

PARLIAMENTARY COUNSEL

Drafting Direction No. 2.2 Use of various expressions in draft legislation

Note: This Drafting Direction contains references to the “head drafter”. It is a reference to the senior person who is responsible for matters of drafting policy. This form is used to enable the Drafting Directions to be applied in other organisations. In OPC the head drafter is FPC.

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Contents

Part 1—Matters to be aware of in choosing expressions to be used in draft legislation	3
Introduction	3
Borrowing from legislation of other jurisdictions	3
Use of names and symbols of Australian legal units of measurement	3
Use of words that are registered trade marks	3
Use of the expression “fringe benefit”	3
“Reasonable” phrases—subjective and objective elements	4
Sunset provisions	5
Drafters	5
Publications Group	6
Persons with disabilities—obligations of representative decision-makers	6
Part 2—Words and expressions to be used in draft legislation	7
“Christian name” and “given name”	7
“Servant” and “employee”	7
“Fax”	8
“Email”	8
Standards Australia	8
References to Australian Standards and joint Australian and New Zealand standards	8
“Notice published in the Gazette”	9
“Day”	9
“Oral”	9
“Money”	9
“Index reference period”	9
“For the purposes of” and “For”	9
Part 3—Definitions of specific expressions	10
Definition of “minerals”	10
Definition of “insolvent under administration”	10
Definitions relating to Indigenous persons	10
Definitions relating to same-sex relationships	11
Background	11
Definition of “de facto partner”	12
Definition of “child”	12
Definition of “parent”	13
Definition of “stepchild” and “step-parent”	13
Tracing rule for terms that describe other family relationships	13

Definitions covering surviving members of a couple	14
Part 4—Scoping provisions	15
Background	15
Approach.....	15
Part 5—Government terminology	16
Public employment—terminology and other matters	16
Terminology	16
General definitions in section 13 of the Public Service Consequentials Act	16
Definitions in the Acts Interpretation Act	16
Referring to APS employees	17
How to refer to Ministers and Departments	17
Background	17
Category 1 references—refer to “the Minister” or “the Department” and rely on sections 19 and 19A of the Acts Interpretation Act.....	18
Category 2 references—refer to other Ministers and Departments in a way that avoids naming them.....	18
Category 3 references—limited situations in which it is appropriate to refer to a Minister by name	19
Parliamentary Departments	19
Part 6—Financial sector terminology	20
References to banks, building societies and credit unions	20
Rely on the general concept of an ADI.....	20
Distinguishing between different kinds of ADIs.....	20
Friendly societies.....	21
Kinds of institutions regulated by the States and Territories.....	21
References to cheques and payment orders	21
Part 7—Notes saying documents are available on websites	21
General form of note	22
Form of note for agreement in Australian Treaties Library.....	22
Form of note if agreement is in force for Australia	22
Form of note if agreement is not yet in force for Australia.....	23

Part 1—Matters to be aware of in choosing expressions to be used in draft legislation

Introduction

1 This Part deals with various matters that you should be aware of in choosing expressions to be used in draft legislation.

Borrowing from legislation of other jurisdictions

2 Drafters looking to legislation from other jurisdictions as inspiration or precedent should be careful to ensure that they do not borrow from that legislation expressions which either have no legal significance in Commonwealth legislation or have a different legal significance in Commonwealth legislation.

Use of names and symbols of Australian legal units of measurement

3 If an Australian legal unit of measurement prescribed by the *National Measurement Regulations 1999* is to be mentioned in draft legislation, the name or symbol prescribed for the unit by those regulations must be used. Note that none of the symbols finishes with a full stop. (See also the *National Measurement Guidelines 1999* which deal with combinations of legal units of measurement.)

Use of words that are registered trade marks

4 Drafters should be aware that many words in common usage that describe relatively new products or processes may in fact be registered trade marks. For example, I understand that “band-aid” and “frisbee” are currently registered trade marks.

5 Ideally, registered trade marks should not be used in legislation. This is because the registered proprietor would be entitled to complain that the use of the trade mark in legislation tended to make the trade mark less distinctive of the goods in question. As well, a word that is in fact a registered trade mark might be interpreted as referring only to the goods properly described by that trade mark and not to the wider class of similar goods.

6 If you suspect that a word you have been asked to include in draft legislation may be a registered trade mark, you should draw this to the attention of your instructors, pointing out the matters mentioned in paragraph 5 above, and suggest that they seek advice about the current status of the word from IP Australia.

Use of the expression “fringe benefit”

7 A common approach to the drafting of a provision dealing with remuneration or benefits received in addition to salary or wages is to adopt the definition of *fringe benefit* in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (the ***FBTAA definition***).

8 However, the FBTAA definition is designed to define the tax base for fringe benefits tax. So there are many differences between the FBTAA definition and the ordinary meaning of “fringe benefit”, including the following:

- (a) the FBTAA definition does not apply to benefits provided in respect of the employment of Commonwealth employees. (Commonwealth employees are covered by the *Fringe Benefits Tax (Application to the Commonwealth) Act 1986*);
- (b) many benefits (which are classified by the FBTAA as “exempt benefits”) are excluded from the FBTAA definition;
- (c) the FBTAA definition does not apply to an employee whose salary or wages are exempt income for income tax purposes e.g. foreign source income of non-residents, certain foreign service income of residents etc.

9 Therefore drafters should consider whether the FBTAA definition can be adopted without modification.

“Reasonable” phrases—subjective and objective elements

10 In the past, legislation has used a number of different phrases, such as “reasonably believes”, “believes on reasonable grounds”, “has reasonable grounds to believe”, “has reason to believe”, “has reasonable grounds for believing”, “has reasonable cause to believe” and “in the reasonable belief”.

