

OPC Drafting Manual

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Purpose of the manual

Overview

1 The purpose of this manual is to provide an overview for drafting Bills in the Office of Parliamentary Counsel.

2 The manual is intended to be a starting point. Consequently, many sections of the manual provide a brief overview and then refer to more detail that is contained in other documents such as the Drafting Directions, the Drafting Notes, the Office Manual or Word Notes.

Relationship to other documents

Drafting Directions

3 The Drafting Directions are an authoritative series of pronouncements on a range of drafting issues. Drafting Directions are issued by First Parliamentary Counsel (*FPC*) after consultation with all drafters and the editorial staff.

4 A complete set of Drafting Directions is issued to all drafters and to the editorial staff. The Drafting Directions are also available on Folio. Until recently, the Drafting Directions were a numbered series (by year and then sequential number).

5 More recently Drafting Directions covering particular topics have been rationalised into larger Drafting Directions. In addition, the Drafting Directions have been organised on a topic basis and numbered accordingly.

6 In the 1980s and before, Drafting Directions used to contain administrative information. This is now relatively uncommon. Also, some Drafting Directions used to be quite short and cover very specific points. Nowadays, they cover a particular subject matter, although they often still only deal with some specific points on that subject.

7 Drafting Directions are not “edited”. They are changed by issuing a replacement.

8 Some other documents are described as having the “status of a Drafting Direction”. This means that it contains rules that should be followed by drafters unless they obtain an exemption in a particular case from FPC.

Drafting Notes

9 The Drafting Notes are a collection of papers written (mostly) by OPC drafters. Some have been subject to some form of peer review but they have not been subject to consultation within OPC and do not have the “approval” of FPC.

10 The Drafting Notes are made available as a research tool for all drafters and as a way of recording and sharing drafting knowledge.

11 Printed sets of Drafting Notes are not maintained. The Drafting Notes are available to all staff through Folio Office Documents.

12 Drafting Notes can be updated by the author editing the document and arranging for the version on Folio to be updated. This is relatively uncommon.

13 Drafting Notes tend to cover a topic.

14 Although there have been projects to ensure that Drafting Notes are prepared on topics that are of importance, the coverage is still somewhat haphazard.

FPC emails

15 From time-to-time, FPC issues emails on drafting issues. These are similar to Drafting Directions but have generally not had the same consultation process.

16 It is intended that these emails will be quickly incorporated into a Drafting Direction.

Relationship with the manual

17 Some of the material that was previously covered in Drafting Directions, Drafting Notes and FPC emails have been incorporated into the Drafting Manual. However, often this Manual only has a brief outline of an area and you need to go to one of the other documents for greater detail.

Presentation and form of legislation

Overview

18 One of OPC's outputs is "a consistent statute book". One area in which OPC concentrates on consistency is the presentation and form of legislation. This consistency is intended to provide a coherent statute book that is easy to use for regular users of legislation. Therefore, this is an area in which there are a substantial number of rules which must be followed when drafting Bills.

19 This section sets out information about a range of matters that deal with the presentation and form of legislation.

Format of legislation

20 The format of legislation is strictly controlled. Details of the format are contained in the OPC Word Note series—particularly Word Note 3 which contains Bill templates, styles and examples and Word Note 4 which contains Formatting rules for OPC Bills and amendments.

21 While there are some differences in the format of some kinds of legislation—in particular, Acts that are part of the Tax Code—OPC is working to reduce the number of variations to give all legislation a consistent look and feel.

Bill titles

General

22 Each Bill has two titles—a short title and a long title. The long title of the Bill is also referred to as the title.

23 The long title could be thought of as a description of the Bill and the short title could be thought of as its name.

Long titles

24 The long title is used to describe the contents of the Bill. This is usually done in a very general way. For example “A Bill for an Act to amend the law relating to taxation.”

25 The drafting of the long title is very important as the long title must encompass all the matters included in the Bill. If there are matters that are not covered by the long title, the Bill may need to be withdrawn from Parliament and then reintroduced.

26 When a Bill receives the Royal Assent and becomes an Act, the words “A Bill for” are dropped from the long title.

27 Drafting Direction 1.1 has more detail about long titles.

Short titles

28 The short title is the name that is used to refer to a particular Bill or Act. For example “*Income Tax Assessment Act 1997*”. Short titles are always shown in italics.

29 While a Bill is in Parliament, the name includes the word “Bill”. This is changed to “Act” when the Bill receives the Royal Assent.

30 The year in the Act title is the year in which the Act passes Parliament. This is usually, but not always, the year in which it receives the Royal Assent. (See for example the *Australian Sports Drug Agency Act 1990* which was passed by Parliament in 1990 but was assented to in 1991). The year is also occasionally changed by a later amending Bill. For example the *Workplace Relations Act 1996* was originally the *Industrial Relations Act 1988*.

31 The short title of an Act can be amended by a later Act. This would be done, for example, where amendments render the short title incorrect or misleading.

32 As a general rule, you should take particular care when naming Bills to ensure that the names you choose are as informative as possible (within reason) and do not cause unnecessary confusion to the Parliament or to any other users of legislation.

33 Drafting Direction 1.1 has more detail about short titles.

Act numbers

34 Each Act is given an Act number which is made up of the year in which it receives Assent and the number Bill that it is for that year. For example the 45th Bill assented to in 2005 would be Act No. 45, 2005.

35 As the year is the year of Assent, it occasionally does not match the year in the Act name. For example, the *Australian Sports Drug Agency Act 1990* which was passed by Parliament in 1990 but was assented to in 1991 is Act No. 18, 1991.

36 Even when the year in the Act name is amended (as with the *Workplace Relations Act 1996* which was originally the *Industrial Relations Act 1988*) the Act number does not change.

Portfolio for cover page of Bill

37 The portfolio of the Minister who is to be responsible for the carriage of the Bill through the Parliament (also known as the sponsoring Minister) is shown on the cover page of the Bill.

38 Drafting Direction 1.2 has further information about this, including an up-to-date list of the portfolios.

Commencement provisions

39 Commencement provisions set out when the Act or provision comes into operation. One way of looking at this is that this is the time when the text is “written” into the statute book. This will always be a point in time.

