



Law Council  
OF AUSTRALIA

Office of the President

10 December 2021

Ms Sarah Chidgey  
Chair, Legislation Act Review Panel  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Via email: [LegislationActReview@ag.gov.au](mailto:LegislationActReview@ag.gov.au)

Dear Ms Chidgey

## REVIEW OF THE LEGISLATION ACT 2003 (CTH)

Thank you for the opportunity to make a submission to the above Review, which is conducted under section 59 of the *Legislation Act 2003* (Cth) (**Act**).

The Law Council of Australia wishes to make some brief observations on several matters relevant to the Terms of Reference and raised in the Discussion Paper released as part of the Review. These concern the extent to which the Act has achieved its objectives in paragraph 3(b) (encouraging rule-makers to undertake appropriate consultation before making legislative instruments) and paragraph 3(e) (improved mechanisms for Parliamentary scrutiny of legislative instruments). Additional comments regarding the use of legislative instruments, the standard of explanatory statements, fundamental legislative principles, the quality of drafting, and the operation of the Federal Register of Legislation are also provided and informed by input received from the Queensland Law Society (**QLS**) and the Corporations Committee of the Law Council's Business Law Section (**Corporations Committee**).

### Consultation on proposed legislative instruments

The Law Council sees considerable value in the objective in paragraph 3(b) of the Act to encourage consultation on proposed legislative instruments, and the substantive consultation obligation in section 17. This is important both in terms of gauging and taking account of the views of regulated entities about the impact of the specific rules upon their operations<sup>1</sup> as well as the views of stakeholders (including civil society), who may have broader interests and expertise relevant to the subject-matter of the proposed instrument, as well as its wider implications.<sup>2</sup>

The national legal profession, as represented by the Law Council, often has interests in both of these respects. In particular, the Law Council has strong interests and expertise in scrutinising proposed legislative instruments from the perspective of the rule of law, including their impacts on human rights and civil liberties.<sup>3</sup> However, our experience is that there can be inconsistent practices among individual rule-makers in recognising the desirability of consulting civil society stakeholders with relevant expertise in these broader institutional matters, often creating problems in implementation. Anecdotally, non-consultation tends to occur most frequently with respect to legislative instruments that

---

<sup>1</sup> As recognised in paragraph 17(2)(b) of the Act (persons likely to be affected by the proposed instrument).

<sup>2</sup> As recognised in paragraph 17(2)(a) of the Act (persons with expertise in relevant fields).

<sup>3</sup> See, for example, Law Council of Australia, [Policy Statement—Rule of Law Principles](#), (19 March 2011).

regulate, exclusively or predominately, the performance of functions or exercise of powers by government agencies.

As a related issue, the Law Council supports efforts to improve consultation on instruments which have been explicitly deemed to be non-legislative pursuant to subsection 8(6) of the Act. This is particularly important where the relevant ‘deeming provision’ has been included to implement a deliberate policy position to exclude the instrument from the requirements of the Act, rather than being merely declaratory of the non-legislative character of the instrument. In our experience, this tends to occur relatively frequently in relation to instruments made under national security laws.

Anecdotally, an example of an instrument deemed to be non-legislative that would have benefited from consultation outside government is the [Minister’s Guidelines to the Australian Security Intelligence Organisation](#), made under section 8A of the *Australian Security Intelligence Organisation Act 1979* (Cth). While there was no opportunity for consultation on those guidelines prior to their making, the Law Council raised a number of technical drafting and policy issues in a [pro-active submission](#) after their release in 2020. These issues remain outstanding, and it would have been valuable for them to have been considered in the development of the guidelines in the first instance.

### **Mechanisms for Parliamentary scrutiny of legislative instruments**

In considering the extent to which the Act has achieved the enumerated objective in paragraph 3(e) (establishing improved mechanisms for Parliamentary scrutiny of legislative instruments), the Review is required to consider the reports of the Senate Standing Committee for the Scrutiny of Delegated Legislation inquiry into the exemption of delegated legislation from parliamentary oversight. As a general observation, the Law Council strongly supports the adoption and timely implementation of that Committee’s recommendations.

The matters raised in the [submission of the Law Council](#) of 2 July 2020 to that inquiry remain the Law Council’s position, and the Reviewers are encouraged to have regard to this earlier work. This is particularly the case in relation to the use of sunset clauses and other safeguards with respect to broad delegations of legislative power to manage emergency circumstances which persist for prolonged periods of time, such as the powers conferred under the *Biosecurity Act 2015* (Cth) in the current COVID-19 pandemic.

### **Use of legislative instruments more generally**

The Corporations Committee had advised that certain pieces of legislation it interacts with regularly (for example, Chapter 7 of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Foreign Acquisitions and Takeovers Act 1975* (Cth)) are examples of a poorly structured hierarchy between primary legislation and subordinate materials. Key issues in these areas include:

- inconsistencies in regulatory framework in subordinate legislation as compared to primary legislation that is not properly flagged in the primary legislation;
- a lack of clear signposting for ordinary readers to work through the subordinate legislation;
- multiple layers of inclusions and exclusions in subordinate legislation; and
- disparate and unlinked subordinate instruments relating to the same regulatory issue.

