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Good afternoon

Please accept the following submission in response to the issues raised in the subject consultation paper. This response is based on experience as a legislation practitioner working within a small team in the Department of Defence.

A Practitioners Perspective

In response to the subject Consultation Paper of May 2017 by the Attorney-General's Department and addressing specific questions, where applicable, raised in the Consultation Paper:

The sunseting framework

Q1-The purpose as prescribed by section 49 of the *Legislation Act 1903* (the Act) appears to have been achieved. Legislative instruments are being assessed, considered and reviewed for relevance and appropriateness. A number of various and differing approaches are undertaken within agencies to ensure instruments are up to date and needed.

Q2- The prime concern from an agencies perspective is being able to allocate sufficient and appropriate resources to undertake a review and fully consider the risks in deciding whether a sunseting instrument can lapse or be remade. Dedicating limited resources (not just to agencies but also to external drafting resources such as the Office of Parliamentary Counsel (OPC)) to renewal processes, especially for regulations, can be a constant challenge.

Q3 - Accordingly with these competing agency resources the current sunseting period of 10 years would appear appropriate with any lesser period likely to cause unnecessary work volume and not improve the quality. The remaking 'same in substance' could become the normal instruction as a default position without any real analysis or fitness for purpose review if the sunseting period was reduced to under 10 years.

Agency processes

Q4- Notwithstanding the agency challenges of obtaining dedicated but limited resources, the full effect of the 'fitness for purpose' reviews on agency processes may be too early to reach a clear conclusion.

Q5- Not sure if having overly prescriptive processes and more guidance would assist or hinder the agencies in the sunseting review. There are currently a number of documents including "The Guide to Managing Sunseting of Legislative Instruments" by the Attorney-General's Department (AGD) and the "Instruments Handbook" by OPC readily available, there is also access and advice/guidance available freely from these two areas and there are a number of training/educational seminars available for attendance by agencies (acknowledging the geographical restraints from regions).

Q6- Sunseting communications to agencies is currently very good (the 18 month window, direct communication from OPC to agency heads, seminar opportunities, deferral procedures from AGD, OPC Instrument adviser prompts etc). Internal distribution of this communication within an agency to ensure there is identified, timely and appropriate engagement to a policy/subject matter area may be difficult and varying.

Q7- Would strongly avoid adding further legislative layers or overly prescriptive processes in any whole of government policy. The sunseting framework is still young and is a challenge for agencies with limited resources. With time and experience in conducting reviews including the identification of relevant stakeholders, most agencies will adapt and find what works for them and this may be quite unique or similar standards to other areas or a contingent approach.

Deferral of sunseting

Q8- Q16- The deferral of sunseting under section 51 of the Act is an essential contingency for specific situations. It usually does not remove the resources and work required to remake an instrument but provides an extension of time. Under section 51(1) (b) (ii) of the Act, essential reasons could include the dissolution of the House of Representatives and this should remain as a realistic option especially where there is a change of Government (policy change and approvals) or where there is limited Minister (decision maker) availability during caretaker period. Prorogation of Parliament is a very unlikely justification to extend deferral due to its limited time affect. Other examples:

A possible time extension of an instrument for a temporary period from its current sunseting date and then lapse the instrument at a later time (as it will not be remade), but it needs to remain law during this period;

A critical review which is occurring and continuing after the sunseting date and the results of this review will affect the fitness for purpose review;

And other 'unforeseen' situations.

At this stage my agency has not utilised or considered the deferral option due mainly to the uncertainty of whether deferral should be a definite consideration or a contingent emergency. In considering any changes to section 51 of the Act the intent of deferrals should be emphasised, that is are they part of the instruments fitness for purpose review or a contingent only consideration and should be rarely used and only in essential circumstances. To extend a deferral beyond 6-12 months (April-October) should be amended if justifiable essential circumstances require longer than 12 months. This deferral is currently a 'once only' and this should remain as such to ensure the instrument is kept up to date and needed, and this mechanism not used as a continual deferral /avoidance mechanism. Based on this intent of deferrals and the potential for a higher volume of requests, the power to grant deferrals could be delegable to ensure the tasks are manageable and there is administrative timeliness. The deferrals should remain subject to tabling.

Alignment of sunseting to facilitate thematic review

Q17-Q22- The alignment of two or more instruments under section 51A of the Act. A suggestion is that the 'alignment' be clarified or removed so that two or more existing instruments with the same sunset date can be eligible where subject to a single review. The change is not requiring an alignment as they have the same sunset date but to defer their sunseting by up to five years or until the review is finalised.

Tabling

Q23- The formal notification from OPC of the sunset list at 18 months is an excellent formal trigger for an agency to respond and engage with their sunseting tasks. It acts as an administrative reminder for agencies to identify policy areas, prepare formal internal communications and commence the fitness for purpose, other reviews and risk assessments. The tabling of the sunseting list is seen as a consequential legislative step.

Parliamentary Rollover

Q24-Q26- No comment

Exemptions from sunseting

Q27 and Q28- The current sunseting exemption provisions covered mainly in the *Legislation (Exemptions and Other Matters) Regulation 2015* and in association with the repeal options available under section 48 of the Act can ensure that spent or redundant legislative instruments (which have exemption) can be repealed. If there are a number of sunset exempt instruments that are obsolete or redundant they can be identified and put forward for repeal as a separate process to formal sunseting. The administrative burden of this repeal process is acknowledged however the number of affected instruments may not be significant in contrast to the remaking of instrument tasks.

Q29-Q34- No comment

Notifiable Instruments

Q35- This agency has used the category of notifiable instruments for public accessibility, for example to replace Gazettal, and as a step short of a legislative instrument. Noting the potential for accumulation on the Federal Register of obsolete or redundant instruments it is understood that some review mechanism needs to be in place. A proper housekeeping review by the administering agency to remove those that are out of date is essential and rather than under the sunseting regime a preferable approach would be to have a repeal process for notifiable instruments similar to the section 48 of the Act repeal for legislative instruments. This would encourage the good house keeping review and achieve the outcome.

Q36- A simple step and process to remove out dated notifiable instruments is needed. This could include a repeal process as provided in the above response or a new mechanism in the Act which covers the removal and repeal of notifiable instruments from the Federal Register in a simple manner.

Federal Register of Legislation (FRL)

Q37- The FRL provides extensive information useful to agency users. In addition to the formal sunset listing within the next 18 months individual portfolios can extract sunset dates for other instruments beyond this time. At this stage the information available appears adequate.

Automatic repeal

Q38-Q39- No comment

Summary

The sunseting framework has been in place for over two years and as a concept has been acknowledged as an effective 'house keeping' approach to ensure legislative instruments are up to date and relevant. This sunset review is primarily termed to consider the operation as set in the Act.

My response is as a practitioner and expresses the challenges and practical experiences from these early reviews and remakes. The common theme in this submission is that agencies are requiring dedicated and engaged resourcing for sunseting projects and to identify specific internal agency areas with available people, expertise and time is the great challenge and obstacle to achieving the remake before the instrument sunsets.

It is hoped that any future changes to the sunseting framework takes these agency issues into consideration to ensure that the review and remaking process value adds and provides a continuous improvement model. It would be disappointing to see the sunseting project perceived as a 'too hard' chore with insufficient time and people to deliver its outcomes.

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6 July 2017

**Directorate of Legislation
Department of Defence**

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