40 Where it is expressed to be a date, subsection 3(2) of the *Acts Interpretation Act 1901* provides that it “shall come into operation immediately on the expiration of the last preceding day”.

41 Commencement provisions in Bills drafted by OPC are often quite complicated. Therefore, a standard approach using a table has been developed to make it very easy to determine when particular provisions in an Act commenced. The table is designed to have the actual date included in the table by publishers once it is known.

42 Although the *Acts Interpretation Act 1901* provides for a default commencement if no commencement provision is included, it is OPC policy that every Bill must have a commencement provision.

43 Commencement provisions need to be contrasted with application provisions. An application provision will be used where it is necessary to specify *what* a provision applies to. For example, “to gifts made after 20 January 2005”. Not all provisions need an application provision. There is more information about application provisions below.

44 Drafting Direction 1.3 has extensive information about commencement provisions.

Amending forms

45 Another area in which OPC adopts a strictly consistent approach is amending forms.

46 The forms to be used are those set out in the Amending Forms Manual. The Amending Forms Manual is listed under its own heading in Folio Office Documents.

47 The Amending Forms Manual is given the status of a Drafting Direction by Drafting Direction 1.4.

48 Macros have been developed in Word to simplify the use of the standard amending forms. The Amendment Shorthand System (ASS) macro provides an abbreviated method for typing the amending “formulae”. It substantially reduces the number of keystrokes needed to produce the amending formula. Details of this macro are in Word Note 28.

49 The PAMS ASS macro has been developed to simplify the forms used for Parliamentary Amendments. This macro uses a menu and dialog box approach. Details of this macro are in Word Note 41.

Textual amendments

50 In common with all other Australian drafting offices OPC uses a “textual amendment” system. Textual amendments involve identifying particular bits of text and either inserting or adding other text after it, omitting that text or omitting the text and substituting other text for it. Sometimes the changes are just little ones, other times one amendment might go for many pages.

51 This can be contrasted with the approach of repealing the whole Act and re-enacting a replacement and the approach of modifying the operation of existing provisions.

52 After an amending Act is passed, these amendments are then incorporated into the Principal Act. This is done by an area in the Attorney-General’s Department (as well as by private publishers in some cases). The consolidated versions are then published on the Internet.

Definitions

Introduction

53 Definitions are an important tool in legislative drafting. They are used for a number of purposes. Primarily, they are used to make legislation more readable by labelling concepts that are used throughout the Bill and reducing the need to repeat text.

54 However, the overuse or misuse of definitions can reduce the readability of legislation. Therefore, it is important to ensure that definitions are used carefully.

55 One approach that OPC has started to adopt is “one expression, one meaning”. Under this approach, an expression is not defined to have different meanings in different parts of an Act.

56 The Plain English Manual and Drafting Direction 1.5 contain the main guidance for using definitions. That Drafting Direction refers to a substantial number of other Drafting Directions that also deal in some way with the use of definitions. There is also a paper in the Drafting Notes titled “Drafting—Definitions: notes for non-SES drafters”.

Asterisking to identify defined terms

57 Asterisking is an attempt to address the difficulty of locating definitions and knowing which terms or expressions are defined. That difficulty is likely to be greater in larger Bills, so a very small Bill is less likely to benefit significantly from asterisks.

58 To date, asterisking of Acts outside the Tax Code has been confined to fairly large Acts. However, within the Tax Code, some medium-sized and smaller Acts have also been asterisked (eg. the Wine Equalisation Tax Act, the ABN Act and the Luxury Car Tax Act).

59 Drafting Direction 1.6 deals with asterisking to identify defined terms.

Units of text in Acts

60 The basic unit of text is a section. These can be grouped into Chapters, Parts, Divisions and Subdivisions. Sections can be divided into subsections, paragraphs and subparagraphs. Some older sections are also divided into sub-subparagraphs.

61 There is also a range of other units of text in Bills and Acts.

62 Attachment A contains information about the different units of text that are found in Bills that are drafted in OPC.

Numbering and lettering

General

63 OPC currently uses two approaches to the numbering and lettering of provisions of Acts. These are the “standard” approach and the “Division-Section” approach. Details of these approaches are contained in Attachment A.

64 Drafting Direction 1.7 contains particular rules about numbering and lettering.

Naming conventions

65 In legislation drafted by OPC, we have adopted the convention of referring to units below the section level using the smallest unit of text. Eg:

- (a) section 12
- (b) subsection 12(1)
- (c) paragraph 12(1)(a)
- (d) subparagraph 12(1)(a)(ii)

66 This can be contrasted with the approach used in some other jurisdictions of referring to all of these items as “section” (eg section 12(1)(a)(ii)).

Application provisions

67 The purpose of an application provision is to provide exactly how the “new” law will apply and how the “old” law will cease to apply. This may involve providing for the “old” law to continue to apply for limited purposes despite the fact that the old law has been repealed.

68 There is a paper in the Drafting Notes titled “Drafting—Application and Transitional Provisions”. This provides guidance on the main points to be considered when drafting application provisions.

Transitional provisions

69 There are many types of transitional provisions. The most common type of transitional provision modifies the effect of the “new” law.

70 Other types of transitional provisions are as follows:

- (a) modify the effect of the “old” law (as it continues to apply by virtue of an application provision);
- (b) override the presumption against retrospectivity;
- (c) ensure that an amendment does not affect the interpretation of the “old” law;
- (d) ensure that the repeal of an amending Act, or of amending provisions, does not effect the operation of amendments made by the amending Act or amending provisions.

71 There is a paper in the Drafting Notes titled “Drafting—Application and Transitional Provisions”. This provides guidance on the main points to be considered when drafting transitional provisions.

Legislation with special formats and rules

Tax Code Bills

72 Bills dealing with Acts in the Tax Code are dealt with in Drafting Direction 1.8 and Word Note 23.

73 The Drafting Direction contains special rules that apply to Bills that will form part of the Tax Code or that amend Acts that are part of the Tax Code. The rules do not apply to any other Bills.

