



Australian Government

Australian Law Reform Commission

Ms Sarah Chidgey
Chair
2021–22 Review of the *Legislation Act 2003*
By Email: legislationactreview@ag.gov.au

8 December 2021

Dear Ms Chidgey

The Australian Law Reform Commission (ALRC) is grateful for the opportunity to make a submission to the 2021–22 Review of the *Legislation Act 2003* (*'Legislation Act'*).

This submission is based on findings from the ALRC's ongoing Review of the Legislative Framework for Corporations and Financial Services Regulation. In the course of this Inquiry, the ALRC has examined the accessibility and navigability of legislation on the Federal Register of Legislation, and the Commission has undertaken extensive data analysis of legislation published on the Register. The ALRC has also made proposals in relation to the publication of legislative materials aimed at improving the experience of users accessing legislation through the Federal Register of Legislation.

Based on findings from the ALRC's Financial Services Inquiry, this letter briefly responds to several of the issues raised in the Review's Discussion Paper. The ALRC suggests that enhancements could be made to the Federal Register of Legislation and the publication of legislation that would further support the achievement of the Act's objects. Amendments to the objects to align the publication of Acts and legislative instruments may also bring benefits in managing and navigating the stock of legislation.

Appendix A contains original ALRC data on the Commonwealth statute book and Appendix B includes relevant excerpts from recent ALRC publications.

Three recent ALRC publications are of particular relevance to the Review Committee's work:

- [Interim Report A: Financial Services Legislation](#) (Report, November 2021)
- [Complexity and Legislative Design](#) (FSL 2, October 2021) (*'FSL 2'*)
- [Improving the Navigability of Legislation](#) (FSL 3, October 2021) (*'FSL 3'*)

The ALRC made two recommendations in *Interim Report A* that are relevant to the Review of the *Legislation Act*:

- **Recommendation 11:** The Office of Parliamentary Counsel (Cth) should investigate the production of Commonwealth legislation using extensible markup language (XML).
- **Recommendation 12:** The Office of Parliamentary Counsel (Cth) should commission further research to improve the user-experience of the Federal Register of Legislation.

The ALRC also made a proposal in relation to the publication of legislative instruments that 'notionally' amend the *Corporations Act*.¹ The ALRC has identified that notional amendments significantly reduce the navigability and accessibility of legislation published on the Federal Register of Legislation.

¹ See Proposal A12 in Appendix B.

Publication of legislation in XML

Approximately 67% of parliaments with legislative management systems use XML for at least some of their work, of which 40% use XML to publish legislative materials such as Acts and Bills.² The UK, New Zealand, and the USA publish some or all of their legislation in XML. Queensland, NSW, and Tasmania's adoption of XML has allowed functionalities not available on the Federal Register of Legislation (see *FSL 3* [162]).

XML offers a way to make documents both human- and machine-readable, and opens up a range of possibilities for making legislation more meaningfully accessible. For example, XML can support the 'marking-up' of definitions, cross-references, dates of amendments, and changes to the text of a provision (including notional amendments). The ALRC explored in detail the potential benefits of XML in *FSL 3* ([139]–[170]). The ALRC concluded that, while there would be significant transition costs in implementing XML, doing so would bring benefits for users of legislation, drafters, lawmakers, and RegTech developers.

Most delegated legislation is not drafted by OPC. If the Review Committee considered XML potentially desirable, it could consider whether amending the *Legislation Act* is necessary in order to achieve consistency in respect of formatting legislation in XML. This could be achieved by granting OPC or the Attorney-General the ability to prescribe publication requirements for legislative instruments.

Changes to the Federal Register of Legislation

Section 3(d) of the *Legislation Act* provides that an object of the Act is 'improving public access to Acts and instruments'. The ALRC suggests that the quality of the experience in accessing and navigating legislation through the Federal Register of Legislation is an important aspect of meaningful public access to legislation. The ALRC identified a range of functionalities that other jurisdictions' legislation websites include that are absent or only partly implemented in the Federal Register of Legislation. These include:

- integrated publication of explanatory materials (*FSL 3*, [113]–[116]);
- annotations (*FSL 3*, [117]–[122]);
- consolidated legislative and guidance documents (*FSL 3*, [124]–[125]);
- hyperlinking, including of uses of defined terms (*FSL 3*, [126]–[131]); and
- point-in-time versions (*FSL 3*, [133]–[136]).

