



Scrutiny of Acts and Regulations Committee

Practice Note

[26 May 2014]

Note: This Practice Note incorporates provisions found in Practice Notes Nos.1 to 4 previously issued by the Committee¹

The Committee's Practice Note provides general advice to government legal and legislation officers. The advice provides guidance concerning the Committee's expectations in respect to information that should be provided to the Parliament, concerning provisions in Bills that engage the Committee's terms of reference. These terms of reference are found in section 17 of the *Parliamentary Committees Act 2003* (the 'Act') and section 30 of the *Charter of Human Rights and Responsibilities Act 2006*.

A. Terms of reference pursuant to section 17 of the *Parliamentary Committees Act 2003*

Where the Committee reports on provisions it will draw the matter to the attention of Parliament and will record in the report that further advice will be sought from the responsible Minister or Member introducing the Bill. The response is then published in the Committee's Alert Digest at the earliest opportunity.

Practices of concern to the Committee include provisions in Bills that inadequately explain and justify:

- i. retrospective commencement on a particular date, and whether any person may be adversely effected by the retrospectivity**
- ii. wide or undefined delegation of administrative powers or functions**
- iii. commencement by proclamation or delayed commencement that is longer than 12 months after introduction, or**
- iv. where the Bill provides insufficient or unhelpful explanatory material particularly in respect to rights or freedoms and other key provisions, such as**
 - Powers of arrest, detention and deprivation of liberty
 - Search and seizure powers without judicial warrant
 - Creation of strict or absolute liability offences
 - Reversal of onus of proof in criminal (or civil penalty) offences
 - Abridgment of the right to silence or the privilege against self-incrimination
 - Freedom of communication, assembly, movement, association, religion or conscience
 - Infringement of the right to vote
 - Denial of or failure to advise of, judicial or merits review of administrative decisions
 - Denial or abridgment of the principle of 'fair trial' or the principles of natural justice

¹ This version reissued 21 June 2016 with further amendments.

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- Acquisition of property without adequate compensation
- Privacy of information and health records
- Is characterised as a 'statute law revision amendment'
- Inappropriately delegates legislative power. Examples: allow regulations to alter the provisions of an Act, or allow regulations to establish a tax (as distinct from a fee for service or penalty).

Where a Bill contains a provision that any of the above mentioned practices the Committee would expect that the Parliament will be provided with an explanation why the provision is desirable or necessary.

The explanation should include the reason why a specific retrospective date is chosen and whether any person may be adversely affected by retrospective application; why a wide or undefined delegation of administrative powers or functions is desirable; and why delayed commencement or commencement by proclamation is necessary or desirable.

Where there is insufficient information provided to the Parliament the Committee may report the matter to the Parliament, or, write to the relevant Minister seeking a further explanation, or both, pursuant to section 17(a) of the *Parliamentary Committees Act 2003*.

B. Terms of reference pursuant to section 30 of the *Charter of Human Rights and Responsibilities Act 2006*

The Committee has determined that it will characterise a Statement of Compatibility, made under the Charter s. 28, as a form of explanatory memoranda equivalent in status to an explanatory memorandum accompanying a Bill.

The Committee considers that, where house amendments are proposed for a Bill that are unrelated to the Bill's purpose as introduced, supplementary information should be provided to Parliament as to the compatibility of those amendments with the Charter's rights.

Where there is insufficient information regarding the Statement of Compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe a Charter right or affect an operative provision of the Charter the Committee may report the matter to the Parliament, or, write to the relevant Minister seeking a further explanation, or do both, pursuant to section 17(a) of the *Parliamentary Committees Act 2003*.

