
POLICY STATEMENT

Justice Impact Assessments

September 2013

Background

1. This Policy Statement proposes the adoption by the Commonwealth of a national justice impact assessment process.
2. Broadly, this process would require Commonwealth Government Departments and Agencies to consider the potential impacts that a proposed legislative or regulatory change may have on the justice system. This includes impacts on:
 - the nature and extent of legal inquiries and disputes;
 - access to legal assistance services including Aboriginal and Torres Strait Islander legal services; community legal centres, family violence prevention legal services, legal aid commissions and alternative dispute resolution processes;
 - the resources or workload of the federal courts and tribunals; and
 - the cost of or access to criminal or civil justice system as a whole.
3. Justice impact assessments would extend the existing Regulatory Impact Assessment (RIA) process to analysis of costs and impacts on the justice system.
4. Currently, the RIA process is guided by best practice frameworks which exist at a national and state and territory level. These frameworks recommend that best-practice regulation making necessitates consideration by relevant government agencies of the anticipated impacts of a proposed regulatory change, primarily through the publication of Regulatory Impact Statements (RIS) alongside bills, regulations or rules, or in advance of such proposals, in the course of public consultations over proposed new government initiatives.¹
5. However, the Law Council is concerned that the existing RIA process is focused on productivity and compliance costs for business. While agencies which draft and advance legislation or regulation are encouraged to give consideration to social and compliance impacts there is no requirement to consider the broader social impacts of a proposed regulatory change, including impacts on the Australian justice system.
6. In the absence of specific consideration of these impacts, there is a risk that there will be costs for the justice system and broader society which are unanticipated and not able to be assessed by Parliament and the broader community.
7. To the extent that regulatory proposals may also be progressed in the absence of a RIA process, there may also be delayed awareness of the impacts of regulation, creating potential for adverse impacts on the public in the interim period.
8. For example, changes to federal court filing fees were introduced in 2010 and again in 2013 without prior engagement in a RIA process. The failure to engage in such a process has meant that adverse collateral impacts, such as increased burdens on the

¹ The Law Council notes that there are variations in the requirements contained within the frameworks of different jurisdictions and that different terminology may also be used.

legal assistance sector, additional administration costs for courts and additional costs of accessing the courts, were not able to be adequately considered by Parliament. There was also no opportunity to estimate the extent to which the fees would diminish the cost of the justice system, by encouraging parties to settle their disputes using alternative dispute resolution mechanisms, whether Court-sanctioned or otherwise. These fees also raised additional barriers to the justice system, impacting seriously on persons not eligible for legal aid but nevertheless of limited financial means.

9. Similarly, impacts can be expected to arise in relation to increasing police activity and criminal sanctions, increasing enforcement of immigration laws and policies, increasing numbers of child protection workers, changes to funding of legal assistance services, changes to social security legislation and many other legislative schemes impacting on the rights and legal obligations those subject to Australian laws.
10. The Law Council supports the introduction of a specific justice impact assessment component within the broader regulatory impact assessment framework.

Regulatory Impact Assessment (RIA) Process

11. The RIA process represents an important mechanism for ensuring that regulatory changes meet their intended objectives, and that any subsequent impacts are acknowledged and appropriately addressed. The RIA process also represents an opportunity to consult with and involve stakeholders, who are in a unique position to identify the likely impacts of new regulatory initiatives.
12. Commonwealth Departments and Agencies are ostensibly guided by the Commonwealth Government's *Best Practice Regulation Handbook 2013*, which was published following reviews of the RIA process in 2012.² The previous *Best Practice Regulation Handbook* and the *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, was endorsed by the Council of Australian Governments (COAG) in 2007.
13. The *Best Practice Regulation Handbook 2013* states that RIAs are required in order to:
 - establish the case for acting in response to a perceived problem, including analysis of the available options and assessment of the impact of each option.
 - provide decision makers with a balanced assessment of proposed regulations; and

² Two reviews were carried out in 2012: Borthwick, D & Milliner R, 2012, *Independent Review of the Australian Government's Regulatory Impact Analysis Process*, <http://www.finance.gov.au/deregulation/docs/independent-review-of-ria-process.pdf> (accessed 12 June 2013); and Productivity Commission, 2012, "Regulatory Impact Analysis: Benchmarking", see <http://www.pc.gov.au/projects/study/ria-benchmarking/report>

- inform the community about the likely impact of a proposal, and the information that was taken into consideration by decision makers.³
14. Some states and territories have their own guidelines outlining processes for preparing and publishing RIAs (or equivalents) in relation to state/territory regulation. There is no requirement to separately consider the justice impacts of a proposed regulatory change under state/territory law.
 15. RIA guidelines generally provide that relevant Departments and Agencies should identify groups in the community who are likely to be affected by a regulatory proposal; and to specify any significant economic, social and environmental impacts on these respective groups. Consideration is also to be given to any specific impacts that the proposal may have for businesses (in particular small businesses), trade and competition.
 16. The Law Council considers that the effectiveness of the RIA process would be enhanced by requiring Departments and Agencies to consider in detail the broader social implications of proposed regulatory changes, with specific consideration of potential impacts on the justice system.