74 The Word Note covers certain formatting features that are different in Tax Code Bills compared to standard OPC Bills.

Social Security Bills

75 The formatting of Social Security Bills is dealt with in Word Note 30. This mainly deals with some components in such Bills that are not found in other legislation.

Usage (including plain English)

Plain English/Plain Language

76 OPC began moving to the use of plain English in the mid-1980s. Our approach to plain English was documented in the early 1990s in The Plain English Manual which was largely drafted by the then First Parliamentary Counsel, Ian Turnbull QC. The Plain English Manual is in Folio Office Documents under Other Drafting Documents.

77 More recently, we have adopted the term “plain language”. This has been done to indicate that we see clear writing as being a wider concept than some of the narrower approaches that had been adopted by some when referring to plain English.

78 The Plain English Manual continues to provide the foundation for OPC’s approach to plain English drafting. The manual provides both a good overview of plain English drafting as well as specific examples of words and phrases that can be used to simplify drafting.

79 Drafting Direction 2.1 gives the Plain English Manual the status of a Drafting Direction and also contains a small number of additional rules on spelling and punctuation.

Macquarie Dictionary and the Style Manual

80 OPC relies on the Macquarie Dictionary and the Style Manual as the basic authorities for spelling and related matters.

81 The Macquarie Dictionary is considered to be the best source of information on current Australian spelling and usage.

Gender neutral language

82 For many years, OPC has drafted using gender neutral language. Drafting Directions on this topic were first issued in 1984.

83 Gender neutral language is used to make the language of Bills more inclusive.

84 We have found that this approach does not make provisions more cumbersome or lead to a proliferation of “his and hers” etc throughout new legislation as drafters tend to use the description of the relevant person (eg “the taxpayer’s”) instead. In many cases this makes the provision clearer than if just “his” was used and may also avoid ambiguity where there is more than one person referred to in the provision.

85 Drafting Direction 2.1 contains guidance on the use of gender-neutral language.

Use of various expressions in Bills

86 The are a range of miscellaneous matters that need to be taken into account when using expressions in Bills. These include avoiding using registered trade marks and matters to be aware of when borrowing legislation from other jurisdictions.

87 Many of these matters are covered by Drafting Direction 2.2 which has parts dealing with the following:

- (a) matters to be aware of in choosing expressions to be used in Bills;
- (b) words and expressions to be used in Bills;
- (c) definitions of specific expressions;
- (d) Government terminology;
- (e) financial sector terminology.

Content

Constitutional law

88 Constitutional law is extremely important to drafters in OPC. There are two main aspects to this. First, every provision of every Act must be supported by a constitutional power. Secondly, there are a number of constitutional prohibitions that must not be contravened.

89 Constitutional law also impacts on a number of procedural matters such as the House in which certain Bills must be introduced.

90 Drafting Direction 3.1 covers a range of these constitutional matters. In addition, there are numerous papers in the Drafting Notes that deal with constitutional law matters.

Taxation

91 The Constitution sets out a variety of procedural requirements in relation to taxation Bills that drafters need to be aware of.

92 Drafting Direction 3.2 deals with the following matters:

- (a) the House of introduction for Bills dealing with taxation or amending Acts that deal with taxation;
- (b) obtaining notices for Bills dealing with taxation;
- (c) that taxation is to be imposed by express words;
- (d) when to structure provisions as provisions imposing tax.

93 Drafting Direction 3.2 deals with the drafting issue of the application of amendments relevant to the making of assessments of income tax and fringe benefits tax.

94 There are a number of papers in the Drafting Notes that deal with taxation.

95 In addition, a manual for drafting taxation Bills is currently being drafted.

Application of Acts in relation to various maritime and external areas

96 Drafting Direction 3.3 deals with the application of Commonwealth Acts to the territorial sea of Australia, the internal waters of Australia, the contiguous zone of Australia, the exclusive economic zone of Australia and the continental shelf of Australia. It also deals with the application of Commonwealth Acts in relation to the adjacent areas in respect of the States and Territories and in relation to the Australian Antarctic Territory.

97 There is also a paper in the Drafting Notes titled “Drafting—Geographical application of Acts”.

Exercise of powers etc. (including by Governor-General)

98 There are a number of issues that drafters need to be aware of when conferring powers on people. A number of these are covered in Drafting Direction 3.4 which covers the following matters:

- (a) the implied conferral of powers and the decision in *Hong Kong Bank*;
- (b) the different views on subsection 33(3) of the Acts Interpretation Act;
- (c) the effect of changes in legislation on delegations;
- (d) that Ministers or Departments should not be required to consult other Ministers or Departments;
- (e) whether a person, who is authorised to exercise a power “after report” or “after receiving a recommendation” of some person or authority, may exercise the power otherwise than in accordance with the report or recommendation.

99 Drafters also need to be aware that, when conferring a power on the Governor-General, the power should not be subject to any precondition that requires the Governor-General to consider a matter. If a precondition is required, it should require that another person, generally the Minister, consider a matter. This is covered in more detail in Drafting Direction 3.4.

Offences, penalties, self-incrimination, secrecy provisions and enforcement powers

100 The drafting of offences, penalties, self-incrimination provisions, secrecy provisions and enforcement powers are an important part of the work of OPC.

101 When drafting provisions dealing with offences, penalties, self-incrimination provisions, secrecy provisions and enforcement powers, drafters should refer to the relevant sections of the Guide to Framing Commonwealth Offences, Civil Penalties And Enforcement Powers.

102 Where issues arise in relation to matters covered by the Guide, they should be raised with OPC's Criminal Law Liaison Officer. This will ensure that dealings with the Criminal Law area of the Attorney-General's Department are co-ordinated.

103 Drafting Direction 3.5, in addition to setting out information about the Guide and the Criminal Law Liaison Officer, provides more detail in the following areas:

- (a) the form of offence provisions: using the expression "commits an offence" and not the expression "a person may/must only" to create an offence;
- (b) penalties for criminal offences: using penalty units and not using the expression "Maximum penalty";
- (c) penalties for civil penalty provisions;
- (d) aggravated offences;
- (e) the geographical jurisdiction of offences;
- (f) general offences created by Chapter 7 of the *Criminal Code*;
- (g) the basis of the privilege against self-incrimination and the abrogation and preservation of the privilege;
- (h) secrecy provisions to take account of powers of the Parliament and Parliamentary Committees;
- (i) compensation for damage to electronic equipment or data.

