



**Australian Government**

**Office of Parliamentary Counsel**

Mr Iain Anderson  
Chair  
c/- Attorney-General's Department  
4 National Circuit  
Barton ACT 2600

## **OPC submission to Sunsetting review**

1 Thank you for the opportunity to provide comments on the Review of the Operation of the Sunsetting Provisions in the *Legislation Act 2003*. This submission is made on behalf of the Office of Parliamentary Counsel (*OPC*).

2 OPC has a key role in the sunsetting regime. In addition to drafting many of the instruments that are subject to sunsetting, OPC publishes all legislative instruments on the Federal Register of Legislation (the *Register*), provides information to agencies and to Parliament about which instruments are approaching their sunsetting date and provides assistance and advice to agencies in managing the sunsetting processes. OPC also took the lead role in the preparation of the bulk repeal instruments that assisted the sunsetting process.

3 The following are OPC's responses to the questions in the discussion paper issued by the Review.

### **1. To what extent has the purpose of the sunsetting framework been realised, and is that purpose still appropriate?**

4 As noted in the discussion paper, the purpose of the sunsetting framework is that legislative instruments are kept up-to-date and only remain in force for so long as they are needed.

5 In OPC's view, the sunsetting framework has been successful in achieving this purpose. In particular, the framework has supported the substantial clean-up of a vast number of instruments that had been in place for many years. Indeed, based on the statistics included in the Consultation Paper, 875 of 2,024 (43%) of instruments have been repealed as a result of sunsetting of which 413 (20%) were allowed to sunset entirely.

6 OPC's view is that the sunsetting repeal process has made the Register easier to use by minimising the number of irrelevant or out-of-date instruments that are displayed as "In force". (When an instrument is repealed it is still accessible on the Register, but is displayed as "No longer in force".)

7 OPC considers that retaining the sunsetting framework into the future will continue to assist in the process of providing better access to law by ensuring that irrelevant and out-of-date instruments are regularly repealed, and no longer displayed as "In force" on the Register.

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28 Sydney Avenue Forrest ACT 2603

Locked Bag 30 Kingston ACT 2604 • Telephone (02) 6120 1400 • Fax (02) 6120 1403 • ABN 41 425 630 817

[www.opc.gov.au](http://www.opc.gov.au)

**2. Do you have any other issues or concerns about the sunseting framework?**

8 OPC does not have any issues or concerns that are not covered by later questions.

**3. Is the current sunseting period of 10 years appropriate?**

9 OPC considers that the current 10 year period is appropriate.

10 It ensures that the workload involved in reviewing instruments is not overwhelming for those with responsibility for doing this. This, in OPC's view, means it is more likely that a substantive review will be undertaken when it comes time to review instruments.

**4. What effect has the sunseting framework had on departmental and agency processes for conducting fit for purpose reviews of legislative instruments?**

11 OPC is not in a position to comment on the effect of the sunseting framework on departmental and agency processes for conducting fit for purpose reviews.

12 However, while on the one hand, the indication from instructions received by OPC from agencies to rewrite sunseting instruments suggests that agencies are conducting fit for purpose reviews of legislative instruments, on the other hand, it appears that the depth of these reviews varies.

13 It is clear that some agencies have conducted detailed analysis, planning and consultation on some legislative instruments before approaching OPC with their drafting instructions.

14 In other cases, it appears that the fit for purpose review has been done at the instrument level, rather than at the provision level (ie determining whether the instrument is still required but not then analysing individual provisions to see if they are still appropriate). In such cases, OPC often initiates further changes identified through the drafting process (such as in relation to out of date cross-references to repealed or restructured legislation, or power issues).

**5. Is there a need to develop whole-of-government policy guidance on processes for managing sunseting legislation? If so, what matters should be covered by such a policy?**

15 OPC notes that there are a wide range of agencies and rule-makers who are covered by the sunseting process. OPC considers that processes that may be suitable for some agencies and rule makers would be less suitable for others. Therefore, OPC considers that there should not be a whole-of-government policy on these processes.

