



2021-2022 Review of the *Legislation Act 2003*

Discussion paper

October 2021

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Background

Section 59 of the *Legislation Act 2003* requires the Australian Government Attorney-General to appoint a body to review the operation of the Act.

The Attorney-General has appointed Ms Sarah Chidgey, Ms Roxanne Kelley PSM and Mr Peter Quiggin PSM QC to conduct a review of the operation of the *Legislation Act 2003* as required under section 59 of the Act and has approved the Terms of Reference below for the conduct of the Review.

Ms Sarah Chidgey is the Deputy Secretary for the Integrity and International Group in the Attorney-General's Department and is the Chair of the Review Committee.

Ms Roxanne Kelley PSM is the Deputy Secretary for the Corporate and Foreign Investment Group in the Department of the Treasury.

Mr Peter Quiggin PSM QC was First Parliamentary Counsel and head of the Office of Parliamentary Counsel from 2004 until April 2021.

About this paper

In conducting their review, the Review Committee seeks feedback from interested stakeholders on the operation of the Legislation Act.

This paper has been prepared to assist stakeholders to give feedback on matters arising from the Terms of Reference below by providing background information and posing questions to assist in formulating submissions.

Terms of Reference

1. The review is to consider and report on:
 - a. the extent to which the objectives listed in section 3 of the *Legislation Act 2003* have been realised
 - b. factors, if any, which have limited achievement of the Legislation Act's objectives
 - c. the extent to which the objectives of the Legislation Act are still appropriate
 - d. how performance against those objectives might be improved.
2. The review should have regard to:
 - a. the Report of the 2008 Review of the *Legislative Instruments Act 2003* (the 2008 Review) and the implementation of those recommendations in the *Legislative Instruments Amendment (Sunsetting Measures) Act 2012* and the *Acts and Instruments (Framework Reform) Act 2015*
 - b. the 2017 Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003 and the implementation of those recommendations in the *Legislation Amendment (Sunsetting Review and Other Measures) Act 2018*
 - c. the Interim and Final Reports of the Inquiry into the exemption of delegated legislation from parliamentary oversight of the Senate Standing Committee for the Scrutiny of Delegated Legislationand without limiting the scope of paragraph 1, may particularly consider:
 - d. whether changes implemented as a result of the reports in 2a. and 2b. have achieved their objectives

- e. the extent to which any of the recommendations in the reports in 2c. so far as they relate to the Legislation Act may further the objectives of the Act or may improve performance against the objectives.
3. To the extent matters raised across the reports referred to above can be considered together, the review should do so.
4. The review may consider any other related matters it regards appropriate.
5. Section 60 of the Legislation Act requires that the sunset provisions are reviewed in 2027. The review may decide to defer particular issues for consideration in the context of that review.
6. In preparing its report the review should consult as widely as it considers necessary.
7. The review is to provide its report to the Attorney-General by 5 June 2022.

Request for public submissions

The Review Committee invites general reflections and observations from stakeholders about the Legislation Act. Discussion questions are included in the paper which may assist stakeholders' consideration of the Terms of Reference.

Submissions close 8 December 2021

Submissions received after this date may not be considered.

Refer to our [privacy policy](#) for more information on the use of your personal information.

Note: Submissions or comments are generally subject to freedom of information processes.

Please contact the Administrative Law Section in the Attorney-General's Department (LegislationActReview@ag.gov.au) should you wish to discuss any matters relating to Review.

History and objectives of the Legislation Act

The Legislation Act (formerly titled the *Legislative Instruments Act 2003* (LIA)) was introduced into the Parliament on 26 June 2003 and passed on 2 December 2003.

The LIA, for the first time, introduced a comprehensive regime for the registration, Parliamentary scrutiny and sunseting of Commonwealth legislative instruments. Sunseting is the automatic repeal of legislative instruments after a fixed period.

The LIA also provided for:

- an authoritative, complete and accessible register of instruments with the establishment of the Register of Legislative Instruments, including a reliable source of compilations and explanatory statements
- a definition of *legislative instrument*
- mechanisms to improve drafting standards and to encourage consultation with experts and parties affected by legislative instruments before they were made.

A statutory review under section 59 of the LIA was undertaken in 2008¹ (the 2008 Review), three years after the commencement of the LIA, to examine the objectives of the LIA, measure performance against those objectives and whether improvements could be made to performance. Broadly, the Committee found that the LIA had been successful in:

- providing an authoritative repository of Commonwealth legislative instruments, explanatory statements and compilations
- improving public access to legislative instruments
- facilitating parliamentary scrutiny of legislative instruments.

The Committee found that the LIA had further work to do in:

- encouraging rule-makers to undertake appropriate consultation before making legislative instruments
- encouraging high standards of drafting of legislative instruments to promote their legal effectiveness, their clarity and their intelligibility
- establishing mechanisms to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, are repealed.

