Australasian Legal Information Institute
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Improving access to legislative instruments –

A submission to the Review of the Legislative Instruments Act

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Introduction

The Australasian Legal Information Institute is a joint facility of the Law Faculties of the University of Technology, Sydney (UTS) and the University of New South Wales (UNSW), which has operated since 1995. It provides a non-profit and free access website for Australian law, AustLII <http://www.austlii.edu.au>, as well as a number of international legal information services, the Asian Legal Information Institute (AsianLII), the Commonwealth Legal Information Institute (CommonLII), and the joint portal that it operates on behalf of all members of the Free Access to Law Movement, the World Legal Information Institute (WorldLII).

AustLII's Australian service currently provides 268 databases from all Australian jurisdictions, and receives over 500,000 access per day, according to AustLII's access logs (which do not measure where one AustLII document is accessed multiple times through local caching). We have only commented or made submissions on those matters relevant to AustLII, not on every aspect of the Discussion Paper.

We have had the benefit of reading the submission by the Australian Law Librarians Association (ALLA), and refer to it in various of our submissions.

Questions and submissions

1. *Is there a need to provide greater clarity about what is, or is not, a legislative instrument? If so, what should be done to improve clarity and resolve doubt?*

    1. **We support the ALLA submission that the Act be amended to include all instruments of a legislative nature made by the Executive and the Governor-General.**

2. *When (if ever) should instruments of legislative character be exempt from publication under the LIA?*

3. *Are the consequences for failing to register a legislative instrument appropriate? What if an instrument has been treated as not legislative for the purposes of the LIA on the basis of legal advice and that legal advice is later brought into doubt or a court rules to the contrary?*

4. *To what extent are rule-makers undertaking appropriate consultation before making legislative instruments?*

5. *Are rule-makers providing enough information about consultation in their explanatory statements?*

6. *Should the LIA mandate compliance with the RIS requirements for proposed legislative instruments that affect business and competition?*

7. *What else could or should be done to encourage high standards of consultation, before and after a rule-maker makes a legislative instrument?*

No comments on Questions 2-7.

8. *How effectively do the measures set out in the LIA ensure consistently high drafting standards?*

As a general comment on the quality of the drafting of legislative instruments, the ability of AustLII and other third parties to re-purpose and/or re-publish the content of the instruments in a manner to add value hinges on the instruments within each category being drafted in a consistent manner and being available in a re-usable format.

For example, the consistent use of styles and the level of headings within a Microsoft Word document enables the programmatic conversion of the content without the need to resort to costly, labour-intensive and error prone manual editing of documents. The more consistent and rich that the style markup is, the richer the opportunities for adding value.

We take a similar view to ALLA: 'that drafting standards for LIs should be uniform across all agencies and that the Department issue guidelines and conduct regular reviews to ensure this.'

2. **We submit that the Legislative Instruments Act should allow regulations to be made establishing standards for uniformity of drafting across agencies with which all LIs must comply, or be returnable for redrafting and re-issue. There should be an ongoing consultation process with interested parties concerning the content of such standards.**

In relation to formats, there are instances where a legacy document has been provided on FRLII as a PDF document, but the content of that PDF document is a scanned image of an original paper document. Such a format cannot be readily converted to any other format without resorting to costly computerised OCR software with the accompanying costly requirement to manually proofread and correct the results of the OCR conversion output which by its nature is imperfect.

