Law Council
OF AUSTRALIA

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23 January 2013

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary

REGULATORY POWERS (STANDARD PROVISIONS) BILL 2012

I am writing to you in response to the Senate Legal and Constitutional Affairs Committee's (the Committee's) Inquiry into the Regulatory Powers (Standard Provisions) Bill 2012 (the Bill).

The Bill has already been the subject of an inquiry conducted by the Parliamentary Joint Committee on Law Enforcement (PJCLE). After receiving submissions and hearing evidence from the Attorney General's Department, the PJCLE declined to comment or make recommendations in respect of the Bill. Instead the PJCLE concluded that the Bill raises issues, potentially including constitutionality, which merit closer consideration and that these issues would be best considered by the Senate Legal and Constitutional Affairs Committee. As a result, the Bill was re-referred by the Senate to your Committee.

The Law Council made a submission to the PJCLE inquiry on 9 November 2012. That submission continues to represent the Law Council's overall views on the Bill. A copy of the submission is included at Attachment A for consideration by the Committee.

The Law Council also wishes to make some additional comments on the Bill in light of:

- the further information provided on the Bill by the Attorney-General's Department (AGD) in its evidence before the PJCLE; and
- the Law Council's review of some examples of existing legislation governing small regulatory agencies, which may be amended or augmented by reference to the Bill.

These matters are discussed below and at Attachment B.

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I note that the Law Council does not propose to address issues of constitutionality in its submission.

PJCLE Hearing

The PJCLE received evidence from the AGD in relation to the Bill at a hearing conducted on 20 November 2012. The Law Council would like to make the following additional comments in light of this evidence.

Parliamentary Scrutiny

If the Bill is passed, it will be possible to trigger its provisions by regulation. Where a regulatory agency wishes to leave open the option of triggering a Part of the Regulatory Powers Act by regulation, the head Act under which that regulation is made must include a provision allowing this to be done. According to the draft Drafting Directions prepared by the Office of Parliamentary Counsel, such a provision would take the following form:

> *Section xx*
>
> *The regulations may:*
>
> *(a) make a regulation subject to monitoring under Part 2 of the Regulatory Powers (Standard Provisions) Act 2013 (monitoring powers); and*
>
> *(b) make information given in compliance, or purported compliance, with a regulation subject to monitoring under Part 2 of the Regulatory Powers (Standard Provisions) Act (monitoring powers); and*
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> *(c) make a regulation subject to investigation under Part 3 of the Regulatory Powers (Standard Provisions) Act (investigation powers); and*
>
> *(d) make a regulation a civil penalty provision under Part 4 of the Regulatory Powers (Standard Provisions) Act; and*
>
> *(e) make a regulation subject to an infringement notice under Part 5 of the Regulatory Powers (Standard Provisions) Act (infringement notices); and*
>
> *(f) make a regulation enforceable under Part 6 of the Regulatory Powers (Standard Provisions) Act (enforceable undertakings); and*
>
> *(g) make a regulation enforceable under Part 7 of the Regulatory Powers (Standard Provisions) Act (injunctions); and*
>
> *(h) make provision in relation to monitoring, investigation and the use of infringement notices, enforceable undertakings and injunctions under the Regulatory Powers (Standard Provisions) Act in relation to a regulation; and*
>
> *(i) modify the Regulatory Powers (Standard Provisions) Act as it applies in relation to a regulation.*

As stated in its original submission, the Law Council is concerned that the ability to trigger the Bill's provisions by regulation may dilute parliamentary scrutiny of precisely what powers are available to an agency in a specific regulatory context, and limit the opportunity for meaningful discussion about whether those powers are appropriate in the circumstances.

This concern was also raised by the Chair of the PJCLE, Mr Chris Hayes MP, with representatives of the AGD during the PJCLE hearing on 20 November 2012. The AGD responded that where the provisions of the Bill are enlivened by regulation, parliamentary scrutiny will be possible at two points: first, when a relevant head Act is passed or amended which provides for the regulation-making power; and secondly, when the regulations are tabled and subject to disallowance.

This response does not assuage the Law Council's concerns. This is because at the initial stage (of passing or amending the head Act) Parliament will not know and will not be able to assess the specific context in which the Bill's regulatory powers will be available and employed. At the second stage (tabling of regulations), where such details will be available, consideration of the appropriateness of the provisions in the circumstances will likely fall under Parliament's radar and not receive the attention it requires. The Law Council continues to hold concerns about diminished parliamentary scrutiny in this regard.

Privilege against Self-incrimination/ Legal Professional Privilege

Clause 25 of the Bill envisages that regulatory agencies will have the power under a monitoring warrant to require any person on the premises where the warrant is executed to answer questions and produce evidence, and that failure to comply, without reasonable excuse, will constitute an offence.

