



Australian Government

Office of Parliamentary Counsel

Instrument Drafting Guidance Note No. 1.1 Deciding if a non-tied instrument should be drafted by OPC

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1 The purpose of this document is to assist agencies decide whether to engage OPC to draft a non-tied instrument.¹

2 When deciding if a particular non-tied instrument should be drafted by OPC, agencies should consider the matters listed in **Attachment A**. Subject to capacity, OPC should draft the instrument if one or more of those matters applies in relation to the instrument.

3 Agencies should consult with their relevant internal legal or legislation area before engaging OPC.

4 Agencies may also find it useful to consult OPC, including by calling the OPC instrument client adviser on **(02) 6120 1390**.

¹ The main kinds of instrument drafting work tied to OPC under the [Legal Services Directions](#) are the drafting of regulations and other instruments made by the Governor-General. If instrument drafting work is not tied to OPC, agencies are not required to use OPC.

Relevant matters

If one or more of the following matters applies in relation to an instrument, agencies should consider engaging OPC to draft the instrument.

- 1 It is unclear if the instrument is authorised by an Act or another instrument.
- 2 The instrument raises a constitutional issue (such as whether the instrument is supported by a constitutional head of power or is otherwise constitutionally valid).²
- 3 The instrument relates to a significant or sensitive legal, political, administrative or financial matter.
- 4 The instrument is a new principal instrument.
- 5 The instrument is an amending instrument that makes significant changes to a principal instrument.
- 6 The instrument raises a novel or complex legal or drafting issue.
- 7 The instrument is intended to fix a mistake or problem that involves a medium to high level of risk or raises significant legal issues.
- 8 The instrument modifies the operation of an Act or another instrument.
- 9 The instrument authorises the making of another instrument.
- 10 The commencement or application of the instrument is retrospective or is otherwise novel or complex.
- 11 The instrument includes offences or civil penalty provisions.
- 12 The instrument includes provisions that should be dealt with in regulations (such as the imposition of tax, powers of arrest or detention or other coercive powers).³
- 13 The instrument is intended to be used as a template to draft other instruments.
- 14 The instrument:
 - (a) raises policy issues that are the responsibility of other agencies;⁴ or
 - (b) is likely to attract comment from the Senate Standing Committee for the Scrutiny of Delegated Legislation⁵; or
 - (c) is likely to be subject to significant scrutiny for any other reason.

² An instrument may be invalid if it infringes a constitutional limitation or principle such as the separation of powers, the implied freedom of political communication or the limitation on giving preference, in laws of trade, commerce or revenue, to a State or part of a State. For further information, see OPC's [Drafting Direction 3.1](#).

³ For further information, see OPC's [Drafting Direction 3.8](#), paragraph 4.

⁴ For further information, see OPC's [Drafting Direction 4.2](#), Attachments A and B.

⁵ For further information, see the Committee's [guidelines](#) for applying its scrutiny principles.