

PARLIAMENTARY COUNSEL

Drafting Direction No. 4.1A Complexity Flag System

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 for Bills and the PLC for instruments.

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Background

1 As part of the Access to Justice program of the Government, we are looking for ways to reduce the complexity of legislation.

2 Over the past 2 decades, the office has done substantial work on plain English drafting and is now recognised as a leader amongst drafting offices in this area. However, legislation continues to be complex.

3 A major reason for the complexity of legislation is the complexity of the underlying policy. The Attorney-General has noted that the office's central position in the legislation process enables us to have a major role in addressing this complexity. The Attorney-General has asked that the office use its influence on the policy decisions of instructors, encouraging them to choose the simpler alternatives whenever possible.

4 The complexity flag system is designed to provide a structured approach to raising issues of complexity with instructors. The office has developed the system as part of implementing the Government's Clearer Commonwealth Laws initiative.

The complexity flag system

Basic description

5 The complexity flag system will mainly consist of comments (***complexity flags***) being included in draft legislation (or drafting plans) raising issues where the office considers that there is complexity.

6 The instructing Department will then respond to those comments.

7 In some cases the flags will relate to the intent of the basic policy or fundamental aspects of how the policy is to be implemented. In other cases the flags will relate to matters of detail or particular provisions.

8 Drafters will work with their instructors to try to get the complexity removed from the draft.

9 To ensure that senior management in the instructing Department are aware of complexity that remains in a draft, there is a complexity contact officer in the Department. Where a complexity flag is not removed on the instructions of the instructor, the head drafter will arrange for a copy of the document with the unresolved complexity flags to be sent to the complexity contact officer in addition to the instructors for the draft.

10 The office will maintain a database that will retain all of the complexity comments and the Departmental responses. This database may be useful in identifying systemic causes of complexity. It may also provide suggestions for avoiding complexity in future cases.

Raising a flag

11 As part of the analysis of drafting instructions, drafters will look for areas that will raise complexity. This is something that drafters have always done to some degree. However,

drafters would have tended to accept a Department's assurance that they had considered the matter and were comfortable with the complexity.

12 Where a drafter sees a matter that they consider will add complexity, they will raise a complexity flag. The flag will be in the form of a specially formatted note that will be included in the draft or plan.

13 The basic form of the complexity flag will be as follows:

☞ Complexity Flag

The drafter considers that this [provision/draft] will add complexity. This is because [...]. It may be possible to reduce the complexity by [...]. Please provide written instructions. Instructions to proceed must be approved by your complexity contact officer. For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).

14 In some cases, the drafter will not be able to suggest an alternative that will reduce the complexity other than by not implementing the proposed amendment or policy.

15 Many drafts will add complexity simply because they are introducing a new system or adding components to an existing system as part of the basic policy that the draft is implementing. Flags should not be raised in these circumstances.

16 Sometimes complexity will be included in the initial instructions but be removed after it is discussed by the drafters and instructors before a draft is produced. To ensure that the existence of the complexity is recorded, the drafter should raise an appropriate flag in the first draft or plan, include a response "Complexity removed after initial discussion with instructors." and then remove the flag. The status should be changed to Complexity removed.

17 Examples of the kinds of comments that may be raised in complexity flags are set out in Attachment A.

Responding to a flag

18 When the instructing Department receives a flag, they will need to consider it and advise the office what they wish to do. This advice should be provided in writing so that it can be included in the office's database.

19 In many cases, drafting will not be able to proceed (or will not be able to proceed in relation to a particular aspect of the draft) until the flag has been resolved. Therefore, it is extremely important that it be addressed as soon as possible.

Removing the flag

20 Once the office has received the instructing Department's response to a flag, the response will be incorporated into the next draft of the legislation or plan. In this way, the Department can check that the response has been recorded correctly.

21 In addition to the Department's written response, the drafter will also record one of the following actions:

- (a) Complexity removed;
- (b) Complexity reduced;
- (c) Complexity remains.

