

PARLIAMENTARY COUNSEL

Drafting Direction No. 4.5 Legal advice on issues arising during drafting

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Drafting Direction No. 4.5
Legal advice on issues arising during drafting

Recommendation 12

Part 1—Introduction

1 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*).

2 This Drafting Direction provides some guidelines for when it is appropriate for drafters to refer legal issues to AGS and sets out the process that is to be followed once it is decided to refer a matter to AGS. It also deals with finding confidential *VIEWS* opinions and giving *VIEWS* opinions to instructors. It also sets out some procedural matters relating to obtaining legal advice about legislation administered by another agency.

Part 2—OPC’s role and AGS’s role

3 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.

4 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.

5 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.

6 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.

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

- the issue is not completely clear-cut and its resolution may have serious, or politically significant, consequences;
- there is a real issue of constitutional law;
- 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;
- the instructors require written advice on the issue for their records;

- 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.

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

9 The guidelines in paragraph 7 assume that the legal issue is one that must be resolved in order for the drafting of the Bill to proceed. Sometimes, it might be possible to draft the Bill in such a way that it is no longer necessary to resolve the issue. Other times, resolving the issue may not be particularly relevant to the drafting process.

10 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.

Part 3—Referral to AGS

Payment by sponsoring agency

11 In July 2000, the Attorney-General's Department announced a change to the financial arrangements for the provision of legal advice on Cabinet work, including legislative proposals and draft legislation. Until 30 June 2000, this kind of advice was funded by OLSC. Under the new arrangements (effective from 1 July 2000), this advice is charged to the agency sponsoring the legislation.

12 In practice, this means that OPC is not able to obtain advice on legislation it is drafting unless the sponsoring agency agrees. This is because a reference by OPC will have financial consequences for the instructing agency.

13 However, the changes in 2000 did not affect the previous practice under which drafters could discuss an issue with AGS staff informally before deciding whether to refer the issue for formal advice. The Deputy General Counsel has advised that "we are more than happy to discuss legal issues with your drafters prior to any formal requests for advice, and at no charge".

Referral to AGS

14 If a drafter forms the view that an issue should be referred to AGS, he or she must discuss the need for a referral with the instructors. The drafter must tell the instructors that their agency will be billed for the advice.

Who should request the advice?

15 The advice may be formally requested by either OPC or the instructing agency. Sometimes it is more efficient for OPC to formulate the questions to be put to AGS, but this should not prevent the agency making the request if instructing officers prefer this approach (the drafter can simply give the agency material to be included in the formal request).

16 If the request is made by OPC, it must include the name of the instructing agency and the name and contact details of the instructing officers (phone numbers, and fax numbers or (for agencies on FedLink) email addresses).

What will AGS do on receiving the request?

17 When AGS receives a request for advice, AGS will write to the instructing agency about their charging approach and related matters.

Copies of requests to be provided to Attorney-General's Department

18 From 3 November 2008, new section 10A of the Legal Services Direction took effect. This means that a copy of a request for legal advice on a constitutional law issue is required to be provided to the Secretary of the Attorney-General's Department.

19 If OPC requests advice from AGS in relation to a constitutional law issue, OPC must ensure that a copy of the request is provided to the Attorney-General's Department. This can be done by emailing a copy of the request for advice to AGD.conrequests@ag.gov.au.

20 If an agency requests constitutional law advice at your request, you should advise your instructors of their obligation to provide the copy of the request to the Attorney-General's Department

21 A copy of the advice should also be provided in this way to AGD.conadvice@ag.gov.au.

Part 4—Disputes between OPC and instructing officers

If instructors object to seeking advice etc.

22 Most of our “clients” (sponsoring agencies, and instructing officers) are keen to obtain legislation that is valid and effective, and will pay for any AGS advice that is necessary to achieve that.

23 However, there will be cases in which an instructing officer will resist our advice that legal advice should be obtained on some aspect of a draft Bill. This already happens sometimes, generally because the instructing officer believes (or knows) that the advice will be inconvenient, or worse, in terms of the policy objectives.