11 The issue with each of these expressions is whether there is only an objective element required by the test, or whether both objective and subjective tests are required. That is, does the test require merely sufficient facts or evidence to found an objectively reasonable belief, or does the test also require a person to have an actual belief which is objectively reasonable?

12 The case law on this issue is not consistent.

13 The phrase “reasonable grounds to believe” only requires an objective test (see *George v Rockett* [1990] HCA 26) while “has reason to believe” requires both an objective and subjective element (see, for example, *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 559, 571-572 (Lockhart J)).

14 On the other hand, *Taiapa v The Queen* [2009] HCA 53 cites Stephen J from *Marwey v The Queen*, in stating that “to ask whether a person has a reasonable belief is not different in substance from asking whether a person has reasonable grounds for belief. His Honour explained that ... the jury are required to consider two questions. The first is an inquiry as to the state of the accused’s mind. The second is an objective question that ... is exclusively concerned with the jury’s view of the grounds, whether they constitute reasonable grounds”.

15 Generally, the expression “reasonably believes” (which requires both an objective and subjective element) should be used in preference to the other phrases mentioned above. However, the other phrases may be used:

- (a) for consistency with the legislation into which the phrase is being inserted; or
- (b) because a Department’s clear policy position is to require only a subjective test or only an objective test; or
- (c) with the approval of the head drafter.

16 Drafters should also generally try to use “reasonably suspects” instead of the other similar variations, except in the circumstances referred to in the paragraphs above. It is worth noting that the test of “suspicion” is a lower test than the test of “belief” (see Jacob J in *Tucs v Manley* (1985) 62 ALR 460 at 461).

17 If a Department’s policy is that only an objective or subjective test should be required, caution should be exercised in using the traditional phrases mentioned above to achieve this outcome. For example, if only an objective test is required, a provision could say “there are reasonable grounds to believe (whether or not any person actually has that belief)”. Similarly, if only a subjective test is required, a provision could say “the person believes (whether or not that belief is reasonable)”.

18 Careful consideration should also be given as to the person who is required to have a belief or suspicion. For example, in section 27 of the *Court Security Act 2013*, a security officer may seize a dangerous item if a *seizing officer* reasonably believes that it is necessary to seize the item. Similarly, in section 15 of that Act a security officer or authorised court officer may do certain things as long as that *or any other* security officer or authorised court officer has a reasonable belief of certain things.

Sunset provisions

Drafters

19 Frequently, entire instruments or Acts, or provisions of instruments or Acts, are required to be sunsetted. There are a number of phrases that have previously been used to achieve this outcome, including “is repealed”, “expires”, “ceases to have effect” and “ceases to be in force”.

20 In future, drafters should not (except as described in paragraph 22) use any expression other than “repeal” if they want an Act, instrument or provision of an Act or instrument to be treated by Publications as having been textually removed from the statute book.

21 If drafters wish the provision to be treated by Publications as remaining on the statute book, but not to have any legal effect, they should use the expression “ceases to be in force”. For example, if consequential amendments would need to be made to remove cross-references to the sunsetted provision or if transitional provisions may be required to deal with the provision ceasing to be in force, it might be better to use the expression “ceases to be in force” so that the provision can be repealed, and the consequential amendments and transitional provisions drafted, at a later date. Drafters can also consider including explanatory notes if leaving cross-references to provisions that have sunsetted might confuse readers.

22 In some cases, it may be clearer to provide for a provision to sunset by turning off a power conferred by the provision from a specified time, along the following lines:

46 Sunset provision

The Director may not make an application under section 45 after the end of 5 years after that section commences.

23 Such provisions would remain displayed in the “In force” part of the Federal Register of Legislation until repealed by a separate amending Act or instrument.

24 Drafters should also be aware that sections 3 (when Acts come into operation) and 36 (calculating time) of the *Acts Interpretation Act 1901* will not apply, so drafters should clarify that the Act, instrument or provision is repealed or ceases to be in force “at the start of” a specified day.

Publications Group

25 Section 4 of the *Legislation Act 2003* defines “repeal”, in relation to instruments, to include “revoke” or “rescind”. If “repeal”, “revoke” or “rescind” is used in relation to an instrument or a provision of an instrument, then the Publications Group will cease to display the instrument in the “In force” part of the Federal Register of Legislation or will remove the provision from the instrument, and record that the instrument or provision has been “Repealed by”. From that time, it is assumed that the instrument or provision has been repealed (and so does not need to be repealed later and does not sunset).

26 Any other phrases that are used (such as “ceases on”, “ceases to have effect as if repealed”, “expires on” or “ends on”), in relation to an instrument or a provision of an instrument, are considered to cease the operation of the instrument or provision, but not actually repeal the instrument or provision. Entire instruments whose operation has ceased will no longer display in the “In force” part of the Federal Register of Legislation but will display in the “No longer in force” part, and the instrument will be recorded as having been “Ceased by” rather than “Repealed by”. As a result, such instruments can be repealed and will still sunset. However, a provision whose operation has ceased, but that has not been repealed, will remain in the relevant Act or instrument.

27 Of course, as a result of paragraph 20 above, the only instruments that would use the expressions “revoke” or “rescind” would be instruments that had been drafted outside OPC.

28 If an entire Act or instrument is repealed, all instruments enabled by that Act or instrument are taken to be repealed. In addition, if a provision of an Act or instrument is repealed, any instrument which is made entirely under that provision (and only that provision) is also repealed and does not need to be expressly repealed.

