



**Australian Government**

**Office of Parliamentary Counsel**

# **OPC's drafting services: a guide for clients**

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Canberra

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Note: This Guide has been prepared in anticipation of the commencement of the amendments in the *Acts and Instruments (Framework Reform) Act 2015*. Those amendments will commence, at the latest, on 5 March 2016. This Guide therefore refers to the *Legislation Act 2003* (rather than referring to the *Legislative Instruments Act 2003*), and to the Federal Register of Legislation, or the FRL (rather than referring to the Federal Register of Legislative Instruments, FRLI or ComLaw).

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## About this Guide

The purpose of this Guide is to assist the staff of agencies who are instructing OPC on the drafting of a Bill or instrument to understand their role and the role of OPC's drafters, how OPC's drafters do their job in the context of the overall legislative process, and how this can affect a particular legislative project.

Additional information relating to legislative instruments is available in the [Legislative Instruments Handbook](#) (a separate OPC publication). That Handbook provides information to help Commonwealth rule-makers and agencies manage their legislative instruments efficiently, effectively and in accordance with the relevant law.

This Guide has been prepared in anticipation of the commencement of the amendments in the *Acts and Instruments (Framework Reform) Act 2015*. Those amendments will commence, at the latest, on 5 March 2016. This Guide therefore refers to the *Legislation Act 2003* (rather than referring to the *Legislative Instruments Act 2003*), and to the Federal Register of Legislation, or the FRL (rather than referring to the Federal Register of Legislative Instruments, FRLI or ComLaw).

## Abbreviation key

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Abbreviation	Meaning
AGD	Attorney-General's Department
AGS	Australian Government Solicitor
ExCo	Federal Executive Council
FPC	First Parliamentary Counsel
FRL	the Federal Register of Legislation (previously known as ComLaw)
LAP	Legislation Approval Process
OLSC	Office of Legal Services Coordination in AGD
OPC	Office of Parliamentary Counsel
PBC	Parliamentary Business Committee of Cabinet
PM&C	Department of the Prime Minister and Cabinet

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## Chapter 1—Introduction

### *OPC's drafting services*

1 The Office of Parliamentary Counsel (*OPC*) is the Commonwealth's principal provider of professional legislative drafting and publishing services. OPC delivers timely, high quality drafting and advisory services for Commonwealth Bills and subordinate legislation, prepares compilations of laws as amended and publishes legislation and government notices. OPC also provides comprehensive, free access to Commonwealth Acts and legislative instruments, and related material, through the Federal Register of Legislation (*the FRL*). The FRL was previously known as ComLaw.

2 This Guide is for clients of OPC's drafting services. It covers key issues and many issues of detail relating to those services, but it does not attempt to cover everything that a client might possibly need to know. It also contains some incidental information about some of OPC's other services. More information about OPC's services is available on the [OPC website](#).

3 OPC is established by the *Parliamentary Counsel Act 1970*. That Act confers the following functions on OPC:

- (a) the drafting of proposed laws for introduction into either House of the Parliament;
- (b) the drafting of amendments of proposed laws that are being considered by either House of the Parliament;
- (c) the drafting of subordinate legislation;
- (d) the preparing of compilations and reprints of, and information relating to, laws of the Commonwealth;
- (e) the publishing, and the making of arrangements for the printing and publishing, of:
  - (i) laws, and proposed laws, of the Commonwealth; and
  - (ii) compilations and reprints of laws of the Commonwealth; and
  - (iii) information relating to laws of the Commonwealth;
- (f) the preparing and publishing of Government Notices Gazettes, including Special and Periodic Gazettes;
- (g) functions conferred on OPC (or on First Parliamentary Counsel) under the *Legislation Act 2003* and any other laws of the Commonwealth;
- (h) with the written approval of the Minister—the provision of assistance to a foreign country in relation to the drafting, printing or publishing of laws of the country or information relating to those laws;

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- (i) functions conferred by the regulations;
    - (j) functions incidental to any of the preceding functions.
  - 4 OPC's drafting services comprise:
    - (a) Bill drafting services (see paragraphs 3(a) and (b)); and
    - (b) instrument drafting services (these are services for the drafting of subordinate legislation: see paragraph 3(c)).
  - 5 Subordinate legislation (also referred to as instruments) includes:
    - (a) Ordinances, Proclamations, regulations, rules and other legislative instruments made under laws of the Commonwealth; and
    - (b) other instruments that:
      - (i) are made under laws of the Commonwealth; or
      - (ii) have or are given the force of Commonwealth law; or
      - (iii) are otherwise related to, or have effect for the purposes of, laws of the Commonwealth.

