



Instructor Guidance Note— Key considerations in drafting instruments

Purpose of guidance

1 This guidance mentions a range of factors that agencies should consider when instructing OPC to draft an instrument, or when drafting an instrument themselves.

Working within the scope of the power to make the instrument

2 The enabling legislation under which an instrument is to be made must provide sufficient power for the instrument-maker to make each provision in the instrument. It is not enough that a proposed provision in an instrument deals with the same subject matter as the enabling legislation. For example, a power to make an instrument specifying matters to be taken into account in deciding whether a person is a fit and proper person to own a dog is unlikely to extend to specifying the breed of dog as a relevant matter.

3 You need to be able to identify a head of power in the enabling legislation for every provision in the instrument. Some provisions might be supported by more than one head of power. You may need to seek legal advice on this issue.

Use the enabling legislation's concepts and defined terms

4 The enabling legislation will use concepts and define terms to have specific meanings for the purposes of the enabling legislation. Such expressions are taken to have the same meaning when used in the instrument (see paragraph 13(1)(b) of the *Legislation Act 2003*). An instrument should use these concepts and terms consistently with the Act. If a term is defined by an Act, the instrument cannot give the term a different meaning. There is no need to repeat definitions from the Act in the instrument.

Subdelegation of legislative power

5 A rule-maker who makes a legislative instrument under a head of power in enabling legislation is exercising delegated legislative power. Issues about validity may arise if:

Instructor Guidance Note—Key considerations in drafting instruments

- the instrument is made by somebody other than the named rule-maker (for example, a purported delegate of the rule-maker); or
- the instrument purports to further delegate legislative power to a person or body (for example, it purports to authorise another person to make a legislative instrument).

6 This issue is commonly called “subdelegation of legislative power”. The basic principle is that subdelegation is not permitted unless the enabling legislation expressly permits it.

7 If the instrument is made by a person other than the named rule-maker, you should consider whether the person has been appropriately authorised to make the instrument in accordance with the enabling legislation. Additionally, any provision in a proposed instrument that allows another person or body to specify or determine a matter should be assessed against this principle. You may need to seek legal advice on these issues.

Incorporation by reference

8 Under section 14 of the *Legislation Act 2003*, a legislative or notifiable instrument may apply, adopt or incorporate some or all of another document, with or without modification. This is commonly called “incorporation by reference”.

9 The other document may be applied, adopted or incorporated as it is in force or existing at the time the instrument commences or at a time before the instrument commences. However, *future versions* of the other document can be applied, adopted or incorporated only if:

- (a) the other document is a Commonwealth Act, disallowable legislative instrument or rules of court; or
- (b) the enabling legislation authorises incorporation of the other document as in force or existing from time to time.

10 If a legislative instrument incorporates other documents by reference, either House of the Parliament may require documents so incorporated to be made available for inspection by that House (see section 41 of the *Legislation Act 2003*).

11 There are similar rules relating to incorporation by reference by instruments *other* than legislative instruments, notifiable instruments or rules of court in section 46AA of the *Acts Interpretation Act 1901*.

Can we make an instrument before the Act commences?

12 An instrument may be made under an enabling provision of an Act that has received Royal Assent but has not yet commenced (see section 4 of the *Acts Interpretation Act 1901*). However, the instrument cannot *commence* before the enabling provision commences.

Conditions on the exercise of instrument-making power

13 An enabling Act may specify certain conditions that must be met, or processes that must be followed, before a legislative instrument can be made. For example, an enabling Act might require a specified group of people to be consulted, or for a report to be obtained and considered, before a legislative instrument is made.

14 It is important to comply with any such conditions, as a failure to comply with them may mean that the legislative instrument is made outside of the instrument-making power and is unlawfully made.

15 This issue frequently arises in cases where it is proposed to rely on the power in subsection 33(3) of the *Acts Interpretation Act 1901* to amend or repeal an existing instrument, and the enabling Act contains conditions that must be satisfied before exercising the power to make an instrument. There can be difficult questions of whether the conditions need to be satisfied, or can be satisfied, in the case of an amending or repealing instrument. You may need to seek legal advice.

