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Senator the Hon Ian Macdonald
Chair
Legal and Constitutional Affairs Legislation Committee
The Senate
Parliament House
Canberra ACT 2600

Dear Senator Macdonald

ACTS AND INSTRUMENTS (FRAMEWORK REFORM) BILL 2014

Thank you for the committee's invitation to make a submission on the Acts and Instruments (Framework Reform) Bill 2014.

I understand that the bill is a consequence of the consolidation of responsibility for drafting, publication and management of Commonwealth legislation under the Office of Parliamentary Counsel (OPC). Generally speaking, responsibility was previously divided between OPC, for primary legislation, and the Office of Legislative Drafting and Publishing (OLDP) within the Attorney-General's Department for delegated legislation, including drafting of regulations in the series of Select Legislative Instruments and maintenance of the Federal Register of Legislative Instruments. The consolidation has provided an opportunity for revision of the *Legislative Instruments Act 2003*, rationalisation and modernisation of legislative publishing, and proposals to formalise and expand the powers of First Parliamentary Counsel. For example, the Federal Register of Legislative Instruments will become the Federal Register of Legislation and will include all legislation, both primary and delegated, and may include other documents.

I note that the explanatory memorandum states that the changes proposed by the bill "will not alter the processes for the development and passage of legislation through the Parliament". It would indeed be extraordinary if the bill did propose to change the processes for the passage of legislation through the Parliament, as these are matters for the Houses to determine for themselves using their powers under section 50 of the Constitution to make rules for the conduct of their business and proceedings, and the exercise of their powers, privileges and immunities.

Leaving aside that infelicity, there are three issues to which I draw the committee's attention.

1. Power to make corrections

New sections 15D and 15V empower First Parliamentary Counsel to make corrections to the register.

Section 15D empowers First Parliamentary Counsel to correct a mistake, omission or other error in the text of registered legislation, subject to conditions. The explanatory memorandum gives some examples of the type of error contemplated for correction under this section. One of the conditions is that the correction does not affect any right or privilege or impose or increase any obligation or liability. These provisions consolidate the existing rules in section 23 of the Legislative Instruments Act and section 8 of the *Acts Publication Act 1905* (to be repealed by the bill). New elements of the provision allow corrections to be made subject to the rules (which are themselves disallowable instruments) and prevent corrections if the error was made at law as part of enacting, making or amending a law (unless it is a technical error such as a misdescribed amendment which may be corrected under section 15V).

Importantly, where such a correction is made, paragraph 15D(1)(b) provides that First Parliamentary Counsel must include in the Register a statement that the correction has been made and a brief outline of the correction in general terms. On the one hand this provision provides transparency in relation to the correction. On the other hand, it begs the question why the requirement is for an explanation only in general rather than specific terms. Perhaps the committee may wish to seek an explanation for this semi- rather than full transparency.

In contrast, new Division 3 of Part 2, relating to editorial and other changes that First Parliamentary Counsel may make in preparing compilations of Acts and instruments, proposes quite broad editorial powers without associated transparency measures. The powers include making changes to the text of a law.

The explanatory memorandum refers to the use of editorial powers for the publication of legislation in most other Australian jurisdictions over the past four decades (but not the Commonwealth or the Northern Territory), as well as in New Zealand (2012) and Hong Kong. It is clearly stated that the editorial power cannot be used to change the effect of a law, resolve an ambiguity or rewrite legislation. However, section 15V and the definition of editorial change in section 15X would appear to permit a wide range of editorial and presentational changes and there is no mechanism – as there is in section 15D – for transparency, let alone oversight.

The committee may wish to seek from First Parliamentary Counsel an explanation of how editorial powers operate in other jurisdictions, who exercises them and whether there is any mechanism for transparency or oversight, including any requirement to report on the extent to which the powers are used, or on particular uses of the power.

While most of the permissible editorial changes are specified, along with the types of errors that are permitted to be corrected (in subsections 15X(2) and (4)), paragraph 15V(2)(b) appears to give First Parliamentary Counsel discretion to make an editorial change that he or she considers **desirable** to bring the Act or instrument into line, or more closely in line, with **legislative drafting practice being used by OPC** (emphasis added).

We might take the example of a non-government amendment to an amending bill that was, of necessity, drafted in haste, possibly on the floor of the Senate in response to an emerging consensus on a negotiated outcome, and agreed to by both Houses. While the amendment is legally sound and unambiguous, it may be expressed in different terms to similar provisions

in the parent Act. When the compilation is prepared, would First Parliamentary Counsel use the discretion in paragraph 15V(2)(b) to standardise the expression of the new provision with similar provisions in the Act? If so, on what basis would such an action be considered "desirable" when the Parliament has clearly laboured over the terms of the amendment?