Many of the reforms to the LIA recommended by the 2008 Review were implemented by the enactment of the *Acts and Instruments (Framework Reform) Act 2015* (the 2015 Act), including to:

- change its name to the Legislation Act
- create a consolidated framework for the publication of Commonwealth Acts and the registration of legislative and other instruments
- change the Federal Register of Legislative Instruments to the Federal Register of Legislation as it became the authoritative repository of Commonwealth legislation and registered instruments
- amend the definition of *legislative instrument*
- provide for the registration of *notifiable instruments*
 - Notifiable instruments are not legislative instruments, but instruments for which public accessibility and centralised management is desirable. Instruments may become notifiable instruments by being registered, by being prescribed by regulation under the *Legislation (Exemptions and Other Matters) Regulation 2015* (LEOMR), or by being declared as notifiable instruments in the enabling legislation.

¹ [2008 Review of the Legislative Instruments Act 2003 | Attorney-General's Department \(ag.gov.au\)](#)

Registration took the place of other publication requirements for these types of instrument (for example, gazettal) that existed previously.

- provide consistency for Parliamentary scrutiny of delegated legislation by applying the disallowance regime in the Legislation Act to all legislative instruments
- consolidate exemptions to the operation of the Legislation Act or to the disallowance and sunseting provisions in the Legislation Act or the LEOMR.
 - Exemptions from the Legislation Act or to the disallowance provisions, or prescription of an instrument to be a notifiable instrument, may also be included in other primary legislation.
- provide for alignment of instruments by enabling the Attorney-General to declare a common sunseting date for a group of related legislative instruments.

Prior to the legislative reforms commencing through the 2015 Act, the Federal Register of Legislation was significantly upgraded to provide the necessary technical functionality.

A statutory review of the sunseting provisions under section 60 of the Legislation Act took place in 2017² (the 2017 Review), twelve years after the commencement of the LIA. As the sunseting period was ten years, it was considered that twelve years was an appropriate period of time to enable a comprehensive review of these provisions. The purpose of the review was to ensure that the requirement for rule-makers to periodically review and re-make legislative instruments was operating in an efficient and effective manner to maintain an accurate and up-to-date register of legislative instruments.

Broadly, the 2017 Review found that:

- the sunseting framework is, in general, fulfilling its stated purpose
- the framework should not be extended to primary legislation
- the 10-year sunseting period should be maintained.

Recommendations from the 2017 Review were implemented through the *Legislation Amendment (Sunsetting Review and Other Measures) Act 2018* (the 2018 Act). They included:

- enabling the Attorney-General to issue a certificate for deferral of the sunseting period of an instrument for up to 24 months
 - For a deferral longer than 12 months, the certificate is disallowable.
- minor amendments regarding:
 - the inclusion of statements of reasons in the explanatory statements for certificates of deferral or declarations of alignment
 - extending or clarifying grounds for deferral and alignment
 - exempting rules of court from sunseting.

The Register of Legislation was also upgraded to provide for sunseting alerts to assist agencies to manage the sunseting of their instruments with the addition of the 'Sunsetting soon' tab to the Legislative Instruments menu on the Register.

² [Report on the Operation of the Sunseting Provisions in the Legislation Act 2003 | Attorney-General's Department \(ag.gov.au\)](#)

Issues for discussion

The Review Committee will review all aspects of the operation of the Legislation Act as required by subsection 59(3) and invites general reflections and observations from stakeholders about whether they consider the Act is fit for purpose. The following discussion questions may also assist stakeholders' consideration of the Terms of Reference.

1. Objectives of the *Legislation Act 2003*

Background

The Legislation Act's objectives have remained largely unchanged since the LIA was enacted in 2003. The *Legislative Instruments Amendment (Sunsetting Measures) Act 2012* inserted subsection 3(ea), and the 2015 Act amended subsections 3(a), (c), (d), (ea) and inserted subsections 3(aa) and (g).

New subsection 3(ea) was inserted to correspond with the addition of Part 5A of the LIA, the provisions of which operate to automatically repeal instruments that have become 'spent', having achieved their purpose as commencing, amending or repealing instruments and provisions. (The 2015 Act relocated these provisions to Part 3 of Chapter 3). Automatic repeal ensures that the 'current legislative instruments' element of the Federal Register of Legislation (the Register) only contains legislative instruments that continue to operate and have legal effect.

The amendments to section 3 in the 2015 Act were made to reflect the expanded scope of the Legislation Act to cover the registration and publication of Acts as well as instruments, and to take account of the creation of *notifiable instruments*. The addition of subsection 3(g) related to the insertion of new section 61, which created a new regulation making power to enable bulk amendments to application, saving or transitional provisions across a number of instruments; for example, where there has been a thematic review of the instruments.

Section 3 is reproduced below.

3 Object

The object of this Act is to provide a comprehensive regime for the management of Acts and instruments by:

- (a) establishing the Federal Register of Legislation as a permanent repository of versions (including authorised versions) of Acts, legislative instruments, notifiable instruments and compilations, together with associated documents and information; and
- (aa) enabling the First Parliamentary Counsel to make editorial changes and some other changes in preparing compilations of Acts, legislative instruments and notifiable instruments, if those changes do not change the effect of the Acts or instruments; and
- (b) encouraging rule-makers to undertake appropriate consultation before making legislative instruments; and
- (c) encouraging high standards in the drafting of legislative instruments and notifiable instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users; and
- (d) improving public access to Acts and instruments; and
- (e) establishing improved mechanisms for Parliamentary scrutiny of legislative instruments; and

(ea) automatically repealing spent legislative instruments and notifiable instruments (or provisions of those instruments) that merely provide for the amendment, repeal or commencement of Acts or other instruments; and

(f) establishing mechanisms to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed; and

(g) enabling regulations to be made under this Act amending or repealing legislative instruments and notifiable instruments in some circumstances.