24 There may also be cases in which instructors resist obtaining legal advice simply because their agency is unwilling to pay for it.

25 It is therefore necessary to consider how to deal with cases where sponsoring agencies refuse to pay for AGS legal advice that OPC thinks is necessary for the proper preparation of the Bill concerned.

26 There are various disputes that might arise if a drafter considers that AGS advice should be sought.

- The instructors might disagree that AGS advice is needed at all.

- The instructors might disagree with OPC's formulation of the kind of advice that is needed or the questions that should be asked.
- The instructors might object to paying for the advice because they believe OLSC should still be paying for such advice.
- The instructors might object to paying for the advice because they believe that another agency involved in the legislative project should pay (eg if the advice relates to consequential amendments of an agency's legislation, and the consequential amendments are required by substantive legislative changes sponsored by another agency).
- The instructors might wish to seek advice from another provider (not AGS).

Disputes about need for legal advice

27 Where the dispute is about the need for legal advice at all, or the kind of advice or the form in which it is sought, the drafter's first step is to ensure that he or she has properly explained the issues to the instructors. In general, this requirement will not be satisfied until the drafter has written to the instructors setting out clearly the legal advice that is needed, and explaining why this is needed.

28 If the instructors are not convinced by such a letter, the matter should be raised with the Assistant Secretary, OLSC. A copy of the letter explaining the issues should be provided to OLSC when the matter is raised with OLSC.

29 If OLSC cannot resolve the matter, the drafter must then raise it with the Attorney-General (through FPC). A template for the notification to the Attorney-General is at Attachment A.

30 If the dispute is not resolved through being raised with the Attorney-General, the LAP memo for the finished Bill must:

- indicate the aspects of the Bill that, in OPC's view, should have been the subject of AGS legal advice, and
- explain the basis for OPC's view, and
- explain why advice was not obtained; and
- explain the possible consequences of the absence of legal advice.

Disputes about who should pay, or who should advise

31 If the instructors agree about the need for legal advice but disagree about who should pay for it or who should give it, the drafter must ensure that the instructors are aware of the source of the relevant requirements:

- a letter from Ian Govey, dated 30 June 2000, is the source of the requirement that instructing agencies rather than OLSC pay;

- the Legal Services Directions (a copy of which is on Folio Office Documents and can also be found on the Attorney-General's Department website) are the source of the requirement to use AGS.

32 If, after the instructors have been referred to these documents, the matter is not resolved, it should be raised with the Assistant Secretary, OLSC. A brief note indicating that there appears to be agreement about the need for legal advice, and identifying the area of dispute (to the extent that the drafter understands it) should be provided when the matter is raised.

33 There is currently no principle laid down for dealing with disputes between sponsoring agencies about which of them should pay for advice relevant to part of a legislative project. If such a dispute arises, the agencies involved should be referred immediately to the Assistant Secretary, OLSC.

34 If OLSC cannot resolve the matter, the drafter must then raise it with the Attorney-General (through FPC). A template for the notification to the Attorney-General is at Attachment A.

35 If the dispute is not resolved through being raised with the Attorney-General, the LAP memo for the finished Bill must:

- indicate the aspects of the Bill that, in OPC's view, should have been the subject of AGS legal advice, and
- explain the basis for OPC's view, and
- explain why advice was not obtained; and
- explain the possible consequences of the absence of legal advice.

What should the drafter do while the dispute continues?

36 Unless it appears that the matter will be quickly resolved, the drafter should continue with the Bill and do the best job possible in the absence of the required legal advice. Any resulting qualifications on our assessment that the Bill is legally effective must be included in any notification to the Attorney-General and in the LAP memo (see paragraphs 29-30 and 34-35). In one case AGS agreed to provide the advice before the liability for payment had been settled, but we cannot assume that this will continue to happen.

37 Cases in which a drafter believes that it is impossible to continue drafting without legal advice should be discussed with FPC. In general, it will not be appropriate for the drafter to take on extra work (eg legal research) to compensate for the lack of legal advice.

