

PARLIAMENTARY COUNSEL

Drafting Direction No. 4.2 Referral of drafts to agencies

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Part 1—Introduction

1 This Drafting Direction deals with the referral by OPC of drafts (e.g. Bills and tied instruments) to agencies other than the instructing agency. Part 2 deals with the referral of drafts to areas within the Attorney-General’s Department and Part 3 deals with the referral of drafts to other agencies.

Why and to whom do we refer drafts?

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

3 However, we should not amend legislation except on the instructions of the administering agencies, or with their consent.

4 Moreover, it is not our responsibility, nor do we have the resources, to help other agencies keep up-to-date with overarching government policies that affect them (as opposed to policies “for which they are responsible”), or more generally to keep up-to-date with other developments in the public sector. Liaison with affected agencies is really the responsibility of the instructors whose draft will have an impact on other agencies’ legislation.

5 Therefore, we do not have any general right or obligation to distribute drafts beyond the agencies mentioned in this Drafting Direction. Apart from these agencies, the decision on how widely a draft is distributed during the drafting process must be one for our clients rather than for us.

When should drafts be referred?

6 In general, deciding when in the drafting process a draft should be referred is a matter of judgement. If a draft is referred too early (i.e. before policy and approach are reasonably well settled), the agencies receiving the draft may waste time considering draft provisions that are later abandoned. If a draft is referred too late, the agencies receiving it may not have time to provide useful comments or negotiate on policy approaches in which they have an interest.

7 However there are some projects that should be referred to some interested agencies as early as possible, perhaps even before drafting has started. For instance, the Criminal Law Policy Branch, the Courts, Tribunals and Administrative Law Branch and the Native Title Unit in the Attorney-General’s Department (*AGD*), the Public Management Reform Agenda Implementation Branch of the Department of Finance (*PMRA Implementation Branch*) and Geoscience Australia have advised that they would prefer to give advice about policy proposals that are relevant to their responsibilities rather than waiting until they see a draft.

Part 2—Attorney-General’s Department

8 Attachment A contains a list of draft provisions that should be referred to various areas of the Attorney-General’s Department for comment, and the areas to which the relevant drafts should be referred.

Timing

9 Ideally, drafts should be referred when they are given to instructors. It is not necessary to send successive copies of a draft to a Division or Office if the relevant provisions have not been changed since the draft was last referred to that area.

Comments on drafts

10 When you have referred the draft to an area, that area is responsible for commenting on the draft in a timely way, or taking any other appropriate action. In some cases, areas will be interested to know that the draft contains certain provisions but will not want to comment on the provisions.

Need to follow up referral

11 In general, therefore, you do not have to follow up the areas to which you have referred the draft. The only exceptions are:

- (a) matters that affect the legal effectiveness of the draft (e.g. whether the draft gives appropriate effect to an international agreement, where that agreement provides the constitutional basis for the draft); and
- (b) matters that must be resolved before the draft can be completed (e.g. penalties for new offences) or that you think ought to be resolved before the draft is completed (e.g. whether a new administrative power ought to be reviewable or whether the draft is consistent with Australia’s international obligations).

Office of International Law—further matters

Billable work

12 Several items in Attachment A require certain provisions to be referred to the Office of International Law (*OIL*) for comment.

13 Work done by OIL on the implementation of international law in Australia (including translation of international law into domestic effect and ensuring the consistency of domestic law with international law) is billable work.

14 OIL has advised that you or your instructors should contact OIL (or one of the other tied providers of international law work, i.e. the Australian Government Solicitor (*AGS*) or the Department of Foreign Affairs and Trade (*DFAT*), under the Legal Services Directions) for advice at an early stage in relation to provisions that are ultimately required to be referred to OIL for comment. Where this has been done, and therefore all that OIL is doing when a draft is ultimately referred to it is checking that you have appropriately reflected the advice in the draft, there will not usually be any need to bill the instructing agency.

15 However, OIL has also advised that where a matter first becomes the subject of international law advice at the time you send a draft to OIL, or where new issues are raised by a draft other than those that have been the subject of prior advice in the development of the legislation, OIL will contact the instructing agency and notify it that the matter requires legal advice and that the agency will be billed for that advice.

16 If you are allocated a drafting project that has international law aspects, you or your instructors should contact OIL quite early in the process (ideally before drafting starts) about the project.

Identifying relevant international agreements

17 Sometimes, it is not apparent on the face of a draft that an international agreement might exist whose content is relevant to the draft. The following measures are aimed at ensuring that any relevant international agreement is taken into account in drafting.