Given that "current legislative drafting practice" is not a defined or regulated concept and, in practice, is a set of directions and practices determined by First Parliamentary Counsel without necessary reference to the Parliament itself, the committee may wish to be reassured that these provisions do not diminish the legislative authority of the Parliament and increase – beyond what is appropriate – the power of First Parliamentary Counsel to make changes to legislation after it has been approved by the Parliament. The committee may wish to clarify with First Parliamentary Counsel the scope of the proposed discretion. Alternatively, the committee may wish to consider whether it would be reasonable for the exercise of editorial powers in relation to compilations to be made more transparent and accountable and, if so, by what means.

Current arrangements with respect to bills provide some context for consideration of the issue. Senate standing order 124 provides as follows:

> Amendments of a formal nature may be made, and clerical or typographical errors may be corrected, in any part of a bill by the Chair of Committees.

A similar standing order of the House – standing order 156 – allows the Clerk to correct clerical or typographical errors in a bill, "under the authority of the Deputy Speaker". Because many more bills are introduced into the House than the Senate, it is the latter rule that is most used for making corrections (referred to as "Clerk's amendments"), but the principles are similar. In practice, the need for such amendments is identified either by OPC or by parliamentary officers when checking bills and amendments. Any proposals for corrections of this type, so far as Senate practice is concerned, are assessed against the standing order and the following guidance in *Odgers' Australian Senate Practice* (13th edition, p. 321):

> This procedure is used to make changes to a bill which are clearly required by any amendments which have been agreed to, and to correct any clear errors. The citation of a bill which originated in one year and passed in another may be altered by this means. The procedure may not be used to make changes of substance, which should only be made by amendment in committee of the whole.

There is in existence a Drafting Direction issued by First Parliamentary Counsel (No. 4.7: Clerk's and Chairman's amendments, and changes to Minister's copy of Bill, reissued October 2010) which deals with the process for seeking such amendments for minor textual errors in bills or parliamentary amendments that have been agreed to. However, the direction contains virtually no guidance on the types of errors which may be suitable for correction by this method because the direction properly recognises the discretion given to the Chair of Committees and the Deputy Speaker by the authority of the standing orders of the relevant House.

Examination of Senate records shows that Senate officers have been very conservative in agreeing to recommend corrections to the Chair of Committees and have often knocked back requests from OPC which were considered to have exceeded the parameters of what the standing order permits, judgements made on the basis of practice and precedent, and on the principle that legislators should have the final say on the substance of legislation. The standing order therefore operates on the basis of an informed and principled discretion.

There is no question that the discretion proposed for First Parliamentary Counsel is both practical and necessary, and subject to detailed constraints, but it is not clear how the proposed new discretion would operate in practice, including in conjunction with the existing process for Chair's amendments. The majority of bills now introduced into Parliament amend existing law and on enactment will be incorporated into existing law by means of a compilation, a process which this bill seeks editorial powers to facilitate. If a Chair's amendment on such a bill were sought by OPC but declined, could that amendment then be made pursuant to these new provisions? If OPC considered that a request for a Chair's amendment was unlikely to be acceptable to officers of the relevant House, would the availability of these new provisions provide a reason to bypass the process authorised by standing orders and go straight to the new editorial powers for authorisation when the compilation is made?

Such questions are unlikely to arise frequently, but they will arise. The lack of visibility on the exercise of the proposed discretion means that we may never know the extent to which the editorial power is being used. The committee may wish to seek First Parliamentary Counsel's views on these matters.

Although the explanatory memorandum justifies the editorial power on the basis that it will conserve limited parliamentary time and other resources, both laudable aims, there is always a balance to be struck between the proper discharge of the legislative function by the Houses and the performance by officials of functions in support of the legislative process. The committee has a role in examining whether the balance is in the right place.

2. Parliamentary scrutiny of legislative instruments

The bill proposes amendments to the existing provisions of the Legislative Instruments Act for the parliamentary scrutiny of legislative instruments. None of the amendments appear to diminish existing rights and powers of the Houses but they include both minor and significant amendments.