These observations were the basis for the ALRC's recommendation that OPC should commission further research to improve the user-experience of the Federal Register of Legislation. The ALRC also noted that the use of XML would support the implementation of potential publication enhancements.

Improved drafting of Acts as an object

Section 3(c) of the *Legislation Act* provides that the Act seeks to encourage 'high standards in the drafting of legislative instruments and notifiable instruments to promote their legal effectiveness, their clarity and their intelligibility to anticipated users'. The Review Committee may wish to consider whether this object should be extended to the drafting of Acts and what processes and institutions may support this object. The ALRC has identified a range of drafting techniques from Australia and overseas that can assist in the navigability, and therefore the accessibility, of Commonwealth legislation (*FSL 3*, [26]–[110]).

² Inter-Parliamentary Union, *World E-Parliament Report* (2018) 54.

Review of Acts as an object

Section 3(f) of the *Legislation Act* has the object of establishing mechanisms to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed'. This could be extended to Acts. In *FSL 3*, the ALRC identified a range of processes currently in place in New Zealand and some European jurisdictions for the review of the statute book (*FSL 3*, [147]–[148]). The Review of the *Legislation Act* offers an opportunity to consider a 'stewardship' approach by OPC to legislation, akin to that in New Zealand.³ The data in Appendix A underline the importance of processes for reviewing the enormous stock of Commonwealth law.

Repeal of amending Acts and Act provisions

Section 3(ea) of the *Legislation Act* provides for 'automatically repealing spent legislative instruments and notifiable instruments (or provisions of those instruments) that merely provide for the amendment, repeal or commencement of Acts or other instruments' (see also s 48A). This could be extended to Acts or provisions of Acts that merely provide for the amendment, repeal or commencement of Acts or other instruments. In the course of the Financial Services Inquiry, the ALRC has identified a number of Acts that are ostensibly 'in force' Principal Acts but which are primarily amending Acts. For example, the over 200-page *Corporate Law Reform Act 1992* is still in force as a Principal Act despite most of its provisions amending the now repealed *Corporations Law*. It remains unrepealed because it includes amendments to other in force Acts, including the *Bankruptcy Act 1966*, and transitional provisions. Automatic repeal of amending Acts or provisions of Acts would avoid the situation at present whereby people have to wade through Principal Acts that contain amendments that are already included in other Act compilations.

Conclusion

We trust this submission is of assistance. If you require any further information, please do not hesitate to contact the ALRC. The action officer is Nicholas Simoes da Silva (nicholas.simoesdaasilva@alrc.gov.au).

Yours Sincerely,

[by email]

Matt Corrigan
General Counsel

³ See, for example, *Legislation Act 2019* (NZ) ss 92–100, which provide for a process for 'progressively and systematically' revising New Zealand legislation (s 92(1)). See, also, *Legislative Standards Act 1992* (Qld) ss 4, 7.