29 However, if a provision (the *enabling provision*) of an Act or instrument is repealed, and a provision (the *instrument provision*) of an instrument is made for the purposes of the enabling provision but under another provision (such as a general rule-making power), the instrument provision will need to be expressly repealed by an amending instrument. Similarly, if an instrument is made under an enabling provision that has been repealed, but is also made under another provision that has not been repealed, the instrument will need to be expressly amended or repealed.

Persons with disabilities—obligations of representative decision-makers

30 There are a number of provisions on the statute book allowing a representative to make decisions for a person with a disability. In the past, legislation has often used the expression “act in the best interests” to describe the obligations of the representative (representatives are also referred to as nominees in some legislation). The Attorney-General’s Department (*AGD*) has advised that the duty of a representative decision-maker should be expressed as an obligation to ascertain and act on the will and preferences of the person represented, unless the will and preferences of that person would pose a serious risk to the person’s personal and social wellbeing. Drafters should use the model in section 7A of the

My Health Records Act 2012 as a precedent for providing for obligations of the representative decision-makers of persons with a disability.

31 If your instructors wish to depart from the precedent you should raise the matter with the head drafter. Any departures from the precedent should be referred to the human rights area of AGD.

Part 2—Words and expressions to be used in draft legislation

“Christian name” and “given name”

32 The expression “given name” should be used in draft legislation, rather than “Christian name”.

33 However, if you are amending legislation that already uses the expression “Christian or given name”, you should ensure that the amendments maintain consistency within the legislation being amended. Whether this is achieved by amending the existing provisions to remove the reference to “Christian or”, or by using “Christian or given names” in the new provisions, is a matter for your instructors, who may wish to consult the Department of the Prime Minister and Cabinet before making a final decision.

“Servant” and “employee”

34 The Commonwealth’s view is that the word “servant” in legislation could be replaced with the word “employee” without any undesirable consequences.

35 The word “servant” should not be used in drafts for new non-amending legislation. “Employee” should be used instead.

36 “Servant” should also be avoided, in favour of “employee”, in drafts for amending legislation if the legislation being amended does not already use the word “servant”.

37 If you are amending legislation that already contains a reference to “servant”, you should, if possible, replace all the existing references to “servant” with “employee”. If this is not feasible, you should make a judgement whether “employee” can satisfactorily be included in the legislation without amending existing uses of “servant”; in making such a judgement, you should favour the use of “employee” unless there are particular reasons against it.

38 A problem may arise if particular legislation uses both “servant” and “employee”, and gives one of those expressions a particular meaning that is broader or narrower than its ordinary meaning (see, for instance, the *Patents Act 1990*). In such cases the most sensible course may be to maintain the structure, and the distinction between the two expressions, that is relied on in the existing legislation, even if this involves using “servant” in new provisions.

39 In general, arguments against using the new expression may be overcome by accompanying the provisions using the new expression with a note that recognises the inconsistency of expression and refers to section 15AC of the *Acts Interpretation Act 1901* (changes to style not to affect meaning).

“Fax”

40 The word “fax” should be used in draft legislation, in preference to the word “facsimile”, to describe the relevant form of communication.

41 If you are inserting a provision including the word “fax” into legislation that already uses “facsimile” to describe a communication method, you should, if possible, bring the existing provisions into line with the new provisions. You must do so if there is any chance that the introduction of “fax” could cast doubt on the meaning of “facsimile” as used in the existing provisions of the legislation.

“Email”

42 The word “email” (without a hyphen) should be used in draft legislation, in preference to the expression “electronic mail”, to describe the relevant form of communication.

43 If you are inserting a provision including the word “email” into legislation that already uses “electronic mail” to describe a communication method, you should, if possible, bring the existing provisions into line with the new provisions.

Standards Australia

44 The *Acts Interpretation Act 1901* contains the following definition:

Standards Australia means Standards Australia Limited (ACN 087 326 690).

45 You should use the name “Standards Australia” in draft legislation.

References to Australian Standards and joint Australian and New Zealand standards

46 The *Acts Interpretation Act 1901* contains the following section:

2L References to Australian Standards

In any Act, a reference consisting of the words “Australian Standard” followed by the letters “AS” and a number is a reference to the standard so numbered that is published by, or on behalf of, Standards Australia.

47 You should take this provision into account in referring to Australian Standards in draft legislation. An Australian Standard should be cited consistently with the following example: “Australian Standard AS 3786:2014, *Smoke Alarms using scattered light, transmitted light or ionization*, as in force ...”.

48 There is no equivalent provision to section 2L of the *Acts Interpretation Act 1901* for joint Australian and New Zealand standards or for international standards.

49 Joint Australian and New Zealand standards should be referred to using the words “Australian/New Zealand Standard”, plus the AS/NZS number and the title of the standard, and a reference to “published jointly by, or on behalf of, Standards Australia and Standards New Zealand”. For example, “Australian/New Zealand Standard AS/NZS 4308:2008, *Procedures for specimen collection and the detection and quantitation of drugs of abuse in*”

urine, published jointly by, or on behalf of, Standards Australia and Standards New Zealand, as in force ...”.

“Notice published in the Gazette”

50 The expression “notice published in the Gazette” should be used (instead of “notice published in writing in the Gazette”).

“Day”

51 Use “day” instead of “date” whenever “day” can be appropriately used.

“Oral”

52 Use “oral” (and “orally”) instead of “verbal” to mean “spoken”.

“Money”

53 Use “money” instead of “moneys”.

“Index reference period”

54 The Australian Bureau of Statistics (**ABS**) has stated that “index reference period” and “reference base” are different names for the same concept and that it prefers “index reference period”.

55 Use “index reference period” instead of “reference base” in new indexation provisions referring to ABS indexes relying on the concept, such as CPI indexes. The concept is not relevant to all ABS indexes. If you are not sure whether the concept is relevant to a particular index, confirm this with the ABS.

