



**SENATE STANDING COMMITTEE**

**FOR THE**

**SCRUTINY OF BILLS**

**ELEVENTH REPORT**

**OF**

**2008**

**15 October 2008**



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## MEMBERS OF THE COMMITTEE

Senator the Hon H Coonan (Chair)

Senator M Bishop (Deputy Chair)

Senator D Cameron

Senator J Collins

Senator R Siewert

Senator the Hon J Troeth

## TERMS OF REFERENCE

### Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
  - (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.



# **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

## **ELEVENTH REPORT OF 2008**

The Committee presents its Eleventh Report of 2008 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Australian Organ and Tissue Donation and Transplantation Authority  
Bill 2008

# Australian Organ and Tissue Donation and Transplantation Authority Bill 2008

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 10 of 2008*. The Minister for Health and Ageing responded to the Committee's comments in a letter dated 14 October 2008. A copy of the letter is attached to this report.

### *Extract from Alert Digest No. 10 of 2008*

Introduced into the House of Representatives on 18 September 2008  
Portfolio: Health and Ageing

#### **Background**

This bill establishes the Australian Organ and Tissue Donation and Transplantation Authority to provide the legislative framework to implement measures that seek to achieve a significant and lasting increase in the number of organ and tissue donations and transplantations in Australia. The bill:

- details the functions of the Authority;
- provides for the appointment of members to the Authority and for the appointment, remuneration, and termination of the CEO;
- requires the development of a four-year strategic plan to provide a nationally-consistent, coordinated system of organ and tissue donation;
- specifies the functions of the CEO; and
- provides for the appointment of staff under the *Public Service Act 1999*.



The bill also establishes the Australian Organ and Tissue Donation and Transplantation Advisory Council, to advise the CEO about organ or tissue donation and transplantation matters, and allows the CEO to establish expert advisory committees to provide advice.

The bill also allows the CEO to provide grants of financial assistance to the States and Territories and to a person other than a State or Territory.

### **Wide discretion**

#### **Subclause 24(1)**

Subclause 24(1) would authorise the CEO of the Authority to delegate ‘any or all of the CEO’s functions and powers to a person who is a member of the Staff of the Authority.’ Since clause 25 provides that the staff of the Authority is simply to be ‘persons engaged under the *Public Service Act 1999*’, the Committee notes that subclause 24(1) gives the CEO a very wide discretion in deciding to whom to delegate functions or powers.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee’s preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the Committee notes that the explanatory memorandum provides no explanation as to why the CEO requires such a broad power of delegation. The Committee **seeks the Minister’s advice** about the reason for this broad power of delegation and whether it might be limited in some way.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee’s terms of reference.*

## ***Relevant extract from the response from the Minister***

Thank you for your letter of 25 September 2008 regarding the Australian Organ and Tissue Donation and Transplantation Authority Bill 2008 (the Bill).

The Committee has noted that subclause 24(1) of the Bill gives the Chief Executive Officer (CEO) a very wide discretion in deciding to whom to delegate functions or powers. Subclause 24(1) allows the CEO to 'delegate any or all of the CEO's functions and powers to a person who is a member of the staff of the Authority'. I note the Committee's preference for delegates to be confined to the holders of nominated offices or to members of the Senior Executive Service (SES).

Subclause 24(1) is intended to provide the CEO with a workable but accountable framework in which to perform his or her functions and needs to be considered in the context of clause 11 of the Bill. Clause 11 confers a number of functions on the CEO. The power of delegation under subclause 24(1) is limited by subclause 24(3) which precludes the CEO from delegating the following key CEO functions: to 'formulate, in writing, policies and protocols relating to organ or tissue donation and transplantation matters' (under subclause 11(1)(a)); or 'to declare, in writing, standards and codes of practice relating to organ and tissue donation and transplantation matters' (under subclause 11(1) (b)). These functions have significant national implications, especially for clinical practice, and therefore will be retained by the CEO.

The Authority is a relatively small agency with an intended staff profile that is limited to an appropriately small number of SES or SES equivalent officers. Apart from the functions set out in subclauses 11(1)(a) and (b), many of the functions in clause 11 may not need to be performed by an SES officer (or another nominated officer). For example, the training function under subclause 11(1)(e) and the research function under 11(1)(h) could readily be performed by a non-SES officer. Proposed structural arrangements allow for officers below an SES to head specialist units including communications and education areas.

It is also worth noting that subclause 24(2) of the Bill gives the CEO the power to direct delegates. This will give the CEO the appropriate control over how any delegated function or power should be exercised.

The Committee thanks the Minister for this timely response, which addresses the Committee's concerns.

Senator the Hon Helen Coonan  
Chair



**THE HON NICOLA ROXON MP  
MINISTER FOR HEALTH AND AGEING**

Senator the Hon Christopher Ellison  
Chair  
Standing Committee for the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600

Dear Senator Ellison *Chris*

Thank you for your letter of 25 September 2008 regarding the Australian Organ and Tissue Donation and Transplantation Authority Bill 2008 (the Bill).

The Committee has noted that subclause 24(1) of the Bill gives the Chief Executive Officer (CEO) a very wide discretion in deciding to whom to delegate functions or powers. Subclause 24(1) allows the CEO to 'delegate any or all of the CEO's functions and powers to a person who is a member of the staff of the Authority'. I note the Committee's preference for delegates to be confined to the holders of nominated offices or to members of the Senior Executive Service (SES).