Recording disputes etc

38 All disputes about obtaining legal advice from AGS should be notified to FPC. For these purposes, a dispute has arisen if the drafter is obliged to write the letter mentioned in paragraph 27, or to refer the instructors to documents as required by paragraph 31. FPC does not need to be notified of cases in which instructors merely request clarification of our views

or referral to the specific documents that set up the requirement for them to use, and pay, AGS, but don't then escalate the matter into a genuine dispute.

Part 5—Confidential VIEWS opinions

39 Confidential VIEWS opinions classified protected and above have been removed from the VIEWS database. A normal VIEWS search will not produce any reference to these opinions. FPC has a copy of some of the affected opinions. You should see FPC if you think FPC may have a copy of an opinion that might be relevant to a drafting project you are working on.

Part 6—Giving VIEWS opinions to instructors

40 From time to time drafters come across opinions in the VIEWS database that would be helpful to instructors on particular projects. The question then arises whether OPC should provide a copy of the opinion to the instructors.

The basic rules

41 There are 2 basic rules:

Rule 1: OPC should not give any instructor an opinion that is marked as “confidential” in the VIEWS database, in any circumstances.

Rule 2: OPC should not give any other opinion to an instructor, except in the following cases:

- Opinions obtained by OPC on its own behalf.
- Opinions obtained by or on behalf of other agencies, where the area of the agency that obtained the opinion, or on whose behalf it was obtained, agrees to it being provided. This agreement should be arranged by your instructor (although you may wish to confirm the agreement yourself).

42 Rule 2 applies even if it appears that, under the Legal Services Directions, the opinion should have been provided to the instructor's agency at the time it was obtained. Drafters should bring any of these cases to the attention of the Assistant Secretary, OLSC.

43 The reason for the rules is that we have access to VIEWS under special arrangements that have been negotiated with AGS and the Attorney-General's Department. Our access to the database is supported by an authorisation made by the Attorney-General on 29 August 1999 under subsection 55ZH(2) of the *Judiciary Act 1903*, but this authorisation does not allow disclosure by OPC to other people. In any case, it would not be appropriate for OPC to give other agencies copies of work done by AGS or other legal services providers without reference to the agency to whom the advice was originally given.

Alerting instructors to the existence of relevant opinions

44 Although you should not give the opinions themselves to other agencies, you may alert your instructors to the existence of a relevant opinion (including a confidential opinion)

by giving them the reference number, author and title. This will make it easier for your instructors to arrange access if they wish (which should be done through AGS).

45 Paragraph 10 of the Legal Services Directions is intended to ensure that agencies administering legislation are aware of legal advice provided in the interpretation of that legislation. You should draw this to your instructors' attention if it might be relevant to their ability to access the advice you have mentioned to them. You should also point out to your instructors that if the agency that obtained the advice provides it to the instructors in accordance with the obligations under paragraph 10 of the Legal Services Directions, any legal professional privilege in the document is maintained (see subsection 55ZH(4) of the *Judiciary Act 1903*).

46 You should also advise your instructors, if necessary, that OLSC may be able to help them if they run into problems with getting access to relevant opinions.

Which opinions were obtained by OPC on its own behalf?

47 OPC obtains a small number of opinions on its own behalf, and instigates requests for a larger number of opinions on behalf of our clients in relation to particular Bills. Some of the latter kind of opinions are formally sought by, and provided to, OPC. The fact that an opinion is addressed to OPC does not therefore prove that it was obtained on OPC's behalf.

48 If you are dealing with an opinion addressed to OPC, you will need to determine whether the opinion was obtained by OPC on its own behalf, or on behalf of an instructor.

49 For opinions obtained since the introduction of the full charging regime, it is likely that the agency that paid for the opinion is the agency that "owns" the opinion. For opinions given before the introduction of the full charging regime, or opinions for which the payer is not apparent, you need to consider the content of the opinion.

