

Response to the LIA Review Committee's Issues Paper: 2008 Review of the Legislative Instruments Act 2003

The New South Wales Council for Civil Liberties ('CCL') is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

The Legislative Instruments Act 2003 (LIA) was intended to introduce a comprehensive regime for the making registration, publication, parliamentary scrutiny and sunseting of Cth delegated legislation. More importantly, the LIA bears on the distribution of powers between the executive and parliament.

Primary legislation results from legislative law-makers in the parliament, whilst delegated legislation, usually described as rule, regulation, ordinance, order, proclamation, declaration, determination, instrument, by-law or disallowable instrument, results from the exercise of decision-making by non-parliamentary decision-makers empowered by primary legislations.

CCL is concerned that there are too many delegated legislative documents that are excluded from the definition of "legislative instruments" under the LIA, and hence are not under the parliamentary scrutiny. It seems to us that the intention of the LIA has been undermined in ways which detract from principles of good governance.

Instruments that are described as not being legislative instruments

In some cases, determinations which are of wide public interest, and general public importance, are deemed to be non-legislative instruments for the purposes of the LIA.

The citizenship test is an example. Subsection 23A(7) of the Australian Citizenship Act 2007 (ACA) sets out that the Minister is empowered to make any determination

regarding the citizenship test and declares that the determination so made is not a legislative instrument. The ACA does not provide clear guidance on how the Minister should exercise his discretion in devising the nature or form of the citizenship test. Under subsection 23A(1), the test only needs to be related to the eligibility criteria referred to in the paragraphs 21(2)(d)-(f). That the ACA provides little limit to the Minister's discretion regarding the test makes the provision a skeleton form of legislation, which is prone to be abused without proper scrutiny. In fact, the test which the Minister has prescribed does not relate to the eligibility criteria referred to in the paragraphs 21(2)(d)-(f). Instead, it is described by the Minister as a test of "values".

In this case, the legislation has allowed the Minister to make his own rules, which might not have been originally intended by the parliament. The proposed answers to the questions, as a matter of fact, determine the law which the ACA fails to detail. The importance of citizenship standards to Australia warrants parliamentary scrutiny of any instrument that sets out these standards. Parliamentary scrutiny ensures the standards of Australian citizenship are kept as the same as the parliament initially intended. Making the Minister's determination a legislative instrument would prevent the delegated rule-maker from abuse of its legislative power for lack of Parliamentary scrutiny.¹

CCL recommends that the present scheme which allows legislation to state conclusively that delegated legislative instruments (including Ministerial determinations) are not subject to the LIA be changed. The existence, and frequent use of s7(1)(b)(ii), is inconsistent with the underlying purpose of the Act. We recommend the abolition of that sub-section.

Yours faithfully

Stephen Blanks

Secretary, NSW Council for Civil Liberties

¹ Paras 12-16, Submission of the Human Rights and Equal Opportunity Commission to the Legal AND Constitutional Affairs Committee on the Australian Citizenship Amendment (Citizenship Testing Bill) 2007.