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Australian Law Reform Commission
via the ALRC Submission Portal

Submission to the Australian Law Reform Commission on Interim Report A - Review of the Legislative Framework for Corporations and Financial Services Regulation

About us

The **Australasian Society for Computers & Law** (AUSCL) is an interdisciplinary and intergenerational think-tank focused on promoting the UN Sustainable Development Goals at the intersection of law, technology and society, through education, policy and networks. AUSCL's core focus is on UN SDG 16 (Peace, Justice and Strong Institutions).

AUSCL brings together various Australian and New Zealand Societies for Computers and Law, formed as early as 1981 and was formally renamed to the Australasian Society for Computers & Law at a ceremony with Her Excellency, NSW Governor General, Margaret Beazley AC QC. AUSCL provides a forum for learned discussion and debate through its Policy Lab, working groups and events program, and attracts support and engagement across Australia and globally, from academia, industry and policy leaders. AUSCL's patron is The Honourable Michael Kirby AC CMG.

The AUSCL is a registered Australian charity.

About this submission

This submission responds to Interim Report A **Recommendation 11: The Office of Parliamentary Counsel (Cth) should investigate the production of Commonwealth legislation using extensible markup language (XML)**.

In making this submission, the AUSCL leverages the expertise from our cross-disciplinary networks – including academics, practitioners, policy makers and other thought leaders.

Our key contextual observations are:

1. There is a pressing need to close the gap between policy intent and outcome.

2. The future is digital. Now is the time to better leverage technology to achieve policy objectives in financial services as well as other areas of law and regulation.

3. By prioritising digitisation, the Government can accelerate achievement of UN SDG 16, encouraging greater transparency, accountability, access to justice and a reduction in the complexity of legislation and compliance activities.

Toward a digitally enabled/data driven approach to legislation

Recent inquiries and Royal Commissions illustrate the clear disconnect between the intent of Parliament and regulators and the outcomes we are seeing in society. This has led to a governance paradox - enterprises are unable to maintain compliance with the new legislation and society feels the impact.

These issues compound over time, as new policy amendments are tacked on to existing legislation, with concepts often defined narrowly to address the particular issue at hand and then becoming out of date. Political intervention and interplay between ministers, departments and regulators can lead to overly detailed legislation that cannot be changed easily.

The drivers of legislative complexity are not likely to go away.

The issue of complexity and sub-optimal design is evident in many pieces of financial services legislation, such as the *Superannuation Industry Supervision Act 1993*, which has also been subjected to many complex amendments over the years.

AUSCL submits that the drivers of legislative complexity are not unique to the Corporations Act nor are they likely to go away. New solutions must be found. The ALRC Review is a unique opportunity to embrace digital transformation and address the challenges inherent in the historical approach to design and drafting of regulation.

Building blocks are in place to leverage technology

The basic problem statement the ALRC has identified is that "*[a]s a result of numerous ad hoc amendments over the past 20 years, several parts and divisions of Chapter 7 of the Corporations Act have lost much of their thematic consistency.*" (p. 424). Yet concepts such as 'thematic consistency' are literary constructs. **Conceptualising legislation as more like "structured data" and less like literature, will reduce regulatory complexity and inconsistency.**

In recent years, significant advances have been made in the field of computational law scholarship, automated textual analysis and other digital legal technology (often grouped under the expression, "Rules as Code"). The AUSCL submits that the key building blocks are largely in place for the Australian Government to leverage advancements in the field of Rules as Code in the regulatory design, drafting and publication processes.

Key building blocks are largely in place to leverage Rules as Code in regulatory design, drafting and publication.

Embedding technology within a legislative design framework will serve a number of important functions, not least of which is improving regulatory design and drafting, but also facilitating downstream compliance by enabling the private sector to more easily access and ingest regulatory requirements into internal compliance systems and processes. Some examples are provided in the Annex.

The ALRC has taken some important steps in this direction with its data-driven analysis of the financial services legislation text. The background report on *Complexity and Legislative Design* illustrates the insights that can flow from automated textual analysis that treats words as items of data. Around the world there is a growing body of literature on the adoption of similar automated text analysis of laws and regulations, techniques which could be used dynamically to improve legislative design in Australia.

Recommendation to use XML does not go far enough

AUSCL strongly agrees with the ALRC in its report *Improving the Navigability of Legislation* that publishing rules in a machine-readable format will facilitate Regtech compliance solutions.