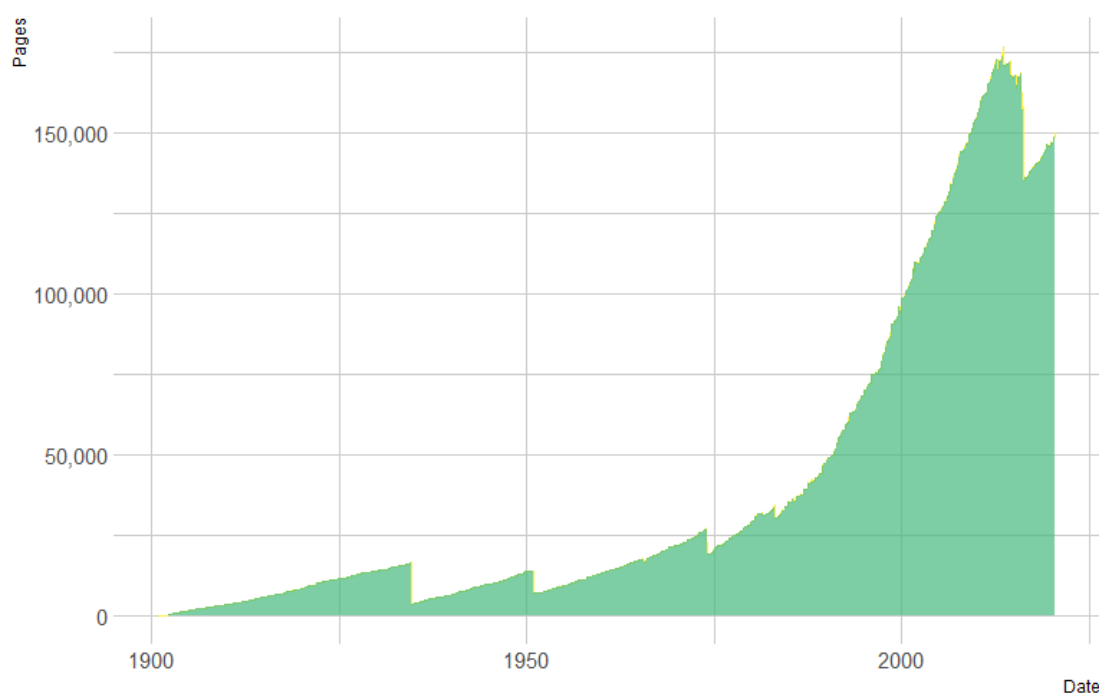
Appendix A: Taking stock of the statute book

The size of the Commonwealth statute book underlines the need for a *Legislation Act* that supports meaningfully accessible Commonwealth law.

- As at 30 June 2021, there were 1,220 Principal Acts in force, covering 115,621 pages and over 20.5 million words (excluding tables of contents and endnotes).
- As at 30 June 2021, there were 3,096 Amending Acts in force. These contained 98,829 pages when passed by the Parliament.
- As at 7 December 2021, there were 24,063 Principal legislative instruments in force, with a further 568 amending instruments.
- In total, as at 7 December 2021, 51,374 Principal legislative instruments have been published on the Federal Register of legislation, covering approximately 20 years (including pre-ComLaw instruments also published on the website). A further 35,073 Amending legislative instruments have been published on the Register. These figures exclude compilations.
- As at 7 December 2021, the Register included 8,140 Principal Acts from the period since Federation in 1901, and a further 5,048 Amending Acts.

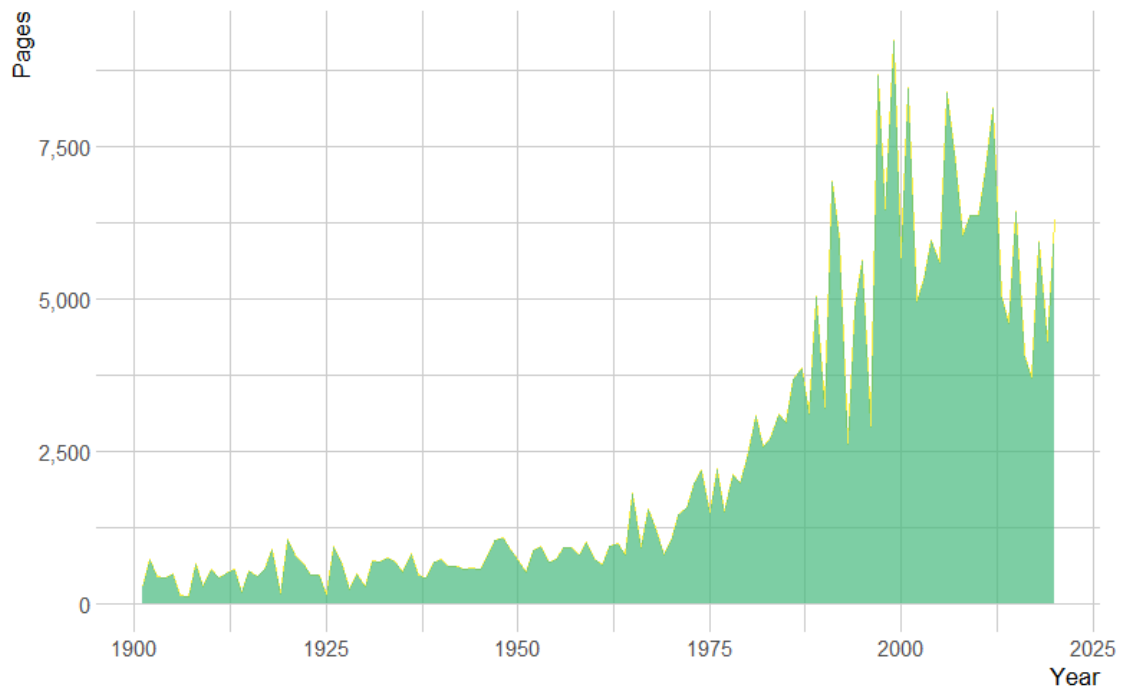
Figure 1 illustrates that the stock of Amending and Principal Acts (as made by the Parliament) is significantly larger than the 115,621 pages currently in force in Principal Act compilations and unamended Principal Acts. Repealing Amending Acts and provisions that have already taken effect in Principal Act compilations would immediately remove tens of thousands of pages from the Commonwealth statute book. It would also remove the amendments that currently appear in Principal Act compilations and unamended ‘as made’ Principal Acts.⁴

