

Regulatory Powers (Standard Provisions) Bill 2014

Portfolio: Attorney-General

Introduced: House of Representatives, 20 March 2014

Summary of committee concerns

1.59 The committee notes that this bill has been re-introduced as a result of the lapsing of the Regulatory Powers (Standard Provisions) Bill 2012 (the 2012 Bill) at the end of the 43rd Parliament.

1.60 The committee notes and welcomes the two main changes between the 2012 bill and the current bill, including the removal of the ability of the provisions of the bill to be triggered by regulation and the inclusion of explicit protection for the privilege against self-incrimination and legal professional privilege.

1.61 The committee re-iterates its previous conclusion in relation to the 2012 bill that a final assessment of the compatibility of the application of the standard provisions in the bill to a specific regulatory scheme will need to be made in the context of that particular bill.

Overview

1.62 This bill seeks to establish a framework of standard regulatory powers exercised by Commonwealth agencies. The bill does not itself grant agencies any powers, but must be triggered by another Commonwealth Act which expressly applies the relevant provisions and specifies other requisite information, such as the persons who are authorised to exercise the applicable powers.

1.63 The new framework provides for monitoring and investigation powers that are designed to be used by an agency to determine compliance with provisions of the triggering legislation. The bill also provides for the use of civil penalties, infringement notices and injunctions to enforce provisions and the acceptance and enforcement of undertakings relating to compliance with provisions.

1.64 The explanatory memorandum accompanying the bill notes that, once enacted, new Acts that require monitoring, investigation or enforcement powers will be drafted to trigger the relevant provisions of the bill. Further, over time, existing regulatory schemes will be reviewed and, if appropriate, amended to instead trigger the relevant provisions of the bill.¹

1 Explanatory Memorandum, p 2.

Compatibility with human rights

Previous consideration by the committee

1.65 The committee considered the 2012 bill in its *Sixth Report of 2012*.² The committee noted that the statement of compatibility accompanying the bill did not appear to meet the committee's expectations as it did not provide sufficient detail about the operation of the individual provisions and how these may impact on human rights. The committee wrote to the then Attorney-General to seek further clarification on how the specific entry, monitoring, search, seizure and information gathering powers in the bill are likely to impact on the right to privacy. The committee also considered that the creation of the infringement notice scheme was unlikely to raise issues of inconsistency with the right to a fair hearing and trial.

1.66 The committee considered the response of the then Attorney-General in its *Tenth Report of 2013*.³ The committee thanked the Attorney-General for his response. The committee noted that the nature of the legislation was that some or all of its provisions must be triggered by another bill applying selected provisions to the operation of that regulatory scheme. Accordingly, the committee shared the Attorney-General's view that a final assessment of the compatibility of a specific application of the standard provisions will need to be made in the context of a particular bill.⁴ In particular, the committee noted that the bill contained a number of civil penalty provisions and that an assessment of whether a particular civil penalty should be classified as 'criminal' for the purposes of human rights law will only be able to be made in the context of the particular regime to which it is applied.

Statement of compatibility

1.67 The statement of compatibility accompanying the bill emphasises that the human rights implications of the bill will differ in each circumstance where the framework contained in this bill is triggered in relation to a particular regulator scheme. It notes that further consideration will need to be given to these implications each time a bill proposes to apply parts of this bill. However, the statement identifies that the bill in and of itself engages the right to privacy⁵ and the right to a fair trial.⁶

2 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2012*, pp 22-24.

3 Parliamentary Joint Committee on Human Rights, *Tenth Report of 2013*, pp 97-98.

4 See, for example, Parliamentary Joint Committee on Human Rights, *First Report of 2013*, paras 1.201-1.215 and *Fifth Report of 2013*, p 57 (comments on the Offshore Petroleum and Greenhouse Gas Storage Amendment (Compliance Measures) Bill 2012).

5 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

6 Article 14 of the ICCPR.

1.68 The committee notes that the statement of compatibility contains a considerable amount of additional detail in relation to the operation of the provisions of the bill and their impact on human rights as compared to the statement of compatibility accompanying the 2012 bill.

1.69 The committee expresses its appreciation to the Attorney-General for ensuring that the statement of compatibility complies with the committee's expectation that, where the committee has raised concerns in relation to a statement of compatibility or measures in a bill, any subsequent re-introduction of the same or substantially the same measures is accompanied by a statement of compatibility addressing the committee's previously identified concerns.⁷

Committee view on compatibility

1.70 The committee notes that this bill largely replicates the 2012 bill, with two main exceptions.

1.71 Firstly, the 2012 bill enabled the standard provisions in the bill to apply to a particular regulatory scheme by way of regulation. The current bill before the committee has been amended to remove this power. Accordingly, the provisions of the bill must be triggered through primary legislation.⁸ The explanatory memorandum accompanying the bill states that:

This will mean that any future legislation that proposes to trigger provisions in this Bill will be introduced and scrutinised by Parliament. An assessment of human rights engagement and compatibility will need to be undertaken in the context of each regulatory scheme and the particular provisions of this Bill that have been triggered. The Explanatory Memorandum to each Bill should clearly set out the relevant agency's current regulatory powers, a comparison with the powers in the Regulatory Powers Bill that will be triggered, and in the case of any expansion of the agency's powers, a detailed explanation of the reasons for the expansion of powers.⁹

7 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament*, p 6, para 1.18.

8 See, for example, proposed new section 98 of the bill. The committee notes this change was recommended by the Senate Legal and Constitutional Affairs Legislation Committee in its examination of the 2012 bill: *Regulatory Powers (Standard Provisions) Bill 2012 [Provisions]*, March 2013.

9 Explanatory memorandum, p 2.

1.72 The committee welcomes this requirement and considers that it will result in better and more informed parliamentary scrutiny of the human rights implications of the application of the framework provisions of the bill to particular legislative schemes.

1.73 Secondly, the current bill before the committee includes explicit protection of the privilege against self-incrimination and legal professional privilege. Accordingly, these protections will be afforded with respect to the wide range of regulatory schemes to which the provisions of the bill may be applied.

1.74 The committee welcomes these additions and considers that the additional provisions further promote the right to a fair trial.¹⁰

1.75 The committee re-iterates its previous conclusion in relation to the 2012 bill that a final assessment of the compatibility of a specific application of the standard provisions will need to be made in the context of a particular triggering bill.

1.76 The committee notes it is unable to conclude that the measures in this bill are compatible with human rights until such an assessment occurs in relation to the specific scheme to which the provisions of the bill are applied.

10 Article 14(3) of the ICCPR.