

Chapter 2

Key issues and committee view

2.1 The Selection of Bills Committee Report noted that the 'legislation has complex implications for a range of portfolio agencies in Indigenous Affairs that necessitates consultative processes to ensure [there are no] unintended consequences'.¹

Indigenous affairs legislation matters

2.2 Schedule 1 of the bill amends the *Aboriginal and Torres Strait Islander Act 2005* repealing the requirements for the responsible minister to table Indigenous Business Australia's (IBA) corporate plan.² The Department of the Prime Minister and Cabinet (PM&C) noted that 'repealing these provisions will remove the duplication of corporate plan tabling under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).³

2.3 IBA confirmed that it has been consulted in relation to this change and that it 'reduces red tape and removes an unnecessary requirement that is additional to those set out for corporate plans in the PGPA Act'.⁴

2.4 Schedule 2 amends the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (ATSIC Amendment Act) to enable the appropriate consenting authority to waive the exercise of its statutory consent power by providing written notice to the organisation concerned that consent is no longer required.⁵ PM&C explained:

Subitems 200(1) and (2) of the ATSIC Amendment Act require that, where a person or body acquired an interest in land using money granted by ATSIC, that person or body must not dispose of the interest without obtaining the written consent from the appropriate consenting authority. The normal mechanism for the Commonwealth to protect its interests in property is through the use of a caveat on the land title deed.⁶

2.5 PM&C advised that the consenting authorities are the Commonwealth, IBA and the Indigenous Land Corporation (ILC) and it is estimated there are more than 4,500 assets held by Aboriginal and Torres Strait Islander organisations across Australia affected by this legislation.⁷

2.6 PM&C stated that:

1 Senate Selection of Bills Committee, Report No. 5 of 2017, 11 May 2017, Appendix 9.

2 Explanatory Memorandum (EM), p. 2.

3 *Submission 1*, p. 1.

4 *Submission 3*, p. 1.

5 EM, p. 2.

6 *Submission 1*, p. 1.

7 *Submission 1*, p. 2.

...any organisation which obtained property (generally land) using ATSIC funds has to get permission from the Commonwealth to dispose or deal in the property. The organisation cannot sell, lease, transfer or change the use of their freehold title without the specific agreement of the Commonwealth.⁸

2.7 Under the current legislation the Commonwealth cannot waive its interests in these properties and can only act on request from the organisation that owns the property. The proposed amendments will enable the Commonwealth to:

...waive the exercise of its statutory consent power by providing written notice to the organisation that consent is no longer required.⁹

2.8 PM&C explained the benefits of the proposed change:

This will support an increase in autonomy and economic independence for Indigenous organisations, reduce red tape, and better enable them to more freely use their land for economic development.¹⁰

2.9 PM&C also indicated that the Commonwealth will:

...adopt a risk-based approach to determine if its interests should be waived. The key criteria to be applied to this decision will be: the age and value of the original grant, value of the land to the Indigenous estate, and the governance and organizational capability of the land holder.¹¹

2.10 PM&C reported that the government has consulted with Indigenous stakeholders, the ILC and IBA.¹²

2.11 The IBA indicated that it has no concerns with this change:

...on the basis that the waiver of the consent requirement is at the discretion of the relevant consenting authority, its appropriateness in relation to particular circumstances can be assessed on a case-by-case basis, and that it enables Aboriginal and Torres Strait Islander organisations to have greater control over assets and thus facilitates greater levels of economic independence.¹³

2.12 PM&C provided answers to questions on notice confirming that:

- the relevant assets are owned by the organisations as freehold interests. The Commonwealth does not own them and the proposed amendments do not give the Commonwealth any additional powers over the properties. Consenting authorities do not currently, and will not under the proposed legislation have the power to shift control of the assets to another entity;

8 *Submission 1*, p. 2.

9 *Submission 1*, p. 2.

10 *Submission 1*, p. 2.

11 *Submission 1*, p. 2.

12 *Submission 1*, p. 2.

13 *Submission 3*, p. 1.