Figure 1: Stock of Commonwealth Acts in force (as made) to 1 July 2021



⁴ The ALRC has identified at least 160 Principal Acts (including compilations) that contain amendments to other Acts. For people navigating the statute book, these Acts clutter meaningful law with amendments that are already integrated in other Acts and are therefore duplicated among Principal Acts. See *Corporate Law Reform Act 1992* above. See also, for example, other Principal Acts containing mainly amendments: *Territories Law Reform Act 2016*, *Insolvency Law Reform Act 2016*, *Competition Policy Reform Act 1995*, *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998*, *National Health Reform Amendment (Independent Hospital Pricing Authority) Act 2011*).

Figure 2: Flow of Commonwealth Act pages receiving Royal Assent per year to 31 Dec 2020



Appendix B: Excerpts from relevant ALRC work (citations omitted)

Improving the Navigability of Legislation

10. According to the New Zealand Law Commission, ‘one aspect of the rule of law is to ensure that Acts of Parliament are accessible and available.’ The law is accessible if it is publicly available, navigable, and able to be understood. ... Complex legislation, even if publicly available, is unlikely to be accessible legislation because it will be difficult to navigate, read and understand.
11. To date, there has not been a substantial amount of empirical research exploring how users (or readers) engage with legislation and what insights that may offer for legislative drafting. In particular, there has been little research to determine whether particular drafting techniques or aids to navigability are effective. Two examples of surveys undertaken in Australia and the United Kingdom are outlined below, and the findings of other research are discussed in the context of specific navigability aids. ...
111. In addition to drafting techniques, there is scope for improving the navigability by applying aids to legislation as it is published on a publicly available website.
112. In Australia, it appears that the legislative drafting agencies of all jurisdictions are responsible for both the drafting and publication of legislation on the internet. At the Commonwealth level, for example, the OPC is responsible for maintaining the Federal Register of Legislation. This also appears to be common internationally. The United Kingdom is an exception, where the roles of drafting and publication are split between the United Kingdom Office of Parliamentary Counsel, responsible for drafting legislation, and the National Archives, which is responsible for maintaining the UK legislation website.

Interim Report A: Financial Services Legislation

Proposal A12: As an interim measure, the Australian Securities and Investments Commission, the Department of the Treasury (Cth), and the Office of Parliamentary Counsel (Cth) should develop a mechanism to improve the visibility and accessibility of notional amendments to the *Corporations Act 2001* (Cth) made by delegated legislation.

- 6.99 Moving to XML can also benefit drafters, parliamentarians, and consultees participating in the lawmaking process. For example, Queensland now publishes indicative reprints of selected principal Acts that would be amended by Bills before Parliament. These show the effect of proposed amendments contained in the Bill. Indicative reprints offer improved understanding and scrutiny of proposed amendments, and can ensure that the effect of amendments on the existing legislative text and scheme are fully appreciated by lawmakers and other interested persons.
- 6.100 In consultation with the ALRC, the Office of the Queensland Parliamentary Counsel (‘OQPC’) suggested that their move to XML brought a range of benefits, including rationalising and repurposing resources, and removing ‘repetitive, mundane, and non-rewarding manual tasks, processes and steps’. They also suggested it assisted in ‘streamlining the production processes to meet tighter turn-around times required by government’. Scholars have also identified similar benefits in other jurisdictions that have introduced XML, particularly for ‘public access, online publishing and automation’ and streamlining of ‘in-house processes for both drafting and publishing’.
- 6.101 Moving to XML would represent a significant body of work for OPC. Importantly, OPC publishes a greater volume of legislation than is published in state and territory jurisdictions. Proper resourcing would be required to ensure adequate quality control in any conversion of existing legislation to XML, and to ensure that XML is used in a way that is fit for purpose. A range of issues would need to be considered, including the scope of XML publication. For