18 Cabinet submissions seeking approval for Bills are accompanied by coordination comments and OIL contributes to these comments in situations where it is aware international law is relevant. So, if you are drafting on the basis of Cabinet authority, you could use the coordination comments in the accompanying submission as one way of working out the impact of international law.

19 To supplement these measures, you should prompt instructors with questions along the lines of the following:

- (a) does the draft implement a treaty or amend legislation that already implements a treaty?
- (b) is constitutional support dependent on a treaty?
- (c) might the draft be considered to infringe civil, political or other human rights?
- (d) does the draft raise any potential issues with the international instruments mentioned in the definition of *human rights* in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*?
- (e) have the instructors had any discussions with OIL, AGS or DFAT?
- (f) did OIL make coordination comments on the Cabinet submission?
- (g) does the draft provide any sort of subsidy or concession in relation to things that are destined for export, or that will compete with other countries' products?
- (h) does the draft impose minimum Australian ownership, or Australian content, rules?
- (i) if the draft deals with human rights, intellectual property, anti-dumping, customs valuation, greenhouse gas, extradition, international tax or other matters you consider may have international law implications, have the instructors considered international law aspects?

20 The matters in paragraphs 19(a), (b), (c) and (d) are examples of matters that already require referral to OIL. The matters in paragraphs 19(e) and (f) are just ways of prompting the instructors to think again about matters they might already have addressed. The specific matters mentioned in paragraphs 19(g), (h) and (i) are matters that might be expected to have international law implications that should have been dealt with by instructors, but which you can ask about as a sort of safety net.

21 Australia's obligations under human rights treaties are wideranging and it may be difficult to identify when proposed legislation relates to these obligations. Drafters should consider if legislation is likely to cover areas such as: civil, political, economic, social or cultural rights; the rights of children; racial discrimination; discrimination against women or any other group; and torture or cruel, inhuman or degrading punishment or treatment.

22 You are not expected to know about the range of international agreements to which Australia is a party or about the content of any specific agreements. Asking these questions is just a way for the Office to seek to add value. The methods outlined above will not be foolproof, but it is hoped that they will reduce the likelihood of OIL missing out on considering a draft that has international law implications.

Human Rights Unit

Statements of compatibility with human rights

23 The *Human Rights (Parliamentary Scrutiny) Act 2011* requires all Bills and disallowable legislative instruments to be accompanied by a statement of compatibility. The statement is an assessment of whether the Bill or instrument is compatible with human rights under 7 core international human rights treaties to which Australia is a party. As it is the responsibility of the sponsoring Minister to provide such a statement with proposed legislation, the statements are to be prepared by the instructing agency, and will accompany or form part of the explanatory material for the Bill or instrument.

24 You should remind instructors of their responsibility to prepare a statement of compatibility for a Bill or disallowable legislative instrument. The Human Rights Unit in AGD can provide guidance to instructing agencies, before and during the drafting process, on issues in relation to the compatibility of policy proposals with human rights.

25 The requirement for all Bills and disallowable legislative instruments to have a statement of compatibility does not mean that all Bills or disallowable legislative instruments prepared in the Office will be routinely distributed to the Human Rights Unit. Instructors therefore need to be aware that it is their responsibility to identify, or seek assistance in identifying, matters that are to be included in a statement of compatibility.

26 As with requests for the Office to "vet" explanatory material or a second reading speech, if you receive a request to "vet" a statement of compatibility, you should inform the person making the request that the "vetting" of statements of compatibility is not one of this Office's functions.

Australian Government Solicitor

27 Drafts should only be referred to AGS if they raise constitutional or other legal issues (e.g. whether there is constitutional power to enact the draft, or whether it involves an

imposition of tax or an acquisition of property otherwise than on just terms, or whether proposed appointments under the draft would fall foul of the doctrine of inconsistent commissions).

How to refer drafts

28 Advice provided by AGS will be charged to the instructing agency. Such referrals should only be made with the agreement of the instructing agency. As well as identifying the issues on which you require advice, you should name the instructing officers, and indicate the timetable for finalising the draft and how quickly you need advice or preliminary advice. See Drafting Direction 4.5 (Legal advice on issues arising during drafting) for more information on this matter.

Need to follow up reference to AGS

29 Advice sought from AGS will usually be needed before the draft can be finalised. This means that on occasions you might have to follow up the referral to AGS, if advice is not received within the requested deadlines.

