



Australian Government
Office of Parliamentary Counsel

First Parliamentary Counsel

Committee Secretary
Senate Standing Committee on Regulations and Ordinances
Parliament House
Canberra ACT 2600
(by email)

Dear Ms Coles

OPC Submission to the Parliamentary Scrutiny of Delegated Legislation Inquiry

Background

1 I am writing in response to an email dated 29 November 2018 from Committee Secretary, Ms Anita Coles, inviting me to make a submission to the inquiry by the Senate Standing Committee on Regulations and Ordinances (the *Committee*) in relation to parliamentary scrutiny of delegated legislation.

2 This submission is made on behalf of the Commonwealth Office of Parliamentary Counsel (*OPC*). OPC is established by the *Parliamentary Counsel Act 1970*. That Act sets out OPC's functions, including the functions of drafting proposed laws and amendments for introduction into the Australian Parliament and drafting of subordinate legislation.

3 Clause 3 of Appendix A to the *Legal Services Directions 2017* provides that certain drafting work is tied to OPC. This includes the drafting of the following subordinate legislation:

- (a) regulations;
- (b) Ordinances and regulations of external Territories and Jervis Bay Territory;
- (c) other legislative instruments made or approved by the Governor-General.

4 OPC drafts other instruments on a billable basis.

5 During the 2017-18 financial year, OPC drafted 271 Federal Executive Council legislative and notifiable instruments that were made and registered on the Federal Register of Legislation. OPC also drafted 161 other legislative instruments for government agency clients.

6 In accordance with Senate Standing Order 23, the Committee scrutinises all regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character. Some, but not all, of these instruments are drafted by OPC on instruction from government agency clients.

The inquiry

7 OPC considers that the Committee performs a useful function in relation to delegated legislation.

8 The most visible aspects of this are the *Delegated Legislation Monitors* that the Committee issues. These obviously affect the content of the individual instruments that are the subject of Monitor.

9 While the impact of comments on the individual instruments are important, OPC considers that the broader impact of the Committee's work is much more important. We consider that the existence of the Committee and its work has a substantial influence on the content of instruments as they are developed and drafted. This is because policy officers and drafters are aware of the views that the Committee has on issues and work to ensure that, to the greatest extent possible, instruments are not in conflict with those views.

10 This is reflected in OPC's practice of referring to the role of the Committee, as well as matters that are likely to attract adverse comment from the Committee, in formal guidance materials, training materials and in day-to-day dealings with government agency clients. OPC's drafting practices also develop over time in response to scrutiny concerns of the Committee. This has contributed to greater consistency in the form and content of legislation.

11 OPC's *Instruments Handbook* (the **Handbook**) (reissued November 2018), which is intended to assist Commonwealth rule-makers and government agency clients in making and managing legislative and notifiable instruments, refers extensively to the Committee. The Handbook includes information on the terms of reference of the Committee, current requirements in relation to the content of explanatory statements, and references to matters that the Committee is likely to comment on. The Handbook notes that government agencies should respond quickly to questions or concerns of the Committee in order to avoid adverse scrutiny comments or disallowance of a legislative instrument.

12 OPC distributes each *Delegated Legislation Monitor* report to all OPC drafters and publications officers. OPC also has an electronic database which contains all *Delegated Legislation Monitor Reports*. This ensures OPC is informed on a timely basis of the scrutiny concerns of the Committee. For new and ongoing drafting projects, this also ensures that OPC is well placed to notify clients of ongoing, increasing or new concerns of the Committee. OPC drafters will often contact, or be contacted by, government agency clients in relation to responding to questions or concerns set out in *Delegated Legislation Monitor* reports.

13 OPC's Drafting Directions, issued by First Parliamentary Counsel (**FPC**), are an authoritative series of pronouncements on a range of drafting issues. The Drafting Directions contain rules that should be followed by OPC drafters unless an exemption is obtained from FPC in a particular case. The Drafting Directions also refer to matters that the Committee is likely to take an interest in (see for example, paragraph 48 of Drafting Direction 1.3 in

relation to retrospective commencement, paragraph 9 of Drafting Direction 3.5 in relation to criminal offences, and paragraph 30 of Drafting Direction 3.8 in relation to matters that are dealt with in legislative instruments other than regulations).

14 In accordance with the Drafting Directions and other drafting guidance materials in OPC, OPC drafters include notes to government agency clients within legislative drafts. This includes drawing clients' attention to matters which are likely to attract adverse comment from the Committee, and OPC often points clients to examples of best practice provisions. This may lead to clients refining their policy (and therefore any draft legislative provisions), or including further explanation and justification in explanatory materials, to assist the Committee in its consideration of an instrument.

