even with an extension to 9 November 2012. The Law Council has been unable to undertake a full analysis of the Bill or consult with its Constituent Bodies, Committees and Sections in the nine business days allowed for the preparation of a submission.

Despite these constraints, the Law Council is keen to use this opportunity to outline some of the key issues and questions that it considers should be explored by the Parliamentary Joint Committee on Law Enforcement (the Committee). In particular, the Law Council suggests that the Committee should seek further information about the types of agencies likely to access the powers contained in the Bill, and the shortcomings in existing powers for these agencies. Without this information, it is difficult to determine whether the Bill is likely to achieve its stated aim.

Key Features of the Bill

The Bill contains a range of standard powers that can be exercised by Commonwealth regulatory agencies. As outlined in clause 3, the Bill provides regulatory authorities with powers for the purpose of:

- (a) monitoring whether provisions of an Act or a legislative instrument have been, or are being, complied with;*
- (b) monitoring whether information given in compliance, or purported compliance, with a provision of an Act or a legislative instrument is correct;*

- (c) gathering material that relates to the contravention of an offence or a civil penalty provision;
- (d) the use of civil penalties to enforce provisions;
- (e) the use of infringement notices where there is a reasonable belief that a provision has been contravened;
- (f) the acceptance and enforcement of undertakings relating to compliance with provisions;
- (g) the use of injunctions to enforce provisions.

Clause 3 also explains that:

A provision of an Act or a legislative instrument is not subject to monitoring, investigation or enforcement under this Act by force of this Act. This Act must be triggered by another Act or by a regulation.

The power to make a regulation triggering this Act must be found in another Act.

The powers contained in the Bill are said to be based on the standard monitoring and investigative powers already available to regulatory agencies responsible for compliance activities. However, neither the Explanatory Memorandum nor the Second Reading Speech provides any examples of the types of regulatory agencies that have similar powers, or that have identified a need for the standard range of powers.

Purpose of the Bill

When introducing the Bill into Parliament, the Attorney-General explained that the Bill was part of the Commonwealth Government's Clearer Laws project,¹ which is designed to 'increase access to justice and improve the accessibility, equity, efficiency and effectiveness of the federal justice system by simplifying and streamlining the statute book.'² The Attorney said that the Bill would remove 'up to 80 pages from Commonwealth Acts and Regulations. She also stated that it would provide greater clarity to those agencies that use regulatory powers and make the law 'easier to understand for Australians and Australian businesses that are the subject of a regulatory regime.'³

The Attorney explained that, before they can be used, the powers contained in the Bill must be triggered in whole or in part by a regulatory agency's governing legislation.⁴ The Attorney also explained that:

In some cases the powers contained in this bill will not be appropriate or sufficient for some regulatory agencies' requirements. For example, law enforcement agencies that deal with national security will continue to require their specialised powers. Similarly, some regulatory agencies may have specific requirements that are not met in this bill and consequently they may

¹ Details of the Clearer Laws Project are available from the Attorney General's Department's website at <http://www.ag.gov.au/DevelopingclearerCommonwealthlaws/Pages/default.aspx>

² *Regulatory Powers (Standard Provisions) Bill 2012* (Cth) Second Reading Speech, Attorney General, the Hon Nicola Roxon MP, Hansard, House of Representatives, 10 October 2012, p. 8 available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F64910c49-3706-419c-93d6-134834c0ae37%2F0027%22>

³ Ibid.

⁴ Ibid.

*choose to not trigger the bill. Alternatively, they may choose to only trigger certain parts.*⁵

The Attorney also outlined a three stage process for implementing the Bill:

In stage 1, new bills or regulations that require investigation or enforcement powers of the kind available under the Regulatory Powers (Standard Provisions) Bill will be drafted to trigger the relevant provisions.

In stage 2, acts and regulations that have been drafted over the past 18 months using precedents based on the Regulatory Powers Bill will be amended to remove those provisions and instead trigger the relevant provisions.