Part 3—Other agencies

General referral requirements

30 Attachment B is a list of draft provisions that should be referred to an agency other than AGD.

Routine distribution of drafts

31 There is currently no routine distribution of drafts. This means that it is up to the instructors and the drafters to ensure that drafts are circulated to other government agencies that need to see them, and are circulated early enough for those agencies to look at them before finalisation.

Territories Branches—further matters

32 Items 16 to 18 in Attachment B require certain provisions to be referred to the Territories Branches in the Department of Infrastructure and Regional Development (the *Territories Branches*) via the Legislation Liaison Officer for comment because of their responsibilities in relation to various territories.

33 It is often not possible for drafters to know that a particular provision might have an effect that the Territories Branches may find of interest. The Territories Branches have been consulted about ways of ensuring that provisions not covered by items 16 to 18 in Attachment B that might still be of interest are referred to the Territories Branches.

34 Cabinet submissions seeking approval for Bills are accompanied by coordination comments and the Territories Branches will contribute to these comments if the proposal may be of interest. So, if you are drafting on the basis of Cabinet authority, you could use the coordination comments in the accompanying submission as one way of working out whether the Bill should be referred.

35 In addition, the Territories Branches are provided with a copy of the legislation program each sittings. The Territories Branches may provide First Parliamentary Counsel with a list of Bills that they consider are likely to be of interest. Drafters should refer any Bill on this list to the Territories Branches for comment.

36 There is no need to refer a provision to the Territories Branches merely because it will apply in one of the relevant Territories.

Where instructions are received from an agency outside the administering portfolio

37 Attachment B requires that copies of drafts be referred to the agency administering legislation that is amended or affected by the draft, where the instructing agency is within another portfolio. Normally, this will be done by sending the draft to the Legislation Liaison Officer for the relevant portfolio.

38 Instructions to amend legislation administered by an agency within a different portfolio from that of the instructing agency should only be accepted where the amendments

are clearly consequential on legislation being drafted for the instructing agency. Even in these cases, instructions will usually be issued by the administering agency. Wherever the instructions come from, a Bill must not be sent for Legislation Approval without either:

- (a) the approval of each Minister administering legislation amended by the Bill, recorded in the LAP memo; or
- (b) a statement in the LAP memo to the effect that you understand that this approval has been, or will be, sought.

39 In some cases, the requirement to refer copies of drafts to the administering agency may be satisfied by obtaining an undertaking from the instructing agency to ensure that copies of the drafts reach the administering agency. However, for a Bill this does not affect the drafter's obligation to mention clearance by the administering Minister in the LAP memo. As well, this approach should not be used if the drafter has any reason to believe that the instructing agency may delay sending copies of drafts to the administering agency.

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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 12 of 2005.

Attachment A—Attorney-General’s Department

Attorney-General’s Department Referral Checklist		
Item	If the provision...	Refer it to... (see Note 12)
1	creates, abolishes or affects the power or jurisdiction of a court	Courts Section Courts, Tribunals and Administrative Law Branch
2	defines <i>magistrate, judge</i> or <i>court of summary jurisdiction</i>	Courts Section Courts, Tribunals and Administrative Law Branch
3	provides or amends a scheme for alternative dispute resolution (<i>ADR</i>) or a mechanism for encouraging the use of ADR	Courts Section Courts, Tribunals and Administrative Law Branch
4	creates, abolishes or affects the power or jurisdiction of a tribunal	Administrative Appeals Tribunal Section Courts, Tribunals and Administrative Law Branch and Administrative Law Section Courts, Tribunals and Administrative Law Branch
5	might be viewed as a privative or ouster provision (see Note 1)	Courts Section Courts, Tribunals and Administrative Law Branch and Administrative Law Section Courts, Tribunals and Administrative Law Branch
6	provides for automated assistance in decision-making or provides for decision-making by computer programs	Administrative Law Section Courts, Tribunals and Administrative Law Branch
7	might discriminate against an individual (because of age, disability, nationality, race, religion, belief, sex, family responsibility, marital status, pregnancy, sexual preference or any other reason)	Human Rights Unit
8	is specifically directed to children (i.e. persons under 18) or applies to children differently from the way it applies to others	Human Rights Unit
9	raises issues relating to evidence or procedure in civil matters, including evidentiary certificates	Courts Section Courts, Tribunals and Administrative Law Branch
10	involves a legal cooperation or mutual recognition scheme concerning private commercial or civil transactions and procedures	Private International Law and Commercial Policy Unit
11	gives an administrative discretion that should perhaps be reviewable	Administrative Law Section Courts, Tribunals and Administrative Law Branch
12	modifies or affects the operation of the <i>Administrative Appeals Tribunal Act 1975</i>	Administrative Appeals Tribunal Section Courts, Tribunals and Administrative Law Branch