The Committee makes the following comments about how a Statement of Compatibility (or other explanatory material) should address the following types of provisions:

i. Penalties, fines and other burdens (Charter ss. 21(5) & 22-27):

The Statement of Compatibility for provisions that may impose penalties, fines or other burdens on a person who is found to have breached a rule or standard should state whether or not it is a criminal penalty for the purposes of the Charter. The Committee notes that such a penalty may be a criminal penalty for the purposes of the Charter, even if Victorian law characterises it otherwise, e.g. as a civil, disciplinary or regulatory penalty. The explanatory material may address whether or not the penalty is equivalent in effect to a criminal penalty having regard to its nature or severity. Where a penalty is a criminal penalty for the purposes of the Charter, the explanatory material may address whether or not the legislation that imposes it is compatible with the criminal process rights set out in Charter ss. 21(5) and 22-27.

ii. Self-incrimination provisions (Charter ss. 24(1) & 25(2)(k)):

The Statement of Compatibility for a provision of any Bill that provides that a human being must answer questions or provide information or documents that may tend to incriminate that person (or creates new powers or extends existing ones that are subject to such a provision) should state whether and how that provision satisfies the test for reasonable limits on rights in Charter s. 7(2). The Committee would prefer that the analysis of reasonable limits set out the demonstrable justification for: the coercive power itself; any removal of the privilege against self-incrimination; any permission to use the answers or information derived from them in later proceedings; and any preconditions on the availability of protections against self-incrimination. The Statement's discussion of less restrictive alternatives reasonably available to achieve the purpose of the provision may address whether the privilege against self-incrimination could be abrogated in a narrower way.

iii. Reverse onus provisions (Charter s. 25(1)):

The Statement of Compatibility for any Bill that creates a provision that reduces the prosecution's burden to prove the accused's guilt or requires an accused to offer evidence of their innocence (or extends the operation of or increases the applicable penalty in respect of such a provision) should state whether and how that provision satisfies the Charter's test for reasonable limits on rights. Examples of such provisions include ones that place the legal onus of proof on an accused with respect to any issue in a criminal proceeding; deem a fact to be proved in any circumstance; provide that proof of any fact is 'prima facie evidence' of a different fact; or place an evidential onus on an accused with respect to an essential element of an offence. The Committee would prefer that the analysis of reasonable limits assess the risk that the provision may allow an innocent person to be convicted of the offence and set out the demonstrable justification for allowing such a risk. In the case of a provision that places a legal onus on an accused, the analysis may address whether an evidential onus would be a less restrictive alternative reasonably available to achieve the provision's purpose.

In addition, the Statement of Compatibility (or explanatory material) for a provision that introduces or significantly alters an exception to a criminal offence should state whether or not the exception places a legal onus on the accused. Examples of such exceptions include provisions stating that 'It is a defence to a prosecution for an offence if...' or 'A person is not liable to be prosecuted for an offence if...' or 'A person is not guilty of an offence if...' or a particular offence provision 'does not apply if'. For exceptions to summary offences, the explanatory material may address the effect of s.72 of the *Criminal Procedure Act 2009*. For exceptions that impose a legal onus on the accused without express words to that effect, the statement of compatibility may address whether or not the inclusion of express words would be a less restrictive alternative reasonably available to achieve the exception's purpose.

iv. Compliance notices for suspected criminals (Charter s. 25(1)):

The explanatory material for any Bill that creates a provision permitting a person suspected of a criminal offence to be given a notice that specifies actions the person must take, must state whether or not the commission of the suspected offence must be proved in any proceedings for breach of the notice. If no such proof is required, then the Statement of Compatibility should examine whether the provision reasonably limits the right to the presumption of innocence in Charter s. 25(1). The discussion may consider whether expressly providing for a court to review the notice, before or after any alleged contravention, is a less restrictive alternative reasonably available to achieve the provision's purpose.

v. National uniform legislation schemes (Charter ss. 28, 30, 32, 36 & 38):

The Statement of Compatibility (or explanatory material) for a Bill that applies non-Victorian laws or refers powers to non-Victorian bodies should fully explain those laws' human rights impact. The Committee would prefer that the explanation have two components: First, the Statement of Compatibility may assess the human rights compatibility of all existing non-Victorian laws that are to be applied in Victoria. Second, the Statement of Compatibility (or explanatory material) may set out whether, and to what extent, the Charter's operative provisions (including its provisions for scrutiny, interpretation, declarations of inconsistent interpretation and obligations of public authorities) will apply under the national uniform legislation scheme.