*In stage 3, where substantial amendment is required to existing investigation and enforcement regimes in current acts and regulations, those regimes will be reviewed and, if appropriate, amended to instead trigger the relevant provisions in the Regulatory Powers Bill.*⁶

No examples were provided in the Second Reading Speech or the Explanatory Memorandum of the type of existing or future Acts, Bills or Regulations that would be likely to be considered within any of these stages.

Law Council's Preliminary Concerns

Difficulties associated with evaluating the necessity and appropriateness of the Bill

As noted above, the Bill is intended to provide a catalogue of powers that are available to Commonwealth regulatory agencies when they have been 'triggered' by the relevant legislation governing the particular agency. The powers contained in the Bill are extensive and some are intrusive, including powers to enter and search premises, to seize items and access equipment and to question people. Some of these powers are confined to investigating and enforcing civil penalty provisions and others extend to the collection of evidence that could relate to the commission of an offence.

The Law Council is of the view that the powers contained in the Bill cannot be evaluated in isolation from the Acts, Bills or Regulations governing the regulatory agencies that are likely to make use of them. By failing to provide information about these agencies and their existing regulatory functions and powers, it is not possible to determine:

- whether there is an identifiable need for this range of standard powers;
- whether the Bill effectively responds to this need;
- whether the powers contained in the Bill go beyond those already available to regulatory agencies; or
- whether the powers contained in the Bill include appropriate safeguards or limits on the use of these powers.

Despite the repeated references to clarifying the law in this area, there are no examples in the Explanatory Memorandum or the Second Reading Speech of any existing complex or

⁵ *Regulatory Powers (Standard Provisions) Bill 2012 (Cth)* Second Reading Speech, Attorney General, the Hon Nicola Roxon MP, Hansard, House of Representatives, 10 October 2012, p. 8 available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22chamber%2Fhansard%2F64910c49-3706-419c-93d6-134834c0ae37%2F0027%22>

⁶ *Ibid.*

inconsistent provisions in the legislation governing regulatory bodies that would justify the need for the Bill.

The Law Council understands that both the Attorney-General's Department and the Department of Finance have conducted informal consultations with a number of Commonwealth regulatory bodies and have received feedback that supports the need for the Bill. However, this information has not been made publicly available or reflected in any of the legislative materials accompanying the Bill.

The difficulties associated with identifying the types of agencies likely to access the powers contained in the Bill arise from the large number and disparate range of Commonwealth regulatory agencies which could use the powers in the Bill. The only guidance as to which agencies may be targeted by the Bill is the reference by the Attorney-General in the Second Reading Speech that in some cases the powers in the Bill will not be 'appropriate or sufficient for some regulatory agencies' requirements.'

This suggests that many large Commonwealth regulatory agencies, such as the Australian Competition and Consumer Commission⁷, which are currently invested with an extensive range of specialist compliance powers, are unlikely to surrender these powers in favour of adopting the 'standard powers' contained in the Bill. It is also apparent from the Second Reading Speech that the Bill is not intended to be utilised by law enforcement agencies or agencies that deal with national security, which will instead continue to use their specialised powers.

As a result, it would appear that the Bill is targeted primarily at smaller regulatory agencies, such as the Great Barrier Reef Marine Park Authority, the Registrar of Indigenous Corporations, the Australian Nuclear Science and Technology Organisation or the Australian Pesticides and Veterinary Medicines Authority, which have a limited range of monitoring, investigation or enforcement powers designed to give effect to their respective statutory functions. These functions range from ensuring that a person in charge of a vessel in a Marine Park does not cause damage to the environment,⁸ to inspecting premises for prohibited chemicals.⁹ Some of these powers are limited to monitoring compliance and enforcing civil penalty provisions, while others extend to investigating and collecting evidence in respect of criminal offences.

While it may be the case that these authorities would benefit from being able to access a standard set of regulatory powers, on the basis of the publicly available materials, it is not clear that this would be the case.

It also appears from the Second Reading Speech that a review of whether existing 'investigation and enforcement regimes in current acts and regulations...' should be amended to 'trigger' the standard powers in this Bill will only occur at the 'third stage' of the implementation of the Bill. The Law Council consider that this type of review – which would identify the extent to which there may be problems with existing powers – should have preceded the development of the Bill and the results of the review should have been made publicly available.