Statutory authorities

104 The drafting of Bills in relation to statutory authorities is a very large topic. It is an area that has become topical again due to the Uhrig Report which has suggested a range of changes in the structures for statutory authorities.

105 Drafting Direction 3.6 deals with various matters in relation to the establishment of a new statutory authority.

Tribunals and other administrative bodies

106 Many decisions by Commonwealth decision makers are reviewable by the Administrative Appeals Tribunal. This is a merits review.

107 In addition, there are a range of specialist tribunals that have been set up to review decisions in particular areas.

108 The paper by the Administrative Review Council, “Administrative Law: What decisions should be subject to merits review?” sets out guidelines about which decisions should be subject to merits review. The paper is available in the Drafting Notes.

109 Drafting Direction 3.7 deals with the notification of review rights, the protection and liabilities of witnesses and contempt in relation to tribunal proceedings.

Subordinate instruments

110 The passage of the *Legislative Instruments Act 2003* changed a number of aspects of the way in which provisions providing for subordinate instruments are drafted. Consequently, any earlier precedents should be treated with caution.

111 Drafting Direction 3.8 covers the drafting of subordinate instruments in some detail.

Evidence and proof (including oaths and affirmations)

112 Drafting Direction 3.9 deals with the following matters:

- (a) certificates or other instruments that are prima facie evidence or conclusive evidence of a matter;
- (b) documents purporting to be a certificate or other instrument that are taken to be such a certificate or other instrument;
- (c) the making of oaths and affirmations;
- (d) the persons before whom an oath or affirmation may be made.

Australian governments or jurisdictions

113 Many Commonwealth Bills have the potential to apply to the Commonwealth and/or States and Territories. Whether it will in particular cases is a matter of policy.

114 Drafting Direction 3.10 covers the following:

- (a) binding the Crown;
- (b) how to refer to States and Territories;
- (c) application of laws to a Territory (other than ACT and NT);
- (d) States grants;
- (e) State land titles functions.

Commonwealth agreements (including treaties and conventions etc.)

115 The Commonwealth enters into a range of agreements that then need to be implemented by, or referred to in, legislation. Agreements that the Commonwealth enters will generally fall into one of the following broad categories:

- (a) international agreements that are binding at international law (eg. treaties and conventions);
- (b) non-binding international agreements;
- (c) domestic agreements between the Commonwealth and other domestic bodies politic such as the States and Territories;
- (d) informal agreements or contracts between the Commonwealth and private parties (these agreements may involve either domestic or foreign private parties but would be governed by private, not public, law).

116 The matters you need to consider vary according to the kind of agreement in question. Drafting Direction 3.11 deals with the following in relation to agreements covered by paragraphs 115(a) and (b):

- (a) role of Parliament;
- (b) identifying international agreements.

117 Drafting Direction 3.11 deals with the following in relation to agreements covered by paragraphs 115(c) and (d):

- (a) the authority to enter these kinds of agreements;
- (b) payments under agreements;
- (c) agreements entered into by Ministers and other Commonwealth officers;
- (d) identifying domestic or private agreements.

118 The formatting of agreements in Bills is dealt with in Word Note 25. The basic rule is that the agreement should be formatted in a way that is substantially similar to the format of the agreement. Exactly how closely the format of the agreement will be followed will be a matter of judgement in each case.

119 There are also 2 papers in the Drafting Notes dealing with giving effect to international agreements.

Appropriations and public money

120 At times it is necessary in a Bill to make clear that the provision itself is not an appropriation but that a further express appropriation is required before payments can be made.

121 Drafting Direction 3.12 sets out the forms of words that should be used to achieve this in particular cases.

Explanatory material

122 OPC includes a range of explanatory material within Bills to assist the users of our legislation.

123 These include simplified outlines, decentralised tables of contents, flowcharts, examples and notes. More information about these can be found in various papers in the Drafting Notes (See particularly “When words are not enough: Graphics and other innovations in legislative drafting” by Hilary Penfold QC).

124 Drafting Direction 3.13 sets out the form of note that should be used to refer to a case to explain an amendment.

Procedural matters

Introduction

125 Information about procedural matters within OPC can be found in a number of sources. This partially reflects history—it depends where the information was first recorded—and it partially reflects the different users within OPC—it has been put where it is considered the relevant users are most likely to find it.

126 This section of the manual describes some of the sources. It also gives an overview of where material on certain topics can be found.

OPC Office Manual

127 The OPC Office Manual has been prepared to provide an introduction to the practice and procedure of OPC. It does not attempt to deal with formal rules to be observed in drafting as such rules are dealt with in documents such as Drafting Directions and the Plain English Manual. Nor does it attempt to set out the minutiae of OPC practice where the practice is the subject of detailed instruction. That instruction will be found in the Office Procedural Circulars or manuals for staff in particular areas.

128 The chapters of the Office Manual are:

- 1 Establishment and functions of OPC
- 2 Organisational structure of OPC
- 3 Basic drafting procedures for preparation of Government legislation
- 4 Legislation Approval Process (LAP)
- 5 Dealing with Bills after submission to LAP

- 6 Relationship with the Attorney-General's Department and AGS during preparation of Government legislation
 - 7 Special considerations applying to omnibus Bills
 - 8 Private Members' Bills and amendments
 - 9 The training of drafters
 - 10 Performance appraisal
 - 11 Drafting tools
 - 12 Facilities provided by the Attorney-General's Department
 - 13 Information Technology
 - 14 Printing, photocopying and correspondence
 - 15 Security
 - 16 Work conditions
- 129 There is also a glossary of commonly used terms.

Other Manuals

130 OPC is developing a range of manuals for staff in particular areas of the office. Although some, such as the Domestic Travel Manual, have little direct relevance to drafting, others contain detailed information about processes surrounding the preparation of Bills. The manuals that are most closely related to drafting are:

- (a) the Legislation Team Manual; and
- (b) the Editorial Team Manual; and
- (c) the Designated Checker Training Module.