The Explanatory Memorandum to the Bill states that "this clause is not intended as an abrogation of the privilege against self-incrimination".1 However, the Bill itself is silent on this issue. In addition, no mention is made in either the Explanatory Memorandum or the Bill about whether legal professional privilege is intended to be abrogated.

Further, Clause 55 of the Bill envisages that regulatory agencies will have the power under an investigation warrant to require any person on the premises where the warrant is executed to provide information or documents and that failure to comply, without reasonable excuse, will constitute an offence. Again, the Explanatory Memorandum states that the clause "does not impinge on the privilege against self-incrimination and a person is not required to answer questions or produce documents if the material would tend to incriminate them." However, again, the Bill itself is silent on the issue and no mention is made in either the Explanatory Memorandum or the Bill about whether legal professional privilege is intended to be abrogated.

[1] Explanatory Memorandum to the Bill, page 11

In its original submission, the Law Council noted and raised concerns about the fact that the Bill was silent in relation to both the privilege against self incrimination and legal professional privilege.

During the PJCLE hearing, the Chair of the Committee questioned representatives of the AGD about this matter. The AGD assured the Committee that, under the provisions of the Bill, a person cannot be compelled to answer questions or produce evidence where that would require them to incriminate themselves. Further the AGD suggested that:

> *"The right to protection against self-incrimination is provided for in that the person entering the premises and speaking to the occupier is required to inform them of what their rights are with respect to the warrant or the consent, if they are entering by consent. Even then, they have to explain the circumstances of their being at the premises, what those rights of the occupier are and what the limits on their warrant or consent are."*

The AGD's answer is somewhat misleading, as is the Explanatory Memorandum at paragraphs 45 and 97. Both the AGD's answer and the Explanatory Memorandum suggest that there is some obligation on an officer executing a warrant to inform an occupier about his or her rights in relation to the warrant in a general sense (including, for example, his or her rights in relation to self incrimination). In fact, the obligation on the executing officer is limited to informing the occupier about his or her right to be present during the search and his or her obligation to assist in the execution of the warrant (see clauses 29(2)(b) and 59(2)(b)).

The Law Council acknowledges that the privilege against self-incrimination and legal professional privilege are probably preserved under the Bill because they are not specifically, or by necessary implication, abrogated and, at least in the case of the privilege against self incrimination, the Explanatory Memorandum expresses an intention not to abrogate the privilege. Nonetheless, it would seem more prudent to address these matters directly in the provisions of the Bill, particularly given that so often litigation concerning the limits of regulatory agencies' powers is generated by uncertainty about the extent to which these privileges have been preserved or abrogated.[2]

If the Bill is to be passed, the Law Council recommends that a specific provision be inserted that clarifies that nothing in the Bill is intended to interfere with the law concerning legal professional privilege or the privilege against self incrimination. Alternatively, the Law Council recommends that a note be added below the relevant provisions of the Bill in the terms recommended by the Office of Parliamentary Counsel in other contexts. That is:

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[2] For example, *see Daniels Corporation Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; 213 CLR 543; 192 ALR 561; 77 ALJR 40; *Mansfield v ACC* [2003] FCA 1059; and *Deputy Commissioner of Taxation v De Vonk* (1995) 61 FCR 564; (1995) 133 ALR 303

"This section does not abrogate or affect the law relating to legal professional privilege, or any other immunity, privilege or restriction that applies to the disclosure of information, documents or other things."[3]

In addition, the Law Council recommends that consideration be given to amending proposed paragraphs 29(2)(b) and 59(2)(b) to clarify that the obligation to inform the occupier of a premises subject to a warrant about their rights, includes an obligation to inform them about their right with respect to the privilege against self incrimination and legal professional privilege.

Increased Powers

During the PJCLE Hearing, both the Chair and Senator Stephen Parry questioned whether the result of the Bill may be that more agencies have access to coercive powers, and/or that those agencies which currently have information gathering and enforcement powers may, by recourse to the 'standard' provisions, expand their existing powers as a matter of course.

In this context, the Law Council notes the response of the Fair Work Ombudsman (the FW Ombudsman), in its submission to the PJCLE. The FW Ombudsman indicated a general desire to retain its current investigative and monitoring powers under the *Fair Work Act 2009* (the FW Act), particularly where these go beyond the Bill's powers, in order to perform its functions and responsibilities effectively. However, the FW Ombudsman noted that triggering certain parts of the Bill could provide a useful addition to the current powers under the FW Act, for example, Part 7 which provides a framework for injunctions.

The Law Council considers that the FW Ombudsman's submission may be indicative of the likely response from most agencies. That is, while resistance to any perceived diminution of existing powers is probable, the possibility of new or expanded powers will most likely be embraced. In further submissions to the PJCLE, other agencies such as the Australian Electoral Commission and the Australian Safeguards and Non-Proliferation Office also indicated that they would be likely to seek to retain their existing specialised powers while augmenting them with certain provisions from the Bill.