As the Senate Scrutiny of Bills Committee (the Scrutiny Committee) observed:

The appropriateness of coercive regulatory powers will depend on the particular statutory context to which they are applied. Thus, although in

⁷ For example, Part VI of the *Competition and Consumer Act 2010* contains provisions relating to pecuniary penalties and offences, injunctions and undertakings which can be pursued by the Australian Competition and Consumer Commission.

⁸ *Great Barrier Reef Marine Park Act 1975* s38DB

⁹ *Agricultural and Veterinary Chemicals (Administration) Act 1992* s69EB

*general it does not appear that the bill departs in any significant detail from the broad principles set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, whether or not the approach taken to particular questions is appropriate is difficult to assess without reference to a particular statutory context and the nature of the regulatory regime. For example, the justification of placing an evidential burden on a person wishing to rely on any exception, exemption, excuse or justification provided in relation to the creation of a civil penalty provision (see clause 99) cannot be assessed in the abstract.*¹⁰

The Parliamentary Joint Committee on Human Rights (the Human Rights Committee) echoed these concerns, noting that:

*[A]s the bill is one of general application, it would be difficult to reach a definitive view on its human rights compatibility and each application of its provisions would need to be assessed on a case by case basis. However, the overall likelihood of compatibility would be improved by the inclusion of adequate safeguards to ensure that the relevant powers are, as far as possible, appropriately targeted and circumscribed to minimise the risk that they could be exercised inconsistently with human rights.*¹¹

For these reasons, the Law Council recommends that the Committee should ask for further details from the Government regarding:

- The legislation for regulatory agencies that currently contains the types of powers included in the Bill;
- Examples of complexity in this legislation or unnecessary inconsistencies in different pieces of legislation relating to regulatory agencies;
- Examples of the type of regulatory agencies that are likely to access the powers in the Bill in stages two and three; and
- Examples of the types of draft legislation which could 'trigger' the powers in the Bill.

The Law Council notes that the Scrutiny Committee left the overall question of the appropriateness of enacting the Bill to the Senate as a whole, but warned that:

*where future legislation applies part or all of the powers in the bill, such bills should be accompanied by detailed consideration in the explanatory memorandum explaining the appropriateness of the standard provisions adopted. This will facilitate adequate Parliamentary scrutiny of such legislation.*¹²

The Human Rights Committee has sought further clarification from the Attorney-General on how the specific entry, monitoring, search, seizure and information gathering powers in the Bill are likely to impact on the right to privacy in article 17 of *International Covenant on Civil and Political Rights* before forming a view on the compatibility of the Bill with human rights.

¹⁰ Senate Scrutiny of Bill's Committee, Alert Digest No.13 of 2012

¹¹ Parliamentary Joint Committee on Human Rights, Sixth Report of 2012, 31 October 2012, *Regulatory Powers (Standard Provisions) Bill 2012*, p. 29

¹² Senate Scrutiny of Bill's Committee, Alert Digest No.13 of 2012

Potential for the Bill to dilute Parliamentary scrutiny

The Law Council is also concerned that the 'framework' approach adopted by the Bill may result in a dilution of parliamentary scrutiny of the content of compliance powers of regulatory bodies. Robust parliamentary scrutiny of these powers is critical, particularly given the intrusive and sometimes coercive nature of these powers and their potential impact on the privacy and fair trial rights of the individuals subject to these powers.