3. **We submit that FRLI should not include scanned images but should only include text. At least the conversion to text needs to be undertaken at the source, rather than shifted as a downstream conversion cost to every downstream user. If agencies submit images, they should be required to replace those images with text within 7 days.**

9. *What else could and should be done to promote and encourage high standards in the drafting of legislative instruments?*

4. **We support ALLA's submission that LIs should display the date of registration.**

5. **We submit that the full name of enabling legislation should always be included at the start of a LI, so as to enable hypertext linking and searches, preferably in a standardised location.**

10. *What (if any) further action is necessary to encourage high standards in the preparation of explanatory statements and compilations?*

6. **We submit that the full name of enabling legislation should always be included at the start of a explanatory statements and compilation, so as to enable hypertext linking and searches, preferably in a standardised location.**

11. *Should rule-makers be required to make documents incorporated by reference available to the public, and if so, how? Does the incorporation of documents such as Australian or international standards raise any issues?*

AustLII is continuing to research the hypertext linking of documents referred to in legislation, including LIs. For example, research is underway on effective linking from legislation to Australian treaties (contained in the Australian Treaties Library on AustLII). Where AustLII holds databases of such materials referred to in legislation, it would be valuable if there was cooperation between AustLII and ComLaw so as to assist ComLaw to link to these materials from the legislation.

7. **We support the ALLA submission that, wherever possible, materials included by reference should be collected in a database or databases separate from FRLI but maintained by ComLaw. We submit that they should be hypertext linked from the LIs referring to them. We also submit that consideration should be given to whether the Copyright Act should be amended to create an exception for government reproduction of copyright materials included by reference in legislation.**

12. *Is a central register (FRLI) still the best option for keeping an authoritative record of legislative instruments and related information? If not, then what is?*

8. **We submit that there should be a standard form of notice which an agency could lodge in FRLI whenever a LI has been amended by a non-LI, or whenever a LI is found invalid by a Court or Tribunal. The Act should at least permit and standardise such notices, but we have not investigated the difficulties that might be involved if this was made mandatory where an agency was aware of such an event.**

13. *How effectively do lodgement/registration processes support the integrity of FRLI?*

14. *If events occur that affect the accuracy and completeness of FRLI information, should rule-makers be obliged to lodge updates to FRLI? If so, how quickly?*

15. *How quickly should rule-makers be expected to lodge compilations?*

16. *What protections should there be for individuals or bodies that have relied on FRLI information that is later found to be in error or incomplete?*

No comment on questions 13-16.

17. How effective has FRLI been in improving public access to legislative instruments?

The ALLA submission notes that FRLI has not removed the need for many users to use AustLII to search regulations. In 2007 AustLII's logs recorded over 20 million page accesses to its databases of Commonweatlh regulations and their explanatory statements. This figure includes accesses by web spiders (robots) but does not make any allowance for the caching of pages by servers local to users.

We think it is safe to conclude that both FRLI and AustLII's databases will continue to be used as the major access points for Commonwealth regulations.

There are various reasons for this. One is the deficiencies in the search engine currently used by ComLaw and noted in the ALLA submission. However, in our view a more important reason is that third party publishers like AustLII do and should provide different forms of value-adding to the basic legislative data than is provided by ComLaw. For example, AustLII provides for (i) simultaneous searches over both legislation and case law (and other materials); (ii) simultaneous searches over legislation from all Australian jurisdictions; and (iii) hypertext linking and 'noteups' indicating relationships between legislation and other materials such as cases. ComLaw cannot be expected to provide any of these features from its own resources.

The Discussion paper says 'A broader question is how best to ensure that legislative information remains accessible into the future and is easily used and understood by others such as businesses operating across multiple jurisdictions. At present every jurisdiction in Australia follows different standards and uses different technology to prepare, publish and store legislative information.' The value-adding provided by AustLII and other third party publishers helps to provide some of the answers to these broader questions of accessibility. It is important that this be recognised as a key goal, so that appropriate resources can be allocated to ensure that it is carried out.

9. We submit that it should be one of the objectives of the legislation, and of the operations of ComLaw, that the provision of LIs and other legislation to third party re-publishers be of the highest quality and effectiveness, so as to maximise the value of the legislation to the community. Appropriate resources should be allocated to ensure this occurs.

18. Is there any particularly useful legislative material extending back to 1901 which should be included on FRLI databases to the extent possible?