Comparison with foreign jurisdictions

17. RIA guidelines (or equivalents) in foreign jurisdictions tend to cover broader considerations, including the economic and social impacts of a proposed regulatory change and, in some jurisdictions, specific assessment of impacts affecting the justice system. The following examples outline the differing approaches in the United Kingdom, Canada, European Union and the State of Virginia (United States of America).

United Kingdom

18. In the United Kingdom, impact assessments must be undertaken where the regulatory proposal is likely to:
 - impose additional costs or reduce existing costs on businesses or the third sector;
 - introduce new regulatory costs on the public sector or bodies that deliver public services;
 - introduce administrative or reporting burdens on the public sector or bodies that deliver public services; and/or
 - involve some kind of redistribution affecting the public, private or third sector.⁴
19. In addition to the general process, there are also specific impact tests that need to be completed, depending on the relevant regulatory proposal under consideration. In

³ Australian Government, *Best Practice Regulation Handbook*, June 2013, p 3, <http://www.finance.gov.au/obpr/proposal/handbook/docs/bpr-handbook.pdf>.

⁴ HM Treasury, http://www.hm-treasury.gov.uk/data_greenbook_impact_assessments.htm

circumstances where a regulatory proposal is expected to have impacts on the justice system, completion of a specific Justice Impact Test is required, as a mandatory aspect within the broader impact assessment process.⁵

20. The Justice Impact Test seeks to assist policy makers to systematically assess the impact of their proposed regulatory changes. It requires agencies to consider and outline the potential impacts that the proposed regulation may have on legal aid, courts and tribunals, prisons and probation services, prosecuting bodies and the judiciary.

Canada

21. In Canada, Regulatory Impact Assessment Statements (RIAS) are required to consider a broad range of factors, including the:
 - potential impacts of the regulation on health and safety, security, the environment and the social and economic well-being of Canadians;
 - costs or savings to government, businesses or Canadians and the potential impact on the Canadian economy and its international competitiveness;
 - potential impacts on other federal affairs; and
 - degree of interest, contention and support among affected parties and Canadians.⁶
22. The Canadian framework's broader approach facilitates a more comprehensive analysis that outlines how the impacts of the proposed regulation will be distributed across stakeholders and sectors.

European Union (EU)

23. The European Commission has produced Impact Assessment Guidelines to assist Commission staff who are responsible for preparing Impact Assessments.⁷ Although the Guidelines do not prescribe which initiatives require an Impact Assessment, this process is generally applicable to any important policy initiatives of the European Commission which will have far-reaching impacts, and may be of a legislative and non-legislative nature.
24. The European Commission's Impact Assessment Guidelines provide that consideration should be given to the environmental, social and economic impacts of a proposed policy change.
25. In looking at the social impacts of a proposed change, consideration of whether there are any distributional impacts between different social and economic groups and on

⁵ Ministry of Justice, 2010, *Justice Impact Test*. Available at: <http://www.justice.gov.uk/downloads/forms/moj/justice-impact-test-form2010.doc>

⁶ Treasury Board of Canada, *RIAS Writer's Guide*, 2009, 5. Available at: <http://www.tbs-sct.gc.ca/ri-gr/documents/riaswg-grrier/riaswg-grrier-eng.pdf>

⁷ See http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm

existing inequalities is encouraged. Other relevant considerations include whether the proposed change may:

- affect equal access to goods and services;
- affect public institutions and administrations, as they endeavour to implement the proposed measures; and
- affect the individual's access to justice.⁸

Virginia, United States of America

26. The Virginia Criminal Sentencing Commission (the Commission), pursuant to section 30-19.1:4 of the *Code of Virginia*, is required to prepare fiscal impact statements for any proposed legislation that may result in a net increase in periods of imprisonment in state correctional facilities. Fiscal impact statements must include:

- a. Impacts on adult and juvenile offender populations (and any necessary adjustments to sentencing guideline recommendations);
- b. impacts on local and regional jails; and
- c. state and local community corrections programs;

27. The Commission's 2012 annual reports states that 287 impact statements on proposed legislation were made in 2012 which fell in to the following categories:

- a. legislation to increase the felony penalty class of a specified crime;
- b. legislation to increase the penalty class of a specified crime from a misdemeanour to a felony;
- c. legislation to add a new minimum mandatory minimum penalty for a specific crime;
- d. legislation to expand or clarify an existing crime; and
- e. legislation that would create a new criminal offence.⁹

Justice Impact Assessment Policy

28. The Law Council supports a RIA process which considers the broader social and economic consequences of new legislation or regulation, including specific impacts on the justice system, courts and tribunals, the legal assistance sector and the administration of justice generally.