- If the opinion is addressed to OPC, and was obtained for general purposes (eg in connection with the issue of a Drafting Direction), you may assume that it was obtained by OPC on its own behalf.
- If the opinion is addressed to OPC, but was obtained in connection with the drafting of a particular Bill or parliamentary amendments, you should assume that it was obtained by OPC on behalf of the agency sponsoring, or instructing on, the Bill or amendments.

Opinions informing the drafter's general approach

50 Drafters routinely read AGS opinions, and absorb information about the AGS views on a whole range of legal issues that might arise in drafting legislation. There is no barrier to a drafter relying on this information in his or her drafting work—indeed, it is vital that we do so. Further, there is no barrier to a drafter advising an instructor that a drafting approach has been adopted having regard to the views of AGS.

51 However, from time to time in such circumstances, an instructor will ask to see a copy of the relevant opinion. At this point, any relevant opinion should be dealt with in accordance with this Drafting Direction.

Other matters

52 Note that staff of the Attorney-General's Department can access the VIEWS Database (subject to an internal process for approval of access).

53 If you have any queries about this general policy, or its application in a particular case, please see FPC.

Part 7—Legal advice about legislation administered by another agency

54 Paragraph 10 of the Legal Services Directions sets out the steps that an agency which is subject to the *Financial Management and Accountability Act 1997* is to follow if it proposes to seek legal advice on the interpretation of legislation administered by another such agency. The steps include:

- providing the administering agency with a reasonable opportunity to consult on the proposal to seek advice; and
- giving the administering agency a copy of the request for advice and the advice.

55 The Australian Public Service Commission would also like agencies subject to the *Commonwealth Authorities and Companies Act 1997* to co-operate in the same way in relation to legal advice about the operation of the *Public Service Act 1999*.

56 You should bear these matters in mind in relation to any relevant advice obtained by OPC. You should also advise your instructors of these matters if they arise in a drafting project you are working on.

Peter Quiggin
First Parliamentary Counsel
December 2008

Attachment A—Notification to Attorney-General

[See template AGS Dispute.dot, in Drafter, EA Forms.]

File No:

[Name of Bill]—Notification of dispute about obtaining AGS advice

This notification is provided in accordance with arrangements proposed in a submission from First Parliamentary Counsel dated 14 July 2003 and subsequently approved by the Attorney-General.

Relevant deadlines

1 [provide any relevant information about deadlines for the Bill concerned, etc.]

Issue

2 The [name of sponsoring agency]'s refusal to agree to pay for AGS advice about [brief description of issue].

Proposed action

3 OPC will continue work on the [name of Bill], and will record any concerns about the Bill's [constitutional validity] [legal efficacy] in the memo prepared for the Legislation Approval Process.

4 You may wish to raise this matter with [title of sponsoring Minister, or Ministers if there is a dispute about which sponsoring agency should pay].

Background

5 [Set out brief description of the Bill, sufficient to provide a context for the following material.]

6 **[Where there is dispute about the need to obtain legal advice]** [Refer to OPC letter setting out the issue on which OPC believes AGS advice should be sought (copy of letter to be included as attachment).]

7 **[Where there is dispute about who should pay for the AGS advice, or about who should provide the advice]** [Refer to OPC notification to OLSC, and mention that relevant documents have been brought to sponsoring agency's attention (copy of notification to be attached).]

Implications

8 [Brief explanation of the possible consequences for the Bill of a failure to obtain AGS advice in a timely way.]

9 [If later legal advice might change the basic direction of the Bill, explain possible waste of resources involved in redrafting. If lack of legal advice may prejudice validity or efficacy of the Bill, comment briefly on the implications of this.]

Consultation

10 [Refer to previous paragraphs of this submission describing our negotiations with sponsoring agencies and our dealings with OLSC.]

Recommendation

11 I recommend that you:

- note this notification;
- consider whether to raise this matter with [title of sponsoring Minister, or Ministers if there is a dispute about which sponsoring agency should pay].

Peter Quiggin
First Parliamentary Counsel
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Noted

.....
Attorney-General
...../...../.....