Office Procedural Circulars

131 Office Procedural Circulars are a numbered series of circulars on matters of ongoing relevance to staff generally or to a particular group of staff. They deal with operational matters that are not strictly drafting matters. They are generally issued by FPC. The General Manager is responsible for their numbering and distribution. Together they constitute a detailed body of information that is of importance to everyone in OPC.

Information Technology Circulars and Word Notes

132 These are two numbered series of circulars issued by the Information Technology staff to provide guidance for the effective use of computers in the various applications available in OPC and to provide guidance for the effective use of OPC's highly customised Word system in the various applications available in OPC.

133 Drafters need to be very familiar with the matters covered by Word Notes. Some Word Notes, particularly Word Notes 3 and 4, contain rules about the formatting of Bills and must be applied by all staff who work on Bills. Other Word Notes, particularly Word Notes 20, 21 and 27 contain important information about the processes for preparing Bills for printing and for introduction into Parliament.

134 The IT Circulars tend to provide more general guidance on the use of the OPC IT system although IT Circular 20 (on Folio Databases), IT Circular 47 (on Online research services and IT Circular 48 (on the IBIS database) are obviously very relevant to our drafting work.

Procedural matters covered by Drafting Directions

Introduction

135 There are a number of procedural matters that are particularly important to drafters. These are currently covered by Drafting Directions, although some of the material may in future be incorporated into the Office Manual.

Relationships with instructors

Who is our “client”

136 An important thing to remember when dealing with instructors is that they are not our sole “client” for a particular Bill. The “client” should generally be seen as the Government as a whole.

137 This distinction is important because it means that there are matters—particularly the checking of authority and the referral of Bills to other agencies—where our responsibility may conflict with the wishes of our instructors.

Bills with multiple “instructors”

138 On some projects, there will be a number of agencies with a legitimate interest in the Bill. For example, when drafting a Bill affecting the operations of a statutory agency, there may be the portfolio Department as well as the agency and possibly a central agency. Often, these agencies will be represented at drafting meetings and may provide comments on draft Bills.

139 It is important that drafters determine who the instructor for such Bills is. The drafter should then only act on instructions that are given by (or agreed to by) that instructor. This ensures that the drafter is not caught in the middle of disputes by making changes that are not authorised by the person or agency responsible for preparing the Bill for Government.

140 Normally, the instructor will be from the portfolio Department that is most affected by the Bill.

141 In general, drafters should take a flexible approach to the involvement of other agencies in the drafting process. They should however ensure that the instructing agency is aware of all discussions etc. that are held. It is also normally good practice to require that the instructing agency formally issue all instructions.

142 In some areas where this issue is common, standing arrangements have been made to ensure that all parties understand their role. For example, for Revenue legislation, the Treasury has made it clear that while they have sole responsibility for instructing, they are committed to involving the ATO. However, this involvement is only to be done at the instigation of the Treasury instructor. See Office Procedural Circular 98 for more information.

Location of meetings

143 For many years OPC has had a practice of requesting instructors to come to OPC rather than drafters going to instructing agencies. While the continuation of this approach is supported, there will be cases where it will be more appropriate for drafters to attend some meetings at instructing agencies.

144 One issue that arises from our preference for instructors to come to OPC is that we need to ensure that we are appropriately hospitable. To this end, carparking spaces are available for instructors and a number of conference rooms (named after former First Parliamentary Counsel) have been established. Drafters should also ensure that instructors are offered tea and coffee etc. at appropriate intervals.

145 Details on booking conference rooms are contained in Office Procedural Circular 58. Similarly, Office Procedural Circular 100 sets out the process for booking car spaces for visitors.

Other matters

146 Drafting Direction 4.1 sets out various matters that are relevant to our dealings with instructors. There is also a paper in the Drafting Notes titled “First meeting with instructors”.

Referral of Bills to other agencies

147 The referring of draft Bills to other agencies is a very important whole-of-government role for OPC.

148 We refer Bills to agencies who have a right or responsibility to provide policy input in relation to a Bill, generally because the agency has a co-ordinating or whole-of-government responsibility for a matter dealt with in the Bill (such as legal policy issues for the Attorney-General’s Department, public sector terms and conditions issues for the Australian Public Service Commission, etc). The intention is to ensure that our Bills properly reflect over-arching government policies.

149 Drafting Direction 4.2 provides details of the referral of Bills.

150 The process of referring Bills is assisted by a macro (the Ref2AGs macro) that simplifies the process of sending Bills to the relevant areas. Details of this macro are contained in Word Note 33.

Consultation with States and Territories under an intergovernmental agreement

151 Some Commonwealth legislation is part of a national scheme of legislation that also involves the States or Territories. Other legislation has been the subject of agreements with the States and Territories that requires the Commonwealth to consult the States and Territories before it amends the legislation.

152 Examples include the Corporations Law, the GST and the agriculture and veterinary chemicals legislation.

153 Drafting Direction 4.3 provides details of the processes that should be followed in these cases.

Statute law revision amendments

154 From time-to-time technical errors are made in Bills. Once these have been enacted, they can only be fixed by an amending Act as the Commonwealth has no provision for editorial changes to be made administratively.

155 These technical changes are often described as Statute Law Revision, or SLR, amendments.

156 Currently, OPC includes some SLR amendments in appropriate portfolio Bills. Where there is no appropriate portfolio Bill, the amendment is included in a Statute Law Revision Bill. It is currently proposed to have one such Bill each year.

157 Drafting Direction 4.4 provides details of the matters that need to be considered when dealing with SLR amendments and what drafters should do if they find an error in a Commonwealth Act.

Australian Government Solicitor advice

158 Legal issues routinely arise during the drafting of Bills. Some kinds of issues are dealt with by drafters, while other kinds of issues are more appropriately referred to the Australian Government Solicitor (*AGS*).

159 Drafting Direction 4.5 provides some guidelines for when it is appropriate for drafters to refer legal issues to AGS. It also sets out the process that is to be followed once it is decided to refer a matter to AGS.