56 If you are inserting a provision including “index reference period” into legislation that already uses “reference base” (or amending an indexation provision that uses “reference base”) you should, if possible, amend the legislation so that it refers to “index reference period” throughout.

“For the purposes of” and “For”

57 The expression “for the purposes of” should be used in draft legislation instead of “for”, including when calling up a head of power (e.g. “[f]or the purposes of section 20 of the Act” or “[f]or the purposes of paragraph (1)(a)”).

58 If you are inserting a provision including “[f]or the purposes of” into an instrument that already uses “for”, the provisions using the old form should not be changed to use the new form unless it would be convenient to do so. Provisions in instruments that are being remade for sunset purposes should generally be updated to use the new form. The head drafter should be consulted if there is uncertainty as to whether the provisions of an instrument should be updated to use the new form of words for calling up the head of power.

Part 3—Definitions of specific expressions

59 Most of the definitions referred to in this Part can be inserted using the Standard Provisions macro, under the Definitions tab of the OPC Insert Standard Provisions and Notes dialog box (which can be opened using the shortcut Alt + N).

Definition of “minerals”

60 The word “minerals” is defined in Commonwealth legislation in a variety of ways. Many definitions put an emphasis (perhaps an undue emphasis) on the inclusion of petroleum. The following definition should generally be adopted:

minerals means minerals in any form, whether solid, liquid or gaseous and whether organic or inorganic.

61 However, it should not be assumed that this definition will be appropriate in all cases, and the definition should be looked at carefully in each instance to make certain that it gives effect to the intended policy.

Definition of “insolvent under administration”

62 The *Acts Interpretation Act 1901* contains the following definition:

insolvent under administration has the same meaning as in the *Corporations Act 2001*.

63 To ensure consistency across the statute book and to reduce the length of the statute book, that definition should generally apply. You should discuss with your instructors whether that definition is appropriate.

Definitions relating to Indigenous persons

64 Subject to paragraph 66, the following definitions in the *Aboriginal and Torres Strait Islander Act 2005* should generally be adopted:

Aboriginal person means a person of the Aboriginal race of Australia.

Torres Strait Islander means a descendant of an Indigenous inhabitant of the Torres Strait Islands.

(Note that “Indigenous” must be capitalised in the definition of *Torres Strait Islander*, consistent with Drafting Direction 2.1, even though it appears in lower case in the *Aboriginal and Torres Strait Islander Act 2005*.)

65 The following definition of *Indigenous person* should generally be adopted:

Indigenous person means a person who is:

- (a) a member of the Aboriginal race of Australia; or
- (b) a descendant of an Indigenous inhabitant of the Torres Strait Islands.

66 Before including these definitions, you should consult the National Indigenous Australians Agency.

67 If you wish to use a different definition of any of these terms, you should discuss the proposal with the head drafter.

- 68 Constitutional law advice should be sought if:
- (a) you wish to use a different definition of any of these terms, or you wish to use any of these terms undefined; and
 - (b) the context in which the term is used might involve reliance on the race power in s51(xxvi) of the Constitution.

Definitions relating to same-sex relationships

Background

69 Government policy is that Commonwealth laws should not discriminate against same-sex couples or their children.

70 In 2008 the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* (the ***Equal Treatment Acts***) were passed by Parliament. The Equal Treatment Acts amended a large number of Commonwealth laws to remove discrimination against same-sex couples and their families. They did this by inserting standard definitions for terms like de facto partner, child, stepchild and parent that cover same-sex couples and their children. For laws that contained terms like grandchild, grandparent, sibling, aunt, uncle, relative or family, a “tracing rule” was also inserted to ensure that these terms do not exclude same-sex families.

71 In 2017, the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (the ***Marriage Definition Act***) amended the definition of “marriage” in the *Marriage Act 1961* to allow any 2 people to marry, regardless of their sex. The Marriage Definition Act also inserted the following section into the *Acts Interpretation Act 1901* to remove any doubt that persons legally married to one another are spouses:

2CA References to spouses

- (1) For the purposes of any Act, a person is the ***spouse*** of another person (whether of the same sex or a different sex) if the person is legally married to the other person.
- (2) Subsection (1) has effect in addition to any provision of an Act that affects the meaning of ***spouse*** in a provision of that Act.

Example: ***Spouse*** is defined for the purposes of an Act to include a de facto partner and a former spouse. Because of this section, a reference in the Act to a person’s spouse covers any person who is legally married to the person, in addition to any person covered by the definition in the Act.

72 If you are including new concepts in draft legislation that will cover parties to a marriage, you should generally rely on the definition of “spouse” in the *Acts Interpretation Act 1901*, and not use “husband” or “wife” (which may not cover same-sex couples). If you are including new concepts in draft legislation that will cover de facto partners or their children, you should generally include the standard definitions set out in paragraphs 75 to 86 below. If you are including new concepts in draft legislation that will cover other family relationships, you should generally include a tracing rule in one of the forms set out in paragraphs 88 to 90 below. If you are including new concepts in draft legislation that will cover the surviving member of a couple where the other member has died, you should generally use a definition modelled on those set out in paragraph 91 below, and not use “widow” or “widower” (which may not cover surviving members of same-sex couples).

73 In the Equal Treatment Acts, a different approach to removing discrimination was used for some laws (for example, the *Migration Act 1958*, the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986*). This was done for policy reasons specific to those laws. Regulations were also amended to implement this Government policy and you may need to consider how these terms are defined through the Regulations. Similarly, the consequential amendments in the Marriage Definition Act sometimes retained existing references to “husband”, “wife”, “widow” and “widower” while also adding in references to “spouse” and “surviving spouse”, to ensure all married couples were covered. This also was done for policy reasons specific to those laws.