In the Second Reading Speech the Attorney stated that:

*All three stages of the bill's application will still be required to undertake the scrutiny and approval processes of the parliament. For the regulatory provisions in the bill to be activated, new or existing legislation would need to be amended to remove its existing regulatory powers and incorporate the Regulatory Powers Bill's provisions. This also ensures that individual assessments of human rights engagement and compatibility will also be apparent in the drafting and scrutiny process.*¹³

However, the Bill appears to permit the activation of these powers through Regulations. As the Scrutiny Committee explained:

*Although the bill also provides that a legislative instrument may only provide that a provision activates a provision in this bill if the power to do so is given under another Act (see, for example, clause 18), it remains the case that the provisions of this Act can be triggered by regulations.*¹⁴

These concerns led the Scrutiny Committee to conclude that the Bill

*may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*¹⁵

As a result, the Law Council recommends that the Committee ask for further details from the Government regarding why it is considered appropriate to enable the application of the provisions in the Bill through Regulations.

Extensive and coercive nature of powers demands careful consideration of adequacy of safeguards and oversight

The Law Council is also concerned that the Bill does not contain the types of safeguards and oversight protections that exist in analogous statutory regimes, such as in the *Crimes Act 1914* (Cth) (the Crimes Act), that are designed to limit the interference these powers may have with the rights of individuals, including the right to a fair trial.

For example, the investigation powers contained in Part 3 of the Bill – which include powers to enter and search premises,¹⁶ to operate electronic equipment,¹⁷ seize documents or items¹⁸ and to subject people to coercive questioning¹⁹ – have the potential to be utilised by a broad range of regulatory officers in the context of a very broad range of

¹³ *Regulatory Powers (Standard Provisions) Bill 2012* (Cth) Second Reading Speech, Attorney General, the Hon Nicola Roxon MP, Hansard, House of Representatives, 10 October 2012, p. 8 available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F64910c49-3706-419c-93d6-134834c0ae37%2F0027%22>

¹⁴ Senate Scrutiny of Bill's Committee, Alert Digest No.13 of 2012

¹⁵ *Ibid.*

¹⁶ *Regulatory Powers (Standard Provisions) Bill 2012* (Cth) clause 51.

¹⁷ *Regulatory Powers (Standard Provisions) Bill 2012* (Cth) clause 52.

¹⁸ *Regulatory Powers (Standard Provisions) Bill 2012* (Cth) clauses 53, 55.

¹⁹ *Regulatory Powers (Standard Provisions) Bill 2012* (Cth) clause 55.

penalty or offence provisions. This is because each of these powers is available to regulatory bodies for the purpose of collecting “evidential material” which includes:

- a thing with respect to which an offence or a civil penalty provision subject to investigation under this Part has been contravened or is suspected, on reasonable grounds, to have been contravened;
- a thing that there are reasonable grounds for suspecting will afford evidence as to the contravention of such an offence or a civil penalty provision;
- a thing that there are reasonable grounds for suspecting is intended to be used for the purpose of contravening such an offence or a civil penalty provision.²⁰

Without knowing for what penalty or offence provisions these powers might be used, it is difficult to evaluate the need for safeguards and oversight mechanisms to protect against undue interference with individual rights.

The Law Council notes that the need for safeguards and oversight mechanisms could be addressed if clear examples were provided of the type of agencies that would be likely to access these powers and the types of compliance powers they already possess or may require. This would allow appropriate comparisons with powers available to other Commonwealth agencies and the protections that exist in relation to those powers.

The Law Council acknowledges that there may be an opportunity for this type of analysis to take place if and when the legislation governing the particular regulatory body is amended to ‘trigger’ the powers in this Bill. However, without at least a preliminary consideration of these matters, it is not possible to assess whether the Bill is in fact needed or is appropriately suited to achieving its aims, or whether an alternative approach to standardising the powers available to smaller regulatory bodies should be pursued.

Concerns arising from particular features of the Bill

The Law Council has not had the opportunity to consider each of the 132 provisions of the Bill and is constrained in its analysis of the key provisions for the reasons outlined above. However, the following examples illustrate the type of issues in relation to which the Law Council considers the Committee should seek further information.

- Clause 21: Operating electronic equipment

Clause 21 invests an authorised person with the power to operate electronic equipment (such as computers) when entering premises with the consent of the occupier or under a warrant and extends to copying ‘relevant data’²¹ from the electronic equipment onto storage devices. The Explanatory Memorandum Bill states that this power is ‘necessary to ensure an authorised person can obtain access to electronic records that may indicate whether the Act or regulation is being complied with or whether information provided under the Act or regulation is correct.’ The Law Council is concerned that this clause does not contain an appropriate threshold for operating electronic equipment and accessing data, which has the potential to interfere significantly with the right to privacy of any person who might operate or own the equipment or data.