160 The drafter's role routinely involves answering instructors' questions about things such as the interpretation of a particular provision in the Bill, the interpretation of the Act being amended or of other legislation, the constitutionality of the Bill or any part of it, or how the general law might apply in particular circumstances. The issues can range from straightforward to extremely complex, and from relatively unimportant to issues crucial to the Bill's legal effectiveness.

161 Under the Legal Services Directions, legal work is tied to Australian Government providers (including AGS) if it involves (among other things) constitutional law issues, or legal advice on draft legislation for introduction into Parliament. Similarly, advice on

compliance with treaties is tied to the Attorney-General's Department, AGS or the Department of Foreign Affairs and Trade. Questions about the rules for tied work should be directed to the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department.

162 OPC is a tied provider for “drafting work”, not legal advice. While drafters can employ their knowledge of constitutional law and other issues to inform the drafting process, they are prevented from providing, for example, constitutional law advice.

163 It is a matter for a drafter's discretion whether a particular legal issue is one that can be properly dealt with by the drafter drawing on his or her own knowledge, or one that should be referred to AGS for advice.

164 However, generally, drafters should refer a legal issue to AGS if any of the following apply:

- (a) the issue is not completely clear-cut and its resolution may have serious, or politically significant, consequences;
- (b) there is a real issue of constitutional law;
- (c) the instructors intend or would expect to refer to or rely on the advice they receive in the course of legal or parliamentary proceedings or public debate;
- (d) the instructors require written advice on the issue for their records;
- (e) it is a request for a drafter to interpret a provision that he or she drafted, once the Bill containing that provision has received the Royal Assent.

165 When answering instructors' questions, drafters should clarify with the instructors the use to which they intend to put the answer.

166 The guidelines should not inhibit drafters' use of their legal qualifications and drafting experience to answer straightforward legal questions that routinely arise throughout the drafting process.

Legislation Approval Process

167 The purpose of the Legislation Approval Process (***LAP***) is to ensure that draft legislation has received all necessary government clearances before it is introduced into Parliament. All draft legislation must be cleared for introduction by a Parliamentary Secretary or junior Minister designated by the Prime Minister for this purpose (the ***designated approver***). This clearance is given on advice from the Legislation Secretariat in the Department of the Prime Minister and Cabinet (***PM&C***).

168 OPC's unique role in the process is to provide independent advice that the legislation is covered by appropriate policy authority. The OPC drafter is the only independent player in the approval process who knows enough about the legislation to be able to test it against the policy authority within the usual deadlines. This is not to suggest that other players (eg policy officers in PM&C) could not acquire the necessary understanding of legislation, only that they may not be able to do it properly in the brief period between when the legislation is

lodged with PM&C and when it is lodged with the designated approver (often less than 2 working days).

169 Further information about the significance of the Legislation Approval Process, and OPC's role in it, can be found in paragraphs 7-22 of *Working with the Office of Parliamentary Counsel: A guide for clients*.

170 Details on the LAP procedures are contained in Drafting Direction 4.6. In addition, Chapter 4 of the *Legislation Handbook* (available under Other Drafting Documents in Folio Office Documents) contains information about policy authority.

House of introduction

171 There are Constitutional limitations on the Bills that can be introduced into the Senate. It is important that drafters are aware of these limitations as an attempt to introduce a Bill into the Senate when it is not allowed has the potential to embarrass the Government and OPC.

172 To ensure that this does not occur, every OPC Bill has a drafter's block on page 1. One of the questions that the drafter must answer is "Is there any constitutional reason why this Bill should not be introduced in the Senate?"

173 The general rule is that Bills that require a Governor-General's message or that deal with taxation should not be introduced into the Senate.

174 Drafting Direction 3.2 has more detail in relation to Bills dealing with taxation. There is more information about Governor-General's messages below.

175 If there is any doubt about whether a Bill can be introduced into the Senate, the matter should be raised with FPC.

Clerk's and Chairman's amendments

176 If a minor textual error in a Bill is discovered after the introduction of the Bill, it may be possible to fix it with a Clerk's or Chairman's amendment. Unlike parliamentary amendments, a Clerk's or Chairman's amendment is not moved in Parliament. It is simply a documentary change, made at the discretion of:

- (a) for a Bill originating in the House of Representatives—the Clerk of the House, acting with the authority of the Deputy Speaker (see Standing Order 156); or
- (b) for a Bill originating in the Senate—the Chairman of Committees (see Standing Order 124).

177 In general, only errors that are obvious on the face of a Bill are suitable for these amendments.

178 Details of the procedure to be followed are contained in Drafting Direction 4.7.

179 There are however some important matters that should be emphasised:

- (a) when dealing with Clerk's or Chairman's amendments you always deal with the House in which the Bill was introduced (it does not matter where the Bill is when the problem is discovered); and
- (b) since it is a matter of discretion for the Clerk or Chairman whether an amendment will be made, a drafter requesting an amendment should first discuss the matter with the relevant table office staff; and
- (c) the table office staff will either agree to the amendment being made or will advise that a parliamentary amendment is required to fix the error.

Parliamentary Amendments—procedural matters

180 Many procedural issues can arise in drafting parliamentary amendments.

181 Drafting Direction 4.8 deals with the following matters:

- (a) amendments to a Bill when the Bill returns to the House in which it was introduced and when Standing Orders need to be suspended to allow the amendments to be moved;
- (b) revising or replacing amendments that have already been circulated in either House.

Messages for Bills and Parliamentary Amendments

182 A message from the Governor-General is required for all votes, resolutions or proposed laws that appropriate revenue or moneys. OPC prepares all of the documentation for these messages for Bills and Parliamentary Amendments.

183 The basic process is as follows:

- (a) a drafter determines that a message is required and prepares a document setting out the reasons;
- (b) the Bills Officer prepares a letter from FPC to the Attorney-General, a letter from the Attorney-General to the Governor-General and the Governor-General's message;
- (c) FPC checks these documents and signs the letter to the Attorney-General;
- (d) OPC delivers the documents to the Attorney-General;
- (e) when the Attorney-General has signed the letter to the Governor-General, OPC delivers the documents to Government House;
- (f) when the Governor-General has signed the message, OPC delivers the message to the House of Representatives table office.