Attorney-General's Department Referral Checklist

Item	If the provision...	Refer it to... (see Note 12)
13	modifies or affects the operation of an administrative law (see Note 2) or the <i>Legislation Act 2003</i>	Administrative Law Section Courts, Tribunals and Administrative Law Branch
14	modifies or affects the operation of the <i>Judiciary Act 1903</i> (section 39B) or the <i>Law Officers Act 1964</i>	Administrative Law Section Courts, Tribunals and Administrative Law Branch and Courts Section Courts, Tribunals and Administrative Law Branch and Office of Legal Services Coordination
15	creates new reviewable or appealable rights, entitlements or responsibilities	Administrative Appeals Tribunal Section Courts, Tribunals and Administrative Law Branch and Administrative Law Section Courts, Tribunals and Administrative Law Branch
16	confers or affects a power to make a subordinate instrument that modifies an Act	Administrative Law Section Courts, Tribunals and Administrative Law Branch
17	confers a power to make a legislative instrument: (a) in relation to which an Act overrides subsection 12(2) or (3) of the <i>Legislation Act 2003</i> ; or (b) for which section 42 (disallowance) or Part 4 of Chapter 3 (sunsetting) of the <i>Legislation Act 2003</i> does not apply (see Note 3)	Administrative Law Section Courts, Tribunals and Administrative Law Branch
18	overrides subsection 14(2) of the <i>Legislation Act 2003</i> by conferring a power to make a legislative instrument that applies, adopts or incorporates any matter contained in an instrument or other writing as in force or existing from time to time	Administrative Law Section Courts, Tribunals and Administrative Law Branch
19	confers a power to make an instrument that is stated not to be a legislative instrument (see Note 4) or stated to be a notifiable instrument	Administrative Law Section Courts, Tribunals and Administrative Law Branch
20	establishes a civil penalty scheme (including conduct rules, breach of which may create liability to a civil penalty)	Administrative Law Section Courts, Tribunals and Administrative Law Branch
21	allows a person to administratively delegate a function or power or provide for another person to perform a function or exercise a power	Administrative Law Section Courts, Tribunals and Administrative Law Branch
22	specifies, for the purposes of the <i>Archives Act 1983</i> (see section 3A), that a body established for a public purpose is taken never to have been so established (usually in the context of corporatisation or privatisation)	Information Law Unit
23	may result in the creation, transfer or disposal of Commonwealth records	Information Law Unit
24	allows search, seizure, arrest, detention or entry onto	Serious and Organised Crime Section

Attorney-General's Department Referral Checklist		
Item	If the provision...	Refer it to... (see Note 12)
	premises, or gives other coercive powers (e.g. to take blood samples) (see Note 5), and: (a) contains a novel or complex issue that the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the <i>Criminal Law Guide</i>) does not address; or (b) would constitute a significant departure from the principles of the Criminal Law Guide (see Note 6)	Criminal Law Policy Branch
25	creates or changes an offence or a criminal penalty, or impacts on criminal liability (e.g. Crown immunity), and: (a) contains a novel or complex issue that the Criminal Law Guide does not address; or (b) would constitute a significant departure from the principles of the Criminal Law Guide (see Note 6)	Criminal Law Reform Section Criminal Law Policy Branch
26	provides for on-the-spot fines or infringement notices in relation to offences, or offences and civil penalties, and: (a) contains a novel or complex issue that the Criminal Law Guide does not address; or (b) would constitute a significant departure from the principles of the Criminal Law Guide (see Note 6)	Offender Management Unit Criminal Casework Unit and Criminal Law Reform Section Criminal Law Policy Branch
27	provides another method of criminal law enforcement (e.g. forfeiture), and: (a) contains a novel or complex issue that the Criminal Law Guide does not address; or (b) would constitute a significant departure from the principles of the Criminal Law Guide (see Note 6)	Criminal Law Reform Section Criminal Law Policy Branch
28	relates in any other way to criminal law or law enforcement, and: (a) contains a novel or complex issue that the Criminal Law Guide does not address; or (b) would constitute a significant departure from the principles of the Criminal Law Guide (see Note 6)	Criminal Law Reform Section Criminal Law Policy Branch
29	relates in any way to criminal law or law enforcement (including as mentioned in items 24-28), and may be thought likely to be sensitive or contentious (see Note 6)	Criminal Law Reform Section Criminal Law Policy Branch
30	triggers powers under the <i>Regulatory Powers (Standard Provisions) Act 2014</i> and in doing so adds to or departs in any way from the policy set out in the Act	Administrative Law Section Courts, Tribunals and Administrative Law Branch and Criminal Law Reform Section Criminal Law Policy Branch
31	includes investigation, monitoring or enforcement schemes of the kind dealt with in the <i>Regulatory Powers (Standard Provisions) Act 2014</i> but does not trigger that Act to create the scheme (see note 7)	Administrative Law Section Courts, Tribunals and Administrative Law Branch and Criminal Law Reform Section Criminal Law Policy Branch
32	raises issues relating to evidence or procedure in criminal matters, including a reversed burden of proof and evidentiary certificate	Criminal Law Reform Section Criminal Law Policy Branch and Courts Section