⁸ European Commission, 2009, Impact Assessment Guidelines, 35-36. Available at: http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf

⁹ See Virginia Criminal Sentencing Commission's 2012 Annual Report, p 4. Available at <http://www.vcsc.virginia.gov/2012VCSCAnnualReport.pdf>.

29. Ideally, regulatory proposals impacting on the justice system should entail genuine consultation with key stakeholders, including courts and tribunals, legal assistance sector providers and legal professional peak bodies, at all stages of the regulatory cycle.
 30. The Law Council considers that the RIA models adopted in the United Kingdom, Canada, the European Commission and the US State of Virginia offer examples of a more robust approach to RIA processes.
 31. The Law Council recommends the adoption of a justice impact assessment process in Australia, similar to the Justice Impact Test adopted in the United Kingdom. Further consideration would need to be given to how such a model would operate within Australia's existing RIA process, including:
 - the advantages and disadvantages of introducing Justice Impact Assessments;
 - whether justice impact assessments should be incorporated as a mandatory component of the RIA process or applicable only in those cases where it is anticipated that the proposed regulatory change is likely to have particular implications for the justice system.
 32. Examples of matters a justice impact assessment process might consider include potential impacts of new legislative or regulatory initiatives on:
 - the volume, length and cost of legal inquiries and disputes;
 - the workloads of courts and tribunals;
 - access to, demand for and resourcing of publicly funded legal assistance services;
 - the cost of and demand for private legal services;
 - access to, demand for, resourcing of and the workload of federal courts and tribunals and the ancillary impacts to state and territory courts and tribunals when exercising concurrent jurisdiction; and
 - the criminal and civil justice system as a whole.
 33. Such a process is important recognition of the downstream costs of changes in legislation and policy to the justice system, which faces growing fiscal and demand-side pressures in a number of areas.
 34. Adoption of justice impact assessments will better inform the legislature, improve Ministerial and Departmental decision-making and improve the overall health of the Australian justice system.
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Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Attachment B: State and Territory Regulatory Impact Statement Process

State	RIS Process
NSW	<p>(Better Regulation Office)</p> <p>A Better Regulation Statement is required for significant new and amending regulatory proposals and must be approved by the Better Regulation Office before a proposal is considered by Cabinet or the Executive Council.</p> <p>The <i>Subordinate Legislation Act 1989</i> continues to require the preparation of a Regulatory Impact Statement for all new statutory rules in NSW.</p> <p>Where a new regulation is significant, the Regulatory Impact Statement can be submitted with a Cabinet Minute or Executive Council Minute in the place of a Better Regulation Statement.</p> <p>The Statements should assess costs and benefits, in particular with reference to small businesses. Areas highlighted as requiring consideration:</p> <ul style="list-style-type: none"> • Compliance costs • Economic impacts • Social impacts • Environmental impacts • Competition restrictions <p>Direct and indirect impacts should be considered.</p>
VIC	<p>(Victorian Competition and Efficiency Commission)</p> <p>The <i>Subordinate Legislation Act 1994</i> (VIC) states that a regulatory impact statement must be provided and that consultation is to be undertaken, if outlined in the Guidelines.</p> <p>RIS are mandatory for the making and amendment of subordinate legislation which imposes a significant economic or social burden and to legislative instruments, such as ministerial directions and orders in council. RIS' should consider the financial, economic, environmental and social impact, including administration and compliance costs and the impacts on different groups, and the community as a whole.</p> <p>In cases where a primary legislative proposal (new legislation or amendments to existing legislation) is expected to have potentially significant effects on business and/or competition, a Business Impact Assessment may also need to be completed, in addition to an RIS. Consultation requires consideration of community/interest groups/peak bodies to be consulted, whether the proposed measure imposes any criminal/civil penalties.</p>

