



Instructor Guidance Note— Drafting instructions template (Bills) checklist topics

1 This *Instructor Guidance Note* covers topics in the Part D checklist of the Drafting Instructions Template (Bills) that agencies are required to use when instructing OPC. Instructors should consider each topic and provide instructions on each topic as required. Other *Instructor Guidance Notes* deal with other topics in the checklist.

Binding the Crown

2 There is a presumption that an Act is not intended to bind the Crown. This is the starting point unless an Act provides otherwise.

3 Near the beginning of an Act, there may be a section that reads along the lines of 'Act binds the Crown'. This means that the Act does apply to the Crown and the Crown must comply with the Act. If an Act binds the Crown, this section may also state whether the Crown is liable for offences and civil penalties under that Act.

4 The Crown in this context refers to the 'body politic', being the Commonwealth and each of the States and Territories. This means how an Act should apply to individual Commonwealth, State or Territory officers, or Commonwealth, State or Territory bodies corporate, is a separate question.

5 When preparing instructions for an amending Bill, take into account any existing provision dealing with binding the Crown in the legislation being amended.

6 Instructors should consider and provide instructions on:

- whether the Bill should bind the Commonwealth, State and Territory governments;
- whether any penalties in the Bill should apply to Commonwealth, State and Territory governments;
- how the Bill should apply to other Commonwealth, State and Territory bodies, such as Commonwealth bodies corporate, that are separate from the Crown.

7 See also Part 1 of OPC's Drafting Direction 3.10. This is quite a technical issue and instructors are encouraged to discuss it with the drafters after providing the initial drafting instructions.

Application in external Territories and outside Australia

External Territories and maritime areas

8 The default position in relation to external Territories is that an Act applies in relation to Norfolk Island, the Territory of Ashmore and Cartier Islands, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands. An express provision is required if an Act is intended to apply to:

- the Australian Antarctic Territory;
- the Coral Sea Islands Territory;
- the Territory of Heard Island and McDonald Islands.

9 The default position in relation to maritime areas is that an Act applies in relation to the Commonwealth's internal waters and the coastal sea of Australia (see section 15B of the *Acts Interpretation Act 1901*). An express provision is required if an Act is intended to apply to:

- the contiguous zone;
- the exclusive economic zone;
- the continental shelf;
- offshore areas in respect of the States and Territories.

10 It is not common for an Act to require application to external Territories or maritime areas. One example of an Act which does have an extended application is the *Offshore Electricity Infrastructure Act 2021* (see section 5 and the definition of Commonwealth offshore area).

11 If one of the above express provisions may be required, instructors should consider consulting with the Office of International Law. See Part 3 of [Drafting Direction 3.10](#) for more information on external Territories and Part 2 of [Drafting Direction 3.3](#) for more information on maritime areas.

Other countries

12 The default position is that references to places, matters and things in an Act are references to places, matters and things in the Commonwealth (see section 21 of the *Acts Interpretation Act 1901*). If an Act is intended to apply to things outside the Commonwealth, the Office of International Law should be consulted before providing instructions.

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Geographical jurisdiction of offences

13 The geographical jurisdiction of offences in an Act is a separate question.

14 Part 2.7 of the *Criminal Code* deals with geographical jurisdiction of offences. The default position is that if any part of the conduct constituting an offence occurs in Australia or on an Australian aircraft or ship, the offence applies. The offence also applies if any part of the result of the conduct constituting the offence occurs in Australia or on an Australian aircraft or ship (see section 14.1 of the *Criminal Code*).

15 If extended geographical jurisdiction is required, sections 15.1 to 15.4 of the Criminal Code provide options for alternative geographical jurisdictions. The Guide to Framing Commonwealth Offences states that caution should be exercised before extending geographical jurisdiction beyond the standard position set out in section 14.1. Also see Part 6 of Drafting Direction 3.5 for more information.

16 When preparing instructions for an amending Bill, take into account any existing provisions dealing with these matters in the legislation being amended.

17 In summary, instructors should consider and provide instructions on:

- whether the Bill should apply in any of the external Territories;
- whether the Bill should have any application to persons, or matters occurring, outside Australia and the external Territories.