Questions for discussion

For all stakeholders:

- A. The overarching objective of the *Legislation Act 2003* is to provide a comprehensive regime for the management of Acts and instruments. To what extent is this objective currently being realised and why?
- B. What (if any) factors inhibit the objectives in paragraphs (a) to (g) of section 3 being fully realised?
- C. Do all the objectives in paragraphs (a) to (g) of section 3 remain appropriate? If not, why not?
- D. What could be done to improve performance against the objectives in paragraphs (a) to (g) of section 3?
- E. Should new mechanisms be added to the regime for managing Acts and instruments? If so, what and why?

2. The current definition of legislative instrument

Background

The definition of *legislative instrument* originally included in the LIA was as follows:

4 Definitions

...

legislative instrument has the meaning given by section 5 and includes instruments that are declared to be legislative instruments under section 6 but does not include:

(a) instruments that are declared not to be legislative instruments under section 7; or

(b) instruments to which section 9 applies

...

5 Definition—a legislative instrument

(1) Subject to sections 6, 7 and 9,³ a ***legislative instrument*** is an instrument in writing:

(a) that is of a legislative character; and

³ Section 6 declared certain instruments to be legislative instruments, Section 7 declared certain instruments not to be legislative instruments, and section 9 expressly provided that rules of court were not legislative instruments.

(b) that is or was made in the exercise of a power delegated by the Parliament.

(2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:

(a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and

(b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

(3) An instrument that is registered is taken, by virtue of that registration and despite anything else in this Act, to be a legislative instrument.

(4) If some provisions of an instrument are of a legislative character and others are of an administrative character, the instrument is taken to be a legislative instrument for the purposes of this Act.

This definition expressly stated that *legislative instrument* did not include instruments declared not to be legislative instruments under section 7 or instruments to which section 9 applied.⁴ Section 5, which contained the substance of the definition was expressed to apply ‘subject to sections 6, 7 and 9’.⁵

The 2008 Review identified that this definition could be improved, noting it provided important guidance to the courts, the public and to rule-makers about the intentions of the Parliament. It found that the definition was circular, defining a legislative instrument as an instrument of a legislative character, and that the scope of the phrase ‘applying the law to a particular case’ was unclear. The 2008 Review recommended the definition be amended to address the circularity and to clarify the reference to instruments that apply the law to a particular case. This was done with the enactment of the 2015 Act, resulting in the current definition:

Definition of legislative instrument in the Legislation Act 2003 (current version)

4 The Dictionary

...

legislative instrument: see section 8.

...

8 Definition of *legislative instrument*

(1) A ***legislative instrument*** is an instrument to which subsection (2), (3), (4) or (5) applies.

Note: Instruments that can be legislative instruments may be described by their enabling legislation in different ways, for example as regulations, rules, ordinances or determinations.

Primary law provides for something to be done by legislative instrument

(2) If a primary law gives power to do something by legislative instrument, then:

(a) if the thing is done, it must be done by instrument; and

(b) that instrument is a ***legislative instrument***.

Example 1: A primary law provides that “The Minister may, by legislative instrument, determine licence conditions for the purposes of this section.”

Example 2: A primary law provides as follows:

“(1) The Chief Executive may, by instrument, determine licence conditions.

⁴ Section 9 provided that rules of court are not legislative instruments.

⁵ Section 6 of the LIA declared certain instruments to be legislative instruments.

(2) The Chief Executive may, by instrument, exempt a person from the requirement under this Act to hold a licence.

(3) An instrument made by the Chief Executive under subsection (1) or (2) is a legislative instrument.”.

Instruments registered on the Federal Register of Legislation

(3) An instrument made under a power delegated by the Parliament is a **legislative instrument** if it is registered as a legislative instrument.

Note: An instrument made under a power delegated by the Parliament may be a legislative instrument because it is registered as a legislative instrument, whether or not it is a legislative instrument because of another provision of this section.

Instruments that determine or alter the law etc.

(4) An instrument is a **legislative instrument** if:

- (a) the instrument is made under a power delegated by the Parliament; and
- (b) any provision of the instrument:
 - (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and
 - (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

Instruments declared to be legislative instruments

(5) An instrument is a **legislative instrument** if it is declared by section 10 or 57A to be a legislative instrument.

Note: Section 10 declares regulations and some other instruments to be legislative instruments. Section 57A declares some instruments to be legislative instruments that were made under a power delegated by the Parliament before 1 January 2005, when the substantive provisions of this Act commenced.

