



STANDING COMMITTEE FOR THE SCRUTINY OF BILLS
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES
PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

4 August 2017

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

Dear Mr Anderson

Sunsetting review

Thank you for the invitation to make a submission to the Review of the Operation of the Sunsetting Provisions of the *Legislation Act 2003* (Legislation Act). This submission is made on behalf of the Senate Standing Committee on Regulations and Ordinances; the Senate Standing Committee for the Scrutiny of Bills; and the Parliamentary Joint Committee on Human Rights (the committees).

The committees have considered the questions in the consultation paper and welcome the opportunity to provide the following comments and responses to select questions.

We wish to acknowledge the significant work of ministers, instrument-makers, departments and agencies in managing the sunsetting process in the lead up to, and since, its commencement in 2015.

Parliamentary oversight

The committees consider that the current 10 year sunsetting framework provides an essential opportunity for Parliament to ensure the content of legislative instruments (instruments) is current and to ensure Parliament maintains effective and regular oversight of the legislative power it has delegated (including the opportunity to consider disallowance of instruments that have been remade due to sunsetting).

Exemptions

The committees accept that in some circumstances it is appropriate for an instrument to be exempt from sunsetting. Where an exemption from sunsetting is proposed, we are concerned about the potential implications of any such exemption for parliamentary oversight and may query the appropriateness of such an exemption.

Our preference is that where it is proposed to exempt a class of instruments from sunsetting (and disallowance) the exemption should be contained in primary rather than delegated legislation.

Legislation (Exemption and Other Matters) Regulation 2015

The Legislation (Exemption and Other Matters) Regulation 2015 (LEOMR) and instruments amending it are disallowable legislative instruments and therefore subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances (R&O Committee).¹

The committees' concerns with respect to the creation of new exemptions to the sunseting regime are centred on ensuring that the Parliament maintains effective and regular oversight of instruments. Our preference is for exemptions to sunseting in the LEOMR to be prescribed as narrowly as possible, by exempting a specific instrument (as in section 12 of LEOMR) as opposed to classes of instruments (as in section 11 of LEOMR).

We are concerned that the current explanatory statement (ES) to the LEOMR may not provide sufficient information in relation to the existing classes of legislative instruments that are not subject to sunseting under section 11.² Without sufficient detail in the ES, it can be difficult to interpret the extent of the classes of instruments that are exempt from sunseting. Our committees therefore recommend that further guidance be given in the ES as to the classes of instruments to which section 11 applies.

Legislation Act 2003

Section 54 of the Legislation Act exempts from sunseting instruments that deal with the relationship between the States and the Commonwealth. The consultation paper queries whether this section should be moved from the Legislation Act and inserted into the LEOMR (question 31). In order to ensure that legislative power is delegated to the executive appropriately, we recommend that significant matters such as these continue to be included in primary legislation (noting the committees' above preference that exemptions of classes of instruments from sunseting be included in the primary legislation).

Policy or legislative guidance

The general scrutiny position of the committees is that significant matters, such as the processes for managing sunseting (including requirements for explanatory material and the criteria for granting exemptions), be included in legislation rather than policy. This allows parliamentary involvement in, and consideration of, such matters.

Processes for managing sunseting legislation

The committees acknowledge that the Attorney-General's Department's *Guide to Managing Sunseting of Legislative Instruments* (December 2016) and the Office of Parliamentary Counsel's

¹ These instruments are also subject to scrutiny by the Parliamentary Joint Committee on Human Rights (PJCHR).

² See, for example, section 11, table item 6 of the LEOMR which exempts 'instruments (other than a regulation) relating to superannuation' from sunseting. The ES does not explain the breadth of the instruments for which this exemption will apply. Similar issues arise with respect to classes of instruments that are exempt from disallowance by virtue of the Legislation Act or the LEOMR. See for example, R&O Committee, *Delegated legislation monitor* 6 of 2017 (14 June 2017), pp 4-7.