Subclause 24(1) is intended to provide the CEO with a workable but accountable framework in which to perform his or her functions and needs to be considered in the context of clause 11 of the Bill. Clause 11 confers a number of functions on the CEO. The power of delegation under subclause 24(1) is limited by subclause 24(3) which precludes the CEO from delegating the following key CEO functions: to 'formulate, in writing, policies and protocols relating to organ or tissue donation and transplantation matters' (under subclause 11(1)(a)); or 'to declare, in writing, standards and codes of practice relating to organ and tissue donation and transplantation matters' (under subclause 11(1)(b)). These functions have significant national implications, especially for clinical practice, and therefore will be retained by the CEO.

The Authority is a relatively small agency with an intended staffing profile that is limited to an appropriately small number of SES or SES equivalent officers. Apart from the functions set out in subclauses 11(1)(a) and (b), many of the functions in clause 11 may not need to be performed by an SES officer (or another nominated officer). For example, the training function under subclause 11(1)(e) and the research function under 11(1)(h) could readily be performed by a non-SES officer. Proposed structural arrangements allow for officers below an SES to head specialist units including communications and education areas.

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I have enclosed a diagram of the proposed structure of the Australian Organ and Tissue Donation and Transplantation Authority for your information.

Yours sincerely

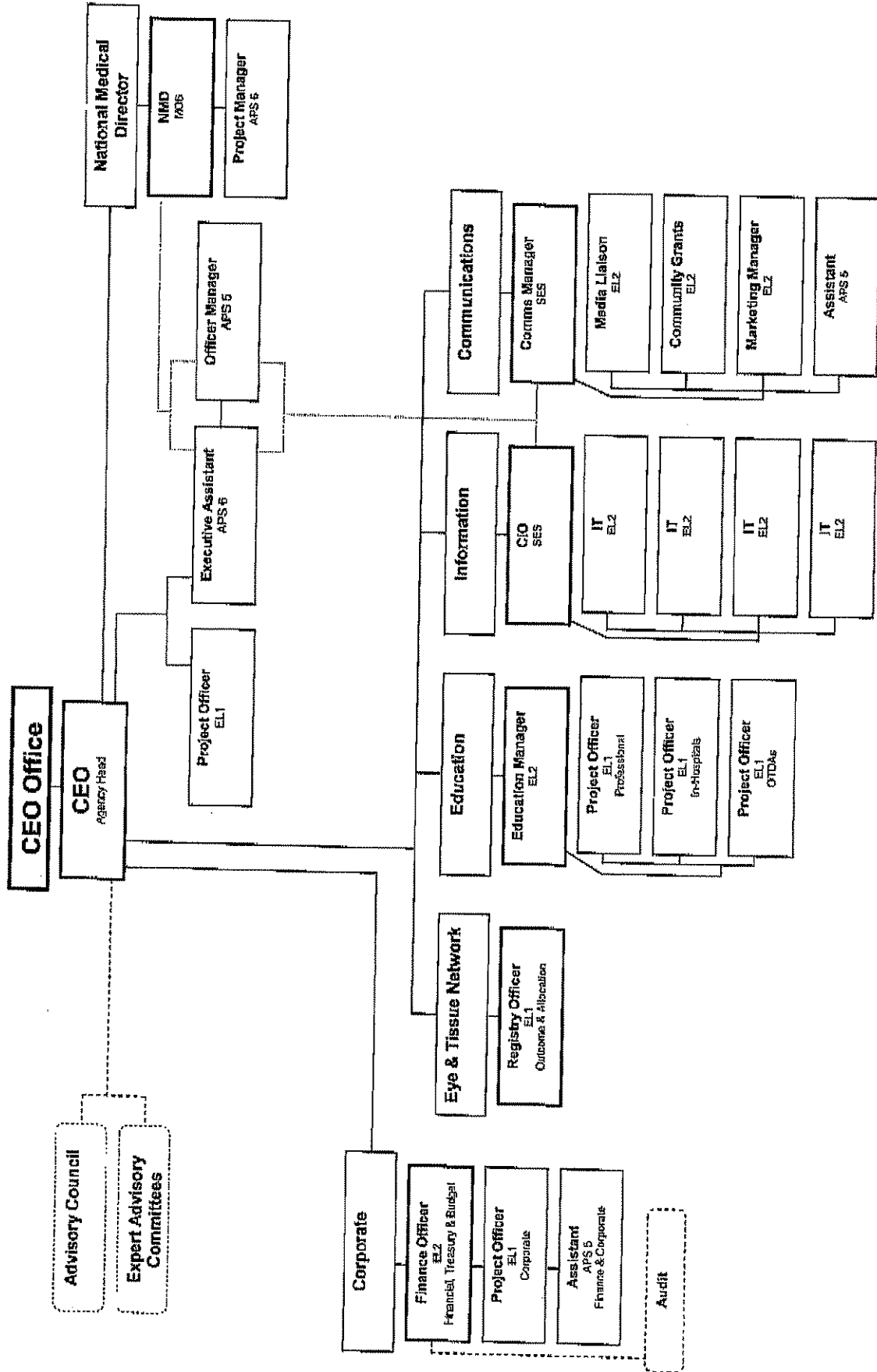
A handwritten signature in black ink, appearing to read 'Nicola', written in a cursive style.

**NICOLA ROXON**

Encl

14 OCT 2008

AUSTRALIAN ORGAN & TISSUE DONATION & TRANSPLANTATION AUTHORITY - PROPOSED STRUCTURE



STAFF IN CONFIDENCE