74 If, when drafting legislation, it becomes apparent that there are policy reasons why the standard definitions or tracing rules are not appropriate, you should discuss the matter with the head drafter.

Definition of “de facto partner”

75 The *Acts Interpretation Act 1901* contains the following section:

2D References to de facto partners

For the purposes of a provision of an Act that is a provision in which de facto partner has the meaning given by this Act, a person is the *de facto partner* of another person (whether of the same sex or a different sex) if:

- (a) the person is in a registered relationship with the other person under section 2E; or
- (b) the person is in a de facto relationship with the other person under section 2F.

76 The definition recognises relationships registered under prescribed State or Territory laws (called *registered relationships*), as well as “genuine domestic relationships” (called *de facto relationships*). The definition indicates that same-sex couples can be de facto partners.

77 The *Acts Interpretation Act 1901* definition does not operate automatically. If you are drafting legislation that will use the concept of a de facto partner of a person, you should pick up the *Acts Interpretation Act 1901* meaning by including the following definition in the draft legislation:

de facto partner of a person has the meaning given by the *Acts Interpretation Act 1901*.

Definition of “child”

78 If you are drafting legislation that will use the concept of a child of a person, you should include the following definition:

child: without limiting who is a child of another person for the purposes of this Act, a person is the *child* of another person if the person is a child of the other person within the meaning of the *Family Law Act 1975*.

79 This definition picks up the rules about the parentage of children contained in the *Family Law Act 1975*. In particular, it covers children of same-sex couples by picking up:

- (a) children born as a result of an artificial conception procedure (see section 60H of the *Family Law Act 1975*); and

- (b) children born under a surrogacy arrangement (see section 60HB of the *Family Law Act 1975*).

80 The definition may need to be adapted if other types of children are to be expressly covered (for example, stepchildren, foster children or wards).

Definition of “parent”

81 If you are drafting legislation that will use the concept of a parent of a person, as well as the concept of a child of a person, you should include the following definition:

parent: without limiting who is a parent of another person for the purposes of this Act, a person is the *parent* of another person if the other person is the person’s child because of the definition of *child* in [relevant section].

82 The definition relies on the standard definition of *child* also being included in the draft legislation. Sometimes, draft legislation may use the concept of a parent of a person without also using the concept of a child of a person. In this case, the following definition of parent should be included:

parent: without limiting who is a parent of anyone for the purposes of this Act, a person is the *parent* of another person if the other person is a child of the person within the meaning of the *Family Law Act 1975*.

Definition of “stepchild” and “step-parent”

83 If you are drafting legislation that will use the concept of a stepchild of a person, you should include the following definition:

stepchild: without limiting who is a stepchild of another person for the purposes of this Act, a child of a de facto partner of the other person is the *stepchild* of the other person if the child would be the other person’s stepchild except that the other person is not legally married to the partner.

84 If you are drafting legislation that will use the concept of a step-parent of a person, you should include the following definition:

step-parent: without limiting who is a step-parent of another person for the purposes of this Act, a de facto partner of a parent of the other person is the *step-parent* of the other person if the de facto partner would be the other person’s step-parent except that the de facto partner is not legally married to the other person’s parent.

85 Both of these definitions rely on the concept of de facto partner being defined in the draft legislation to cover same-sex couples.

86 Note that “step-parent” is hyphenated and “stepchild” is not. This reflects how these terms appear in the Macquarie Dictionary.

Tracing rule for terms that describe other family relationships

87 If you are drafting legislation that will use concepts to describe other family relationships (for example, grandchild, grandparent, sibling, aunt, uncle, relative or family), you will need to ensure that the concepts cover same-sex couples and their families. This can be done by including a “tracing rule”. There is no standard tracing rule but, generally, one of

the forms set out below should be followed. The form will need to be adapted depending on the concepts it will apply to and whether the standard definitions of *de facto partner*, *child* and *parent* will also be included in the draft legislation.

88 The following form should be used if only concepts that describe relationships traceable through a parent-child relationship (for example, grandchild, grandparent, sibling, aunt or uncle) will be included in the draft legislation. For examples of the use of this form, see subsection 29(5) of the *Age Discrimination Act 2004*; subsection 6(3) of the *Broadcasting Services Act 1992*; subsection 23DZZID(3) of the *Health Insurance Act 1973*; subsection 44-11(5) of the *Aged Care Act 1997*; and subsections 10(5) and 17A(9A) of the *Superannuation Industry (Supervision) Act 1993*.

- (#) For the purposes of [this legislation], if one person is the child of another person because of the definition of *child* in [relevant provision], relationships traced to or through that person are to be determined on the basis that the person is the child of the other person.

89 The following form should be used if concepts that describe family relationships more generally (for example, relative or family) will be included in draft legislation. For examples of the use of this form, see subsection 42F(3) of the *Australian Federal Police Act 1979*; subsection 4(2) of the *Safety, Rehabilitation and Compensation Act 1988*; and section 9AA of the *Corporations Act 2001*.

- (#) For the purposes of [this legislation], relationships (including the relationship of being family or being relatives) are taken to include the following (without limitation):
- (a) relationships between de facto partners [(within the meaning of the *Acts Interpretation Act 1901*)];
 - (b) relationships of child and parent that arise if someone is the child of a person because of the definition of *child* in [relevant provision];
 - (c) relationships traced through relationships mentioned in paragraphs (a) and (b).

90 The following form should be used if a concept like “member of a family” will be included in draft legislation. For examples of the use of this form, see subsection 5(6) of the *Bankruptcy Act 1966*; subsection 16A(4) of the *Crimes Act 1914*; section 4AAA of the *Customs Act 1901*; and subsection 6(10) of the *Privacy Act 1988*.