Instruments that are not legislative instruments

(6) Despite subsections (4) and (5), an instrument is not a **legislative instrument** if it is:

- (a) declared by an Act not to be a legislative instrument; or
- (b) prescribed by regulation for the purposes of this paragraph.

(7) However, subsection (6) does not apply to an instrument that is a legislative instrument under subsection (3) by registration.

(8) Despite anything else in this section, the following are not legislative instruments, and cannot become legislative instruments under subsection (3) (by being registered as legislative instruments):

- (a) an instrument that is a notifiable instrument because of subsection 11(1) (primary law gives power to do something by notifiable instrument);
- (b) a commencement instrument;
- (c) a compilation of a legislative instrument or notifiable instrument;
- (d) rules of court or a compilation of rules of court;
- (e) an explanatory statement for a legislative instrument, or rules of court mentioned in paragraph (d).

As can be seen, the amendments consolidated the definition into a single provision and avoid the circularity apparent in the original definition.

Section 4 of the Legislation Act as amended now refers to section 8 for the definition of *legislative instrument*. Section 8 of the Legislation Act is comprehensive in that it contains all provisions setting out what are or are not legislative instruments. It also makes clear in subsection 8(4) that an instrument that determines or alters the law, which is an instrument of a legislative character, is a legislative instrument. Subsection 8(6) provides that an instrument is not a legislative instrument where it is declared not to be a legislative instrument under other primary legislation or the LEOMR.

Instruments that do not fulfil the definition set out in subsection 8(4) of the Legislation Act are administrative in nature and are, therefore, not regulated by the Legislation Act (unless legislative instrument status is conferred by legislative prescription or registration). An instrument will be more likely to be administrative in nature if it merely applies the law to a particular circumstance or person/s rather than determining the content of the law.

The issue

An instrument that is legislative in character should be properly categorised as a legislative instrument and neither exempted nor stated to be a notifiable instrument.

Where the rule-maker considers that an instrument is not legislative in character, a provision is often included in primary legislation stating the instrument is either not legislative, or that it is a notifiable instrument (and therefore is not legislative). This reflects the practice of the Office of Parliamentary Counsel (OPC) to clarify the status of legislative instruments when drafting primary legislation.⁶ This means that, in practice, any possible ambiguity is resolved in the legislation. A statement in primary legislation that an instrument is not legislative is determinative of whether the instrument is legislative or not for the purposes of section 8 of the Legislation Act.

However, a question that often arises during the Parliamentary scrutiny process is whether the statement merely clarifies the character of the instrument or operates as a substantive exemption from the operation of the Legislation Act. It may not be clear on the face of the provision whether instruments made pursuant to the provision will be legislative or administrative in character, and indeed it may vary from instrument to instrument made under the same provision; for example where the provision is such that an instrument may be made in relation to certain named individuals or may be more broadly framed for classes or groups of people.⁷

The Senate Standing Committee for the Scrutiny of Delegated Legislation in its Final Report of its *Inquiry into Parliamentary scrutiny of delegated legislation*⁸ discussed the categorisation of instruments as 'not legislative' or notifiable and the impact of such categorisation on its ability to scrutinise instruments that are legislative in character. As noted above, subsections 8(6) to 8(8) of the Legislation Act allow for a legislative instrument to be declared not to be a legislative instrument by primary legislation or the LEOMR. Section 11 allows for primary legislation to specify that an

⁶ [Drafting Direction No. 3.8 Subordinate legislation \(opc.gov.au\)](#) at paragraphs 67 to 69.

⁷ An example of this is at proposed subsection 24(3) of the Exposure Draft of the [Financial Accountability Regime Bill 2021](#) (Bill), which enables the Regulator to determine whether remuneration of a particular kind is (or is not) 'variable remuneration' for one or more 'accountable persons' or for a class of 'accountable persons'. While the Bill states that the determination is not a legislative instrument (subsection (4)), properly characterising the determination may depend on whether the decision is made in reference to one 'accountable persons' or to a class of 'accountable persons'.

⁸ [Report – Parliament of Australia \(aph.gov.au\) at pages 56 to 58, and see recommendation 11.](#)

instrument will be a notifiable instrument, regardless of whether it is legislative in character. The Senate Committee therefore recommended (recommendation 11) that section 11 of the Legislation Act be amended to clarify that notifiable instruments must not be legislative in character.

The characterisation of an instrument as being legislative or administrative may determine the scope and grounds of review available for decisions made by or under the instrument. In general, review rights for decisions of an administrative character would include merits review (where available), judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (where available) and judicial review under paragraph 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*.

By contrast, if an instrument is of a legislative character, review rights would be limited to judicial review under paragraph 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*.

Questions for discussion

For all stakeholders:

- A. Does the definition of *legislative instrument* remain appropriate in meeting the objectives of the Legislation Act?

For Australian Government agencies:

- B. Does your Australian Government agency find it difficult to determine whether a proposed instrument is legislative?
 - i. If so, what difficulties does your agency experience?
 - ii. If so, does your agency routinely seek legal advice on the character of the proposed instrument?
- C. Does legal advice assist your agency to determine whether a proposed instrument is legislative? If not, why not?
- D. What amendments to the Legislation Act definition or other mechanisms would assist your agency with the difficulties it encounters?