The use of these broad categories will assist with the analysis of the data in the office's database.

22 Once a draft of the legislation or the plan containing the response has been sent to the Department, the flag will be removed from the draft.

23 The response will be recorded in the office's database.

Complexity flags for parliamentary amendments

24 Generally, drafters will not be required to raise complexity flags when drafting parliamentary amendments of a Bill, due to the short timeframes usually involved for preparing such amendments.

25 However it will be important that, where possible, information is collected about complexity arising after the introduction of a Bill. Therefore, drafters are encouraged to raise flags when drafting parliamentary amendments if time permits. In particular, if a parliamentary amendment resulting from a recommendation of a parliamentary committee is considered to add complexity to a Bill, drafters should raise a flag.

26 A complexity flag relating to a parliamentary amendment can be raised in a separate Bill insert document instead of the parliamentary amendment document.

Use of the collated information

27 It is hoped that the raising of complexity flags will lead to an immediate reduction in the complexity of some legislation.

28 The other major purpose of the system is to enable the office to collect information about the causes of complexity in legislation. It is considered that this will enable the office to adopt an evidence-based approach to developing material to assist instructors and policy makers to develop policies that will minimise complexity.

Complexity contact officer

29 The Departments involved in the system will each need to appoint a complexity contact officer. The officer should be an SES officer who is in a position to influence instructors across the Department.

30 The complexity contact officer will need to be able to give high priority to dealing with complexity flags that are raised with them. Legislation is often drafted under extreme time pressures and the resolution of flags will have to be done in a very timely manner.

31 If the flags cannot be resolved quickly, it is likely to result in a delay in the draft legislation being finalised for introduction or making.

32 The head drafter will undertake the role of complexity contact officer. Instructors who are concerned that a drafter is taking an approach that is unnecessarily complex will be able to raise the matter directly with the head drafter. In the normal course of events, this would occur after the matter had been raised with the drafter.

Peter Quiggin PSM
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Attachment A—Sample complexity comments

This attachment contains examples of complexity flags that may be raised. The examples are not intended to be exhaustive—they give an indication of the approach that can be used.

Complex approach to implementing policy

For drafting instructions that instruct drafters to take a particular approach to implementing a policy:

Complexity Flag

The drafter considers that this approach to implementing the policy will add complexity. This is because the approach [...]. This will [add to the length and complexity of the legislation][make the legislation difficult to read and apply][...]. It may be possible to reduce the complexity by [adopting an alternative approach][...]. Please provide written instructions on whether you intend to proceed with the [approach/draft]. Instructions to proceed must be approved by your complexity contact officer. For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).

Providing for a “carve-out” or “add-in”

For a provision that provides for a “carve-out” or “add-in” (i.e. a special case):

Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision, by applying special rules in the case of [.....] will require additional provisions [and impact on the structure of the provisions]. This will make the legislation longer and more difficult to read. This inclusion of the special case will also make future amendments more complicated. It may be possible to reduce the complexity by not making special rules for [.....]. Please provide written instructions on whether you intend to proceed with the [provision/draft]. Instructions to proceed must be approved by your complexity contact officer. For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).

Replacing a general provision with detailed specific provisions

For a provision replacing a general provision with detailed specific provisions:

Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision will replace a general provision with a range of detailed specific provisions. This will add to the length and complexity of the legislation. It may be possible to reduce the complexity by reconsidering the need for the detailed specific provisions. Please provide written instructions on whether you intend to proceed with the [provision/draft]. Instructions to proceed must be approved by your complexity contact officer. For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).

Replicating general offences

For a provision replicating a general offence provision with a specific offence provision:

Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision replicates a general offence in [*insert reference to provision of the Crimes Act 1914 or Criminal Code*]. This will add to the length and complexity of the legislation. It may be possible to reduce the complexity by reconsidering the need for a new specific offence and relying on the general offence. Please provide written instructions on whether you intend to proceed with the [provision/draft]. Instructions to proceed must be approved by your complexity contact officer. For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).