Attorney-General's Department Referral Checklist		
Item	If the provision...	Refer it to... (see Note 12)
		Courts, Tribunals and Administrative Law Branch
33	requires disclosure of prior criminal conduct or convictions or amends Part VIIC of the <i>Crimes Act 1914</i> relating to spent convictions (particularly if an exemption is proposed) (see Note 8)	Criminal Law Reform Section Criminal Law Policy Branch
34	confers a power to require production of documents or to question a person, removes the privilege against self-incrimination or abrogates legal professional privilege (see Note 9)	Courts Section Courts, Tribunals and Administrative Law Branch
35	concerns firearms or other prohibited weapons	Firearms Section Criminal Casework Unit
36	provides for secrecy or non-disclosure obligation with respect to official information	Security and Intelligence Law Section Counter Terrorism and Intelligence Unit and Office of International Law
37	overrides a secrecy law or a non-disclosure obligation with respect to official information or excuses a person from liability for disclosure of information under a secrecy law	Security and Intelligence Law Section Counter Terrorism and Intelligence Unit and Office of International Law
38	potentially impacts on the <i>Electronic Transactions Act 1999</i> (see Note 10)	Private International Law and Commercial Policy Unit
39	relates specifically to citizenship or to refugees	Office of International Law
40	is based on the external affairs power	Office of International Law
41	seeks to implement an international agreement	Office of International Law
42	seeks to implement an international agreement that deals with private commercial or civil transactions and procedures	Private International Law and Commercial Policy Unit
43	is expressed to apply: (a) in the contiguous zone; or (b) in the exclusive economic zone; or (c) in relation to the continental shelf; or (d) in relation to the offshore areas in respect of the States and Territories; or (e) in relation to foreign citizens or nationals in the Australian Antarctic Territory or adjacent maritime areas (see Note 11)	Office of International Law
44	involves another international law issue (including human rights matters)	Office of International Law
45	raises a conflict of law or private international law issue (e.g. where there is a foreign element to a private commercial or civil transaction)	Private International Law and Commercial Policy Unit
46	raises a novel issue relating to the conduct of litigation by the Commonwealth	Office of Legal Services Coordination
47	concerns or affects the delivery of legal services to or by the Commonwealth	Office of Legal Services Coordination

Attorney-General's Department Referral Checklist

Item	If the provision...	Refer it to... (see Note 12)
48	provides for financial assistance in legal proceedings or legal assistance (e.g. legal aid commissions, Indigenous legal assistance providers, community legal centres)	Legal Assistance Branch
49	involves Commonwealth officers or bodies performing functions or duties, or exercising powers, under State legislation (<i>Hughes</i> issues)	General Counsel (Constitutional) Office of Constitutional Law
50	involves State officers or bodies performing functions or duties, or exercising powers, under Commonwealth legislation (<i>Zentai</i> issues)	General Counsel (Constitutional) Office of Constitutional Law
51	involves an issue relating to Chapter III of the Constitution (by conferring non-judicial functions or powers on judicial officers, or by conferring judicial functions or powers on non-judicial officers) where AGS advice on the issue has been sought	General Counsel (Constitutional) Office of Constitutional Law and Courts Section Courts Tribunals and Administrative Law Branch
52	might affect relations between the Commonwealth and the States and Territories	General Counsel (Constitutional) Office of Constitutional Law
53	provides for collection, storage, use or disclosure of tax file numbers	Information Law Unit
54	provides for collection, storage, use or disclosure of other personal information	Information Law Unit
55	creates or affects a data base or register of personal information	Information Law Unit
56	might infringe civil, political or other human rights relating to privacy or freedom of speech	Human Rights Unit and Information Law Unit and Office of International Law
57	allows automated marketing of personal data	Information Law Unit
58	modifies or affects the operation of the Freedom of Information Act	Information Law Unit
59	affects access to Government-held information or affects correction of Government-held personal information	Information Law Unit
60	affects native title rights and interests (e.g. interests in land or regulatory schemes concerning use, taking, preservation or extraction of resources, flora or fauna)	Native Title Unit
61	seeks to implement an international agreement creating extradition or mutual legal assistance obligations for Australia	Treaties Taskforce Transnational Crime Branch