For non-Government stakeholders:

- E. Do you experience adverse impacts from how Australian Government agencies interpret the definition? If so, what are they? How could they be addressed?

3. Changes to the Federal Register of Legislation

Background

The 2008 Review found that limiting the scope of the Register to legislative instruments meant primary legislation and other delegated legislation were excluded, raising accessibility concerns. There was no authoritative register for primary legislation and there were several different types of subordinate instruments that were not covered by the LIA and therefore not required to be registered. The 2008 Review recommended that the LIA be amended to require other instruments to be registered on the Register, and that registration would satisfy any gazettal or other publication requirements. It recommended that these additional instruments should not be automatically subject to the tabling, disallowance and sunset provisions of the Legislation Act and a failure to register should not affect the instrument's operation unless it is required to be published or gazetted to be effective.

Other findings from the 2008 Review related to ensuring that the version of an instrument on the Register would be the authoritative version and that compilations could be more readily updated

and registered. The 2008 Review also found that the effectiveness of the Register as a single and authoritative repository was adversely affected when up-to-date information on changes in the application or operation of an instrument was not available on the Register; for example, a finding of invalidity of an instrument by a court, the instrument being disallowed, or other instruments coming into force amending or repealing a registered instrument.

The 2008 Review recommended that rule-makers be required to notify the Attorney-General's Department (which at that time was responsible for the Register) of events that resulted in the repeal, modification or invalidity of a registered instrument, and that the Attorney-General be empowered to make regulations to formally revoke spent or invalid instruments and correct typographical errors. In addition, it recommended that any instrument that amends or repeals a registered instrument must also be registered.

In relation to compilations, the 2008 Review found that section 33 of the LIA was too narrow.⁹ The 2008 Review raised doubts as to whether section 33 covered an instrument's variation or revocation, and recommended that it be amended to require the registration of a compilation of an instrument that was partially revoked or sunsetted as soon as practicable after the relevant event.

Recommendations were also made to develop a new IT system to support the Register and to ensure that any references to legislation in hard copy or electronic versions identified the version on the Register as the authoritative version.

The legislative amendments to implement the 2008 Review recommendations in relation to the operation of the Register were made through the 2015 Act following the upgrade of the Register to enable it to better perform its existing functions and to support the new functions.

The 2017 Review recommended that OPC consider mechanisms to generate sunseting alerts through the Register in addition to tabling of sunseting lists to assist departments and agencies in managing their instruments subject to sunseting. The Register has since been upgraded to include a 'Sunsetting soon' tab in the Legislative Instruments menu.

The issue

The 2017 Review provided an opportunity for both government and non-government stakeholders to raise any issues they had regarding the operation of the Register, legislatively or functionally, as they related to the sunseting provisions of the Legislation Act. Government agencies have also continued to raise matters informally with OPC as they arise or when OPC has consulted them on proposed upgrades to the Register.

The Delegated Legislation Committee's Final Report discussed the searchability of the Register¹⁰ and noted that it was not possible to search for instruments on the Register that were not subject to disallowance. The Committee recommended in its 2019 Interim Report of its *Inquiry into the exemption of delegated legislation from parliamentary oversight* that the searchability of the Register be improved.

This review provides the first formal opportunity since 2017 to examine whether the 2015 Act amendments and the upgrades to the Register have achieved their objectives and whether any further legislative or technical changes would enhance the operation of the Register.

⁹ Section 33 of the LIA required the registration of a compilation where the instrument was amended or partially disallowed.

¹⁰ [Report – Parliament of Australia \(aph.gov.au\) at paragraph 1.21 on page 7 \(and related footnote\)](#)

For all stakeholders:

- A. Do you consider that the Register is fulfilling its functions as required by Chapter 2, Part 1 of the Legislation Act? If not, why not?
 - B. Do you experience any difficulties with the Register, either through the operation of the provisions of the Legislation Act or the Register's functionality?
 - i. If so, what difficulties do you have or experience?
 - ii. If so, do you have suggestions to amend the Legislation Act and/or upgrade the functionality of the Register to address your concerns or difficulties?
-

4. Improving the standard of legislative instruments and explanatory statements

Background

The 2008 Review identified that the standard of drafting and compilation of legislative instruments had improved since the commencement of the LIA due to greater public exposure of instruments and informal advice provided during the registration process. However, it identified that the quality of legislative instruments still varied widely between agencies. The 2008 Review's recommendations focused on identifying drafting and compilation issues and identifying training needs and tools to assist agencies.

The 2008 Review also identified ongoing issues with the quality of explanatory statements, which are intended to assist the reader to interpret a legislative instrument. Stakeholder comment at the time included that explanatory statements did not always assist in understanding the instrument.

