



Instructor Guidance Note— Roles of instructors and drafters

1 This Instructor Guidance Note gives an overview of the role of the instructor and the role of the drafter. It describes expectations and responsibilities of each role and how instructors and drafters work together. It provides guidance on what makes a good instructing team. This note is limited to the instructor’s role as it relates to the development of legislation, which is usually only part of an instructor’s work.

2 While there are certain responsibilities that belong only to the instructor or only to the drafter, policy making and drafting legislation are inherently linked. Although the drafter can assist the instructing agency in finding a legally effective solution to a policy issue, it is expected that the instructing team will make a genuine attempt at finding the solution before instructing OPC. It is important that the instructions clearly communicate the proposed solution, taking into account the relevant legislation, so the drafter can produce legally effective and well-expressed legislation that achieves the policy intention.

The role of the instructor—key expectations and responsibilities

Instructors develop comprehensive policy

3 Instructors are the policy experts for the project. Legislative policy development requires instructors to take a policy decision and fill out the detail, having regard to the following:

- existing legislative context in which the policy is to be implemented;
- political considerations;
- administrative considerations;
- complexity of various policy options;
- matters which have to be dealt with in legislation (you may be able to deal with other matters administratively).

4 It is particularly important for instructors to engage with the existing legislative context. Instructors should consider current legislation while developing policy in order to identify the changes that need to be made and the legislation that needs to be in place to achieve the policy outcome. Instructing agencies are the experts in their existing legislation and the instructing team will need access to that expertise.

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5 Once the comprehensive policy has been developed, the instructing team should be in a position to tell drafters about all aspects of the scheme—from the big picture to relatively minor details.

Instructors prepare and explain drafting instructions

6 Once comprehensive policy has been developed, the instructing team must prepare drafting instructions. There are multiple *Instructor Guidance Notes* on the OPC website that can assist.

7 The instructing team should be fully familiar with their drafting instructions and should be able to explain them to the drafter. The instructing team should be able to answer any questions asked by the drafters, or be able to obtain the answer. This includes questions about the meaning of existing legislative provisions or the operation of existing administrative or regulatory regimes. Detailed consideration of the policy and a deep understanding of the scheme will assist instructors when explaining the instructions or answering questions in relation to the instructions.

Instructors examine drafts

8 It is a vital part of an instructor's role to check that the draft Bill or instrument gives legal effect to the instructions (which should in turn, give effect to the underlying policy) and to point out issues with the draft.

9 Drafts will often have comments or questions from the drafter to the instructor which will be expressed in drafters notes. When examining a draft, it is important that the instructor respond to every question or issue raised in the drafters notes (other than notes that merely list things to include in the explanatory memorandum or explanatory statement). Questions or issues raised in a drafters note indicate that the drafter does not have enough information to draft the provision. To ensure that draft provisions are being settled quickly and efficiently, before sending a draft back to the drafter, double check that all issues or questions raised in the drafters notes have been responded to.

10 However, instructors should not limit their consideration of a draft to questions and issues raised in notes. The drafter relies on the instructors to check that the draft meets the instructing agency's requirements. Instructors should feel free to comment on any aspect of draft legislation—from small typos to larger issues.

Instructing agency obtains any legal advice

11 If a drafter believes that legal advice about any aspect of draft legislation or a drafting project should be obtained, the drafter will discuss this with the instructors. The instructing agency is responsible for obtaining and paying for legal advice on a draft Bill.

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12 It is often useful if the instructing team seeks input from OPC on a request for legal advice before it is sent. It is important that the instructor keep OPC informed on the timeframes for obtaining the advice as this can affect drafting timeframes. The instructing team should send a copy of the advice to OPC as soon as it is obtained.

Instructors address scrutiny by parliamentary committees

13 Bills and legislative instruments are subject to scrutiny by:

- the Parliamentary Joint Committee on Human Rights; and
- for Bills—the Scrutiny of Bills Committee; and
- for legislative instruments—the Scrutiny of Delegated Legislation Committee.

14 Instructors need to be aware of the kinds of issues that these committees are likely to comment on. If drafters consider that instructors are asking for provisions that are likely to attract adverse comment, the drafters will draw this to the attention of the instructors. However, instructors should be considering these issues and not assume that drafters will identify all possible issues.

15 Adverse comments from one of these committees could have serious implications. For a Bill, adverse comment could result in the Bill not being passed, passage being delayed or the Bill needing to be amended in Parliament. For a disallowable legislative instrument, adverse comment could result in a motion for disallowance.

Instructors are responsible for documents to support the Bill or instrument

16 The instructing agency is responsible for supporting documents including the explanatory memorandum (**EM**), the explanatory statement (**ES**) and statements of compatibility with human rights.

17 For the EM for a Bill, the instructing agency is responsible for the following:

- preparing the EM and providing it to the Minister for approval;
- submitting the EM for the Legislation Approval Process (see *Instructor Guidance Note—Matters affecting timeframes for the development of Bills*);
- arranging for the required number of copies of the EM to be printed and delivered to the relevant table office.

18 For Bills, there is also a second reading speech. Like the EM, the instructing agency is responsible for preparing, and arranging for the printing and distribution of the second reading speech.