Given the lack of public-sector leadership or standards, there are now many Regtech companies globally that translate legislation and rules into machine-readable formats for their clients on a proprietary basis. AUSTLII fills some portion of this gap in publishing fully HTML-based versions of legislation.

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Australia has the expertise and capability to lead in the adoption of technology-based digital law solutions at the national, public-sector level. This would be fully consistent with the recommendations of the Select Committee on Australia as a Technology and Financial Centre.[1]

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[1] See *Second Interim Report* Recommendation 9: "that the Australian Government establish a Commonwealth 'Rules as Code' innovation hub." https://www.aph.gov.au/-/media/Committees/fintech_cttee/second_interim_report.pdf?la=en&hash=CAF20E4390C048F8EE71C29D188817618864D131

Importantly, for the avoidance of doubt, this submission is not recommending a 'Rules as Code' approach with coded versions of legislation have equivalent status as traditional legislation. Instead, we believe that technology can be used as a supporting tool to allow drafters and regulators to improve the coherence, consistency, and clarity of their human-language instruments and to facilitate compliance and fulfilment of legislative intent.

> *Recommendation 1: That the ALRC urges the Government to fund and assign accountability to an agency or department (such as the Office of Parliamentary Counsel or the Digital Transformation Agency) to implement XML-formatted (or other international standard) publication of all federal legislation and subordinate instruments.*

However, we believe that basic XML publication is only an initial step, and may not go far enough. There are different XML schemas that have been developed for legal drafting, and there are also more modern markup languages that could be considered.

At this time, our intent is not to recommend any specific technology, but to ensure that accountability and funding is provided to progress to the next stage.

> *Recommendation 2: That ALRC explicitly promote the use of digital legal technology in the drafting process to help avoid the current problems highlighted in its review of the Corporations Act.*

As noted above, we are suggesting that the ALRC adopt a full-blown 'Rules as Code' objective. While the Rules as Code projects are providing useful outcomes and learnings for the long-term development of digital law, they are clearly not yet sufficiently standardised or scalable on a national level and could introduce new risks around transparency as well as up-front costs for Government.

An approach that integrates a markup language such as XML, and incorporates tools, taxonomies and standards to identify the key components of legislation as data elements would allow a more structured approach to drafting. Tagged legislative text could be ingested and managed dynamically through software products developed by Regtech companies or even end-users based on their particular objectives and needs.

> *Recommendation 3: That ALRC explores implementation of technology for all new legislation whereby definitions are managed through a public taxonomy or glossary of core legislative concepts, which are tagged in and linked to relevant legislation.*

Definitions of key terms in legislation are highlighted as a major issue within the ALRC's review. With definitions and other concepts such as obligations and exclusions converted to tagged textual data, inconsistencies and other pitfalls could be more readily flagged for drafters. Cross-references and downstream impacts on other provisions or laws could be more easily identified. Markups from prior versions would keep track of substantive changes to definitions, obligations and exclusions.

Tools to achieve this (such as standardised legal ontologies and ontology management software) are emerging around the world, although there is no consensus on the best approach. The ALRC Review and the subsequent redrafting of this huge body of law could be an important catalyst to reach agreement on a standardised approach and how to implement it in Australia.

The way forward

There are a number of hurdles that will need to be overcome to implement and realise the benefits of technology-enabled legislation.

First, this initiative needs to be driven by the public sector, which alone makes laws, but no single agency currently has the mandate or funding to progress this work.

Second, technology tools and standards do not exist, or exist only in proprietary offerings. There are some open-source initiatives, but Government agencies will require fully supported tools that can be implemented at scale, with robust support and training available.

Third, a framework and model for widespread adoption of digital legislation has not been articulated. Most activities remain limited to basic XML and small-scale pilots.

Finally, general principles for digital legislation tools to ensure they support key values such as transparency, compliance, efficiency, and integrity, have not been agreed. There are a number of different approaches that could be adopted, and it is not clear which is best. Further dialogue is needed with all stakeholders, including policy-makers, legislative drafters, regulators, Regtech companies, regulated entities and the general public.

The ALRC's Review could help to drive progress across these areas by:
1. recommending Government funding be allocated to a specific agency to implement XML-based legislation (such as the DTA or OPC);
2. proposing a concrete timeline for XML publication of legislation;
3. proposing a roadmap for trialling and adoption of more sophisticated digital legislation techniques and tools;
4. sponsoring a 'sandbox' to invite interested parties to test digital drafting and analysis techniques and tools on draft legislation (for example, the sample Chapter 7 text provided with the Interim Report); and

5. convening a working group to develop high-level principles for digital publication of legislation.