In 2012 OPC's function of drafting primary legislation and amendments to primary legislation was expanded to include the function of drafting delegated legislation, which was transferred from the Office of Legislative Drafting and Publishing in the Attorney-General's Department. The primary aim of transferring responsibility for drafting delegated legislation to OPC was to increase the standard of instrument drafting across the Australian Government and to ensure a consistent style across Acts and regulations. As well as providing drafting services for other instruments on a fee for service basis, OPC publishes guidance for its instructors and drafters, including drafting templates,¹¹ and provides training on the legislative process and instrument drafting.¹²

The *Legal Services Directions 2017*¹³ provides that certain drafting work is tied to OPC. Agencies must use OPC's drafting services for all Government Bills and regulations, Ordinances and regulations of external Territories and Jervis Bay Territory, and other legislative instruments made or approved by the Governor-General. Agencies may also use OPC's specialist legislative drafting services for other instruments made under legislation on a fee for service arrangement.¹⁴

¹¹ [Drafting resources | Office of Parliamentary Counsel \(opc.gov.au\)](https://www.opc.gov.au/drafting-resources)

¹² [Training | Office of Parliamentary Counsel \(opc.gov.au\)](https://www.opc.gov.au/training)

¹³ [Legal Services Directions 2017 \(legislation.gov.au\)](https://www.legislation.gov.au/legislation.gov.au) – See Appendix A.

¹⁴ [Drafting | Office of Parliamentary Counsel \(opc.gov.au\)](https://www.opc.gov.au/drafting)

The issue

Subsection 3(c) of the Legislation Act includes as an object of the Act:

encouraging high standards in the drafting of legislative instruments and notifiable instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users;

This review provides a formal opportunity to examine whether the measures implemented following the 2008 Review have assisted to improve overall standards of drafting of instruments and explanatory statements and whether more work can be done.

The Review Committee welcomes stakeholders' views on whether there are any ongoing or systemic issues with the quality of drafting of instruments. The Review Committee also welcomes stakeholders' views on whether the quality of explanatory statements could be improved.

In this regard, the Review Committee notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation regularly seeks further information from relevant Ministers in relation to explanatory material supporting legislative instruments. The Delegated Legislation Committee has also commented on the impact that its work has had on the processes for drafting and consultation, including on the quality of legislative instruments and the accompanying explanatory statements.¹⁵

Questions for discussion

For all stakeholders:

- A. Do you consider the object of the Legislation Act to encourage high standards of drafting has been achieved? If not, why not?
 - i. If yes, do you believe it should remain as an object of the Legislation Act?
- B. Do you experience difficulties in interpreting Commonwealth instruments? If so, what are they? How could they be addressed?

For Australian Government agencies:

- C. Does your Australian Government agency draft its own instruments?
 - i. If yes, do you find the guidance and training available to your drafters helpful? If not, why not?
 - ii. If yes, would additional or revised guidance and/or training assist your drafters? If so, what would you suggest?
- D. Does current guidance on the drafting of explanatory material assist your policy officers? If not, why not?
- E. Would additional or revised guidance and/or training assist your drafters? If so, what would you suggest?
- F. Do you have any other comments or suggestions regarding the quality of drafting, including whether there is room for improvement?

¹⁵ [Report – Parliament of Australia \(aph.gov.au\) at paragraphs 6.13 to 6.18 on pages 92 and 93.](#)

5. Whether the 10 year sunset period remains appropriate

Background

The Legislation Act provides that legislative instruments are automatically repealed after 10 years. This automatic repeal is called sunset. The intent of the sunset framework is to ensure legislative instruments are up-to-date and only in force for so long as required.

The 2017 Review was conducted 12 years after the commencement of the LIA to enable sufficient time to assess the operation of the sunset provisions under the Legislation Act. This timeframe recognised that the standard sunset period was 10 years, and that this period could be extended by 12 months in certain circumstances.¹⁶ The 2017 Review considered reducing the sunset period, but as almost all submissions received supported the retention of the 10 year sunset period, it recommended that the 10 year period be retained.

The Interim and Final Reports of the Senate Standing Committee for the Scrutiny of Delegated Legislation's *Inquiry into the exemption of delegated legislation from parliamentary oversight*¹⁷ both discussed the sunset provisions, focusing on exemptions from the operation of the Legislation Act and the effect these exemptions have on the opportunity for parliamentary oversight of the relevant instrument.

While the Senate Committee did not make any recommendations concerning the sunset period, it did make recommendations about exemptions from sunset, which are further discussed below. The Senate Committee's Final Report also stated its view that, in general, delegated legislation should not include provisions made under Henry VIII clauses¹⁸ that amend or modify the operation of primary legislation. However, where such provisions are appropriate for inclusion in a legislative instrument, they should not be in force for more than three years, and in the exceptional circumstances where it may be appropriate for the instrument to be in force for more than three years, the Senate Committee established the following guidance on the exceptional circumstances in which it may be appropriate for such instruments to remain in force for more than three years:

- where the operative provisions of an instrument will not practically commence for those affected by the instrument for a period of time after the formal commencement date for the instrument; and
- where the instrument will sunset no more than five years after the commencement date for the instrument and the explanatory statement to the instrument makes it clear that the measures in the instrument will not need to remain in force after the instrument sunsets.¹⁹

The issue

Paragraph 5 of the Terms of Reference notes that there will be a review of the sunset provisions of the Legislation Act in 2027 under section 60 of the Act. The Review Committee may therefore defer particular sunset issues for consideration at that time.