Need for, and Alternatives to, the Bill

In its original submission the Law Council commented that, based on the materials provided in support of the Bill, it was not possible to assess whether there was an identifiable need for a range of standard regulatory powers and whether the Bill effectively responds to this need.

The Law Council considers that even after the AGD's evidence to the PJCLE, the impetus for this reform and whether it effectively addresses a current need or problem is still unclear. During the PJCLE hearing, Senator Parry questioned the AGD regarding the need for the Bill, asking whether agencies had been seeking legislation of this kind. The AGD confirmed that agencies had not made such requests and that the Bill was prompted more by the Clearer Laws project.

[3] See for example: s156, *Paid Parental Leave Act* 2010 (Requirement for person to assist in applications for civil penalty orders); s219TSGF, *A New Tax System (Family Assistance) (Administration) Act 1999* (Minister requiring person to assist in applications for civil penalty orders)

The Law Council acknowledges that the Bill may have positive impacts. Some of these have been identified in submissions to the PJCLE. For example, the Department of Infrastructure and Transport has noted that the administration of the *Motor Vehicle Standards Act 1989* would be greatly simplified with regard to the verification of evidence, monitoring and enforcement if the Bill were passed.

Furthermore, in theory, it is possible to see that the Bill may have the following results:

- It may be easier for businesses dealing with multiple regulatory agencies to understand their rights and responsibilities, and respond accordingly;
- Agencies (particularly smaller agencies) may be able to rely on common training materials and operational manuals, and to share lessons learned and innovations amongst agencies;
- A more consistent best practice with respect to when and how regulatory powers are employed may emerge amongst agencies; and
- A more consistent body of case law of broader application may emerge about the exercise of powers and their limitations.

However, it is not clear the extent to which this type of "cross-fertilisation" already occurs, or, more importantly, does not occur because of disparities in existing legislation. This has not been addressed in the supporting material to the Bill.

The Law Council considers that the objectives of the Bill, in a generic sense, have merit. However, in the absence of a broader discussion about the current legislative landscape and the practices and procedures it has resulted in, it remains difficult to comment on the necessity for the Bill and whether it offers the best method of delivering a more efficient and consistent outcome.

During the PJCLE Hearing, the AGD advised that the Bill is modelled on an Office of Parliamentary Counsel Drafting Direction which has been used for the last 18 months in order to ensure that there is a more consistent approach taken to the way government agencies' regulatory powers are enacted. This raises for consideration whether such an approach might be sufficient in itself to deliver greater uniformity and clarity as new agencies are established and existing agencies consider the need for revised or additional regulatory powers.

As another alternative, the Law Council notes that during the PJCLE hearing Senator Parry queried why each principal Act or regulation as it currently stands, could not just be amended to conform with a single regulatory model, rather than using a separate Bill. The AGD's response was that this would not have the advantage of streamlining the statute book. However, the Law Council notes that this potential advantage must be weighed against the risk of confusion if agencies need to refer to multiple statutes for the source of their powers, rather than a single principal Act.

Review of Existing Legislation Governing Small Regulatory Agencies

In order to better understand how the Bill might work in practice, the Law Council has examined some examples of existing legislation governing the operation of smaller regulatory agencies, and compared this legislation to the provisions of the Bill. This analysis is set out at Attachment B. The legislation chosen predates the Office of Parliamentary Counsel Drafting Direction.

While there may be other examples of Acts or regulations that could be streamlined in a straightforward manner to incorporate the provisions of the Bill, the examples chosen in Attachment B suggest that the process of resolving the differences between existing legislation and the Bill will often be complicated and require substantial consultation and negotiation.

The examples emphasise the risk that, if passed, the Bill may have the opposite effect to that intended. Rather than resulting in clearer, streamlined legislation, current legislation may, in fact, be largely preserved in its current form, with the provisions of the Bill simply used to augment and thereby complicate existing regulatory regimes.

Conclusion

The Law Council considers that a further public review, which seeks detailed comments from agencies as to the need for the Bill, and how they would seek to reconcile existing legislation with it, is needed in order to establish the efficacy and likely outcomes of the Bill if enacted.

However, if the Bill is to be passed without such a review, the Law Council submits that the Bill should at least be amended to:

- Ensure that the provisions of the Bill may only be triggered by another Act and not by regulation; and
- Provide directly that the privilege against self incrimination and legal professional privilege are not abrogated by the provisions of the Bill;

This submission has been lodged by the authority delegated by the Directors to the Acting Secretary-General, but does not necessarily reflect the personal views of each Director of the Law Council of Australia.

Yours sincerely

Mr Martyn Hagan

Acting Secretary-General