16 OPC notes that AGD and OPC provide guidance and assistance to agencies and rule makers. This includes material that is in the *Instruments Handbook* that is published by, and regularly updated by, OPC and the *Guide to Managing Sunseting of Legislative Instruments* published by AGD. OPC considers that this kind of guidance is more appropriate than a whole-of-government policy on processes.

**6. Is there a need to clarify the roles and responsibilities of different Commonwealth departments and agencies in relation to the sunseting framework?**

17 OPC considers that the sunseting process has been working smoothly and that there have not been issues about the roles and responsibilities of different Commonwealth departments and agencies.

18 Consequently, OPC does not consider that there is any need to clarify these roles and responsibilities.

**7. Is there a need to develop policy or legislative guidance on undertaking reviews of sunseting legislative instruments?**

19 OPC notes that there are a wide range of agencies and rule-makers who undertake reviews of instruments. There is also a huge variety of instruments and they are of vastly varying size and complexity. OPC considers that approaches that may be suitable for some agencies and instruments would be less suitable for others.

20 OPC notes that AGD and OPC provide guidance and assistance to agencies and rule makers. This includes material that is in the *Instruments Handbook* and the *Guide to Managing Sunseting of Legislative Instruments*.

21 OPC considers that the current level of guidance is largely sufficient although OPC is considering whether something like a checklist of matters to consider during a fit for purpose review would be of assistance. The checklist could be included in the *Instruments Handbook*.

22 OPC considers that legislative guidance would be likely to be counter-productive as it would be likely to result in rule-makers only doing what is necessary to comply with the legislative requirements.

**8. What (if anything) could and should be done to streamline the deferral process?**

23 OPC is not involved in the deferral process and does not have a view on this matter.

**9. What (if any) changes should be made to the criteria in section 51 to provide greater clarity and ensure closer alignment with the purposes of the sunseting framework?**

24 OPC notes that only 21 deferrals (covering 53 instruments) have been made by the Attorney-General. OPC is also not aware of other cases where it would seem that a deferral should have been available but was not.

25 Consequently, OPC considers that the criteria in section 51 for obtaining a deferral strike an appropriate balance and do not require changes.

**10. Should the Attorney-General have the power to defer the sunseting of an instrument for more than 12 months?**

26 OPC's view is that there may be a very small number of cases in which a deferral of more than one year would be appropriate. However, in these cases OPC considers it would be more appropriate for an additional deferral to be granted. There should be a limit of 2 or 3 on the number of deferrals for an instrument.

**11. To what extent is the prorogation of Parliament an appropriate criterion to justify the deferral of the sunseting of an instrument?**

27 Until the prorogation of Parliament in 2016, it was probably assumed that prorogation went hand-in-hand with the calling of an election. However, the prorogation last year reminded people that prorogation can be used outside this process.

28 In this sort of case, prorogation probably isn't an appropriate trigger to defer sunseting because there is no reason why, when Parliament resumes, the sunseting process could not be continued with.

29 However, OPC does not believe the existing provision providing for deferral as a result of prorogation would apply in this sort of case because of the reference in subparagraph 51(1)(b)(ii) to "before a new government is formed".

30 On balance, OPC does not consider that the provision needs to be amended.

**12. Should section 51 be amended to replace all references to 'cease to have effect' with 'repealed'?**

31 OPC's drafting practice is to use the term "repeal" to indicate that a law or provision should be removed from the statute book. OPC believes that the reference to "cease to be in force" in subparagraph 51(1)(b)(i) should remain so that the Attorney-General can continue to issue deferral certificates in cases where an instrument will either be repealed or otherwise cease to be in force in the following 12 months. However, OPC supports replacing the reference to "cease to be in force" in paragraph 51(1)(c) with "be repealed".

32 OPC does not believe that leaving the reference to "cease to be in force" in subparagraph 51(1)(b)(i) undermines with the policy of ensuring that redundant instruments are repealed, because the instrument would be repealed as a result of sunseting after the end of the deferral period. Allowing the Attorney-General to give the certificate in this case ensures that the instrument is not required to be remade for a brief period before it ceases to have effect.

