

PARLIAMENTARY COUNSEL

Drafting Direction No. 4.1 Dealings with instructors

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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 20 of 2005.

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Part 1—Introduction

1 This Direction deals with a number of matters relating to our dealings with instructors. Office Procedural Circular 98 also deals with a number of matters relating to tax drafting processes/liaison with Treasury.

Part 2—Making contact with instructors when you receive instructions

2 Sometimes First Parliamentary Counsel (*FPC*) allocates instructions in circumstances where the drafting team is not able to start work on them quickly (for instance, instructions for parliamentary amendments of a Bill drafted by a team which is currently busy with something else).

3 If you receive instructions and you are not able to start work on the instructions within a couple of days, you should make contact with your instructors and let them know when you are likely to be able to start work on the instructions.

Part 3—“Vetting” of explanatory memoranda or second reading speeches

4 Sometimes requests are made to OPC to “vet” an explanatory memorandum or a second reading speech relating to a Bill. If you receive such a request, you should inform the person making the request that the “vetting” of explanatory memoranda and second reading speeches is not one of OPC’s functions. Your instructors are expected to know what the Bill is intended to achieve and should therefore be able to determine whether an explanatory memorandum or second reading speech prepared in relation to the Bill accurately reflects the substance of the Bill.

5 However, sometimes your instructors may be concerned about whether a particular passage in an explanatory memorandum or a second reading speech accurately summarises a technical provision of a Bill. You should assist your instructors in this respect if time and resources are available having regard to your other commitments.

Part 4—Disputes with instructors over content

6 In the course of drafting a Bill, you may sometimes receive a request from a Minister, a member of the staff of a Minister or a person in the instructing Department or agency:

- (a) for the inclusion in the Bill of a provision that you consider, for any reason, should not be included in the Bill or should not be included in the terms requested; or
- (b) for the non-inclusion in, or deletion from, the Bill of a provision that you consider should be included or retained in the Bill; or
- (c) for the making of an alteration to a provision in the Bill that you consider should not be made.

7 If a request is made and pressed, you should raise the matter with FPC promptly so that FPC is fully informed for the purposes of Legislation Approval Process meetings or any other relevant discussions.

Part 5—Senate Scrutiny of Bills Committee

OPC’s role in advising instructors

Background

8 In June 2003 FPC attended a meeting with the Senate Scrutiny of Bills Committee. The Committee was interested in the standard of explanatory memoranda.

9 There was some discussion about OPC’s role in advising instructors to ensure that matters that are of interest to the Committee are clearly explained in the explanatory memorandum (eg retrospective or otherwise unorthodox commencement provisions). Committee staff mentioned a case in which a commencement provision that allowed more than 6 months for proclamation was not explained in the explanatory memorandum. When the committee staff contacted the sponsoring agency about this, the agency staff said that this was because OPC had not told them that they needed to explain it.

10 The Committee did not seem to have any particular sympathy with the view of the sponsoring agency that it was OPC’s responsibility to ensure that their explanatory memorandum was adequate. FPC told the Committee that OPC did try to draw to our instructors’ attention matters that are of interest to the Committee.

Advising instructors

11 You should endeavour to alert your instructors to any requested provisions that are likely to be of interest to the Committee, and advise your instructors to set out clearly in the explanatory memorandum the reasons for such provisions.

12 One member of the Committee also suggested that explanatory memoranda should more clearly identify the “mischief” being addressed by particular Bills. You may consider suggesting this to your instructors in appropriate cases.

Special or standing appropriations

Background

13 In its Fourteenth Report of 2005, the Senate Scrutiny of Bills Committee stated the following:

In a report on the financial management of special (standing) appropriations in November 2004, the Australian National Audit Office found widespread illegalities and lack of accountability and control in the management of these appropriations. More than half of the appropriations were not properly reported by departments and agencies in their annual financial statements. [...]

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The executive government is empowered to spend money only in accordance with an appropriation under section 83 of the Constitution. The use of standing appropriations limits accountability and scrutiny by denying the Parliament the opportunity to approve expenditure through its annual appropriations processes.

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

The committee has therefore determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to the presence in bills of standing appropriations. It will do so under provisions (1)(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

In accordance with its usual practice, the committee will look to the explanatory memorandum to the bill for an explanation of the reason for the standing appropriation. Where circumstances warrant, the committee will also seek from the responsible minister an explanation justifying the inclusion of the provision and the exclusion of the appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations process.

Advising instructors

14 If you include a "special" or "standing" appropriation provision in a Bill, you should alert your instructors to that report and advise your instructors to address the matters raised in that report in the explanatory memorandum.

Peter Quiggin
First Parliamentary Counsel
2 May 2007