Commencement or application of an instrument before it is registered

16 A provision of a legislative or notifiable instrument may commence, or apply, before the day the instrument is registered under the *Legislation Act 2003*: see subsection 12(1A) of that Act.

17 However, such a provision does not apply in relation to a person (other than the Commonwealth or an authority of the Commonwealth) to the extent that, as a result of the provision commencing before the day of registration, the person's rights as at that day would be adversely affected, or liabilities would be imposed on the person in respect of anything done or omitted to be done before that day: see subsection 12(2) of the *Legislation Act 2003*.

18 The rules in subsections 12(1A) and (2) may be overridden by the instrument's enabling legislation, if the enabling legislation is an Act: see subsection 12(4) of the *Legislation Act 2003*.

Matters that should be included in regulations

19 The following kinds of provisions should generally be included in regulations (as opposed to another kind of legislative instrument, such as rules):

- offence or civil penalty provisions;
- powers of arrest or detention;
- entry, search or seizure provisions;
- impositions of taxes;
- provisions setting the amount to be appropriated, where the Act provides the appropriation and authority to set the amount;
- direct amendments of the text of an Act.

Significant matters in instruments

20 Unless there is an express provision in the Act permitting a legislative instrument to include a provision of the following kind, you should get legal advice before drafting, or instructing OPC to draft, an instrument that includes such a provision:

- a provision with retrospective commencement or application;
- a provision imposing a penalty or civil liability;
- a provision imposing a fee;
- a provision conferring jurisdiction on a court;
- a provision prohibiting conduct or an activity (as opposed to a provision authorising regulation of conduct or an activity);
- a provision interfering with fundamental common law rights (which covers things like the presumption of innocence, the privilege against self-incrimination, legal professional privilege, access to courts and procedural fairness);
- a provision that directly amends, or modifies the operation of, the enabling Act (often called “Henry VIII clauses”).

21 While it is possible that the text, context and purpose of an Act is such that it will be construed, in particular circumstances, as permitting an instrument

to contain a provision doing one of the things above, despite the absence of an express power to do so, this is by no means certain.

Legislation Act exemptions and other matters

22 Check whether the instrument is of a kind mentioned in the *Legislation (Exemptions and Other Matters) Regulation 2015*. These regulations may affect the following matters:

- whether an instrument is, or is not, a legislative instrument or a notifiable instrument;
- whether a legislative instrument is subject to disallowance;
- whether a legislative instrument is subject to sunseting.

Scrutiny of Delegated Legislation Committee

23 Instructors should ensure that the explanatory statement for a legislative instrument contains information addressing the requirements for each scrutiny principle set out in the Guidelines published by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Finalising and preparing ExCo instruments for making

24 At the end of the drafting process for an instrument that is made or approved by the Governor-General (an **ExCo instrument**), OPC will provide the instructing agency with a final version of the ExCo instrument in a form that is suitable for signature.

25 The instructing agency is responsible for lodging the ExCo instrument, and various other documents, with the Executive Council Secretariat in the Department of the Prime Minister and Cabinet.

Disallowance-related limits on remaking instruments

26 The *Legislation Act 2003* imposes some limits on the remaking, in a form that is the same in substance, of legislative instruments that are subject to disallowance, or that have been disallowed.

27 An instrument generally cannot be remade:

- (a) pending tabling or for a period after tabling (see section 46); or
- (b) while open to disallowance (see section 47); or
- (c) if the instrument is disallowed—for 6 months after disallowance (see section 48).

More information

- OPC Instruments Handbook
- OPC Instrument Drafting Guidance Notes
- OPC Instrument Fact Sheet Series
- *Drafting Direction 3.8—Subordinate legislation*
- Guidelines of the Senate Standing Committee for the Scrutiny of Delegation Legislation

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.