184 Determining whether a Bill, or more particularly a Parliamentary Amendment, requires a message can be quite complex and, in some cases, can involve disputes between

the two Houses. If drafters are at all unsure about the need for a message in a particular case, they should speak to FPC.

185 Details on messages and the process to be followed within OPC are contained in Drafting Direction 4.9.

Parliamentary Amendments and requests

186 There are constitutional limits on the amendments that the Senate can make to Bills. Where the Senate cannot make an amendment, it can request the House of Representatives to make the amendment.

187 This is an area that has been the subject of a number of disputes between the two Houses over the years. There are still some cases in which the two Houses disagree about the power of the Senate to make amendments.

188 OPC's role is to advise the relevant Minister about whether we consider the Senate has the power to make a particular amendment. It is then the responsibility of the Minister to decide the form of the amendment (ie whether it should be moved as a request or an amendment).

189 Determining whether the Senate has the power to make an amendment can be quite complex and, in some cases, can involve disputes between the two Houses. If drafters are at all unsure, or consider that it is a case on which the Houses will disagree, they should speak to FPC as early as possible.

190 Details on amendments and requests and the process to be followed within OPC are contained in Drafting Direction 4.9. The House of Representatives Practice and Odgers' Australian Senate Practice have sections that set out the views of the two Houses on this matter.

Presentation of Bills for Royal Assent

191 OPC is closely involved in the presentation of Bills to the Governor-General for Royal Assent.

192 Drafting Direction 4.10 details the procedures for obtaining Royal Assent to a Bill after it is passed by both Houses of the Parliament. More details of the processes are contained in the Legislation Team Manual.

Attachment A—Components of Bills

Components of Bills

1 Bills can be broken up into a number of different components. This attachment is intended to give a brief overview of the components.

2 This section sets out the numbering approach used in Bills that use the standard number system. The modifications of this system for Bills with Division-section numbering are set out in the following section.

Chapters

3 Chapters are the highest level of division that a Bill or Act can be broken up into.

4 Normally, only very large Bills have Chapters. An example of an Act with Chapters is the *Aged Care Act 2004*.

5 Chapters are given Arabic numbers (1, 2, 3 etc).

Parts

6 If a Bill or Act has Chapters, the Chapters will usually be divided into Parts.

7 Also, many medium-sized Bills or Acts are divided into Parts without there being any Chapters. An example of an Act with Parts but no Chapters is the *Age Discrimination Act 2004*.

8 Parts are given Arabic numbers (1, 2, 3 etc). For an Act that is divided into Chapters, the Part numbering starts again at the start of each new Chapter.

9 There are some older Acts in which the Parts have Roman numbers (eg I, II, III etc). If a new Part is added to such an Act, it is also given a Roman number.

Divisions

10 If a Bill or Act has Parts, some of them may be broken down into Divisions.

11 An example of a Part that is broken into Divisions is Part 4 of the *Age Discrimination Act 2004*.

12 Although it is possible to have a Bill without Parts or Chapters but that has Divisions, it is extremely uncommon.

13 Divisions are given Arabic numbers (1, 2, 3 etc). The Division numbering starts again at the start of each new Part.

Subdivisions

14 If a Bill or Act has Divisions, some of those Divisions may be broken into Subdivisions. You can only have a Subdivision where you have a Division.

15 An example of a Division that is broken into Subdivisions is Division 3 of Part 2 of the *ACIS Administration Act 1999*.

16 Subdivisions are lettered (A, B, C etc). The Subdivision lettering starts again at the start of each new Division.

Sections

17 The basic building blocks of Acts are sections. Every Act has at least 3.

18 A section is a chunk of information identified by a bolded section number and section heading. There are no specific rules about how much information can be put into a single section—this is up to the drafter (subject to an in-house rule that a section should not be “too long”). A section or subsection can contain more than one sentence.

19 Sections can be single units or they can be broken up further.

20 Sections are given Arabic numbers (1, 2, 3 etc). The numbering runs from the start of the Act until the end of the Act.

Subsections

21 One way of breaking sections up further is to divide them into subsections.

22 Subsections are identified by an Arabic number in brackets (eg: subsection (1)). If a section is broken into subsections, there should be 2 or more of them in the section.

Paragraphs

23 Sometimes a subsection, or a section that doesn't have any subsections, is divided into paragraphs.

24 A paragraph is identified by a lower case letter in brackets (eg: paragraph (a), (b), (c) etc).

Subparagraphs

25 Sometimes a paragraph is divided up into subparagraphs. You can only have subparagraphs if you have paragraphs.

26 Subparagraphs are identified by roman letters in brackets (eg: (i), (ii), (iii) etc).

Sub-subparagraphs

27 Some subparagraphs are divided into sub-subparagraphs. You can only have sub-subparagraphs if you have subparagraphs.

28 OPC's current drafting practice is not to include any new sub-subparagraphs in Bills.

29 Sub-subparagraphs are identified by a capital letter in brackets (eg: (A), (B), (C) etc).

Other components of Bills and Acts

30 Bills and Acts sometimes have other components.

31 In particular, a Bill can have one or more Schedules at the end of it.

32 There are two types of Schedules—amending and non-amending. Where a Bill has both amending and non-amending Schedules, the amending Schedules appear last.

Amending Schedules

33 The most common type of Schedule is an amending Schedule.

34 A typical amending Bill or Act is made up of a few initial sections saying the name of the Act, when it commences and then a standard section saying that the Schedules have effect. At the end of the Bill there will be a number of different Schedules. Each of those Schedules will contain amendments to a particular Act or Acts.

35 Amending Schedules may be divided into Parts. In some rare cases, the Parts are then divided into Divisions. Parts and Divisions are numbered with Arabic numbers (1, 2, 3 etc). The numbering of Parts starts again at the start of each Schedule and the numbering of Divisions starts again at the start of each Part.