**13. To what extent is the level of discretion available to the Attorney-General in granting deferrals of sunseting appropriate?**

33 OPC considers that the level of discretion available to the Attorney-General is appropriate.

34 As noted above, only 21 deferrals (covering 53 instruments) have been made by the Attorney-General. OPC is also not aware of other cases where it would seem that a deferral should have been available but was not.

35 OPC considers that an expansion of the Attorney-General's discretion would be likely to lead to less meritorious claims for exemptions being brought forward.

**14. Should the power to grant deferrals of sunseting be delegable?**

36 OPC considers the deferral of sunseting to be an important issue.

37 OPC notes that there have only been 21 deferrals made by the Attorney-General. Consequently, there does not appear to be a substantial administrative burden associated with the Attorney-General personally granting the deferrals.

38 Consequently, OPC would not support making the power to grant deferrals of sunseting be delegable.

**15. Is the tabling requirement for certificates of deferral appropriate?**

39 OPC considers the deferral of sunseting to be an important issue. OPC considers that it is appropriate that Parliament is advised when this occurs.

40 Paragraph 51(2)(b) requires a copy of the certificate to be laid before each House of the Parliament not later than 6 sitting days of that House after the issue of the certificate. However, as the certificate is a legislative instrument, the certificate is separately required under subsection 38(1) to be tabled within 6 sitting days of the certificate being registered. Given the requirement for the certificate to be tabled as a legislative instrument, OPC recommends that paragraph 51(2)(b) be repealed.

**16. Would it be appropriate for more than one deferral of sunseting to be granted for the same instrument?**

41 OPC's view is that there may be a very small number of cases in which a deferral of more than one year would be appropriate. However, experience in other areas makes OPC wary of an arrangement under which rolling deferrals could be issued.

42 If it is considered that more than one deferral should be allowed under section 51, OPC considers that this should be limited to 2 or possibly 3 deferrals in total.

**17. To what extent has section 51A encouraged thematic reviews of related legislative instruments? What factors, if any, have limited the achievement of this purpose?**

43 OPC notes that although only 7 thematic reviews have been commenced, these have covered a total of over 120 instruments. OPC considers that this demonstrates that the thematic review provisions are useful even if only in a limited number of cases.

44 OPC is not aware of factors that have limited the achievement of the purpose. This is an issue on which agencies would be in a better position to comment.

**18. Is it appropriate for section 51A declarations to be subject to disallowance?**

45 The thematic reviews may involve the deferral of sunseting for particular instruments for up to 5 years. OPC considers that this is an important issue and that Parliamentary oversight is appropriate.

46 Therefore, OPC considers that the section 51A declarations should continue to be subject to disallowance.

**19. To what extent would including a requirement for a statement of reasons, similar to the requirement for certificates of deferral under paragraph 51(2)(a), better achieve the overarching purposes of the sunseting framework?**

47 OPC agrees that the inconsistency between section 51 and 51A instruments in relation to whether a statement of reasons is required seems anomalous. OPC suggests that the explanatory statement is the most appropriate place to put a statement of reasons. OPC suggests amending both sections 51 and 51A to include a requirement for a statement of reasons in the explanatory statement for the instrument.

**20. Should section 51A allow the Attorney-General to align the sunseting dates of instruments that have been the subject of a completed review, in order to facilitate the implementation of the findings of that review?**

48 OPC notes the comments in the discussion paper about section 51A being unable to be used where the review has occurred but further time is required to implement the recommendations.

49 OPC considers that this situation would be one in which it would be appropriate for section 51A to be applied.

50 Consequently, OPC recommends that section 51A be amended to ensure that it can be used where the review has been completed.

**21. Is there a need for more policy guidance on the types of thematic review that may be appropriate for the purposes of section 51A?**

51 OPC notes that a relatively small number of thematic reviews have been commenced.

52 OPC notes that AGD and OPC provide guidance and assistance to agencies and rule makers. This includes material that is in the *Instruments Handbook* and the *Guide to Managing Sunseting of Legislative Instruments*.