²⁰ *Regulatory Powers (Standard Provisions) Bill 2012* (Cth) clause 40.

²¹ ‘Relevant data’ is defined as information relevant to determining whether (a) a provision that is subject to monitoring under Part 2 of the Bill has been, or is being, complied with; or (b) information subject to monitoring under Part 2 is correct.

In previous submissions relating to analogous provisions in the Crimes Act, the Law Council has pointed out that a computer is materially different from a desk or filing cabinet – both in terms of the volume and type of material it may contain and in terms of the fact that it may allow access to data held off-site at multiple secondary locations.²² The privacy implications of searching a computer and all data accessible from it are considerably more far-reaching than the privacy implications of searching a desk or filing cabinet. For this reason, the Law Council would be concerned if clause 21 could provide a blanket authorisation to operate a computer found on premises and to access any and all of the data available from it. The Law Council suggests that some further threshold test, whether it be a reasonable belief or a reasonable suspicion that the operation of the computer is likely to provide access to relevant material, should be explored.

- Clause 22: Securing electronic equipment to obtain expert assistance

Clause 22 permits an authorised person to secure electronic equipment under a monitoring warrant for up to 24 hours (which can be extended for a further 24 hours) to provide the authorised person time to engage expert assistance to operate the electronic equipment. An authorised person may only secure equipment if the person has reasonable grounds to believe that relevant data on the equipment may be destroyed or altered if the equipment is not secured.

There is no material provided in the Explanatory Memorandum that explains why this power is necessary and why the time period of 24 hours has been chosen. There is no example given of any regulatory agency that currently has powers to operate electronic equipment for the purpose of monitoring compliance, which has called for the need to secure such equipment to seek expert assistance. Nor is there any example of why a time period of 24 hours, which can be extended to 48 hours, is necessary to obtain this assistance. Without this information the Law Council queries why this power is necessary, particularly in light of the potential for the use of this power to interfere with the privacy rights of any individual with data contained on the equipment and its potential to seriously disrupt the lives of those who may rely upon that equipment for employment or communication purposes.

The Law Council also notes that this power does not require the same level of judicial oversight as a similar power contained in section 3LA of the Crimes Act.

- Clause 25: Authorised persons may ask questions and seek production of documents

Clause 25 provides that when an authorised person enters premises with the consent of the occupier or under a monitoring warrant, he or she may ask the occupier to answer any questions or produce documents relevant to the monitoring function. Failure to comply with this request carries a penalty of 30 penalty units.²³

While the Explanatory Memorandum states that this clause 'is not intended as an abrogation of the privilege against self-incrimination...', the Law Council is concerned that this provision does not explicitly provide adequate protections against self-incrimination. The clause also does not address the possibility of the documents or information being subject to legal professional privilege. Similar concerns apply in relation to the coercive

²² Law Council of Australia, Submission to the Senate Committee on Legal and Constitutional Affairs inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009* (19 October 2009) pp. 21-23 available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=3306F4A4-1E4F-17FA-D253-3263BA339C41&siteName=lca

²³ The Law Council notes that the clause contains a defence of non-possession of the documents or the occupier having taken reasonable steps to locate the required documents without success.

questioning powers contained in clause 55, which also allows an authorised person to request information or documents relevant to the person's entry to the premises to search for evidential material.

- Clauses 33 and 71: Monitoring and investigation warrants

Clause 33 outlines the process for regulatory bodies to obtain a warrant to exercise monitoring powers under Part 2 of the Bill. Under clause 33, an issuing officer may issue the warrant if satisfied that it is reasonably necessary that one or more authorised persons should have access to the premises for the purpose of determining whether: (a) a provision that is subject to monitoring under Part 2 has been, or is being, complied with; or (b) information subject to monitoring under Part 2 is correct.