However, in light of the recent consideration of sunset requirements by the Senate Committee, the Review Committee invites stakeholders' views to support a holistic examination of the operation of the sunset provisions within the context of the Act.

¹⁶ As provided for by section 51 of the Legislation Act prior to the amendments made by the *Legislation Amendment (Sunsetting Review and Other Measures) Act 2018*.

¹⁷ [Exemption of delegated legislation from parliamentary oversight – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au/Exemption_of_delegated_legislation_from_parliamentary_oversight)

¹⁸ Henry VIII clauses are clauses in primary legislation that enable delegated legislation to be made that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation.

¹⁹ See paragraph 7.112 on page 120 of the Final Report.

The Review Committee also welcomes stakeholders' submissions on the Senate Committee's views concerning appropriate timeframes within which delegated legislation made under a Henry VIII clause should sunset, including having regard to the practical implications of this view on existing legislative instruments.

Questions for discussion

For Australian Government agencies:

- A. Does your Australian Government agency have any concerns about the current sunset period in the Legislation Act? If so, what are they?
- B. Would a change to the sunset period assist with remedying any concerns that you have? If yes, what would that change be?
- C. Would additional or revised guidance and/or training assist your agency with managing the sunset of your agency's instruments within the current period? If so, what would you suggest?
- D. Does your agency manage legislation that contains Henry VIII clauses?
 - i. If yes, do you have any views on whether the sunset period for instruments created under a Henry VIII clause should be less than 10 years? If so, what period would be appropriate? Would your agency require additional assistance to manage the sunset of these instruments? If so, what would you require?

For non-Government stakeholders:

- E. Do you have any concerns regarding the current sunset period? If so, what are they?
- F. Do you consider that there should be a different sunset period for certain types of instruments, particularly instruments made under a Henry VIII clause? If so, what period would be appropriate?

6. The current framework for exemptions from the operation of the Legislation Act

Background

An object of the Legislation Act is to provide improved mechanisms for Parliamentary scrutiny of legislative instruments.²⁰ This object has been implemented by:

- requiring that legislative instruments be tabled in both Houses of Parliament
- enabling either House of Parliament to issue a notice of intention to disallow a legislative instrument in whole or in part within 15 days after the instrument was tabled in that House automatically disallowing an instrument if the notice of disallowance is not disposed of within those 15 days
- repealing most legislative instruments after a fixed period of time (also known as sunset).

These mechanisms are, however, subject to some exemptions. The 2017 Review reviewed legislative and policy criteria for exemptions from sunset and considered whether the exemptions should be expanded. The 2017 Review recommended that the policy criteria for exemptions should be expanded to include large and complex instruments in certain circumstances, and to include a scheme that is applicable to a permanently closed class of persons. It also recommended that the policy criteria for exemptions should remain in policy rather than legislation, and that all exemptions

²⁰ *Legislation Act 2003* paragraph 3(e)

from sunseting should be prescribed in the LEOMR (other than those set out in section 54 of the Legislation Act).

The exemptions from both sunseting and disallowance have been the subject of two inquiries by the Senate Standing Committee for the Scrutiny of Delegated Legislation (previously known as the Senate Standing Committee on Regulations and Ordinances) in their 2020 Interim and 2021 Final report, *Exemption of delegated legislation from Parliamentary oversight*, and in their 2019 report, *Parliamentary scrutiny of delegated legislation*. The 2021 report reiterated recommendations made in the 2019 report to place all exemptions from disallowance and sunseting in primary legislation. Further, the 2021 report recommended that the LEOMR be repealed and that any exemptions in the regulation that remain appropriate should be set out in a schedule to the Legislation Act. Both reports raised concerns that the exemptions from disallowance and sunseting adversely impacted on the ability of Parliament to scrutinise delegated legislation.

The issue

This Review will consider whether the requirements for rule-makers to periodically review and, where appropriate, remake legislative instruments is operating efficiently and effectively and whether the exemptions remain appropriate and promote these aims. It will also consider whether the current exemption framework for both disallowance and sunseting exemptions furthers or impedes the objective in subsection 3(e) of the Legislation Act to provide a comprehensive regime for the management of instruments by establishing improved mechanisms for Parliamentary scrutiny of legislative instruments.

This Review will also take into account the Senate Committee's 2019, 2020 and 2021 Reports. On the one hand, the Review Committee notes that some of the recommendations made by the Senate Committee would effectively reverse reforms implemented as a result of the 2008 Review and the 2017 Review, which recommended that all exemptions from disallowance and sunseting be included in, and remain in, the LEOMR. On the other hand, as submitters to the Senate Committee (and the Senate Committee itself) observed, the mere making of reforms need not, in and of itself, preclude those reforms from being overturned. The Review Committee welcomes stakeholders' views in this regard.

Questions for discussion

For all stakeholders:

- A. Do you have any concerns about the current exemption framework in the Legislation Act? If so, what are they and what legislative or other changes would remedy them?
- B. Do you consider that the current exemption framework facilitates sufficient Parliamentary scrutiny of legislative instruments? If not, why not?