- once a consenting authority waives the consent rights in a property, the rights cannot be reinstated; and
- the intent of the amendment is to increase autonomy for affected organisations and allow them to manage their own assets in a way that will benefit their organisation and the community they represent.¹⁴

2.13 Schedule 3 repeals spent Indigenous Affairs portfolio legislation.¹⁵

Other issues

Auditor-General Act amendments

2.14 Schedule 4 of the bill proposes to amend the *Auditor General Act 1997* to restore the ability of the Auditor-General, as an independent officer of the Parliament, to present the Australian National Audit Office (ANAO) annual report directly to the Parliament. Following the implementation of the *Public Governance Performance and Accountability (Consequential and Transitional Provisions) Act 2014*, the ANAO was included in the annual reporting requirements for non-corporate entities where the annual report must be presented to the responsible minister for tabling in Parliament.¹⁶

2.15 The Auditor-General will arrange for a copy of the annual report to be tabled in both Houses of Parliament by 15 October or by the end of any further period as granted under the *Acts Interpretation Act 1901*.¹⁷

2.16 The committee supports providing a legislative basis for the date that annual reports are required to be tabled in Parliament. This differs from section 46 of the PGPA Act which prescribes a date for the provision of an annual report to the responsible minister (the 15th day of the fourth month after the end of the reporting period of the entity). However, it does not provide for a timeframe for the minister to table the report in the Parliament. The committee has detailed these timeframe issues in relation to the tabling of annual reports most recently in its report on annual reports No 1 of 2017.¹⁸

2.17 The ANAO has indicated that the Auditor-General intends to continue to:

...ensure his annual report meets the [Public Governance, Performance and Accountability Rule 2014 (PGPA Rule)] and prescribed requirements for annual reports for non-corporate Commonwealth entities, with the exception of presentation of the report to the Parliament through a responsible Minister.¹⁹

14 Answers to question on notice from PM&C, received 7 June 2017.

15 EM, p. 2; *Submission 1*, p. 2.

16 EM, p. 12.

17 EM, pp 7-8.

18 Senate Finance and Public Administration Legislation Committee, *Annual reports (No. 1 of 2017)*, 22 March 2017, pp 8–9.

19 ANAO, *Submission 2*, p. 2. See also EM, p. 12.

2.18 The committee expects that in meeting the PGPA Rule and prescribed requirements this will include complying with the Guidelines for the Presentation of Documents to the Parliament prepared by PM&C which states:

As per past practice, it is expected that the responsible Minister will present the report to each House of Parliament on or before 31 October. If Senate Supplementary Budget Estimates hearings are scheduled to occur prior to 31 October, it is best practice for annual reports to be tabled prior to those hearings. This ensures that annual reports are available for scrutiny by the relevant Senate standing committee.²⁰

2.19 As noted in the committee's reports on annual reports, the committee has previously commended the ANAO for consistent early presentation of its annual report.²¹

Royal Commissions Act amendments

2.20 Schedule 5 of the bill would amend the *Royal Commissions Act 1902* (RC Act) to give commissioners the power to compel the provision of a written statement; increase the penalty for failure to comply with a summons or notice to produce; updates references so that penalties now expressed in dollar value are instead expressed in penalty units; and allow the Secretary of the Attorney-General's Department (AGD) to be given custody of Royal Commission Records by regulation.²²

Power to require information or statement

2.21 The proposal to give Commissioners the power to compel the provision of a written statement implements a recommendation of the report of the Royal Commission into the Home Insulation Program, which supported the reason for a similar recommendation made by the Australian Law Reform Commission (ALRC) in its 2009 *Making Inquiries Report*. The ALRC considered that this power to require written statements other than by way of oral evidence '...may reduce the need for hearings and examinations and enable more flexible, less formal and more cost effective inquiry procedures...'.²³

2.22 The Attorney-General is responsible for 'Administrative support for Royal Commissions and certain other inquiries'. AGD indicated:

The department supports the proposed amendment of the Royal Commissions Act to provide for a new power for commissioners to issue a

20 Department of the Prime Minister and Cabinet, *Guidelines for the Presentation of Documents to the Parliament (including Government Documents, Government Responses to Committee Reports, Ministerial Statements, Annual Reports and other Instruments)*, August 2016, pp 4-5.

