

PARLIAMENTARY COUNSEL

Drafting Direction No. 4.1 Dealings with instructors

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.

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Part 1—Introduction

1 This Direction deals with a number of matters relating to our dealings with instructors. Office Procedural Circular No. 8.7 also deals with a number of matters relating to tax drafting processes/liaison with Treasury.

Part 2—Making contact with instructors when you receive instructions

2 On receipt of instructions, you should phone the instructors.

3 If you are not able to start work on the instructions within a couple of days, you should let your instructors know when you are likely to be able to start work on the instructions.

Part 3—“Vetting” of explanatory memoranda, explanatory statements or second reading speeches

4 Sometimes requests are made to OPC to “vet” an explanatory memorandum, an explanatory statement or a second reading speech. If you receive such a request, you should inform the person making the request that the “vetting” of explanatory memoranda, explanatory statements or second reading speeches is not one of OPC’s functions. Your instructors are expected to know what the draft is intended to achieve and should therefore be able to determine whether an explanatory memorandum, an explanatory statement or a second reading speech prepared in relation to the draft accurately reflects the substance of the draft.

5 However, sometimes your instructors may be concerned about whether a particular passage in an explanatory memorandum, an explanatory statement or a second reading speech accurately summarises a technical provision of the draft. You should assist your instructors in this respect if time and resources are available having regard to your other commitments.

Part 4—Disputes with instructors over content

6 In the course of drafting legislation, you may sometimes receive a request from a Minister, a member of the staff of a Minister or a person in the instructing Department or agency:

- (a) for the inclusion in the draft of a provision that you consider, for any reason, should not be included in the draft or should not be included in the terms requested; or
- (b) for the non-inclusion in, or deletion from, the draft of a provision that you consider should be included or retained in the draft; or
- (c) for the making of an alteration to a provision in the draft that you consider should not be made.

7 If a request is made and pressed, you should raise the matter with the head drafter promptly.

Part 5—Senate Standing Committee for the Scrutiny of Bills

Background

8 In June 2003 First Parliamentary Counsel attended a meeting with the Senate Scrutiny of Bills Committee. The Committee was interested in the standard of explanatory memoranda.

9 There was some discussion about OPC’s role in advising instructors to ensure that matters that are of interest to the Committee are clearly explained in the explanatory memorandum (e.g. retrospective or otherwise unorthodox commencement provisions). Committee staff mentioned a case in which a commencement provision that allowed more than 6 months for Proclamation was not explained in the explanatory memorandum. When the Committee staff contacted the sponsoring agency about this, the agency staff said that this was because OPC had not told them that they needed to explain it.

10 The Committee did not seem to have any particular sympathy with the view of the sponsoring agency that it was OPC’s responsibility to ensure that their explanatory memorandum was adequate. First Parliamentary Counsel told the Committee that OPC did try to draw to our instructors’ attention matters that are of interest to the Committee.

Advising instructors

11 You should endeavour to alert your instructors to any requested provisions that are likely to be of interest to the Committee, and advise your instructors to set out clearly in the explanatory memorandum the reasons for such provisions.

12 One member of the Committee also suggested that explanatory memoranda should more clearly identify the “mischief” being addressed by particular Bills. You may consider suggesting this to your instructors in appropriate cases.

13 You should check the Committee’s Scrutiny Digests to see what comments they have made on Bills you have drafted. If the Committee has made a comment, you should contact the instructors to provide assistance in preparing the response. You should not wait for the instructors to contact you.

General rule making powers

14 The Committee has been commenting on any Bill that includes a general rule making power (rather than a general regulation making power). Without limiting paragraph 11, if you include such a provision you should advise your instructors to set out clearly in the explanatory memorandum the reasons for providing for rules rather than regulations. You may wish to suggest that the instructors use the following precedent (adapted from the response to the Committee’s request relating to the Product Emission Standards Bill 2017, set out in Committee’s Scrutiny Digest 10 of 2017).

The Bill enables rules to be made which will *[insert a brief description of what the rules will do, e.g. “specify the types of products to be regulated under the framework and how*

those products are to be regulated”]. Specifying these matters in rules rather than regulations accords with the Office of Parliamentary Counsel's Drafting Direction No. 3.8 – Subordinate Legislation. That Drafting Direction provides that, if legislation is to provide for the making of legislative instruments, OPC’s starting point is that the instruments should not be regulations unless there is a good reason for regulations to be used.

Consistent with that Drafting Direction, the approach of including elements of the *[insert a general description of the new legislation, e.g. “new emissions standards framework”]* in rules (rather than regulations) has a number of advantages including:

- (a) it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) under the Bill and enables the number and content of the legislative instruments under the Bill to be rationalised, thereby reducing the complexity otherwise imposed on the regulated community if these matters were to be prescribed across a number of different types of instruments;
- (b) it simplifies the language and structure of the provisions in the Bill that provide the authority for the legislative instruments; and
- (c) it shortens the Bill.

Due to these advantages, the Drafting Direction states that drafters should adopt this approach where appropriate.

The Drafting Direction states that matters such as compliance and enforcement, the imposition of taxes, setting amounts to be appropriated, and amendments to the text of an Act, should be included in regulations unless there is a strong justification otherwise. The Bill does not enable the rules to provide for any of the types of matters listed. This is clarified by clause *[insert number of relevant provision]* of the Bill, which specifically prevents the rules from including these types of matters. As rules made under the Bill cannot provide for these types of matters, it is appropriate that the elements of the *[insert a general description of the new legislation, e.g. “emissions standards framework”]* be prescribed in rules rather than regulations.

In addition, clause *[insert number of relevant provision]* clarifies that the rules made under the Bill are a legislative instrument for the purposes of the *Legislation Act 2003*. Pursuant to sections 38 and 39 of that Act, all legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within 6 sitting days of the date of registration of the instrument on the Federal Register of Legislation. Once tabled, the rules will be subject to the same level of Parliamentary scrutiny as regulations (including consideration by the Senate Standing Committee for the Scrutiny of Delegated Legislation), and a motion to disallow the rules may be moved in either House of the Parliament within 15 sitting days of the date the rules are tabled (see section 42 of the *Legislation Act 2003*).

Part 6—Senate Standing Committee for the Scrutiny of Delegated Legislation

During drafting

15 You should endeavour to alert your instructors to any requested provisions that are likely to be of interest to the Senate Standing Committee for the Scrutiny of Delegated

Legislation (*SDLC*), and advise your instructors to set out clearly in the explanatory statement the reasons for such provisions. An indication of the types of provisions likely to attract scrutiny from the SDLC can be found in the following:

- (a) the technical scrutiny principles published by the SDLC;
- (b) Drafting Direction No. 3.8 on Subordinate Legislation (see material on Instrument-making powers—delegation, Instrument-making powers—dealing with significant provisions and Explanation when relying on the necessary or convenient power).

After making

16 You should check the SDLC's *Delegated Legislation Monitor* to see what comments they have made on instruments you have drafted. If you become aware that the SDLC has raised scrutiny concerns, you should contact the instructors to offer assistance in preparing the agency's response. You should not wait for the instructors to contact you.

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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 20 of 2005.