Note 1: A privative or ouster provision is one that tries to put particular questions beyond the jurisdiction of the courts.

Note 2: The administrative laws are:

- a) the *Administrative Decisions (Judicial Review) Act 1977*; and
- b) the *Administrative Appeals Tribunal Regulations 1976*; and
- c) the *Administrative Decisions (Judicial Review) Regulations 1985*.

Note 3: It is the policy of Courts, Tribunals and Administrative Law Branch that all exemptions from the sunseting regime must be included in the Legislative Instruments Regulations and must not be included in the Act containing the power to make the instrument (see Drafting Direction 3.8).

Note 4: Please include a drafter's note:

- a) indicating that the instrument is specified not to be a legislative instrument because it does not have a legislative character; or
- b) indicating that the instrument is specified not to be a legislative instrument because it is being exempted from the *Legislation Act 2003*; or
- c) stating that it is unclear whether or not the instrument has a legislative character and requesting AGD's advice.

Note 5: It doesn't matter whether these things are in connection with a criminal investigation, the monitoring of compliance with the law, or the protection of the revenue.

Note 6: **Departures from fundamental criminal law principles** The Criminal Law Guide requires instructors to consult with Criminal Justice Policy and Programmes Division about any departures from fundamental criminal law principles. If draft legislation includes an approach that would constitute such a departure, the draft should be referred to Criminal Justice Policy and Programmes Division. Such departures from these principles may require the positive approval of the Attorney-General. The following examples are listed in the Guide, Pt 1.3.2:

- a) retrospectively applying offences (Pt 2.1.3);
- b) regulation-making power for regulations to include offences punishable by imprisonment (Pt 3.3);
- c) evidentiary certificates as conclusive evidence of fact (Pt 5.3);
- d) infringement notices for fault-based offences (Pt 6.2.1);
- e) removal of privilege against self-incrimination without "use" or "derivative use" immunity (Pt 9.5);
- f) persons assisting an authority empowered to use force against a person (Pt 8.3.4);
- g) use of lethal force;
- h) invasive personal searches (Pt 10.3);
- i) entry, search and seizure without warrant or consent (Pt 8.6).

Exceptional circumstances In addition, the Criminal Law Guide recommends that certain approaches to criminal law policy should be adopted only in exceptional circumstances. If these approaches are proposed in draft legislation, the draft should be referred to Criminal Justice Policy and Programmes Division. Examples of relevant topics are as follows: (however, there may be others not listed here):

- a) Entry of authorised persons without requirement to identify themselves (Pt 8.3.2);
- b) Arrest powers conferred on non-police officers (Pt 10.1).

Sensitive or contentious legislation The Criminal Law Guide requires instructors to consult with Criminal Justice Policy and Programmes Division about draft legislation relating to criminal law or law enforcement that may be thought likely to be sensitive or contentious. Such draft legislation should be referred to Criminal Justice Policy and Programmes Division, and may require the positive approval of the Attorney-General (see the Guide, Pt 1.3.2).

Other circumstances In other respects, the Office will continue to work with Criminal Justice Policy and Programmes Division to clarify matters that should, or should not, be referred to that Division under the Criminal Law Guide, Pt 1.3.2. If in doubt, drafters should contact the Criminal Law Policy Section of that Division to discuss whether a particular matter should be referred.

Note 7: Schemes of the kind dealt with in the *Regulatory Powers (Standard Provisions) Act 2014* include the following:

- a) investigation involving entry, search and seizure by consent or under warrant;
- b) monitoring involving entry and search by consent under warrant;
- c) civil penalty orders;
- d) infringement notices;
- e) enforceable undertakings;
- f) injunctions in aid of enforcement.