In addition to the general concerns described above relating to the absence of rigorous thresholds that need to be satisfied before particular monitoring powers can be exercised under these warrants, the Law Council is also concerned that clause 33 does not require the authorised person to be named in the warrant, and permits such warrants to be in force for up to three months.

No justification is provided for why such warrants – which authorise a broad range of coercive and intrusive powers, including the power to enter premises – should be in force for a period of up to three months. No examples are provided that illustrate why a shorter period of time would not suffice for the purposes of any particular regulatory body which already possesses or otherwise requires these types of monitoring powers. The Law Council notes, for example, that under section 39U of the *Great Barrier Reef Marine Park Act 1975* (Cth), warrants to enter premises for the purpose of ascertaining a person's liability to charge or pay a certain amount, are available to the Great Barrier Reef Marine Park Authority only for a maximum period of 14 days.

Similar concerns apply in relation to clause 71 of the Bill which outlines the process for obtaining a warrant to exercise the broad range of investigation powers contained in Part 3 of the Bill. This clause allows investigation warrants to be obtained if the issuing officer is satisfied there are reasonable grounds for suspecting that there is, or there may be within the next 72 hours, evidential material on the premises. These warrants can be in force for a period of up to one week.

For the reasons outlined above, the Law Council queries why the time periods in the Bill have been considered appropriate, and notes that they appear to go beyond the authorisation periods in analogous existing provisions.

- Clause 40: Evidential material

Clause 40 outlines what constitutes 'evidential material' for the purposes of exercising the extensive investigative powers contained in Part 3 of the Bill. As noted above, evidential material includes:

- a thing with respect to which an offence or a civil penalty provision subject to investigation under this Part has been contravened or is suspected, on reasonable grounds, to have been contravened;
- a thing that there are reasonable grounds for suspecting will afford evidence as to the contravention of such an offence or a civil penalty provision;
- a thing that there are reasonable grounds for suspecting is intended to be used for the purpose of contravening such an offence or a civil penalty provision.

This definition of 'evidential material' goes well beyond the definition contained in the Crimes Act which is limited to 'a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form.'²⁴ It also appears to go beyond the scope of the existing powers of a number of smaller regulatory authorities.

Without a clear justification for this definition, the Law Council considers that it fails to sufficiently define and limit the scope of the powers contained in Part 3 of the Bill. For example, when applied in conjunction with the powers in clause 49 of the Bill, this definition allows an authorised person to enter premises if the person *suspects* that there *may* be 'evidential material' which includes a thing that there are reasonable grounds for suspecting will afford evidence as to the contravention of a civil penalty provision. This appears to set an unreasonably low threshold for the use of a power that has the potential to significantly interfere with the privacy rights of individuals.

- Clause 60 Completing execution after temporary cessation

Clause 60 provides that, even where the authorised person and all persons assisting in the execution of an investigation warrant leave the premises, the warrant will continue to apply if the authorised person and all persons assisting are absent from the premises for:

- one hour or less in any situation other than an emergency;
- for twelve hours in an emergency situation;
- for longer than 12 hours where the occupier consents in writing; or
- where an issuing officer considers there are exceptional circumstances that justify authorising a longer period than 12 hours (e.g. the emergency preventing the execution of the warrant continues for more than 12 hours).

In other words, this clause allows for interruptions to occur during the execution of a warrant, and then the resumption of the use of powers under the warrant without further authorisation or oversight being required (except where resumption after 12 hours is authorised).

The Law Council notes that this clause has also attracted the attention of the Scrutiny Committee which has observed that:

Although it may be the case that flexibility is appropriate in some contexts, it is important to ensure (as the explanatory memorandum also recognises) that searches are undertaken in a 'timely fashion and that a warrant does not authorise an authorised person to search a premises on multiple occasions from time to time.

...