7. Should there be a power to remove documents from the Register to correct errors

Background

The Register is intended to be an authoritative and permanent repository of Commonwealth legislation. This is reflected in section 15B of the Legislation Act, which provides that the Register is, for all purposes 'taken to be a complete and accurate record of all registered Acts, legislative instruments and notifiable instruments'. To assist in the maintenance of the Register, section 15D provides a limited power for First Parliamentary Counsel to rectify errors. This limited power

includes the ability to rectify errors such as those made by OPC in compilations, where an instrument has been made and a Government agency uploads the incorrect version, or an unauthorised version of an explanatory statement is uploaded.

Where the incorrect version of an instrument is uploaded, the Register will not reflect the law as made. The power to rectify errors is therefore necessary to ensure the Register correctly reflects the law.

The issue

Although errors such as those mentioned above may be rectified, it is currently unclear whether there is power to *remove* the incorrect document or instrument from the Register. They therefore remain on the Register and publicly available. This raises a question about whether the Register properly fulfils its function as an authoritative repository of legislation if it contains documents that are not reflective of the law without an ability to remove incorrect documents.

Questions for discussion

For all stakeholders:

- A. Should there be a power in the Legislation Act for instruments or documents to be removed from the Register?
- B. If so, in what circumstances should such a power be exercised?
- C. With whom should such a power sit? Should it be First Parliamentary Counsel or the Attorney-General or another person? If another person, who should that be?
- D. If power is created in the Legislation Act to remove instruments or documents, should there be any ongoing reference within the Register to the instrument or document, or to its fact?

8. Appropriate consultation by rule-makers under the Legislation Act

Background

Section 17 of the Legislation Act provides that rule-makers must be satisfied that any consultation they consider appropriate and reasonably practicable has been undertaken before making a legislative instrument. It also provides that the rule-maker may take into account ‘any relevant matter’ in deciding what consultation is appropriate and includes whether parties likely to be affected by the legislative instrument have had an adequate opportunity to comment. Section 15J of the Legislation Act sets out the requirements for an explanatory statement relating to a legislative instrument, which includes a description of consultation undertaken or, if there was no consultation, an explanation for its absence. Section 19 of the Legislation Act provides that the failure to consult does not affect the validity or enforceability of an instrument.

The 2008 Review considered the importance and value of consultation in the process of making legislative instruments, and found that more needed to be done by rule-makers to meet their obligations under the LIA. The 2008 Review also considered whether the requirement to consult should be made mandatory, but found that it was appropriate for rule-makers to be responsible for determining the form and scope of consultation because the nature and extent of consultation should vary according to the nature of the legislative instrument. The 2008 Review also found that a failure to consult should not affect the validity of an instrument.

Section 18 of the LIA included examples of when consultation may be unnecessary or inappropriate having regard to the nature of the instrument. However, the 2008 Review found that the examples

had been misconstrued as exemptions from consultation. A recommendation was therefore made to repeal section 18, and it no longer appears in the Legislation Act. A recommendation was also made to review and update guidance material for Government agencies.

The Senate Standing Committee for the Scrutiny of Delegated Legislation assesses delegated legislation against a set of scrutiny principles, which includes Principle (d) those likely to be affected by the instrument were adequately consulted in relation to it. In 2019, in its report of its *Inquiry into Parliamentary scrutiny of delegated legislation*,²¹ the Committee noted that its role is limited to assessing whether the consultation requirements of the Legislation Act have been met. It expressed the concern that its ability to assess whether those likely to be affected by the instrument were adequately consulted is limited. This is because the Legislation Act leaves consultation to the rule-maker's discretion in section 17 and section 15J can be satisfied with limited information.

The issue

As for other matters considered by the 2008 Review and given effect through the 2015 Act, this review is the first formal opportunity to examine whether the implementation of the reforms has assisted rule-makers to better meet their obligations with respect to consultation.

This Review will consider whether it remains appropriate for the rule-maker to determine what constitutes adequate consultation, and whether any changes to the requirements for information to be included in explanatory statements would assist to ensure they contain detailed information about the consultation decisions made by rule-makers.

Questions for discussion

For all stakeholders:

- A. Do you consider adequate consultation to be an important and valuable part of the development of legislative instruments? If not, why not?
 - i. If so, should the objective in subsection 3(b) of the Legislation Act remain as it is, or should it be amended? If so, can you suggest how it could be changed?

For Australian Government agencies:

- B. Does your Australian Government agency consider the consultation provisions of the Legislation Act when developing legislative instruments? If not, why not?
 - i. If so, do you routinely consult with those who will be affected by the making of the instrument? If not, why not?
- C. Would any amendments to the Legislation Act or additional guidance assist with determining when and what consultation is required? If so, what do you suggest?

For non-Government stakeholders:

- D. Do you consider the object of the Legislation Act to encourage adequate consultation has been achieved? If not, why not?
 - i. If so, do you believe it should remain as an object of the Legislation Act? If so, do you suggest any changes?
- E. Do you consider that amendments should be made to the consultation provisions of the Legislation Act? If so, what do you suggest?

²¹ [Report – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au)