53 OPC considers that the current level of guidance is sufficient.

**22. Should the Attorney-General have the power to 'align', to a later date, the sunseting dates of instruments that already have the same scheduled sunseting date? To what extent would this support the purpose of section 51A?**

54 This question is really whether a delay in sunseting should be permitted simply to allow a review to occur. On one view, there is sufficient notice that the sunseting will occur (as it only happens 10 years after the instruments were made) and allowing this would enable agencies and rule makers to extend the sunset period to 15 years.

55 OPC considers that making the change to allow such an extension would confuse the purpose of section 51A and change it from a mechanism to align instruments to a mechanism to extend the sunseting period whenever there was a review. If this was done, the obvious next issue would be why it should not apply where there was only one instrument covered by the review.

56 Consequently, OPC would not support this change.

**23. How effectively does tabling of the sunseting lists support departments and agencies in managing the sunseting of the legislative instruments for which they are responsible?**

57 OPC considers that agencies other than OPC would be in a better position to comment on this matter.

58 However, OPC notes that the compilation and publication of the lists has been very useful in ensuring that the information contained in them is correct. This is an important step in the sunseting process and OPC supports the continuation of the current process.

**24. To what extent is parliamentary roll over still a necessary and appropriate safeguard for preventing the sunseting of a legislative instrument?**

59 OPC's view is that it is important that there be some process available to Parliament to ensure that legislative instruments do not sunset in situations where that would not be supported by both Houses of the Parliament.

60 Therefore, OPC considers that it is important that this provision be retained even though, to date, it has not been used.

61 However, OPC considers that this provision would be an inappropriate method for the Government to use with instruments that would otherwise sunset. The Government should go through the process of reviewing and remaking instruments that are to sunset.

62 Therefore, OPC supports the current strong policy that the provision is not to be used by the Government to avoid the sunseting of instruments or to obtain an extension of time before sunseting occurs.

**25. Is it appropriate that the availability of parliamentary roll over of a legislative instrument relies upon that instrument's**

***appearance in a sunseting list or a certificate of deferral, and that there is a 6-month time limit on moving such a resolution?***

63 OPC notes that the First Parliamentary Counsel is under a statutory obligation to table these lists. Implicitly, the obligation is that the lists must be correct. OPC considers that this is the most straightforward approach that can be adopted.

64 OPC notes that the provision has not been used in a way that is contrary to its historical purpose.

65 Therefore, OPC recommends that the section not be amended.

***26. Should Parliament be able to roll over legislative instruments that have had their original sunseting dates changed by a declaration of alignment under section 51A?***

66 OPC does not think that Parliament should roll over legislative instruments that have their original sunseting dates changed by a declaration of alignment under section 51A. OPC believes that this would add unnecessary complexity to section 53.

***27. To what extent does the scope of the current sunseting exemptions achieve the broader objectives of the sunseting framework?***

67 OPC considers that it is imperative for the sunseting framework to have appropriate exemptions. This ensures that the framework can achieve its goals while still providing certainty where necessary and ensuring that the workload involved is not excessive.

68 In general, OPC considers that the current range of sunseting exemptions are appropriate.

69 While the scope of some of the class exemptions may not be certain in some borderline cases, OPC considers that they are a better approach than trying to list every instrument that would be exempt under them.

***28. Is there an appropriate balance between the operation of the exemptions provisions and the administrative burden for the responsible agency?***

70 OPC is unable to comment on this issue.

***29. To what extent is section 54 still appropriate, having regard to the broader objectives of the sunseting framework?***

71 OPC considers that the broader classes covered by subsection 54(1) are appropriate. OPC also considers that the mechanism of including other exemptions in regulations is also appropriate.

**30. Should subsection 54(1) be amended to include intergovernmental bodies or schemes involving the Territories, not just the States?**

72 OPC does not believe that there is a legal reason for subsection 54(1) to include a reference to Territories. Cooperative schemes are generally entered into between the Commonwealth and States when there is insufficient constitutional power for the Commonwealth to enact the scheme alone. OPC is not aware of a cooperative scheme that the Commonwealth has entered into with the Territories and not the States because the Commonwealth can rely on the Territories power in section 122 of the Constitution in relation to Territories. On the other hand, the *Gene Technology Act 2000* is an example of a scheme that is merely between the Commonwealth and the States. Cooperative schemes that involve the Commonwealth, the States and the Territories would, in OPC's view, be covered by the reference to "the Commonwealth and one or more States".