Note 8: If an exemption from the spent convictions scheme is proposed, you should advise your instructors to contact the Criminal Justice Policy and Programmes Division. That Division will then discuss the matter with your instructors and require your instructors to consult the Australian Information Commissioner.

Note 9: If it is proposed to remove the privilege against self-incrimination without providing for a "use" or "derivative use" immunity, the provision must be referred to the Assistant Secretary, Criminal Justice Policy and Programmes Division under item 24 (see Note 6(e)).

Note 10: A provision may potentially impact on the *Electronic Transactions Act 1999* by, for example, exempting an electronic transaction from that Act, being similar to a provision of that Act or dealing with electronic transactions.

Note 11: For further information, see Drafting Direction No. 3.3 (Application of legislation in relation to various maritime and external areas).

Note 12: See the Commonwealth Government Directory, or www.gold.gov.au, for contact information.

Attachment B—Other agencies

Provisions to be referred to other agencies		
Item	If the provision...	Refer it to... (see Note 1)
1	creates or abolishes an agency	APSC [Legislation Liaison Officer]
2	creates a statutory office	APSC [Legislation Liaison Officer]
3	relates to the terms and conditions of statutory office-holders	APSC [Legislation Liaison Officer]
4	amends, or refers to, the <i>Public Service Act 1999</i> , the <i>Long Service Leave (Commonwealth Employees) Act 1976</i> , the <i>Maternity Leave (Commonwealth Employees) Act 1973</i> , the <i>Remuneration Tribunal Act 1973</i> , the <i>Equal Employment Opportunity (Commonwealth Authorities) Act 1987</i> or the <i>Defence Act 1903</i> to the extent it relates to the Defence Force Remuneration Tribunal	APSC [Legislation Liaison Officer]
5	relates to staffing powers (e.g. by providing for the staffing of a Commonwealth body (whether or not under the <i>Public Service Act 1999</i>) or empowering a Commonwealth body to appoint consultants)	APSC [Legislation Liaison Officer]
6	provides APS employees will assist a non-APS agency (e.g. subsection 49(2) of the <i>Public Service Act 1999</i>)	APSC [Legislation Liaison Officer]
7	relates to the terms and conditions of APS employment	APSC [Legislation Liaison Officer]
8	imposes a standard of conduct specifically on APS employees	APSC [Legislation Liaison Officer]
9	imposes offences or penalties specifically on APS employees	APSC [Legislation Liaison Officer]
10	provides for secrecy or non-disclosure obligation with respect to official information	APSC [Legislation Liaison Officer]
11	refers to information published by the Australian Bureau of Statistics	Australian Bureau of Statistics [Legislation Liaison Officer]
12	affects a function, duty or power of the Auditor-General	Australian National Audit Office [Legislation Liaison Officer]
13	will apply differently in the Territory of Heard	Department of the Environment

Provisions to be referred to other agencies		
Item	If the provision...	Refer it to... (see Note 1)
	Island and McDonald Islands or the Australian Antarctic Territory to the way in which it applies elsewhere	[Legislation Liaison Officer]
14	is specifically directed at the Territory of Heard Island and McDonald Islands or the Australian Antarctic Territory	Department of the Environment [Legislation Liaison Officer]
15	is of a kind that the drafter considers will be particularly controversial in its application in relation to the Territory of Heard Island and McDonald Islands or the Australian Antarctic Territory	Department of the Environment [Legislation Liaison Officer]
16	will apply differently in a non-self-governing territory (see Note 2) to the way in which it applies elsewhere	Department of Infrastructure and Regional Development [Legislation Liaison Officer]
17	is specifically directed at a non-self-governing territory (see Note 2)	Department of Infrastructure and Regional Development [Legislation Liaison Officer]
18	is of a kind that the drafter considers will be particularly controversial in its application in relation to a non-self-governing territory (see Note 2)	Department of Infrastructure and Regional Development [Legislation Liaison Officer]
19	creates a statutory entity, whether or not the entity is to be a body corporate separate from the Commonwealth	Department of Finance [Branch Manager, PMRA Implementation Branch]
20	amends or repeals legislation creating or continuing a statutory entity (including varying the governance arrangements for the entity), whether or not the entity is a body corporate separate from the Commonwealth	Department of Finance [Branch Manager, PMRA Implementation Branch]
21	exempts a statutory entity from some or all of the PGPA Act, or makes a statutory entity not subject to that Act	Department of Finance [Branch Manager, PMRA Implementation Branch]
22	creates an organisation (e.g. a company, incorporated association, joint venture, partnership or trust) in which the Commonwealth has an ownership interest	Department of Finance [Branch Manager, PMRA Implementation Branch]
23	authorises a Commonwealth body to borrow from the Commonwealth or from financial markets	Department of Finance [Branch Manager, PMRA Implementation Branch]
24	authorises the collection of relevant money by entities that are not part of the Commonwealth and are not owned by the Commonwealth	Department of Finance [Branch Manager, PMRA Implementation Branch]