21 Annual reports (No. 1 of 2014), p. 19. Since that time the ANAO has tabled its annual report as follows: 2013–14 on 24 September in both Houses; 2014–15 on 17 September 2015 in House of Representatives (12 October 2015 in Senate); and 2015–16 on 14 September 2016 in both Houses.

22 EM, p. 4.

23 EM, p. 14; *Submission 1*, p. 3.

written notice to require a person to give information or a statement in writing to a royal commission. This new power would enable future royal commissions to use a more streamlined approach to gathering evidence. The department also supports the further proposed amendments that would ensure that the information gathered under the new compulsive power will be treated in the same way as other evidence gathered by royal commissions in the use of their current compulsive powers.²⁴

Increase in penalties

2.23 The proposal to increase the penalty for failure to comply with a summons or notice to produce implements recommendation 78 of the final report of the Royal Commission into Trade Union Governance and Corruption, which recommended the RC Act be amended 'to increase the penalties for a failure to comply with a summons to attend, a failure to comply with a notice to produce, a failure to be sworn or answer questions, and a failure or refusal to provide documents to at least a maximum penalty of 2 years' imprisonment or a fine of 120 penalty units or both'.²⁵ PM&C indicated that:

In making that recommendation, Commissioner Heydon observed that the existing penalty for those offences is 'inadequate' and explained that a penalty of up to 2 years' imprisonment is consistent with the penalty applicable to a failure to comply with notices issued by the Australian Security and Investments Commission.²⁶

2.24 The proposal to express penalties in penalty units is consistent with current legislation drafting practice.²⁷

2.25 AGD indicated:

Two years imprisonment is consistent with the penalties available for failure to comply with notices issued by the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission.

Royal Commissions are the highest form of public inquiry in Australia and it is imperative that persons comply with requests made under the Royal Commissions Act and that if they do not they are appropriately dealt with under the law. As such the proposed increase in penalties is proportionate and reasonable.²⁸

Custodian of Royal Commission records

2.26 The final proposal is to allow the Secretary of AGD to be given custody of Royal Commission Records by regulation. PM&C indicated that:

24 *Submission 4*, p. 2.

25 EM, p. 15; *Submission 1*, p. 3.

26 *Submission 1*, p. 3.

27 *Submission 1*, p. 3.

28 *Submission 4*, p. 3.

Currently, the only Commonwealth Department of State that can be given custody of Royal Commission records is the Department of the Prime Minister and Cabinet (the Secretary is the prescribed person for that purpose). The proposed amendment to add the Secretary of the Attorney-General's Department gives more flexibility to determine an appropriate custodial agency within the Commonwealth.²⁹

2.27 AGD noted that:

...this provision would apply in relation to Royal Commission records of Royal Commissions established before, on or after the commencement of this amendment.³⁰

Scrutiny of bills committee

2.28 In the Scrutiny Digest 5/17, the Scrutiny of Bills Committee draws three areas of the bill to Senators' attention: reversal of evidential burden of proof;³¹ privilege against self-incrimination;³² and significant penalties.³³

2.29 In relation to the first two, the Scrutiny of Bills Committee is seeking advice from the minister regarding the appropriateness of these provisions.

2.30 In relation to the third, Section 3 of the RC Act provides that a person served with a summons to appear as a witness before a royal commission shall not fail to attend unless excused or released. The bill seeks to increase the maximum penalty for a failure to attend from six months' imprisonment or a \$1,000 fine to two years' imprisonment with no possibility of a fine. In relation to this provision, the Scrutiny of Bills Committee is seeking advice from the minister:

...as to why the penalty for offences of failure to attend as a witness, produce a document or answer a question before a Royal Commission is being substantially increased to up to two years imprisonment (without the possibility of a fine) and whether this accords with comparable Commonwealth offences.³⁴

Human rights committee

2.31 The Explanatory Memorandum indicates that the bill is compatible with human rights 'because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate'.³⁵

29 *Submission 1*, pp 3-4.