The most significant is the decision to remove from section 44 the table of instruments exempt from disallowance. Such exemptions may be made in future by declarations in Acts, or in regulations made for the purposes of paragraph 44(2)(b). It is proposed that the existing exemptions will be transferred from the Legislative Instruments Act to the new regulations. The committee may wish to ask for the draft regulations to satisfy itself of these matters. In any case, the new regulations will be subject to examination by the Regulations and Ordinances Committee, and will also be subject to disallowance. The rationale is to consolidate prescribed exemptions for greater accessibility, a commendable aim provided that the rights of the Parliament are not affected.

The insertion of a new simplified outline of the Part also assists accessibility. A new section 39 clarifies arrangements for tabling explanatory statements, including supplementary and late explanatory statements. This improves on the existing provision.

Schedule 1, item 49 repeals and replaces existing section 48 which deals with the remaking of instruments after they have been disallowed. Old section 48, which was taken from the *Acts Interpretation Act 1901* (the previous host of the disallowance framework) where it had been since 1932, contained confusing terminology that had a different meaning under the standing orders of the Senate where most disallowance action occurs. Under old section 48, a regulation the same in substance could be remade within 6 months of disallowance only if the House which disallowed the regulation rescinded the disallowance resolution (if the

disallowance had occurred by resolution) or, alternatively, if the House approved the remaking of the instrument (if the instrument was taken to have been disallowed because the notice was unresolved at the end of 15 sitting days).

Under Senate standing orders a rescission motion requires 7 days' notice and, if agreed to, has the retrospective effect of quashing a decision from the time it was made, as if it never had been made. Before new standing orders came into effect in 1990, rescission also required the agreement of an absolute majority of senators. In contrast, a simple resolution is all that is required to cease the operation of a previous resolution with prospective effect; for example, to allow the remaking of regulations. For this reason, motions to allow the remaking of regulations which have been disallowed by resolution are not technically rescission motions and are not treated as such in the Senate. In any case, the effect of disallowance is declared by statute (see sections 42 and 45 of the Legislative Instruments Act) and could not be affected by procedural rules of a House.

Section 48, as proposed to be re-enacted, avoids confusion by providing only one method of approving the remaking of disallowed instruments within 6 months of disallowance (by resolution with prospective effect), regardless of the method by which the instrument was disallowed. I note that the section continues to make reference to the relevant House as the House "in which notice was given of the motion to disallow the disallowed instrument or provision". Although notice is usually given of disallowance motions, they may also be moved by leave or pursuant to a suspension of standing orders. However, in *Dignan v Australian Steamships Pty Ltd* (1931) 45 CLR 188 (at 198), Rich J. held that the statutory provisions as to notice are directory, not imperative, so the reference to notice does not limit the Houses on their method of proceeding on disallowance matters.

3. The status of legislative rules and the rule-making power for First Parliamentary Counsel

Finally, I draw the committee's attention to an issue that the Regulations and Ordinances Committee has been pursuing over the past few months. It is relevant to the bill because it involves a problematic policy change made without parliamentary scrutiny, apparently in connection with the organisational change that consolidated the functions of OLDP and OPC, a major reason for the development of this bill.

What follows is a summary of the issue which is covered in much more detail in the following reports of the Regulations and Ordinances Committee:

Delegated Legislation Monitor No. 10 in relation to the:

- Australian Jobs (Australian Industry Participation) Rule 2014 [F2014L00125] (pp 18-43); and
- Jervis Bay Territory Rural Fires Ordinance 2014 [F2014L00443] and Jervis Bay Territory Rural Fires Rule 2014 [F2014L00533] (pp 55-60);

Delegated Legislation Monitor No. 13 in relation to the Farm Household Support Secretary's Rule 2014 [F2014L00614] (pp 6-14).

There are many kinds of legislative instruments authorised to be made by Commonwealth statutes. The principal kind of instrument is a regulation and many Acts contain a general regulation-making power along the following lines:

The Governor-General may make regulations prescribing all matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Acts also commonly contain powers to make delegated legislation in the form of determinations, guidelines, rules etc for specified purposes.

Regulations, formerly drafted by OLDP and now by OPC, are subject to a high level of executive oversight. They are made by the Governor-General, approved by the Executive Council and drafted, at no charge to the relevant agency, by OPC as part of its core (or "tied") business that cannot be outsourced. Regulations are declared to be legislative instruments and are disallowable by definition under the Legislative Instruments Act.

Other types of delegated legislation may be made by ministers or designated officials, may not be subject to approval by Executive Council and may be drafted by the agency or outsourced (including to OPC on a fee for service basis). Whether such instruments are disallowable is generally determined by whether the authorising Act declares them to be legislative instruments.