36 An item is the basic unit within an amending Schedule, and is the unit used to make textual amendments.

37 Each item will have a heading with an Arabic number (1, 2, 3 etc.) in the margin followed by text identifying what is to be amended. The numbering starts again at the start of each Schedule.

38 The line after the heading of an amending item sets out the amendment to be made.

39 However, there are some items in amending Schedules that do not make amendments. These usually contain application, savings or transitional provisions. These items can be divided into subitems. Each of those subitems is given an Arabic number in brackets ((1), (2), (3) etc).

Non-amending Schedules

40 Some Acts or Bills have Schedules at the end of them that are not amending Schedules. At OPC we call them non-amending Schedules.

41 Non-amending Schedules may be divided into Parts. In some rare cases, the Parts are then divided into Divisions. Parts and Divisions are numbered with Arabic numbers (1, 2, 3 etc). The numbering of Parts starts again at the start of each Schedule and the numbering of Divisions starts again at the start of each Part.

42 They are used for a number of different purposes. Sometimes they are used to contain text that could be contained in the body of the Bill or Act as a section. In this case, the things that look like items/sections in them are usually called clauses, and numbered using Arabic numbers (1, 2, 3 etc). Clause numbers start again at the start of each Schedule.

43 The clauses can be divided into subclauses (numbered (1), (2), (3) etc.) or paragraphs (numbered (a), (b), (c) etc.).

44 For example, the *Classification (Publications, Films and Computer Games) Act 1995* has a non-amending Schedule containing the National Classification Code.

45 Sometimes a non-amending Schedule sets out the text of an international treaty that the Bill or Act is bringing into force in Australia or that the Bill or Act relies on for constitutional power. For example see Schedule 1 to the *Petroleum (Timor Sea Treaty) Act 2003*. If the treaty gives the units that look like items/sections a name and numbering system, those names and numbering systems are used in the Schedule and in references to provisions of the Schedule.

Preambles

46 A few Bills (particularly Bills for new Principal Acts) have preambles.

47 The preamble goes at the very start of the Bill before the enacting words and explains why the Bill is being enacted. It always ends with “The Parliament of Australia enacts:”.

48 For an example, see the *Native Title Act 1993*.

Definitions

49 Definitions are very common in Bills.

50 Definitions are used to say what particular words mean (eg: ***prescribed period***) and to give words special meaning for particular Acts. In other cases they take a word that has a broad meaning (eg: ***company***) and say that for the purposes of the Act it has a more limited meaning.

51 Definitions usually appear in a list. We put the defined word in bold italics. We list the defined terms in alphabetical order.

52 Sometimes definitions are put in the narrative style (Eg: “A person has a ***qualifying interest*** in an asset if...”). In that case the defined term still appears in bold italics.

Notes

53 Notes are also a common component of Bills. They are in small type and appear just under the particular Bill component they relate to.

54 We use several different types of notes in Bills.

55 Some notes go into the text of provisions of Principal Acts. They help explain links between provisions. Some of them give examples illustrating how provisions work, and might even be identified as examples rather than notes.

56 Other notes do something different. They change section or subsection headings. These changes are done by notes rather than by amendments because the section and subsection headings are not part of the Act.

Tables

57 Tables are used often in Bills. OPC has developed a standard format for tables and rules for the use of tables. These are set out in Word Note 24.

Formulas

58 Some Acts include formulas. They are particularly in Tax Bills and Bills involving the calculation of allowances or benefits.

59 OPC uses special processes for producing formulas in documents. These are set out in Word Note 10.

Penalties

60 Provisions that create criminal offences will often have a penalty at the foot of the provision. Basically a penalty is indicated by the word “Penalty” followed by a colon then by a term of imprisonment or a number of penalty units.

61 Penalties should not include dollar amounts (eg: \$5,000). Instead, the penalty should be expressed in penalty units (each penalty unit is equal to \$110). This is intended to ensure that the value of penalties isn’t gradually eroded by inflation.

62 Drafting Direction 3.5 deals with offences, penalties and other matters.

Overviews, calculators and other things in boxes

63 OPC uses boxes around text to highlight particular features that are used in Bills.

64 These include outline and overview provisions that give an explanation of a Bill or a Part or Division of a Bill.

65 Boxes are also used for method statements and calculators. These are step by step guides that are usually used for calculating an amount. For example, section 60 of the *Child Support (Assessment) Act 1989* has a method statement for the estimation of the child support income amount.

Components of Bills—Bills using Division-section numbering

Description of the Division-section numbering system

66 A system of numbering, called Division-section numbering, was introduced to deal with very large Acts that are likely to be subject to substantial amendment.

67 The system was designed to avoid section numbers such as 159FZZZZG and 160ZZRAAA (which appeared in the *Income Tax Assessment Act 1936*).

68 The system is sometimes called the TLIP numbering system as it was first used in the Tax Law Improvement Project (TLIP) in the rewriting of the Income Tax Assessment Act.

69 The system works by having each section number made up of 2 components separated by a dash. The first component is the Division number and the second number is the number of the section within that Division. An example of a section number in this form is 23-45.

70 For this system, Division numbers are unique within an Act (they do not start again at the start of each Part) but the section component starts again at the start of each Division.

71 Another aspect of this approach is to leave gaps in section numbers. Generally, a gap of 5 is left between Division numbers in a Part to leave space for additional Divisions. A larger gap may be left at the end of a Part. Within Divisions, gaps of 5 are usually used between the sections. Therefore, the sections in Division 45 may be numbered as 45-1, 45-5, 45-10 etc. The Division after Division 45 may be Division 50.

Modifications from the standard numbering system

72 Most of the material in the section about the components of Bills and Acts applies to legislation with Division-section numbering in the same way as it does to legislation with standard numbering.

73 The main modification is that Divisions are numbered from the start to the end of the Act and the numbering does not restart at the start of each Part.

74 In some Acts that use this method, Parts are also numbered with numbers that reflect the Chapter in which they are located. For example, Part 1-1 would be the first Part in Chapter 1 and Part 2-1 would be the first Part in Chapter 2.

75 Subdivisions in Acts using Division-section numbering also include the Division number in the Subdivision number. For example Subdivision 45-A.