- (#) For the purposes of [this legislation], the members of a family, in relation to any person, are taken to include the following (without limitation):
- (a) a de facto partner of the person [(within the meaning of the *Acts Interpretation Act 1901*)];
 - (b) someone who is the child of the person, or of whom the person is the child, because of the definition of *child* in [relevant provision];
 - (c) anyone else who would be a member of the person’s family if someone mentioned in paragraph (a) or (b) is taken to be a member of the person’s family.

Definitions covering surviving members of a couple

91 If it is necessary to refer to the surviving member of a couple where the other member has died, the following definitions may be used:

surviving spouse of a person who has died means a person who was the spouse of the person immediately before the person died.

surviving spouse or de facto partner of a person who has died means a person who was the spouse or de facto partner [(within the meaning of the Acts Interpretation Act 1901)] of the person immediately before the person died.

92 Sometimes it may be necessary for policy reasons to include additional requirements, for example that the surviving person has not re-married or formed another relationship, or that the relationship between the surviving person and the person who died was of a particular duration or nature.

Part 4—Scoping provisions

Background

93 A common drafting technique is to include a provision at the start of a Part, Division, Subdivision or section worded along the lines “This Part/Division/Subdivision/[*provision*] applies to/if....”.

94 Some of the reasons for this technique are:

- (a) to assist a user of the legislation to work out if a case the user is interested in is covered by the further provisions and therefore whether the user needs to read the further provisions;
- (b) to simplify the drafting of the later provisions through the use of a narrative drafting style;
- (c) to break up lengthy sentences.

95 Some drafters have been using the expression “only applies” or “applies only” in scoping provisions.

Approach

96 If you are drafting a scoping provision worded along the lines “This [Part/Division/Subdivision/*provision*] applies to/if....”, you should use “applies” rather than “only applies” or “applies only”.

97 There is an implicit “only” in the “applies” wording as the scoping provision is intended as a statement of the entire scope of the Part/Division/etc. It is not intended merely as an example of the operation of the Part/Division/etc.

98 The expression “only applies” or “applies only” in a scoping provision should not be used without the head drafter’s approval.

99 The adoption of a consistent approach to this issue will avoid any undesirable arguments based on some scoping provisions using “only” and others not.

Part 5—Government terminology

Public employment—terminology and other matters

100 Paragraphs 103 to 116 deal with terminology relating to public service. The terminology is derived from the *Public Service Act 1999* (the ***Public Service Act***), the *Public Employment (Consequential and Transitional) Act 1999* (the ***Public Service Consequentials Act***) and the *Acts Interpretation Act 1901*.

101 The terminology should be used when drafters draft provisions dealing with public employment.

102 The phrase “a person who is in the service or employment of the Commonwealth” should be avoided, as it is unclear whether the phrase would cover, for example, members of the ADF or the AFP or persons engaged under contracts for service.

Terminology

103 There are 3 types of “Agency” covered by the Public Service Act:

- (a) Departments (approximately the same as departments of State under section 64 of the Constitution);
- (b) Statutory Agencies (like OPC);
- (c) Executive Agencies.

104 Apart from the heads of Departments and other agencies, all members of the Australian Public Service are called “employees” (the expression “officer” is not used). The Senior Executive Service consists of “SES employees”.

105 APS employees do not “hold” or “occupy” offices. Instead, they occupy “positions”. Note, however, that Secretaries, and Heads of the new “Executive Agencies”, are appointed to “offices”.

106 The title of Secretary of a Department is “Secretary of [*specified Department*]”.

107 Parliamentary Departments are covered by their own legislation, the *Parliamentary Service Act 1999*.

General definitions in section 13 of the Public Service Consequentials Act

108 Section 13 of the Public Service Consequentials Act should be noted. Among other things, section 13 provides that specified types of references to “office”, “officer” etc. are to include references to APS employees etc.

Definitions in the Acts Interpretation Act

109 The *Acts Interpretation Act 1901* contains the following provisions:

- (a) section 2B includes definitions of ***APS employee***, ***SES employee*** and ***acting SES employee***;

- (b) sections 19C, 21, 25B and 33A include definitions extending “officer” to cover APS employees and extending “office” to cover a position occupied by an APS employee.

Referring to APS employees

110 References to APS employees should use the Acts Interpretation Act definitions of *SES employee* and *acting SES employee*.

111 An APS employee must be classified as Senior Executive Band 1, 2 or 3 in order to fall within the definition of *SES employee*. This means that a reference to an SES employee does not include a reference to an APS employee with a different classification (such as DAFF Band 4) even if that classification is in the same APS group as SES employees under the Classification Rules made under the Public Service Act.

112 References to APS employees at a particular level, other than SES employees, should be in the following form:

- ... an APS employee [insert any limitation, e.g. in the Department] who is:
- (a) classified as [insert classification, e.g. Executive Level 2][or equivalent]; or
 - (b) acting in a position usually occupied by an APS employee who is so classified.

113 If the policy is to cover all APS employees at or above a particular classification, the following form should be used:

- ... an APS employee [insert any limitation, e.g. in the Department] who is:
- (a) a SES employee; or
 - (b) an acting SES employee; or
 - (c) classified as [insert classification, e.g. APS Level 5][or equivalent] or higher; or
 - (d) acting in a position usually occupied by an APS employee who is so classified.

114 “or equivalent” should be included after the classification if the policy is to cover all APS employees in the same APS group under the Classification Rules. For example, Customs Level 5 is a different but equivalent classification to Executive Level 2. “or equivalent” may also cover classifications under a modern award or transitional APCS (see paragraph 5(a) of the Classification Rules).