18 These are quite technical issues and instructors are encouraged to discuss them with the drafters after providing the initial drafting instructions.

Consequences for non-compliance with obligations

19 If the Bill will impose obligations, the Bill will need to impose consequences for non-compliance with those obligations. Those consequences may include the loss or denial of a benefit, a criminal offence, a civil penalty, or all three.

20 The *Regulatory Powers (Standard Provisions) Act 2014* (**Regulatory Powers Act**) is the starting point for all regulatory powers. The Regulatory Powers Act covers monitoring powers, investigation powers, civil penalties, infringement notices, injunctions, and enforceable undertakings.

21 The Regulatory Powers Act can be triggered by other Acts. This allows Commonwealth Acts to apply a set of standardised powers without repeating lengthy provisions. An Act can trigger only some of the powers under the Regulatory Powers Act, and can also include modifications of those powers if necessary.

22 New or amending Acts that require powers of the kind available under the Regulatory Powers Act should be drafted to trigger the relevant provisions of that Act, unless there are compelling policy reasons to take a different approach. Instructors may

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wish to consult the Administrative Law Section if they are considering another approach. See also [Drafting Direction 3.5A](#).

23 In relation to criminal offences, the starting point is the *Criminal Code Act 1995*, the *Crimes Act 1914* and the [Guide to Framing Commonwealth Offences](#). Instructors may need to be familiar with basic concepts such as physical elements, fault elements and penalties. The Guide includes advice on these topics and many others.

24 Triggering the coercive powers in the Regulatory Powers Act needs to be justified in the explanatory materials. The inclusion of offences that depart from the positions set out in the Guide to Framing Commonwealth Offences also needs to be justified. See the Senate Standing Committee for the Scrutiny of Bills [Committee Guidelines](#), Principle (i).

25 Instructors should consider and provide instructions on:

- what consequences should apply to obligations imposed by the Bill;
- which powers of the Regulatory Powers Act are to be triggered, and whether any modifications of those powers are required;
- what offences are to be included, addressing the matters in the Guide to Framing Commonwealth Offences.

Statutory bodies and offices

26 A statutory body is a body that is established by legislation, such as OPC (see the *Parliamentary Counsel Act 1970*) . Non-statutory bodies are not created by legislation, such as the Attorney-General's Department.

27 A statutory office is a position created by legislation, such as the Australian Small Business and Family Enterprise Ombudsman. The office-holder is the person occupying that position. A statutory office can be an appointment that is not necessarily part of a larger statutory body. For example, the Australian Small Business and Family Enterprise Ombudsman is supported by Departmental staff (see section 33 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015*).

28 Note that the [Legislation Handbook](#) states that the general position is that new functions should be conferred on an existing Commonwealth entity rather than creating a new Commonwealth entity (see paragraph 5.59 of the Handbook).

29 If a new Commonwealth body is required, a number of policy decisions will need to be made in relation to the kind of body. This includes how the body is funded, governance, staff, functions and powers etc. This will likely require that instructors are familiar with the *Public Governance, Performance and Accountability Act 2013 (PGPA Act)* and the *Public Service Act 1999*. See [Drafting Direction 3.6](#) for more information.

30 Instructors intending to create a new statutory body should consult the Department of Finance. Instructors may also wish to consult the Department of Finance

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on amendments to an existing statutory body, particularly in relation to changes to financial or governance arrangements.

31 Instructors should consider and provide instructions on:

- for a new statutory body:
 - what kind of body will it be? e.g. a corporate Commonwealth entity or a listed entity?
 - will the *Public Service Act 1999* apply to the body? e.g. should a statutory agency be created?
 - what other arrangements will apply to the new body? e.g. functions, composition, remuneration for any office holders?
- for amending an existing body:
 - what changes are proposed to the existing arrangements?
 - what are the consequences of those changes under the PGPA Act, *Public Service Act 1999*, or other related legislation?