30 *Submission 4*, p. 3.

31 Schedule 5, item 11, subsection 3(6C).

32 Schedule 5, items 19–25 and 28.

33 Schedule 5, items 4, 7, 10, 11, 13, 15 and 16.

34 Senate Scrutiny of Bills Committee News, 11 May 2017, drawing on material in the committee's Scrutiny Digest No. 5 of 2017.

35 EM, p. 5.

2.32 The Parliamentary Joint Committee on Human Rights (PJCHR) also drew the increased penalty for failing to attend a royal commission as a witness to the attention of Senators. The PJCHR reports on the compatibility of the proposed measure with the right not to incriminate oneself and points out:

By increasing the penalty for a witness who fails to attend and give evidence to a royal commission in circumstances where the witness will not be afforded the privilege against self-incrimination, the measure engages and limits the right not to incriminate oneself. Current section 6P of the RC Act permits a royal commission to disclose evidence relating to a contravention of a law to certain persons and bodies including the police and the Director of Public Prosecutions (DPP) in these circumstances.³⁶

2.33 The PJCHR is seeking advice from the Minister for Indigenous Affairs as to 'whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law; how the measure is effective to achieve (that is, rationally connected to that objective); whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and whether a derivative use immunity would be workable'.³⁷

2.34 The PJCHR also points out that by increasing the penalty for failure to appear as a witness, in circumstances where the witness is not afforded the privilege against self-incrimination, the measure engages and limits the right to privacy. The PJCHR is seeking advice from the Minister for Indigenous Affairs as to 'whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law; how the measure is effective to achieve (that is, rationally connected to) that objective; and whether the limitation is a reasonable and proportionate measure to achieve the stated objective'.³⁸

2.35 The bill seeks to amend section 2(3B) of the RC Act to give a royal commission the power to issue a notice requiring a person to give information or a statement in writing. The statement of compatibility acknowledges that the measure engages and limits the right to privacy but argues it is permissible on the basis that:

The collection and use of that personal information is a proportionate limitation of the right to privacy in pursuit of a legitimate objective to ensure a Royal Commission can fully inquire into, and report on, matters of public importance.³⁹

2.36 The PJCHR is seeking advice from the Minister for Indigenous Affairs as to 'whether the limitation is a reasonable and proportionate measure to achieve the stated

36 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, report 4 of 2017, 9 May 2017, p. 29.

37 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, report 4 of 2017, 9 May 2017, p. 30.

38 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, report 4 of 2017, 9 May 2017, p. 31.

39 EM, p. 5.

objective (including the availability of less rights restrictive measures and the existence of relevant safeguards).⁴⁰

2.37 Regarding the compatibility of the measure with the right not to incriminate oneself, the PJCHR notes that 'the statement of compatibility does not acknowledge that this right is engaged and limited so does not provide an assessment as to whether the limitation is justifiable under international human rights law.⁴¹ The PJCHR is seeking advice from the Minister for Indigenous affairs as to 'whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law; how the measure is effective to achieve (that is, rationally connected to) that objective; whether the limitation is a reasonable and proportionate measure to achieve the stated objective; and whether a derivative use immunity would be workable'.⁴²

2.38 The PJCHR has also asked the Minister for Indigenous Affairs whether a foundational assessment of the RC Act could be undertaken to determine its compatibility with human rights.⁴³

Committee view

2.39 The committee notes that the submissions to the inquiry do not raise any issues of concern in regards to the bill.

Recommendation 1

2.40 The committee recommends that the Senate pass the bill.

Senator James Paterson

Chair

40 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, report 4 of 2017, 9 May 2017, p. 32.

41 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, report 4 of 2017, 9 May 2017, p. 29

42 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, report 4 of 2017, 9 May 2017, p. 30. See also EM, p. 5.

43 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, report 4 of 2017, 9 May 2017, p. 34.