115 The paragraphs dealing with acting employees should be included if the policy is to cover such employees.

116 APS level classifications should be referred to as, e.g. APS Level 6, not APS 6.

How to refer to Ministers and Departments

Background

117 References to Ministers or Departments in draft legislation generally fall into one of 3 categories:

- (a) **category 1:** when you want to refer to the Minister who administers (or will administer) the provision containing the reference, or to the Department administered by that Minister;

- (b) **category 2:** when you want to refer to some other Minister or Department, and it is not a category 3 situation;
- (c) **category 3:** when you want to refer to a Minister or Department who or that, traditionally, has policy responsibility for a particular kind of matter.

118 Referring to Ministers or Departments by name (e.g. the “Minister for Finance and Deregulation” or the “Department of Immigration and Citizenship”) can cause considerable administrative difficulties, and reader confusion, each time Ministerial arrangements are changed, whether because of a Ministerial reorganisation or because of a one-off decision about the responsibilities of a particular Minister. Section 19B of the *Acts Interpretation Act 1901* (substitute reference orders) provide some help in this situation, but they do not cover every problem situation and, even in situations that they do cover, their “notional amendment” effect may well be unknown to many users of the legislation.

Category 1 references—refer to “the Minister” or “the Department” and rely on sections 19 and 19A of the Acts Interpretation Act

119 If you want to refer to the Minister who administers (or will administer) the provision containing the reference, or to the Department administered by that Minister, you should simply refer to “the Minister”, or to “the Department”, and rely on sections 19 and 19A of the *Acts Interpretation Act 1901* to give meaning to the reference.

120 This rule applies even for Ministers (e.g. the Treasurer or the Attorney-General) or Departments (e.g. the Treasury), that have longstanding traditional names that are unlikely to be changed. It would however be permissible to refer to a named Minister in legislation administered by that Minister if the reference would be within the special cases covered by category 3.

Category 2 references—refer to other Ministers and Departments in a way that avoids naming them

121 There will also be situations in which you need to refer to a Minister or Department:

- (a) who or that does not (or will not) administer the provision containing the reference; and
- (b) in a situation that is outside the limited special cases covered by category 3.

122 In these situations, you should try to avoid referring to the Minister or Department by name. An approach that will often provide a convenient solution is to identify a key piece of legislation administered by that Minister, and to refer to the Minister who administers that legislation (or to the Department administered by the Minister who administers that legislation).

123 If you have to make several references to the Minister or Department, you could do this by giving the Minister or Department a generic title (e.g. “the Health Minister”), and defining that generic title by reference to the administration of the identified legislation (subject to paragraph 126). For example:

Water Minister means the Minister administering the *Water Act 2007*.

Immigration Department means the Department administered by the Minister administering the *Migration Act 1958*.

124 You should not use the approach “Minister administering section 1 of the [X] Act”. You should avoid identifying a piece of legislation that is administered by multiple Ministers. If this appears unavoidable, you should consult the head drafter on the approach to take.

125 If the above approach is not a viable option in a particular situation, you should explore whether there might be other ways of avoiding referring to the Minister or Department by name. Referring to the Minister or Department by name should be regarded as an option of last resort.

126 As the legislation that is currently dealt with by the Department of Employment, Skills, Small and Family Business has historically been subject to frequent moves between Departments, you should not identify that Department or its Minister or Secretary by referring to particular legislation, but instead by referring to policy responsibility, consistently with the following:

Employment Department means the Department responsible for employment policy, including employment services.

Employment Minister means the Minister responsible for employment policy, including employment services.

Employment Secretary means the Secretary of the Department responsible for employment policy, including employment services.

Category 3 references—limited situations in which it is appropriate to refer to a Minister by name

127 In a few limited situations, it is appropriate to refer to a particular Minister by name because that Minister (regardless of what legislation he or she administers) has traditionally had a role in relation to particular kinds of matters.

128 The only situations currently in this category are:

- (a) the Prime Minister’s role as the head of Government; and
- (b) the Attorney-General’s role in relation to legal proceedings.

129 If you are instructed to refer to some other Minister, or to a Department, by name, and your instructors assert that it is appropriate to do so because that Minister or Department has a traditional role in relation to a particular kind of matter, you should consult the Parliamentary and Government Branch of the Department of the Prime Minister and Cabinet about the proposed reference.

Parliamentary Departments

130 The phrase “Parliamentary Department” is defined in Commonwealth legislation in a variety of ways. The following definition should generally be adopted:

Parliamentary Department means a Department of the Parliament established under the *Parliamentary Service Act 1999*.

131 If you wish to use a different definition, you should discuss the proposal with the head drafter.

Part 6—Financial sector terminology

References to banks, building societies and credit unions

132 This Part deals with financial sector terminology.

133 Banks, building societies and credit unions are regulated by the Commonwealth under the *Banking Act 1959* (the ***Banking Act***) under an umbrella concept of ***ADI*** (short for authorised deposit-taking institution).

134 The regime in the Banking Act covers the whole of Australia (though there is an as yet unused capacity to cease its extension to an external Territory by notice published under section 6A of the Act). The Act does not cover the operations of institutions outside Australia, and so the regime does not affect how to refer to institutions as so operating.

135 There are two main implications for drafters.

Rely on the general concept of an ADI

136 If you want to refer in general terms to an Australian institution within the range of institutions traditionally known as banks, building societies and credit unions, you should refer to an ADI and define it as follows:

ADI means an authorised deposit-taking institution within the meaning of the *Banking Act 1959*.

