

2 December 2021

Our ref: LP:GA

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Dear Mr Tidball

2021-2022 Review of the *Legislation Act 2003*

Thank you for the opportunity to provide comments for inclusion in the Law Council's submission to the 2021-2022 Review of the *Legislation Act 2003* (the **Act**).

We have considered the discussion paper and related issues and provide the following response.

Section 1, question D

This question asks what can be done to improve performance against the objectives in paragraphs (a) to (g) of section 3 of the Act, which set out the object of the legislation. Paragraph (c) relates to "encouraging high standards in the drafting of legislative instruments and notifiable instruments".

We consider this paragraph should make reference to, or be accompanied by, a set of fundamental legislative principles that are also included in the Act.

In Queensland, section 4 of the *Legislative Standards Act 2003 (LSA (Qld))* sets out the meaning of fundamental legislative principles. Specifically, section 4(2) provides:

- (2) The principles include requiring that legislation has sufficient regard to—
- (a) rights and liberties of individuals; and
 - (b) the institution of Parliament.

The LSA (Qld) then refers back to the fundamental legislative principles in various contexts, including:

- the required content of an explanatory note, including the requirement that an explanatory note must include a brief assessment of the consistency of the legislation with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency (section 23);

- the function of the Office of Parliamentary Counsel, to include providing advice to Ministers, governance entities and members about the application of fundamental legislative principles (section 7); and
- that parliamentary counsel guidelines with respect to the drafting practices that are to be observed by persons in the drafting of exempt instruments may make provision with respect to the application of fundamental legislative principles to exempt instruments (section 9).

We also refer to the ALRC report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129) which considered how Commonwealth laws encroach on a number of freedoms. Chapter 13 of this Report analyses the common law's general disapproval of retrospective laws, but the discussion also highlights that there are limited clear legislative prohibitions on or discouragement of enacting retrospective laws at the federal level.

In addition, the Legislation Handbook produced by the Department of Prime Minister and Cabinet makes a reference to the retrospective application of legislation, but does not refer to any other fundamental legislative principles.

We consider that these are important principles at common law and should be contained in the Act. The benefit of the LSA (Qld) is that it 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. This improves the accessibility of the legislation to the general public, including highlighting any areas of particular concern in the legislation.

Section 3, question B

Section 3 of the discussion paper relates to the Federal Register of Legislation.

Our members have reported some difficulty in using the Federal Register of Legislation (**FRL**) website to locate and access legislation, even reporting that they avoid using the website and instead use other sites. This may be a result of a lack of awareness of all of the website's features and useability.

We are cognisant of the difficulties of hosting and making accessible voluminous pieces of legislation, for example, there is a necessity to have pdf versions separated into volumes due to electronic size of files.

However, we consider there are some key improvements to the way legislation is displayed on the FRL that would enhance both the user-experience of the website and, fundamentally, the ability to examine federal legislation. These are:

- Providing indicative reprints of legislation for bills and legislation that has been passed but not yet commenced or consolidated. For example, there is currently a bill before the Queensland Parliament which will amend the *Evidence Act 1977* (QLD). The Queensland Legislation website provides a web version and pdf version of the act with the amendments.¹
- Providing hyperlinks from the table of contents to the relevant sections and a quick return function to the table of contents. We know this is present in the side bar, but it would be

¹<https://www.legislation.qld.gov.au/view/whole/pdf/speciallabel/bill-2021-049/act-1977-047>

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beneficial in the actual document. This function should also be available in pdf versions of the legislation;

- 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 (see screen shot below about section 4 of the LSA (Qld)).

The web browser version of the Queensland Legislation website provides this information:

The screenshot displays the Queensland Legislation website for the **Legislative Standards Act 1992**, specifically **Part 2, Section 4**. The page features a table of contents on the left, status information, and a 'Point-in-time versions' timeline. The main text of section 4 is shown, detailing conditions for the delegation of legislative power.

Point-in-time versions timeline:

Date	Version
1/12/1994	1
15/09/1995	2
01/12/1996	3
28/02/2002	4
28/03/2003	5
08/12/2003	6
02/11/2009	7
19/05/2011	8
18/08/2011	9
12/11/2012	10
23/09/2013	11

Section 4 text:

(h) does not confer immunity from proceeding or prosecution without adequate justification, and

(i) provides for the compulsory acquisition of property only with fair compensation, and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill—

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation—

(a) is within the power that, under an Act or subordinate legislation (the *authorising law*), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only—

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by an Act.

s 4 amd 1992 No. 68 s 3 sch 1; 1994 No. 83 s 8; 2013 No. 39 s 111 sch 4

Section 4, question B

It is critical that legislation is drafted clearly and in a way that effectively addresses the policy intent and does not produce unintended consequences. Legislation should also be drafted in a way that upholds fundamental legislative principles as discussed above.

Legislation which is evidence-based and which follows extensive consultation will ordinarily be of a higher standard than reactive, specific instance legislation.

We also consider that there are benefits in developing 'model provisions' in some contexts, where the drafting has been carefully considered, provided that the drafting is also regularly reviewed to ensure that it is appropriate. This would also have the benefit of consistency across legislation.

In addition, we consider there are often deficiencies in the explanatory memorandum to legislation. In many instances, the explanation is a verbatim repetition of the provision which is of no use and provides no assistance when interpreting and applying the legislation. 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.

Section 5, question F

We consider that there should be a different sunset period for certain types of instrument, particularly instruments made under a Henry VIII clause. We consider that generally, an initial 12 month period would be appropriate, with the option to end the legislation earlier if circumstances change.

In this regard, we have highlighted the risks of sunset clauses a number of times through the pandemic. Generally, our view has been that such extraordinary powers should be limited in their application both in time and scope. As the landscape of the pandemic was regularly shifting, we recommended that the extraordinary legislation should only be extended for 6 months to ensure that there was parliamentary review of the powers given the period of time the powers had already been in place.

Section 6, questions A and B – exemptions from operation of the Act

QLS provided the LCA with a submission on the exemption of delegated legislation from parliamentary oversight on 25 June 2020. We enclose a copy of the submission for your reference. The submission responds to a number of the issues raised in the Discussion Paper.


Section 8, question A

As stated above, consultation is critical to achieving the policy objectives of legislation. Consultation with affected stakeholders helps to achieve the following benefits:

- The legislation as drafted is more likely to achieve its objectives;
- Stakeholders are likely to identify unintended consequences;
- Affected stakeholders can prepare for the impact of the proposed changes and are more likely to have 'buy-in' to the policy intent of the legislation.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer
President