



5 August 2021

The Hon Karen Andrews MP  
Minister for Home Affairs  
Parliament House  
CANBERRA ACT 2600

Via email: [dlo@homeaffairs.gov.au](mailto:dlo@homeaffairs.gov.au)

Dear Minister,

**Aviation Transport Security Amendment (Screening Information) Regulations 2021 [F2021L00736]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

***Significant penalties in delegated legislation***

***Strict liability***

***Conferral of discretionary powers***

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties. This may include whether the instrument provides for offences of strict liability. In addition, Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. This includes whether an instrument imposes significant penalties. Senate standing order 23(3)(c) further requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers.

Subregulation 4.17A(2) enables the Secretary to give a written notice to a screening authority specifying requirements relating to screening that is carried out at a screening point using certain types of equipment. In determining whether to specify a requirement, subregulation 4.17A(4) provides that the Secretary may give consideration to a number of factors, including 'any other matter the Secretary considers relevant'. This appears to enable the Secretary to exercise considerable discretion as to the matters that may be included in these requirements.

The committee's scrutiny concerns in relation to this broad discretion are heightened by subregulation 4.17A(6) which provides that a person commits an offence of strict liability if the screening authority does not comply with the requirements specified in the Secretary's notice in relation to the screening. The penalty for contravention of this subregulation is 100 penalty units.

While the explanatory statement to this instrument explains the nature and scope of regulation 4.17A, including the necessity of a strict liability offence and the penalty for non-compliance, the committee is concerned that an element of this strict liability offence is left to the

Secretary's discretion and the requirements that must be complied with appear to be issued via a non-legislative notice with no parliamentary or public oversight or transparency. In this regard, the committee draws your attention to the Attorney-General's Department's *Guide to Framing Commonwealth Offences* which provides that the scope of an offence should be clear on its face. It is unclear to the committee how regulation 4.17A can, of itself, ensure sufficient clarity and certainty required of offence provisions, given it relies on the discretion of the Secretary. In this regard, although subregulation 4.17A(4) provides a non-exhaustive list of factors the Secretary may consider in exercising their discretion, there is only limited, non-exhaustive guidance in subregulation 4.17A(3) about the nature of the requirements that the Secretary may specify.

**The committee would therefore appreciate your advice as to:**

- **whether written notices given by the Secretary under subregulation 4.17A(2) will be subject to any parliamentary or public oversight or transparency, noting that a failure to comply with the requirements set out in the notice is a strict liability offence with a significant penalty;**
- **whether further guidance about the types of requirements that may be specified by the Secretary in a written notice can be included on the face of the instrument, or at least the explanatory statement; and**
- **whether the explanatory statement can be amended to provide guidance about the 'other matters' that the Secretary may consider under paragraph 4.17A(4)(g) in exercising their discretion.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **19 August 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**