In its scrutiny of the Australian Jobs (Australian Industry Participation) Rule 2014, the Regulations and Ordinances Committee became aware of a broad rule-making power, similar to the broad regulation-making power described above, that appeared to the committee to represent a novel approach to making delegated legislation. In its scrutiny of this and the other rules referred to above, that committee established that:

- the broad rule-making power has only been used in Acts since 2013, after the consolidation of OPC and OLDP;
- it is a practical response to the need for OPC to concentrate its resources on drafting regulations, a class of instruments with sensitivities or risks appropriate to a higher level of oversight;
- it also provides scope for OPC to establish a revenue stream from drafting rules or other types of instrument on a fee for service basis.

The Regulations and Ordinances Committee has pursued a number of concerns with OPC and agencies about rules made pursuant to the new type of broad rule-making power, including:

- lack of consultation over the implementation of what the committee regarded as a new type of delegated legislation;
- potential diminution in the quality of rule drafting and in quality-control mechanisms generally, from a lower level of executive oversight;
- the impact of potentially lower quality instruments on the workload of the committee;
- how to ensure that particularly sensitive matters involving rights, obligations, liabilities and penalties (including offences, powers of arrest, entry, search or seizure) will continue to be dealt with by regulation; and
- whether a rule-making power should be able to be delegated.

In return, First Parliamentary Counsel has provided detailed explanations to the committee and has also reissued the relevant Drafting Directions on two occasions to clarify these policy documents in response to the issues raised by the committee. These matters are dealt with in detail in the Monitors referred to above.

Whether a rule comes before the Regulations and Ordinances Committee for parliamentary scrutiny generally depends on whether it is declared to be a legislative instrument in the authorising Act. Since 1932, the Senate, through the Regulations and Ordinances Committee, has worked consistently to improve the quality of delegated legislation. While the new broad rule-making power is in the process of being deployed more widely across Commonwealth legislation, the committee may wish to consider whether there is a need to include in the definition of "legislative instruments" in the Legislative Instruments Act (as amended), these types of legislative rules made under the new broad power, rather than leaving them to be dealt with on a case by case basis.

There will no doubt be arguments for and against such an all-encompassing approach. If adopted, it would mean that the Regulations and Ordinances Committee would be required to scrutinise all rules. However, the terms of reference of the Scrutiny of Bills Committee ensure that the case-by-case approach can be monitored in any event.

The Legislative Instruments Act already contains a general regulation-making power (in section 62). The bill proposes a minor amendment to this section but also inserts a new general rule-making power, in section 61A:

> **61A Rules made by First Parliamentary Counsel**
>
> The First Parliamentary Counsel may, by legislative instrument, make rules prescribing all matters required or permitted by this Act to be prescribed by the rules.

The rule-making power does not extend to making rules "necessary or convenient to be prescribed for carrying out or giving effect to this Act", so it is not as broad as the general rule-making power that has made an appearance in Commonwealth legislation since 2013.

The narrower scope of the rule-making power in this case means that the power is limited to making rules authorised by specific provisions in the legislation and not otherwise. The authorising provisions are as follows:

- s. 15A—Federal Register of Legislation – establishment and maintenance
- s. 15D—Federal Register of Legislation – correction of errors
- s. 15E—Federal Register of Legislation – keeping the register
- s. 15H—registration of legislative instruments etc.
- s. 15L—events affecting currency or accuracy of Register
- s. 15M—rules for lodgement and registration
- s. 15P—registered compilations – information requirements
- s. 15Q—definitions of required compilation event etc
- s. 15R—lodgement of compilations of instruments – required compilation events
- s. 15U—compilations – rules
- s. 15ZA—authorised versions.

The explanatory memorandum indicates that rules rather than regulations are appropriate in these circumstances because the matters to be dealt with tend to be of a technical nature and may need to be updated at short notice in response to legal or technological developments.

The bill thus provides an example of how the new broad-ranging rule-making power can be modified to keep it within definite and appropriate limits, noting that the specialist and technical nature of OPC's work is itself a limiting factor on the scope of the power that may be exercised.

Conclusion

While I have mild concerns about the scope of the editorial power that the bill will give First Parliamentary Counsel in relation to compilations, the bill will provide for consistency of oversight of the legislative publishing function across the range of Commonwealth legislation. I have indicated matters on which the committee may consider it useful to seek further information from First Parliamentary Counsel.

Please let me know if I can provide any further assistance to the committee.

Yours sincerely

(Rosemary Laing)