Split commencement of provisions

For a provision providing for a split commencement for amendments:

Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision will require a range of provisions to deal with transitional matters. This will add to the length and complexity of the legislation. It may be possible to reduce the complexity by having a single commencement date for all amendments. Please provide written instructions on whether you intend to proceed with the [provision/draft]. Instructions to proceed must be approved by your complexity contact officer. For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).

Use of an unusual index—suggest CPI

For a provision using an unusual indexation index:

Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision will use an index that is not normally used and that may be difficult for users of the legislation to locate. It may be possible to reduce the complexity by relying on the Consumer Price Index. Please provide written instructions on whether you intend to proceed with the [provision/draft]. Instructions to proceed must be approved by your complexity contact officer. For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).

Provision includes too much detail

For a provision including a lot of detail in the legislation:

Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision includes a lot of detail that may be subject to change. This will make the legislation longer and more difficult to read and will also make it more difficult to keep up to date. It may be possible to reduce the complexity by including the detail in regulations or another legislative instrument. Please provide written instructions on whether you intend to proceed with the [provision/draft]. Instructions to proceed must be approved by your complexity contact officer. For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).

Attempt to overcome legal problem

For a provision included to overcome a possible legal problem:

⌘ Complexity Flag

The drafter considers that this provision will add complexity. This is because [...]. It is noted that the provision has been included in response to legal advice that there “is some risk” that [...]. It may be possible to reduce the complexity by accepting that risk. Please provide written instructions on whether you intend to proceed with the [provision/draft]. Instructions to proceed must be approved by your complexity contact officer. For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).

Unnecessary provision

For an unnecessary provision:

⌘ Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision is legally unnecessary [and could be handled administratively].[...]. The inclusion of unnecessary provisions adds to the length of legislation [and can increase complexity]. It would be possible to reduce the complexity by removing the provision. Please provide written instructions on whether you intend to proceed with the [provision/draft]. Instructions to proceed must be approved by your complexity contact officer. For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).

Attachment B—Complexity Flags: a quick guide for instructors

Complexity Flags : a quick guide for instructors

The complexity flag system

As part of implementing the Government’s Action Plan for Clearer Commonwealth Laws, OPC has established a complexity flag system. The system aims to reduce complexity in legislation and collect information about sources of complexity.

What is a complexity flag?

Complexity flags are specially formatted notes that are included in a draft or plan where OPC considers there is a matter that adds complexity. The basic form of the flag looks like this:

 Complexity: Pending	Applies to: Applies to:[provision/draft] The drafter considers that this [provision/draft] will add complexity. This is because [...]. It may be possible to reduce the complexity by [...]. Please provide written instructions on whether you intend to proceed with the [provision/draft]. Instructions to proceed must be approved by your complexity contact officer. For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).
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Why are complexity flags raised?

Raising complexity flags is a routine part of the drafting process. The flags may relate to a particular provision in a draft, but could also be raised because a particular approach to implementing a policy will add to complexity.

A flag will be raised, even where there is little that instructors can do to avoid adding complexity. Doing this gives a more complete picture of the sources of complexity in legislation.

OPC does not expect that every complexity flag raised will result in the complexity identified being able to be removed (but the complexity flag itself must be resolved to be removed). Drafters will work with instructors to identify options for reducing or removing complexity, where possible.

A complexity flag is not a criticism of instructors, Departments or the Government’s policies.

What instructors need to do

Instructors must consider and respond in writing to any complexity flags raised in a draft or plan. A flag must be resolved to be removed from the draft. The draft cannot be finalised if it contains unresolved complexity flags.

Each Department has a complexity contact officer. If a response to a complexity flag is for the complexity to be retained, this must be approved by the instructing department’s complexity contact officer.

Instructors are not required to provide OPC with detailed written explanations for retaining complexity.

The instructor’s response and the outcome (i.e. whether the complexity was removed, reduced or remains) will be recorded in the draft or plan. The flag will then be removed and the information added to the office’s complexity flag database.

Note: For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au)