	<p>Assessment of RIS' and BIA's are undertaken by the Victorian Competition and Efficiency Commission (VCEC).</p> <p>Subject to the <i>Charter of Human Rights and Responsibilities Act 2006</i>, consideration must also be given to whether the regulatory proposal is compatible with the Charter Act. Statement of compatibility (primary legislative proposals) and a Human Rights Certificate (for subordinate legislation) are required to be completed.</p> <p>http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/VictorianGuidetoRegulationJuly2011/\$File/VictorianGuidetoRegulationJuly2011.pdf</p>
QLD	<p>Regulatory Assessment Statement system incorporates the Regulation Impact Statement (RIS) and Public Benefits Test (PBT)</p> <p>RAS system applies to primary, subordinate and quasi-regulation.</p> <p>A Preliminary Impact Assessment (PIA) must be undertaken to determine where a RAS is required. The PIA must briefly assess the potential economic (including competition), social, environmental and compliance impacts on business, community and government. Where there is likely to be a potentially significant impact, an RAS will be required.</p> <p>The <i>Statutory Instruments Act 1992</i> provides some guidelines regarding the preparation of regulatory impact statements, however these are intended to be directory only and a failure to comply will not invalidate the legislation.</p> <p>http://www.treasury.qld.gov.au/office/knowledge/docs/ras-system-guidelines/ras-system-guidelines.pdf</p>
SA	<p>For the purposes of the RIA process, agencies must consult with stakeholders where a regulatory proposal:</p> <ul style="list-style-type: none"> • will have significant impacts on business, the community or the environment, and/or • where the views of parties/stakeholders who are affected by the proposal will be an important consideration for decision makers or the proponent agency. <p>The RIA should outline the impact on business, consumers, the wider community and the environment</p> <p>http://www.competitivesa.biz/documents/BetterRegulationHandbook_Jan2011.pdf</p>
WA	<p>(Department of Treasury and Finance)</p> <p>RIA Guidelines provide that Government Agencies are required to first complete a Preliminary Impact Assessment, after which they must complete an RIS if it is found that a regulatory proposal is likely to have a 'significant negative' impact on business, consumers or the economy.</p> <p>In WA, there are 2 stages of the RIS process:</p> <ul style="list-style-type: none"> a) Consultation RIS, to provide stakeholders with an early understanding of the policy issues, likely costs and benefits and

	<p>alternatives;</p> <p>b) Decision RIS, using information obtained from consultation, provides a more complete analysis of the policy issue</p> <p>RIS elements should objectively examine the proposal's broader impacts, including social justice implications for individuals and the community as a whole</p> <p>http://www.treasury.wa.gov.au/cms/uploadedFiles/Treasury/Economic_reform/Regulatory_Gatekeeping/ria_guidelines_july_2010.pdf</p> <p>http://www.treasury.wa.gov.au/cms/content.aspx?id=3669</p>
ACT	<p>(Regulation Policy Unit, Department of Treasury)</p> <p>The <i>Legislation Act 2011 (ACT)</i> provides that a regulatory impact statement must be prepared in relation to subordinate law or proposed law which is likely to impose appreciable costs on the community.</p> <p>However a failure to comply does not invalidate the legislation.</p> <p>Reference is made to the need to consider mutual recognition issues e.g. between States and Territories and with New Zealand</p> <p>Relevant factors/impacts to be taken into consideration include:</p> <ul style="list-style-type: none"> • social welfare and equity considerations, including community service obligations; • government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity <p>the costs/benefits to government, including those associated with the development, implementation and review of regulation</p> <p>http://www.treasury.act.gov.au/documents/regulatory_impact_statement_guide.pdf</p>
TAS	<p>Legislation Review Program (Economic Reform Unit of the Department of Treasury and Finance)</p> <p>Applies to the preparation of new primary legislation and/or amending existing primary legislation. Where a proposal may restrict completion or have a significant negative impact on business, an assessment of the costs and benefits is required to establish whether the restriction/impact is in the public benefit.</p> <p>http://www.treasury.tas.gov.au/domino/DTF/DTF.nsf/lookupFiles/LRP-Procedures-Guidelines-Manual.pdf/\$file/LRP-Procedures-Guidelines-Manual.pdf</p>
NT	<p>Regulation Making Framework</p> <p>The <i>Subordinate Legislation Act 1992</i> provides that regulation impact statements must be provided for proposed subordinate legislation which would impose a significant burden, cost or disadvantage on any sector of</p>

	<p>the public. However a failure to comply does not invalidate the legislation.</p> <p>The RMF involves a two-stage process comprising a Preliminary Regulation Impact Statement (PRIS), undertaken at the time approval to draft legislation is requested and, if required, a Regulation Impact Statement (RIS) is prepared as part of the regulation development process. A RIS is required only if the PRIS indicates the proposal will have material economic implications.</p>
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