The ALLA submission identifies some valuable historical sources of legislation material which could be included in FRLI. Other expert groups could no doubt identify further materials of value.

AustLII has acquired high quality and high throughput scanning and OCR equipment and is carrying out a number of archival projects using that equipment. It would be an efficient use of resources, if sufficient funding could be found, for AustLII and ComLaw to investigate possible cooperation in the use of this equipment for legislative archive projects, with the resulting data to be available to both AustLII and ComLaw.

10. We submit that ComLaw and AustLII should consider cooperation on legislative archival projects so as to make use of equipment available through AustLII.

19. What could and should be done to enhance and to ensure the longevity and interoperability of legislative databases such as FRLI?

AustLII already provides a largely standardised format for all forms of legislation from all Australian jurisdictions, by conversion of the data obtained from ComLaw and its equivalents in all jurisdictions into common formats. AustLII is the only service, free or commercial, providing this across all jurisdictions. The ALLA submission notes that this is one of the main advantages of AustLII in relation to legislation.

AustLII already receives good cooperation from ComLaw and from its State and Territory counterparts, but would like to work even more closely with them so as to ensure that its uniform provision of Australian legislative material becomes of even higher quality. It may be possible for a joint approach to the Australian Research Council or similar funding bodies to provide for funding for research or infrastructure development funds to create collaborative improvements to legislation quality and higher interoperability between all free access sources of legislation.

11. We submit that consideration should be given to ComLaw, AustLII and other free access providers of legislation seeking joint research funds to improve the quality and interoperability of legislation.

20. Who should bear the cost of publishing legislative information and of any 'value added' services associated with it? Why?

These are really two separate questions.

The Background Paper says 'There is no charge for access to FRLI information but fees could be charged if new 'value added' services were made available. At present, the cost of maintaining FRLI is significant and is not covered by the fees that AGD levies on lodging agencies.'

12. We submit that the government should pay the cost of providing free access to legislation and should not provide 'pay for use' services. AGD/ComLaw should be allocated more funds to provide those legislative services that are judged important for the government to provide.

We consider that government should only provide those 'value added' services which can be provided for free access. Which services are available from free access tends to change and increase constantly, as free-access services which carry out research such as AustLII introduce new services. There is no objective definition of a 'value added service'. Perceptions of what is an expected service and what is 'value added' change constantly with technology, with research developments, and with people's needs.

If a government service operator tries to distinguish between 'basic'/free services and 'value-added'/fee-paying services, it will find that it has two conflicts of interest in relation to its fee-paying services.

The first conflict is with its own free services, as there will be constant pressure to define services as 'value added' so as to maximise revenue, therefore impoverishing the free services irrespective of how easy it becomes to develop the so-called 'value adding'. The general public and the public interest will inevitably be the loser when government service providers are placed in such a position of conflict in defining what is 'value adding'.

The second conflict of interest is with all third parties who are relying on the government service as the source of data, because there will be a constant temptation to deny them the highest quality data (not matter how easy it becomes to provide it) so as to stop them competing more effectively against the government's 'value added' services. AustLII has previously seen an example of a government which was not willing to allow AustLII to provide copies of legislation in a common

format, but only lower quality text copies, because the government provider then charged for copies in that higher quality format.

13. We submit that government provision of what it defined as 'value added' services for a fee would inevitably lead to undesirable conflicts of interests which would diminish effective access to legislative information.

14. We submit that, to reduce development costs, ComLaw should instead consider collaboration with third parties with similar public access goals, such as AustLII, to develop free access value added services that both services can use. External funds may be available for such developments.

21. When (if ever) should legislative instruments be allowed to commence before the time of registration?

15. We submit that a legislative instrument should not be allowed to commence before the time of registration.

22. Should a legislative instrument that contravenes the restrictions on retrospective commencement remain valid prospectively?

No comment.

23. Should the default commencement be later than the day after registration?

No comment.

24. What else could and should be done to give the public better notice of legislative instruments coming into effect and/or to synchronise their commencement?