Nevertheless, the Corporations Committee notes that it is important to retain the capacity of agencies to modify for specific situations for the reasons explained in the takeovers context by the High Court in *DB Management*.<sup>4</sup> However, the general policy principles and

---

<sup>4</sup> Australian Securities and Investments Commission v D B Management Pty Ltd & Ors ((2000) 18 ACLC 166.

legislative framework should be reflected in the principal legislation and the subordinate legislation should remain clear and accessible.

In this area, the Law Council is supportive of the important work on legislative hierarchy being done by the Australian Law Reform Commission on the Corporations Act.

### **Standards of explanatory statements**

The Discussion Paper released as part of the Review seeks feedback on the standard of explanatory statements. In this regard the Law Council notes that there are often deficiencies in the explanatory memorandum to legislation, and in many instances the explanation is a verbatim repetition of the provision which provides little assistance when interpreting and applying the legislation. Ideally, these documents should be detailed and include the policy rationale for the provision, reasons why certain language is used and examples and references to other supporting literature.

On a related issue, the Law Council has received feedback suggesting that not all Departments follow a proper consultation processes, including where regulatory impact statements are not always provided. Where a high-level recommendation has been made by the Productivity Commission or a Royal Commission to consider law reform, this does not do away with the need for regulatory impact analysis on the particular proposal. Further, some impact statements use 'boilerplate' language, particularly when addressing the requirements of the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* or Parliamentary Joint Committee on Human Rights' *Guidance Note 2: Offence provisions, civil penalties and human rights*.

### **Reference to fundamental legislative principles**

Paragraph 3(c) states that an object of the Act is 'encouraging high standards in the drafting of legislative instruments and notifiable instruments'. The QLS has suggested that this paragraph could benefit from a reference to a set of fundamental legislative principles within the Act. The QLS specifically cites section 4 of the *Legislative Standards Act 2003* (Qld) which provides that legislation should have sufficient regard to:

- rights and liberties of individuals; and
- the institution of Parliament.

The application and observation of these fundamental legislative principles is then instituted in various stages of the drafting process.<sup>5</sup> The QLS notes that this approach provides an objective and transparent set of standards for legislation, particularly when an explanatory note for new legislation must include the assessment of the relevant bill against the fundamental legislative standards. The QLS has suggested that this approach improves the accessibility of the legislation to the general public, including highlighting any areas of particular concern in the legislation.

### **Quality of drafting**

More generally, the Law Council acknowledges the difficulties that the Office of Parliamentary Counsel face with the volume of legislative demands and the time constraints imposed on it. Unfortunately, the quality of primary legislation and subordinate regulation drafting is not universally high (see for example the above reference to Chapter 7 of the Corporations Act), and the results of obscure or overly complex or convoluted provisions is that they impose significant costs on the end users, create loopholes (the desire for

---

<sup>5</sup> See, for example ss 7, 9 and 23 of the *Legislative Standards Act 2003* (Qld).

elimination of which often mistakenly leads to the shape of the provision in the first place) and adds to ambiguity.

Again, noting that a key objective of the Act is to encourage high standards in the drafting of legislative instruments and notifiable instruments, it is submitted that the measures to achieve this aim at section 16 could more directly reflect the drive towards clear language, recognising that it already requires steps to be taken to promote intelligibility to anticipated users.

### **Federal Register of Legislation**

Section 3 of the Discussion Paper accompanying the Review relates to the adequacy of Federal Register of Legislation (**FRL**). Input received from the QLS has highlighted areas of possible improvement to the FRL, albeit acknowledging the difficulties inherent in hosting and making accessible voluminous pieces of legislation. Those areas suggested of improvement by the QLS are as follows:

- where possible, providing indicative reprints of legislation for bills and legislation that have been passed but not yet commenced or consolidated;
- providing hyperlinks from the table of contents to the relevant sections and a quick return function to the table of contents while this is present in the side bar, it would be beneficial in the actual document, as well as available in pdf versions of the legislation); and
- having notes about amending legislation in the browser version of the particular provision (appearing below the provision), rather than only appearing at the end of the legislation.

Similarly, the Corporations Committee has remarked that FRL generally works well, however for legislation that is significantly modified by legislative instruments (such as the Corporations Act), it would be helpful to have a full and official annotated version or mark-up available also. The Corporations Committee notes that a single consolidated version would have two uses. First, it would make it easier for users to know what the law actually is. Secondly, it would impose great discipline on lawmakers, and discourage the practice of layering modifications that include exceptions, and then exceptions to exceptions, and so on.

The Discussion Paper also asked if there should be a power in the Act for instruments or documents to be removed from the Register. That may be useful to avoid clutter, however a note should be required so there is an audit trail.

### **Further information**

The Law Council would be pleased to engage further with the Review as its work progresses, including participating in consultations on any proposals under consideration or providing supplementary views on specific issues, should the Review wish to obtain the views of the national legal profession. The contact officer is Dr Natasha Molt, Director of Policy ([natasha.molt@lawcouncil.asn.au](mailto:natasha.molt@lawcouncil.asn.au), (02) 6246 3754).

Yours sincerely



**Dr Jacoba Brasch QC**  
**President**