Distinguishing between different kinds of ADIs

137 Generally, Treasury consider that it should not be necessary, and indeed that it is not desirable, to distinguish between different kinds of ADI. However, if there is a need to do so, one way of making a distinction is on the basis of section 66 of the Banking Act, which controls the use of certain expressions. For example:

- (a) a reference to an ADI that, under that section, is allowed to assume or use the word “bank”, “banker” or “banking” should equate (approximately) to the traditional concept of a “bank”. For an example of a reference like this, see the definition of ***Australian bank*** in section 9 of the *Corporations Act 2001*;
- (b) a reference to an ADI that, under that section, is allowed to assume or use the expression “building society”, “credit union” or “credit society” should equate (approximately) to the traditional concept of a “building society” or “credit union”. For an example of a reference like this, see paragraph 38(1)(b) of Schedule 4 to the *Corporations Act 2001*.

138 In the past, the expressions “bank”, “building society” and “credit union” were sometimes used undefined, presumably on the assumption that the expressions have well understood meanings. It would be safer in future to ensure that there is a definition to cover institutions so operating.

Friendly societies

139 Bodies that conduct life insurance (or similar) business through benefit funds are regulated under the *Life Insurance Act 1995* (the ***Life Insurance Act***) as a class of life companies known as “friendly societies”.

140 There is currently no other legislation (Commonwealth, State or Territory) purporting to regulate other kinds of bodies as “friendly societies”. Other bodies that were previously known as friendly societies are now either incorporated associations or ordinary Corporations Act companies.

141 It is possible that there may be a need to refer to friendly societies (the *Financial Sector Reform (Amendments and Transitional Provision) Act (No. 1) 1999*, for example, provides for friendly societies to retain their favourable tax treatment). If there is such a need, it will be possible to refer to a company that is a “friendly society” for the purposes of the Life Insurance Act. For an example of a reference like this, see paragraph 38(1)(c) of Schedule 4 to the *Corporations Act 2001*.

Kinds of institutions regulated by the States and Territories

142 Some institutions, such as cooperative societies (including cooperative housing societies), incorporated associations, or other odd kinds of institutions, continue to be established, referred to or regulated by the States and Territories.

References to cheques and payment orders

143 Under the *Cheques Act 1986*, cheques can be drawn on a wide range of financial institutions—not just on banks as was once the case. In particular, cheques can be drawn on anything that is an ADI under the Banking Act. The concept of an ADI covers bodies that have traditionally been known as banks, building societies and credit unions.

144 The main implications for drafters wanting to refer to cheques are as follows:

- (a) if you simply want to refer to a cheque then, subject to the next 2 points, you may simply use that expression undefined;
- (b) if you want to refer to a cheque, and go on to refer to the body on which the cheque is drawn, you should refer to the financial institution (rather than the bank) on which the cheque is drawn;
- (c) if you want to refer to a bank cheque, you should now refer to a cheque that a financial institution draws on itself. The expression “bank cheque” is outdated, having regard to the range of financial institutions that are now permitted to draw cheques on themselves.

Part 7—Notes saying documents are available on websites

145 It may be helpful for legislation to tell readers about the availability on a particular website of a document that is mentioned in the legislation. This can be done using a note to a provision (e.g. a definition) that mentions the document. Such a note can be inserted using the Standard Provisions macro, which can be run using the shortcut Alt+N.

146 To avoid having to amend the legislation in the event of a website changing or disappearing, or its address (URL) changing, the note should be in the form of a statement that the document could, in the year the note was drafted, be viewed on the website. To give the reader a greater chance of finding the document in that event, the name of the “owner” of the website should also be mentioned in the note. As the note is just a statement of historical fact, the note should not give a hyperlink to the website, but should give the address of the website up to and including the domain name, but not including any “lower level” part of the address (i.e. not including a forward slash after the domain name or any more text after that slash). The address should not be enclosed in angle brackets but should be enclosed by parentheses, i.e. round brackets.

General form of note

147 The note should take the following form for any document except an agreement included in the Australian Treaties Library:

Note: The [insert name or description of document] could in [insert year of drafting] be viewed on [insert whose] website ([insert website address]).

148 Some examples of this form are as follows:

Note: The Policy Manual could in 2013 be viewed on the Department’s website (<http://www.department.gov.au>).

Note: The United Nations Security Council resolutions could in 2013 be viewed on the United Nations’ website (<http://www.un.org>).

Form of note for agreement in Australian Treaties Library

149 The Australian Treaties Library contains international agreements to which Australia is a signatory. The Australian Treaties Library is published on the AustLII website, using material supplied by the Australian Government. Agreements in the library that are in force for Australia are included in the Australian Treaty Series with a year and unique number.

150 A note telling the reader about an agreement in the Australian Treaties Library should mention the library (as well as conforming with paragraph 146). If the agreement is in force for Australia when the note is drafted, the note should also give the Australian Treaty Series details for the agreement. If the agreement is not in force for Australia when the note is drafted, the note should not include the “ATNIF” (Australian treaties not yet in force) citation, as this will be superseded when the agreement comes into force for Australia.

Form of note if agreement is in force for Australia

151 If the agreement is in force for Australia, the note should be in the following form:

Note: The [insert name or description of agreement] is in Australian Treaty Series [insert year and number, with parenthesised short form citation] and could in [insert year of drafting] be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

152 An example is:

Note: The Convention is in Australian Treaty Series 1997 No. 21 ([1997] ATS 21) and could in 2013 be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

Form of note if agreement is not yet in force for Australia

153 If the agreement is not yet in force for Australia, the note should be in the following form:

Note: The [insert name or description of agreement] could in [insert year of drafting] be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

154 An example is:

Note: The Treaty could in 2013 be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

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