Provisions to be referred to other agencies		
Item	If the provision...	Refer it to... (see Note 1)
25	exempts from all or any part of the PGPA Act money that is part of the Consolidated Revenue Fund	Department of Finance [Branch Manager, PMRA Implementation Branch]
26	is a special or standing appropriation, whether or not it is affected by a sunset clause	Department of Finance [Branch Manager, PMRA Implementation Branch]
27	creates, or amends provisions creating, a special account or relates to the administrative arrangements applying to a special account	Department of Finance [Branch Manager, PMRA Implementation Branch]
28	creates a fund or account for the Commonwealth or a statutory entity	Department of Finance [Branch Manager, PMRA Implementation Branch]
29	specifies, for the purposes of the <i>Archives Act 1983</i> (see section 3A), that a body established for a public purpose is taken never to have been so established (usually in the context of corporatisation or privatisation)	National Archives of Australia [Director-General]
30	may result in the creation, transfer or disposal of Commonwealth records	National Archives of Australia [Director-General]
31	allows termination of an appointment without cause	PM&C [First Assistant Secretary, Government Division]
32	refers to a specific agency's status as an Executive Agency or Departmental Agency	PM&C [First Assistant Secretary, Government Division]
33	might affect social justice for Aboriginals, Torres Strait Islanders or South Sea Islanders	PM&C [Indigenous Affairs Legal Branch]
34	amends the <i>Competition and Consumer Act 2010</i> or the <i>Competition and Consumer Regulations 2010</i>	Treasury [Legislation Liaison Officer]
35	might affect the operations of the <i>Corporations Act 2001</i> or related legislation including the <i>Corporations Regulations 2001</i>	Treasury [Legislation Liaison Officer]
36	provides for corporatisation or privatisation of a Government organisation	Treasury [Legislation Liaison Officer]
37	imposes personal criminal or civil liability for corporate criminal or civil fault	Treasury [Legislation Liaison Officer]
38	exempts an incorporated statutory body from Commonwealth taxes	Treasury [Legislation Liaison Officer]
39	describes any point, line or area by reference to its	Geoscience Australia

Provisions to be referred to other agencies		
Item	If the provision...	Refer it to... (see Note 1)
	location on the Earth's surface (see Note 3)	[Director, Law of the Sea and Maritime Boundaries Advice Section]
40	seeks to implement an international agreement	Department of Foreign Affairs and Trade [International Organisations and Legal Division]
41	repeals or amends a law of the Northern Territory or an enactment of the Australian Capital Territory	Department of Infrastructure and Regional Development [Legislation Liaison Officer]
42	repeals or amends an Ordinance under the <i>Seat of Government (Administration) Act 1910</i>	Department of Infrastructure and Regional Development [Legislation Liaison Officer]
43	amends, or otherwise affects, legislation administered within a portfolio other than that including the instructing agency (see paragraphs 37 to 39 of this Drafting Direction)	The portfolio Department whose legislation is amended or otherwise affected [Legislation Liaison Officer]
44	affects functions, duties or powers of a Minister, or of an official of a Department or agency, within a portfolio other than that including the instructing agency	The portfolio Department whose Minister or official is affected by the provision [Legislation Liaison Officer]

Note 1: For contact information for these agencies, see the Commonwealth Government Directory, or www.gold.gov.au.

Note 2: The non-self-governing territories for these purposes are:

- a) Norfolk Island; and
- b) the Jervis Bay Territory; and
- c) the Territory of Cocos (Keeling) Islands; and
- d) the Territory of Christmas Island; and
- e) the Coral Sea Islands Territory; and
- f) the Territory of Ashmore and Cartier Islands.

Note 3: Examples include descriptions of marine boundaries, land boundaries and regulatory areas (such as a fisheries access/closure area; marine protected area etc.), whether or not using geodetic datums, survey plans etc.