73 However, OPC acknowledges that subsection 54(1) may be confusing for readers. If it were thought desirable for subsection 54(1) to refer to Territories it should refer to "one or more States or Territories". If such a change is made, a corresponding change should also be made to paragraph 44(1)(a).

**31. Should subsection 54(1) be moved from the Legislation Act and inserted into LEOMR?**

74 While OPC's general preference would be for all of the exemptions to be in the one location (in the LEOMR), it is noted that the exemption deals with the relationship between the States and the Commonwealth. Therefore, it may be considered that it is more appropriate for this to be in the Act.

75 OPC does not have a concluded view on this matter.

**32. Are the five policy criteria still appropriate and aligned to the overall objectives of the sunseting framework?**

76 OPC considers that the criteria are basically appropriate. However, there are two changes that OPC suggests should be made.

77 The first is that OPC is aware of the issue that has arisen for instruments of the type that are effectively frozen 'closed class' schemes. For example, there are instruments under a number of schemes administered by the Department of Veterans' Affairs that have closed to new members but that remain in place to provide benefits to existing recipients. These schemes pay benefits for the life of both the primary beneficiary and their spouse, and sometimes also their children, so can continue in existence for many decades. Generally, these schemes are subject to little change once they only apply to a closed class and therefore regular reviews of the instruments under them are inappropriate.

78 OPC considers that instruments under these schemes should be exempt from sunseting.

79 While a class could be introduced into the LEOMR to cover these schemes, OPC considers that it would be more appropriate for these to be dealt with by a specific exclusion

for each scheme. The exclusion could be put in place at the time that the class becomes closed.

80 The second is to provide an exemption where instruments are:

- (a) very large; and
- (b) subject to regular amendment; and
- (c) subject to regular review.

81 There is a very substantial amount of work required by both the makers of instruments and the users of large instruments when instruments are remade. Even if the instrument is remade in the same form, there is the need for extensive transitional provisions.

82 The cost of this of this will, in OPC's view, outweigh the benefits in cases where the instrument is regularly amended and also subject to regular review. Both of these processes will ensure that the major objective of sunseting (to ensure that instruments are up-to-date) will be achieved without the need for the instrument to actually sunset and be remade.

83 OPC recommends that the policy be updated to add 2 additional criteria to cover these matters.

**33. *Should the criteria for granting specific exemptions from sunseting be set out in legislation, rather than policy?***

84 OPC's view is that it is preferable for the criteria to remain in policy rather than in legislation. As the instruments providing the individual exemptions are disallowable, they are subject to Parliamentary scrutiny. So far, no instrument providing an exemption has been disallowed (although a disallowance motion has been given in relation to the exemption of the *Migration Regulations 1994* which has not yet been resolved).

**34. *To what extent are the classes of instruments set out in section 11 of the LEOMR still appropriate, having regard to the broader objectives of the sunseting framework?***

85 OPC considers that the classes set out in section 11 are still appropriate.

86 As mentioned above in response to question 32, OPC is aware of the issue that has arisen for instruments of the type that are effectively frozen 'closed class' schemes. Generally, these schemes are subject to little change once they only apply to a closed class and therefore regular reviews of the instruments under them are inappropriate.

87 OPC considers that instruments under these schemes should be exempt from sunseting.

88 However, while a class could be introduced to cover these schemes, OPC considers that it would be more appropriate for these to be dealt with by a specific exclusion for each scheme. The exclusion could be put in place at the time that the class becomes closed.

**35. Should notifiable instruments be subject to the sunseting framework, or alternatively a modified automatic repeal or bulk repeal process?**

89 OPC's view is that the sunseting framework should not apply to notifiable instruments at this stage.

90 Notifiable instruments that amend or repeal other instruments are already subject to the same automatic repeal and bulk repeal processes under sections 48A and 48C as legislative instruments. OPC considers that these arrangements work well and that there are benefits in the same process applying to both legislative and notifiable instruments.