Appropriations, spending and contracting

32 In order to spend Commonwealth money, there must be an appropriation and a power to spend.

33 An appropriation authorises the drawing of money from the Consolidated Revenue Fund.

34 Any expenditure associated with the instructions will need to be covered by an appropriation. There are two main types of appropriations: standing appropriations and annual appropriations.

35 A standing appropriation (also sometimes known as a special appropriation) is a provision in an Act that enables spending from the Consolidated Revenue Fund on an ongoing basis. An example of a standing appropriation is section 77 of the PGPA Act. New standing appropriations require consultation with the Department of Finance.

36 New standing appropriations will also attract scrutiny from the Senate Standing Committee for the Scrutiny of Bills because, once enacted, a standing appropriation does not require ongoing parliamentary approval. See the [Committee Guidelines](#), Principle (v).

37 Annual appropriations are done through the annual appropriation Acts (such as the *Appropriation Act (No. 3) 2024-2025*) or supply Acts (such as the *Supply Act (No. 1) 2025-2026*). There are different types of appropriation Acts. The so-called 'No. 1 Acts' appropriate money for the annual ordinary services of government. Other appropriation Acts cover new spending measures and Parliamentary Departments.

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38 OPC will advise that if a Bill that includes a new appropriation, an increase in an existing appropriation, or a change in the destination of an appropriation, it cannot be introduced in the Senate and requires a message from the Governor-General in accordance with sections 53 and 56 of the Constitution. OPC, rather than the instructing agency, arranges the message. See [Drafting Direction No 4.9](#) for more information.

39 Separate from an appropriation, the Commonwealth requires a power to spend money. In some circumstances, this power must be based in legislation, supported by a Constitutional head of power.

40 For example, the *Financial Framework (Supplementary Powers) Act 1997* and *Financial Framework (Supplementary Powers) Regulations 1997* provide legislative authority for spending for certain Commonwealth programs.

41 Instructors should consider and provide instructions on:

- will the Bill involve expenditure by the Commonwealth? If so, has advice been sought from AGS on the constitutional risk of the proposed expenditure and on whether legislation is required to authorise the expenditure?
- is a new standing appropriation, or amendments to an existing standing appropriation, required?
- will the Bill need to provide legislative authority for spending and contracting? If so, what is the proposed scope of the spending power?

Powers to make instruments

42 Not all matters are appropriate to be dealt with in instruments. Instruments do not have the same level of Parliamentary oversight as Bills. This means that significant matters should be dealt with at the Act level rather than in rules, regulations or other instruments.

43 The Senate Standing Committee for the Scrutiny of Bills will comment on Bills which inappropriately delegate legislative power. See the [Committee Guidelines](#), Principle (iv). As stated in the Guidelines, the Committee will typically be concerned with Bills which:

- enable instruments to modify the operation of an Act or exempt persons or entities from the operation of an Act;
- include significant matters in an instrument;
- allow an instrument to set the rate of a tax or fee; and
- allow an instrument to create offences or civil penalties.

44 The Senate Standing Committee for the Scrutiny of Delegated Legislation will also comment on instruments that deal with matters more appropriate for

Instructor Guidance Note—Drafting instructions template (Bills) checklist topics parliamentary enactment. See the [Committee Guidelines](#), Principle (j). As stated in the Guidelines, the Committee will typically be most concerned with delegated legislation that:

- establish significant elements of a program of national significance or of a regulatory scheme;
- impose significant penalties; and
- impose taxes or levies.

45 On the other hand, matters of detail and matters which may change frequently may be best dealt with by subordinate legislation. For example, the amounts of fees to be paid for various applications.

46 See also the [Legislation Handbook](#) at paragraphs 5.65 to 5.76.

47 If it is appropriate to use an instrument, then turn to the *Instructor Guidance Note—Instrument issues for Bills* for further guidance in developing your instructions.

The purpose of Instructor Guidance Notes is to assist agencies with general legislative drafting issues and preparing drafting instructions for Bills and instruments. The series is intended to be a starting point for instructors' own engagement with the matters covered. Instructor Guidance Notes are not statements of official policy and are not intended to be a comprehensive statement of the law. This Instructor Guidance Note should not be relied on as a substitute for legal advice.