Instructor Guidance Note—Key considerations in making legislative instruments

Purpose of guidance

1 This guidance mentions a range of matters to assist agencies when making legislative instruments.

Consultation on legislative instruments

2 Before a legislative instrument is made, the rule-maker must be satisfied that any consultation that the rule-maker considers to be appropriate and reasonably practicable has been undertaken (see section 17 of the *Legislation Act 2003*). Inadequate consultation is one of the most frequent grounds of criticism by the Senate Scrutiny of Delegated Legislation Committee.

3 It is the role of instructors:

- to establish what the rule-maker considers to be the most appropriate form of consultation at an early stage of the drafting process; and
- to satisfy the rule-maker that consultation has been undertaken to the required standard before the instrument is made; and
- to ensure that the explanatory statement for the instrument includes a description of the consultation undertaken or, if there was no consultation, an explanation for its absence.

4 Further information on how to meet the consultation requirement may be found on the Committee's website.

Referral of legislative instruments

5 Legislative instruments made by the Governor-General (known as ***Executive Council instruments*** or ***ExCo instruments***) must be referred to agencies who have a right or responsibility to provide policy input in relation to provisions in the draft. This generally occurs because the agency has a coordinating or whole-of-government responsibility for a matter dealt with in the draft.

6 OPC's *Drafting Direction 4.2—Referral of drafts to agencies* identifies the kinds of provisions that will be referred and the agencies to which they will be referred.

7 It is not OPC's role to decide whether the policy preferences of an agency to which a draft is referred should be reflected in the final legislation. This needs to be resolved between that agency and the instructors. If agreement cannot be reached, that agency might brief its Minister, so that the matter is resolved at Ministerial level.

8 For instruments other than ExCo instruments, the referral process is not mandatory. Instead, drafters will draw their instructors' attention to provisions that raise issues that may warrant referral and ask their instructors whether they would like the provisions to be referred.

Finalisation of legislative instruments

9 When a legislative instrument drafted by OPC is ready to be made, OPC will provide instructors with a final version of the instrument in a form that is suitable for signature by the rule-maker. The final version is provided electronically and instructors are responsible for arranging for the instrument to be printed and signed by the rule-maker.

10 In general, the minimum time that should be allowed for OPC to finalise a settled draft of a legislative instrument is 3 working days. This is because of the large volume of other editorial work (for both Bills and instruments) that generally coincides with the times that draft instruments are required to be finalised. If there are a large number of changes required before an instrument can be finalised, obviously, the turnaround time will be greater.

Federal Executive Council requirements

11 If the legislative instrument is made by the Governor-General, the instrument must be lodged by the instructing agency with the Secretariat of the Executive Council (***ExCo***). More information about ExCo processes and requirements can be found in the *Federal Executive Council Handbook*, available from the Department of the Prime Minister and Cabinet's website.

Explanatory statement

12 An explanatory statement must be approved by the rule-maker for each new legislative instrument. The statement needs to comply with section 15J of the *Legislation Act 2003*. Among other things, the explanatory statement must:

- explain the purpose and operation of the instrument; and
- describe any document that has been incorporated in the instrument by reference and indicate how it may be obtained; and
- include a statement of compatibility with human rights (if the instrument is disallowable).

13 As is the case with the explanatory memorandum for a Bill, the explanatory statement can be used by courts to interpret a legislative instrument. Further, the

Senate Scrutiny of Delegated Legislation Committee places considerable reliance on the explanatory statement to understand the instrument and to assess its purpose. For these reasons, the explanatory statement should be as clear and informative as possible. Further information on the Committee's expectations for explanatory statements may be found on the Committee's website.

Lodgement of legislative instruments

14 All legislative instruments (and their explanatory statements) must be lodged online by the instructing agency with OPC for registration on the Federal Register of Legislation. A legislative instrument will not be enforceable unless it is registered.

15 Once an instrument is registered, it becomes the law and so will never be removed from the Federal Register of Legislation. For this reason, the agency lodging the instrument should check the instrument carefully before lodging it to ensure that it is the correct version and does not include any inappropriate material (such as personal information).

16 Generally, instruments will be registered within 2 working days. If express registration or registration on a specific day is required, then contact the OPC helpdesk early to discuss this (lodge@legislation.gov.au or (02) 6120 1350).

17 The person from the instructing agency who lodges the instrument for registration will be notified by email as soon as the instrument is registered and available on the Federal Register of Legislation.

18 There is an annual fee that pays for all routine registrations. OPC only charges additional fees if the instructing agency requires a special arrangement or additional service, such as registration at a specific time or an express, after-hours or peak period service.

Compilations of legislative instruments

19 A compilation shows the text of a law as amended and in force on a specified date. If a legislative instrument is amended, the *Legislation Act 2003* requires a compilation of the amended instrument to be prepared and lodged with OPC for registration on the Federal Register of Legislation (see sections 15Q and 15R of that Act). A compilation is also required to be prepared and lodged if a provision of a legislative instrument is disallowed.

20 If the drafting of the instrument is tied to OPC under the *Legal Services Directions 2017*, OPC will prepare the compilation without charge to agencies. OPC can prepare compilations of other instruments on a billable basis.

Tabling and disallowance

21 Legislative instruments, and their explanatory statements, that have been registered on the Federal Register of Legislation must be tabled in each House of the Parliament (see sections 38 and 39 of the *Legislation Act 2003*).

22 OPC arranges for all legislative instruments and explanatory statements that are registered to be delivered to Parliament for tabling (unless the instrument is exempt from tabling). The Table Offices in the House and Senate arrange tabling.

23 Legislative instruments are subject to disallowance by either House for a period of 15 sitting days after tabling, unless the instrument is exempt (see sections 42 and 44 of the *Legislation Act 2003*). The enabling legislation for the instrument might provide that the instrument is exempt from disallowance. Alternatively, the instrument might be exempt because it is covered by the *Legislation (Exemptions and Other Matters) Regulation 2015*.

24 If a notice of motion to disallow an instrument (or a provision of an instrument) is either passed, or not dealt with, within 15 sitting days of the notice being given, the instrument (or provision) is disallowed and is repealed at that time.

More information

- *Instruments Handbook* available from OPC's website
- *Instrument Drafting Guidance Note No. 1.4—Timeframes for the development of instruments* available from OPC's website
- *Federal Executive Council Handbook* available from the Department of the Prime Minister and Cabinet's website

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.