*Noting that the importance of flexibility may vary depending on the details of a particular regulatory context and that this can be assessed case-by-case as relevant legislation is brought before Parliament, **the Committee leaves the appropriateness of this provision to the Senate as a whole**(emphasis in original).²⁵*

- Clause 67: Return of seized things

²⁴ Crimes Act 1914 (Cth) s3C

²⁵ Senate Scrutiny of Bill's Committee, Alert Digest No.13 of 2012 p 19

Clause 67 places limits on the purposes for which material can be seized under an investigation warrant, and requires the relevant chief executive of a regulatory agency to take reasonable steps to return to the owner, or the person from whom it was seized, any thing seized under the Bill. Clause 67 provides that this must occur within 60 days, or before 60 days if the seized thing is not required for evidence or the reason the thing was seized is no longer relevant.

In the absence of any examples provided in the Explanatory Memorandum to the Bill, the Law Council queries why this time period has been identified as appropriate.

Similarly, the Law Council questions why clause 68, which permits an issuing officer to issue an order extending the period for which a thing may be retained up to a maximum period of three years, is considered to be a necessary and appropriate standard power for regulatory bodies to access.

Conclusion

As noted above, the Law Council has not been able to carefully consider each of the provisions contained in the Bill in the short period of time allocated for making submissions to this inquiry.

The absence of adequate time to consider the provisions of this Bill is particularly regrettable in the context of the principles contained in the Attorney-General's Department's Clearer Laws Project, the objects of which this Bill is said to further.

The Law Council notes that the Clearer Laws Project acknowledges the need to allow adequate time for public consideration and scrutiny of proposed legislative changes. For example, one of the causes of legislative complexity identified as part of this project is 'the pressure to prepare legislation in constrained timeframes, so that the focus becomes getting the legislation drafted rather than making it clear.' One of the strategies to address this is to release 'an exposure draft for public comment...' or use 'focus groups to test how easy the legislation is understand.'²⁶

The Clearer Laws Project also emphasises the need to conduct an in-depth analysis into the need for any substantive law reform. For example, one of the strategies to address legislative complexity advises that 'at the beginning of the process, careful attention should be given to identifying what the problem is and what policy options could be used to address the problem.'²⁷

The Law Council is of the view that the information currently available suggests that there has been a failure to comply with these important principles.

The Law Council notes the submission to the Committee by the Australian Law Reform Commission²⁸ which states that the Bill has a similar aim to one of its key

²⁶ Attorney General's Department document, *Causes of complex legislation and strategies to address these*, (6 May 2011) available at

<http://www.ag.gov.au/DevelopingclearerCommonwealthlaws/Documents/Clearer%20Laws%20-%20Causes%20of%20complex%20legislation%20and%20strategies%20to%20address%20these.PDF>

²⁷ Attorney General's Department document, *Causes of complex legislation and strategies to address these*, (6 May 2011) available at

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²⁸ Australian Law Reform Commission, Submission to the Parliamentary Joint Committee on Law Enforcement's Inquiry into the *Regulatory Powers (Standard Provisions) Bill* 2012 available at http://www.alrc.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=le_ctte/regulatory_powers/submissions.htm

recommendations in its report *Principled Regulation: Federal Civil and Administrative Penalties in Australia*.²⁹ That recommendation was for a Regulatory Contraventions Statute of general application to cover various aspects of the law and procedure governing non-criminal contraventions of federal law.

However, the Law Council notes that almost ten years has elapsed since that recommendation was made. The Bill will apply to a wider range of legislation than was examined by the ALRC in its 2003 Report. The Bill also extends to criminal as well as non-criminal contraventions. Accordingly, the Law Council considers that it is important that the Committee seeks information about the types of regulatory agencies that will be likely to access the powers under the Bill and information about the shortcomings in the existing powers of these agencies.

The Law Council does not oppose statutes of general application per se but considers that it is important to assess the necessity of any proposed legislation in the context of existing regulatory powers.

The Law Council hopes that the matters raised in this letter are of some assistance to the Committee.

Due to time constraints, this submission has not been considered by the Directors of the Law Council of Australia.

Yours sincerely

Professor Sally Walker
Secretary-General

²⁹ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95), March 2003 available at <http://www.alrc.gov.au/report-95>