Instruments Handbook (March 2017) provide useful guidance on managing sunseting legislation. However, we are concerned that, in some instances, instruments are being remade due to sunseting with either substantively the same effect, or in identical form, to the old instrument, to ensure the status quo pending completion of a broader review.³ This practice appears to indicate a lack of planning for sunseting in advance of an instrument's sunseting date and may undermine the importance of the sunseting mechanism.

Our committees recommend that consideration be given to amending the Legislation Act to include specific review requirements for sunseting legislative instruments, including:

- that instruments be reviewed to provide sufficient time to implement any review recommendations in advance of their sunset date;
- that the review consider whether the instrument's existing provisions remain appropriate for delegated, as opposed to primary, legislation;⁴ and
- a requirement to table in Parliament major reviews of instruments (such as reviews of regulations).⁵

Explanatory material to legislation being remade due to sunseting

Over recent months the R&O Committee has identified issues where instruments being remade due to sunseting do not sufficiently explain the purpose and operation of the instruments in their ESs, as required by section 15J of the Legislation Act.⁶ In the absence of an item-by-item description of the provisions of such instruments, a statement in the ES that an instrument has been made with 'minimal changes' or with 'no changes' can provide insufficient information for the R&O Committee and the PJCHR to effectively scrutinise the instrument and for users of such an instrument to understand its operation. Therefore, we recommend that relevant guidance materials be clarified to specify that the requirements of section 15J apply equally to instruments being remade due to sunseting.

Criteria for granting exemptions from sunseting

As stated above, instruments amending the LEOMR are disallowable legislative instruments and are therefore subject to scrutiny by the R&O Committee.⁷ However, we note that the Legislation Act does not specify any conditions or legal criteria that must be satisfied before the Attorney-General (AG) can exercise his or her delegated power to make an instrument granting a sunseting

³ See for example Seacare Authority Code of Practice Approval 2017 [F2017L00326] which reapproved the 2000 Code for an interim period pending completion of the Seacare Authority's review. See R&O Committee, *Delegated legislation monitor 7 of 2017* (21 June 2017) pp 31-35.

⁴ See for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2017* (14 June 2017), Defence Legislation Amendment (2017 Measures No. 1) Bill 2017, pp 100-103.

⁵ See Attorney-General's Department's *Guide to Managing Sunseting of Legislative Instruments* (December 2016), p. 13.

⁶ See for example Legal Services Directions 2017 [F2017L00369] which repealed and remade Legal Services Directions 2005 [F2006L00320] with minimal changes. See R&O Committee, *Delegated legislation monitor 5 of 2017* (10 May 2017), pp 12-13.

⁷ These instruments are also subject to scrutiny by the PJCHR.

exemption. Instead, there is a principle that sunseting exemptions should only be granted where the instrument is not suitable for regular review under the Legislation Act. Currently, this principle is underpinned by the five criteria set out in the *Guide to Managing Sunseting of Legislative Instruments* that: the rule-maker has been given a statutory role independent of the Government, or is operating in competition with the private sector; the instrument is designed to be enduring and not subject to regular review; commercial certainty would be undermined by sunseting; the instrument is part of an intergovernmental scheme; and the instrument is subject to a more rigorous statutory review process.

While these criteria form part of the administrative framework to guide the AG's decisions under the Legislation Act to grant sunseting exemptions, we are concerned that, as the criteria are not codified, these could change at any time without any parliamentary involvement. Our committees note that the ESs that accompany instruments which create new exemptions from sunseting for specific instruments do not routinely provide a strong justification for such an exemption.⁸ We recommend amending the Legislation Act to specify the criteria for granting exemptions from sunseting.

The Attorney-General's powers

The committees recognise that the process to review instruments can be lengthy and understand the need for the Legislation Act to provide flexibility for sunseting to be deferred for short periods or aligned to facilitate the undertaking of a thematic review. Our preference is that departments, agencies and instrument-makers plan for sunseting well in advance of an instrument's sunset date and use the following mechanisms in the Legislation Act sparingly.