The AUSCL would be happy to serve as a forum to bring together thought leaders and legislation digitisation practitioners within the public and private sectors to contribute to contribute their expertise.

Roundtable

In furtherance to this submission, AUSCL invites the ALRC to a Roundtable with thought leaders from within AUSCL's extensive multidisciplinary digital law network. This Roundtable will give the ALRC the opportunity to explore ancillary opportunities and challenges. We will look forward to co-designing this Roundtable with the ALRC.

> *Recommendation 4: That ALRC enlists the assistance of AUSCL in co-designing a roadmap for digital enablement within the Australian legislative framework.*

AUSCL has run similar Roundtable sessions for the Department of Home Affairs and the Digital Transformation Agency to help capture expert and multi-disciplinary views on policy and legislative development, on subjects including Digital Identity, Artificial Intelligence, and Cybersecurity.

AUSCL plays an active role in promoting greater understanding of Rules as Code and has run a series of Masterclasses and webinars on Rules as Code and its application within legislative drafting through to compliance by design initiatives. On 15 March 2022, AUSCL will co-host the Rules as Code 2.0 Global Plenary with the UNSW Allens Hub for Technology, Law and Innovation featuring many of the field's experts from across the globe. Registration for the event is via https://rac2022.eventbrite.com.au. The ALRC and its staff and stakeholders are welcome to attend as our guests.

Contact Natalia Crnomarkovic, AUSCL Future Law Network Leader ███████████████ if you would like to discuss any aspect of this submission either in person or as a Roundtable discussion.

Yours sincerely,

Marina Yastreboff
President

on behalf of the
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AUSCL Future Law Network and Policy Lab

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The authors' contribution is made in their personal capacity and does not necessarily represent the views of the author's employer, clients or workplace.

Annex

Prototype legislation for Chapter 7

The ALRC's Prototype Legislation released for consultation in November 2021 could be used as a test case of how digital tools could aid in drafting and analysis of new legislation.

This excerpt of legislative drafting based on Chapter 7 contains essentially only two obligations:
1. A person who carries on a financial services business must hold an AFSL.
2. A person must give another person a PDS if the person issues a financial product to that other person.

The wording of these two obligations make up a tiny part of the overall legislative text and are buried deep within it. Most of the 20-pages of legislation deals with definitions, clarifications, inclusions and exclusions related to the underlying terms relevant for the obligations, such as:

- what are financial services
- what is financial services business
- where is the financial services business
- what are (and are not) financial products
- the different forms of providing, issuing, acquiring, selling of the financial products that require a PDS to be given
- which type of AFSL
- which other person
- when the PDS must be given.

A digital legislation approach could start with the two core obligations in their most basic form. The key defined terms used in the core obligations would be managed in a taxonomy tool, with each term linked through data mapping to those obligations and exclusions.

With appropriate front-end software tools, drafters could see whether they had dealt with all desired exclusions for a particular term as per their policy instructions, and understand whether this was consistent or inconsistent with how the same term has been addressed in other legislation.

Users of this legislative text could readily generate a list of obligations based on who they apply to, when they apply, etc. which could be ingested into internal compliance obligations registers.

Design and distribution obligations

Increased complexity of legislation is evident in the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*. There are real questions about whether this policy will have the desired outcome of truly customer centric products or just increase compliance burden with little or no impact on consumers. Through the process of digitising this new set of obligations for compliance purposes on behalf of regulated entities, inconsistencies and unintended consequences have become readily apparent.

For example, the definition of what constitutes a financial product for this particular amendment with conduct conditions adds complexity that is confusing to both the consumer and regulated entities. Aligning the AML/CTF obligations with regards to product risk assessments and distribution channels is not mapped or referenced. This has implications for regulated entities' risk and credit management frameworks and how they manage their obligations registers.

Reference cases in technology-enabled legislation

- US District of Columbia makes its legislation available in XML format and publicly available for software developers to use and comment on.
- Denmark's seven principles for digital-ready legislation that forms part of their legislative drafting process.
- New Zealand, Israel and Uruguay took their pension eligibility rules and used the French Government's OpenFisca platform to visualise how legislation is interconnected and to assess pension eligibility.
- Governments and the private sector have developed custom apps, tools or guides that help citizens and business understand their rights and obligations, e.g. NZ SmartStart, Australian Checkbox app, UK DoNotPay app, and the Australian citizenship wizard.