Improvements to ComLaw's 'Notify me when' service[1], which does apply to FLRI, is probably one of the best ways to improve public notice. There needs to be more flexible and precise ways of specifying searches than the current search engine allows.

16. We submit that more flexible search options in the the Notify Me When service would improve public notification of LIs.

One problem with the Notify Me When service is that it requires users to disclose their 'First Name*' and 'Last Name*' to use the service. The asterisk denotes a required field. We questions whether this is consistent with the requirements of the Information Privacy Principles in the *Privacy Act 1988*, particularly those concerning the collection of the minimum necessary personal information[2]. Why is it necessary for a person to identify themselves in order to obtain notice of free access Commonwealth legislation?

1. ———————————

[1] 'Notify me when subscription service' at <http://www.comlaw.gov.au/comlaw/subscriptions.nsf/subscription?OpenForm>

[2] s14 – IPP1.1 '(b) the collection of the information is necessary for or directly related to that purpose.'

17. We submit that consideration needs to be given to whether the Notify Me When service's requirements that users identify themselves by name is consistent with the *Privacy Act 1988*.

25. *When (if ever) should legislative instruments be exempt from disallowance?*

26. *What (if any) special disallowance regimes are still needed?*

27. *Should rule-makers be encouraged to remake rather than amend instruments? If so, how should the issue of disallowance be handled?*

28. *Are the current restrictions on remaking legislative instruments pending Parliamentary scrutiny and following disallowance appropriate?*

29. *What (if anything) could and should be done to assist rule-makers to comply with such restrictions?*

30. *Are the current procedures for both parliamentary and judicial scrutiny of legislative instruments adequate? Should those procedures be altered or clarified in any way?*

31. *Are the current arrangements for extending the life of a legislative instrument appropriate?*

32. *Should the LIA be amended to provide for sunsetting after five rather than 10 years?*

33. *When (if ever) should legislative instruments be exempt from sunsetting?*

34. *What (if any) special sunsetting regimes should be retained?*

35. *Should rule-makers be required to conduct periodic reviews of legislative instruments which are exempt from sunsetting?*

36. *When is the most appropriate time to review the operation of the LIA's sunsetting provisions?*

37. *How could or should the clarity of the LIA be improved?*

No comments on Questions 25-37.

38. *How should exemptions from the requirements of the LIA be made and recorded?*

18. We submit that all exemptions should be required to be recorded on a standard form of notice registered in FRLI, so that any searcher can find either the LI or the exemption notice.

39. *Should the principles for making decisions about exemptions be made explicit? If so, where?*

40. *Would there be merit in bringing all disallowable instruments into the LIA disallowance regime? Should these also be subject to sunsetting?*

41. *Would there be merit in bringing other documents that must be tabled into the LIA registration and tabling regime?*

42. *Are there any documents subject to tabling or disallowance which should not be brought into the LIA regime? Why?*

43. *What if any legislative instruments are still gazetted as well as registered? Why?*

No comments on Questions 39-43.

44. Would there be merit in integrating other gazette notices into ComLaw/FRLI?

19. We agree with the ALLA submission that integrating other gazette notices into ComLaw/FRLs is desirable but not a high priority.

45. Are there any gazettes or gazette notices which should not be integrated into ComLaw/FRLI? Why?

No comment.

46. Do you have any other issues or concerns about what the LIA does or should do? If so, what?

It is desirable for government to state a clear policy allowing republication of legislation by third parties, including individual end-users. Current practices seem quite liberal in this regard, but the transactions costs for those who only want to do minor republication of legislation, and don't know how to get permissions, are high. Third party republishers like AustLII are unable to give any useful advice to those who seek to republish legislation on AustLII. The review should note the recommendations of the CLRC re Crown copyright in legislation.

20. We submit that the Commonwealth should give a general licence to the public to republish legislation, subject to any appropriate conditions.

List of submissions

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