Certificates of deferral

We consider that current section 51 of the Legislation Act, which allows the AG to defer sunseting in certain circumstances for up to six or 12 months, is appropriate. The consultation paper queries whether the AG should have the power to defer the sunseting of an instrument for more than 12 months (question 10). However, the paper provides no detail as to when a deferral of sunseting for more than 12 months may be appropriate. In the absence of a sufficient justification, our committees do not consider that the AG should have the power in a non-disallowable instrument to defer the sunseting of an instrument for more than 12 months.

Declaration of alignment

Our committees consider that current section 51A of the Legislation Act, which allows the AG to align sunseting of particular instruments for up to five years via a declaration which is subject to disallowance, is appropriate. The consultation paper questions whether it is appropriate for section 51A declarations to be subject to disallowance (question 18). We consider that continuing to subject these declarations to the disallowance process is essential to ensure Parliament maintains effective

⁸ See for example Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] which exempts the Migration Regulations 1994 from sunseting. See R&O Committee, *Delegated legislation monitor* 7 of 2017 (21 June 2017) pp 14-20.

oversight of such declarations (which represent an exercise of legislative power that the Parliament has delegated).

The consultation paper also questions whether including a requirement for a statement of reasons for a declaration of alignment, similar to the requirement for certificates of deferral under paragraph 51(2)(a), would better achieve the overarching purposes of the sunseting framework (question 19). We recommend that the Legislation Act be amended to require that a statement of reasons be included where such a declaration is made.

Discretion

The consultation paper includes a question relating to the appropriate level of discretion that should be available to the AG in granting deferrals of sunseting (question 13). Our committees consider that the current level of discretion available to the AG in granting deferrals of sunseting under section 51 of the Legislation Act is appropriate.

However, should future amendments to the Legislation Act seek to expand the level of discretion available to the AG under section 51, we would expect the explanatory material to such amendments to provide a detailed justification as to why the expansion of the discretionary power was necessary. Broad discretionary powers may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers or to insufficiently subject the exercise of legislative power to parliamentary scrutiny. As such, our committees' general position on broad discretionary powers is that rules or guidance about the exercise of such powers should be included in primary legislation.

Delegation

The consultation paper questions whether the AG's power to grant deferrals of sunseting should be delegable (question 14). However, the paper does not provide any further details about the need to delegate this power. In the absence of a substantial justification, we consider that any delegation of the AG's significant powers to grant a deferral of sunseting under section 51 of the Legislation Act would be inappropriate.

Federal Register of Legislation

Sunseting information

The committees consider that the sunseting information provided on the Federal Register of Legislation is clear and easy to navigate. In particular, we welcome the inclusion of the date on which a particular instrument will sunset or the relevant authority which exempts a particular instrument from the sunseting requirements.

Automatic repeal provisions

The committees note that the automatic repeal provisions in the Legislation Act, and how their operation is recorded in respect to relevant instruments on the Federal Register of Legislation, appears to have caused confusion. In particular, our committees note that the R&O Committee

secretariat routinely responds to inquiries from the public, departmental staff, and Senators' or Members' staff concerning the operation of the automatic repeal provisions where instruments are still subject to disallowance.

We recommend that the information provided on the Federal Register of Legislation be amended to explain that notwithstanding the automatic repeal of an instrument, it may still be subject to disallowance.

Sitting days

The committees note that other submissions to this review have commented on the meaning of the term 'sitting day'. We support the recommendation made by the Office of Parliamentary Counsel, in relation to the automatic repeal provisions, that the *Acts Interpretation Act 1901* be amended to clarify the meaning of 'sitting day'. Periodically an issue arises as to whether 15 sitting days has expired where the Senate has suspended and resumed a sitting the following calendar day. Putting the matter beyond doubt would be desirable.

The committees would greatly appreciate receiving a copy of the final review once it is complete and an opportunity to comment on any recommendations arising.

Should you require any clarification around any of the comments provided, we invite you to address inquiries in the first instance to the Secretary of the R&O Committee, Ms Toni Dawes (telephone 6277 3066).

Yours sincerely



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