example, would all older compilations be converted to XML, and how would this be prioritised relative to converting more modern or new laws to XML? Would all gazetted instruments and notifiable instruments be prepared in XML? Would all delegated legislation be prepared in XML, or just delegated legislation drafted by OPC? If all delegated legislation were to be produced in XML, all Commonwealth agencies would need to be required to use an XML template, because much delegated legislation is not drafted by OPC. Having all delegated legislation in XML would be preferable, for example to avoid potentially needing to locate OPC-drafted delegated legislation separately from other delegated legislation on the Federal Register of Legislation, and to enable consistent identification of the use of defined terms.⁷⁷ However, achieving uniformity across multiple agencies may be challenging. ...

6.106 Experiences overseas suggest that a range of other steps can be taken to improve the way users understand and interact with legislation. For example, the European Union's European Legislation Identifier ('ELI') seeks to support legislation that is more interactive and a statute book that is more navigable. The ELI provides information (metadata) about legislation, linking together legislation through metadata such as what the legislation amends, authorises, repeals, corrects, and authorises. While some of this information is available through the Federal Register of Legislation, it is often at a high level. For example, the 'Series' webpage for an amending Act has a list of Acts that are amended by the first Act. In contrast, the European Union and UK legislation websites provide information about each provision that is being amended, and the date from which the changes take effect. For regulated entities, it is therefore easier to track changes in obligations, and for RegTech providers to develop solutions that can automatically identify changes to legislation across the entire statute book. The European Union website also labels legislation with topics, so it is easier to find all legislation associated with 'financial instruments' or 'financial services', for example. ...

6.108 [I]t is possible to obtain information about the users of legislation and use that information to improve the drafting and presentation of legislation. OPC drafting guidance acknowledges that legislation's intended audience is important, advising drafters that 'it helps to know you who your readers are and why they read the law':

Sometimes you can decide who most of the users of a law will be, and then deliberately aim at them, as in the case of the *Social Security Act 1991*. However, we usually write for a variety of users, and all our laws are also read by administrators, members of Parliament, lawyers and the judiciary. Legislative drafters are possibly the only people who habitually write highly technical documents for such a wide range of readers.

6.109 Better data about the users of legislation, both generally and in regard to particular Acts, would help legislative drafters make informed decisions about their audience.

Complexity and Legislative Design

147 One approach to managing the complexity in the statute book is to conduct regular reviews of the stock of legislation. Godwin, Brand and Langford argue that legislative review is extremely important. They suggest that the 'inherent risk of incoherence resulting from patchwork amendments over a long period of time could be mitigated by more rigorous review of legislation'.

148 New Zealand has a Legislation Design and Advisory Committee ('LDAC') which examines the stock of existing laws and encourages agencies to proactively review their legislative instruments. The *Legislation Act 2012* (NZ) also provides that the 'Attorney-General must prepare a draft 3-yearly revision programme for each new Parliament'. The purpose of this programme is to 'make New Zealand statute law more accessible, readable, and easier to understand'. Some European jurisdictions also have formal processes in place to review the stock of legislation. ...

- 154 Independent review bodies can also serve a legislative stewardship role. In Australia, a Corporations and Markets Advisory Committee (CAMAC) existed from 1989 to 2014 and had the ability to make recommendations about any matter connected with a proposal to make or amend corporations legislation. It had the ability to consider the stock of legislation and make law reform proposals on an ongoing basis.
- 155 It is possible that the Office of the Parliamentary Counsel (Cth) could adopt more of a ‘stewardship’ role in which it focuses more squarely on reviewing and managing the stock of legislation in priority areas, such as areas that frequently change. However, this would likely require improved resourcing and potential changes to its mandate and powers.