15 Examples of the kinds of matters that OPC drafters draw clients' attention to include the following:

- (a) identifying in an explanatory statement whether a legislative instrument is made under the "necessary or convenient" power;
- (b) for provisions that involve the incorporation of a document by reference—identifying whether the document is incorporated as in force from time to time or at commencement, including a description of the incorporated document in the explanatory statement, and including information about where the incorporated document can be readily and freely accessed;
- (c) for strict liability offence provisions—providing information in the explanatory statement regarding why a strict liability provision, as well as the penalty attaching to that provision, is appropriate;
- (d) for delegation provisions—limiting the class of delegates to persons who hold sufficiently senior positions, or to persons who have appropriate qualifications or expertise in relation to the exercise of a power or the performance of a function or duty, as well as including an explanation in the explanatory statement regarding the appropriateness of the breadth of the delegation.

16 The re-writing of instruments that are due to sunset is an example of the important role that OPC plays in minimising the likelihood of a legislative instrument attracting adverse comment from the Committee, and therefore the risk of disallowance of the instrument. Due to the age of a sunset instrument, it is likely that aspects of the instrument do not comply with current OPC drafting policy and standards, including on matters relevant to the terms of reference of the Committee.

17 While government agency clients are responsible for determining whether the sunset instrument is fit-for-purpose, OPC drafters are responsible for ensuring the new instrument is legally effective, complies with current drafting practices, is written in plain language and all provisions are authorised by enabling legislation. OPC drafters are proactive in managing this sunset process, and will draft provisions with the scrutiny concerns of the Committee in mind. As noted earlier, if a client's policy is likely to attract adverse comment from the Committee, OPC drafters will draw the clients' attention to this and, at the very least, encourage the client to include further explanation and justification in the explanatory materials in relation to the policy approach. This role is intended to facilitate scrutiny of the new instrument by the Committee (amongst other things).

18 The scrutiny concerns of the Committee have also contributed to the development of drafting practices, including the use of standard provisions, within OPC. OPC has developed a number of standard provisions in relation to subordinate legislation. The kinds of matters standard provisions cover that are relevant to the terms of reference of the Committee include the scope of rule-making powers, identifying whether an instrument is a legislative instrument and identifying if a legislative instrument is not subject to sunseting. These standard provisions facilitate OPC's aim for consistency in the presentation, form and content of legislation, which is intended to provide a coherent statute book that is easy to use.

19 For example, section 25 of the *Modern Slavery Act 2018* sets out OPC's standard rule-making power provision. That provision provides that legislative rules made by the relevant Minister may not create an offence or civil penalty; provide powers of arrest, detention, entry, search or seizure; impose a tax; set an amount to be appropriated from the Consolidated Revenue Fund; or directly amend the text of an Act. These limitations are consistent with longstanding concerns of the Committee regarding the matters that may not be appropriate for inclusion in subordinate legislation.

20 Finally, as noted earlier in this submission, OPC is not responsible for drafting all instruments that are scrutinised by the Committee. However, OPC provides formal training to government agency clients to build their capacity and expertise in the drafting of untied legislative and notifiable instruments. OPC Client Advisers also provide advice concerning the drafting of these kinds of instruments.

21 In the 2017-18 financial year, OPC ran 8 Simple Instrument training courses to a total of 253 participants. This was in addition to the 7 Legislation Process Courses and 4 Advanced Legislation Process Courses run in that period. In 2018, OPC and the Attorney-General's Department also presented a number of seminars on the sunseting of instruments to staff of many government agencies that are responsible for instruments.

22 OPC's course materials include extensive information in relation to the Committee which is intended to assist government agencies in the drafting of untied instruments. This information may also assist an agency in determining whether to use OPC to draft an untied instrument, due to the complexity of the issues and the possibility of adverse scrutiny comments. Exercises and practical examples are worked through to highlight the kinds of issues that are likely to attract adverse comment from the Committee, whether in relation to draft provisions or the quality of explanatory materials. OPC considers that running these courses and providing these services is an important way for OPC to contribute to the improvement of instructing and instrument drafting standards.

Conclusion

23 OPC considers that the Committee performs a very valuable function in scrutinising instruments to ensure that they comply with the standards established by the Committee.

24 While this role is visible in the Committee's *Delegated Legislation Monitors*, what is more important in OPC's opinion is the positive effect that the Committee's work has on the development of legislative instruments.

25 I would be happy to provide further information if that would be of assistance.

Peter Quiggin PSM
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24 January 2019