91 However, OPC is open to further considering this issue at a future time when it becomes clearer how many notifiable instruments are on the Register.

**36. Is there a need for a formal, established mechanism by which notifiable instruments can be amended, replaced, repealed, superseded or simply removed from the Notifiable Instruments Register?**

92 Subsection 33(3) of the *Acts Interpretation Act 1901* applies to notifiable instruments in the same way as that subsection applies to legislative instruments meaning that notifiable instruments may be able to amended or repealed as a result of that subsection. In particular cases, provisions in enabling legislation that provide for a notifiable instrument might also provide an explicit power for the notifiable instrument to be varied or revoked instead of, or in addition to, the power in that subsection. As also mentioned above, automatic repeal applies to notifiable instruments under sections 48A and 48C of the *Legislation Act 2003*. In addition, notifiable instruments can be repealed under section 48E, or amended under section 61, of the *Legislation Act 2003*. OPC does not believe that any further power to amend or repeal notifiable instruments is required.

93 OPC also notes that no instrument is ever entirely removed from the Register. This is because the Register is a repository of historical information as well as current information. For this reason, notifiable instruments, like legislative instruments, are not removed from the Register but cease to be displayed in the "In force" part of the Register and are instead displayed in the "No longer in force" part. It is OPC's view that notifiable instruments should continue to operate in this way.

**37. How useful is the sunseting information provided on the FRL? What could be done to enhance this information?**

94 OPC notes that we are in the process of redeveloping the Register. Consequently, OPC is interested in any suggestions that could be incorporated as part of that redevelopment.

**38. To what extent are the automatic repeal provisions appropriate?**

95 OPC suggests a change to the automatic repeal provisions as discussed under question 39.

**39. Should Division 1 of Part 3 of Chapter 3 be amended to increase the time between the making of a purely amending or commencement instrument and its automatic repeal?**

96 The sunseting framework is also assisted by the automatic repeal of solely amending or commencement instruments. OPC notes that this also applies to solely repealing instruments.

97 While OPC considers that the automatic repeal system is beneficial, OPC considers that disallowable legislative instruments are repealed too soon. At the moment, they are repealed immediately after they have fully commenced. In most cases, this is before the end of the disallowance period. OPC is aware that this has caused confusion for a range of people, and in particular for members of the Parliament when voting to disallow an amending instrument that has already been repealed.

98 OPC recommends that the timing of the automatic repeal of a disallowable legislative instrument be the start of the day after the later of the following events, unless the instrument has been repealed earlier under subsection 38(3) or 42(1) or (2):

- (a) the end of the period during which the instrument or a provision of the instrument may be disallowed in either House of the Parliament;
- (b) whichever of the following is applicable:
  - (i) the commencement of the instrument or of the last of the instrument's provisions to commence;
  - (ii) if the last of the instrument's provisions that have not commenced are repealed, or cannot commence because of the occurrence of an event—the repeal of those provisions or the occurrence of that event.

99 OPC would also recommend that the references to “cease to have effect” in subsections 38(3), and 42(1) and (2) are also replaced with references to “are repealed”.

100 OPC notes that subparagraph 45(2)(a)(ii) and subsections 48A(4) and 48C(4) may also need to be repealed if this approach is adopted.

101 OPC recommends that no changes are made to when notifiable instruments or non-disallowable legislative instruments are automatically repealed.

102 If this recommendation is adopted, OPC would also recommend that the *Acts Interpretation Act 1901* be amended to clarify the meaning of “sitting day”.

103 The concept of sitting day is used in the provisions related to disallowance (as well as in a range of other legislation). It has become clear recently that there is some doubt about how to calculate sitting days in cases where a House starts sitting on a day and does not adjourn until a later day. This usually happens when a Thursday sitting “continues” into a Friday.

104 OPC considers that a simple definition could clarify this matter and put it beyond doubt. Any amendment would need to be developed in consultation with both Houses of Parliament to ensure that it operated as intended.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'ML', with a long horizontal stroke extending to the right.

Meredith Leigh  
Acting First Parliamentary Counsel  
27 June 2017