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19 For the ES for a legislative instrument, the instructing agency is responsible for preparing the ES, getting it approved by the relevant rule-maker and then lodging it for registration on the Federal Register of Legislation. For an instrument to be made by the Governor-General, the instructing agency is also responsible for preparing and lodging an explanatory memorandum with the Executive Council (see the *Federal Executive Council Handbook* on PM&C's website).

Instructors are encouraged to provide feedback to OPC

20 We encourage instructors to provide frank and constructive feedback on the drafting process and the draft legislation. OPC values feedback and appreciates the time that instructors take to provide it. In particular, OPC is keen to receive information about how our legislation works in practice. For example, do particular legislative structures, or particular drafting approaches, make legislation especially difficult or especially easy to work with? Has the legislation been interpreted by a court or tribunal in a way that is inconsistent with the original policy intentions?

21 Feedback can be given to First Parliamentary Counsel, to the agency's Bill or instrument client adviser, to the drafters of the legislation concerned or to feedback@legislation.gov.au.

What makes a good instructing team?

22 The instructing agency should ensure that the instructing team has the right mix of skills and includes experts in the agency's legislation. When a drafter asks questions, the instructing team should be able to answer having regard to the agency's legislation. The instructing team should also have someone with sufficient authority to make on-the-spot decisions on most issues that will arise during the drafting process. OPC recognises that some decisions must be made by Ministers or agency heads, but it is inefficient for drafters to work with an instructor whose instructions are routinely overruled by someone else. It is also important that officers from the legal or legislation area are involved in the preparation of drafting instructions and in the process of working with OPC.

23 A good instructor can clearly articulate the issue and the intended approach to address the issue. When providing comments on drafts, the instructor should clearly state why the draft provision does not work or does not give effect to the policy and explain the problem to the drafter. Instructors need to explain why a draft provision does not work rather than providing specific drafting or returning the draft provision with suggested changes to the wording.

24 Providing a draft provision is an inefficient way of instructing, for both instructors and drafters. This is because it does not give the drafter enough information to be satisfied that the legislation meets key requirements. For the draft to move forward, the instructor would need to provide a complete explanation of what their drafting is seeking to achieve. The drafter's role is to provide legislation that produces a particular

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legal effect, and this cannot be done unless the instructor clearly explains the desired outcome.

The role of the drafter

25 All of OPC's drafters are qualified as lawyers and have additional expertise in drafting legislation. Drafters have:

- knowledge of constitutional law and legal issues relevant to Commonwealth legislation; and
- expertise relating to the legislation process and drafting issues, styles and approaches; and
- expert skills in the areas of legislative analysis and legislative problem solving.

26 Using drafting instructions as a starting point, the drafter works with the instructing team to develop a tailored legal solution to implement the policy. Drafters work to ensure that the legislation developed meets the following requirements:

- legislation must comply with constitutional requirements;
- legislation must be legally effective, i.e. it must produce the desired outcome as a matter of law;
- legislation must be workable, i.e. it must work in practice for the agency or regulator as well as those required to comply;
- legislation must clearly communicate its purpose and operation;
- legislation must meet Parliamentary expectations.

27 The key aspects of the drafters' role are:

- analysing drafting instructions, and seeking clarification from the instructors as necessary; and
- assisting instructors with problems identified in the drafting process and reducing complexity; and
- producing clear and legally effective drafts that give effect to the instructions.

28 Drafters will invariably ask a lot of questions about the instructions. This is part of their job. The questioning is intended to ensure that there are no unintended gaps in the legislation and no unintended consequences.

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29 Drafters will spend time at the start of a project developing an understanding of the policy, instructions and existing law. This means that the first draft may take longer than expected. However, it also means that the first draft will be more well developed, and reduce the amount of work required to complete it. Drafters may need to do a fair amount of work on a matter before being able to estimate when a first draft will be available.

30 Drafters can also advise on matters related to the management of a project, especially if the project is unusually large or urgent. Some project management matters drafters can advise on include:

- critical paths for the project (for example, policy decisions or legal advice which must be obtained before legislative details can be developed or before drafting can commence); and
- timetables (for example, realistic timeframes for finalising drafting or time and workload implications from intended exposure of a draft to other agencies or the general public); and
- coordination and liaison requirements (this involves ensuring all necessary Commonwealth consultation is undertaken and all necessary policy authority and clearances are sought well before a Bill or instrument is introduced or made).

Some things that are not part of the drafter's role

31 OPC drafters do not prepare or settle EMs, ESs, statements of compatibility with human rights or other supporting documents.

32 OPC drafters do not generally draft for non-government parties. *Instructor Guidance Note—Amending a Bill while it is in Parliament* provides further information.

33 Drafters do not generally appear before parliamentary committees. Any requests for drafters to appear must be referred, through First Parliamentary Counsel, to the Attorney-General.

34 OPC's functions do not include providing formal legal advice on issues that arise in drafting projects. The instructing team is responsible for obtaining legal advice.

More information

- OPC offers courses for instructors. Details are available on the *Training* page of OPC's website.

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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.