6 A lot of the information in this Guide applies to all of OPC's drafting services. But because there are some different processes and rules that apply to different kinds of drafting, there is also some information that applies only to Bills or to instruments, or that applies only to particular kinds of instruments.

***Some kinds of legislative drafting work (tied work) can only be done by OPC drafters***

7 Some kinds of legislative drafting work cannot be undertaken by anyone other than OPC drafters. This is because the work is tied to OPC by the Legal Services Directions issued by the Attorney-General (available on [the FRL](#)).

- 8 The main kinds of drafting work tied to OPC are the drafting of:
- (a) Bills, and parliamentary amendments of Bills, for the government; and
  - (b) regulations and other legislative instruments, and commencement Proclamations, to be made by the Governor-General; and
  - (c) Ordinances and regulations of non-self-governing Territories.

9 OPC does not generally charge for drafting work that is tied to OPC, and does not charge for the drafting of some limited categories of non-tied instruments, such as rules of court. This work is budget-funded.

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10 If drafting work is not tied to OPC, agencies are not required to use OPC. However, agencies can take advantage of OPC's extensive specialist drafting skills and expertise by engaging OPC to draft non-tied instruments on a billable basis.

11 Even if OPC is not engaged to do the actual drafting of non-tied work, there is a range of other useful services that OPC can provide. For more information about engaging OPC to do non-tied drafting, or to provide other services, see Chapter 9.

## **OPC's staff**

### **General information**

12 OPC has about 100 staff, consisting of 3 statutory officers (First Parliamentary Counsel (*FPC*) and 2 Second Parliamentary Counsel) and other staff employed under the *Public Service Act 1999*. These other staff include:

- (a) drafters; and
- (b) publications staff providing compilation, instrument registration and editorial services; and
- (c) corporate services staff providing finance, administration and IT services.

13 FPC is the head of OPC and is responsible for administering OPC so that it best achieves its statutory functions.

14 FPC allocates Bill drafting work and monitors its progress. FPC also acts as senior drafter on some drafting projects. In addition to their role as senior drafters, the 2 Second Parliamentary Counsel assist, and deputise for, FPC.

15 FPC also has general oversight over instrument drafting work. Day-to-day allocation and monitoring of instrument drafting work is part of the role of the senior drafters who head OPC's instrument drafting teams.

### **The drafters**

16 In OPC, drafting is done by specialist legislative drafters who have a mix of knowledge and skills that equip them to draft efficiently and effectively. Their skills and knowledge include analytical skills, creativity and problem solving skills, knowledge of drafting issues, styles and approaches, knowledge of the legislative process for Bills and instruments, and legal knowledge (particularly knowledge of legal issues relevant to Commonwealth legislation). OPC's drafters all have legal qualifications.

17 OPC's drafters work either in Bill or instrument drafting teams, with Bill drafting work being done by Bill drafting teams and instrument drafting work generally being done by instrument drafting teams. All teams are headed by a senior drafter.

18 Some instrument drafting work is done by Bill drafting teams, or with input from Bill drafting teams. This can be particularly advantageous for an instrument that is to be made under powers recently drafted by a Bill drafting team.

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19 OPC occasionally makes use of contract drafters. For drafting work that is tied to OPC (see paragraph 8), contract drafters can only be arranged through OPC.

### ***Legislation Process Courses***

20 OPC runs one-day [Legislation Process Courses](#) for instructors and potential instructors. The courses are very popular and receive good feedback.

21 The courses are presented by experienced drafters, and cover a range of issues that are likely to be relevant to anyone instructing OPC. They cover some of the same ground as this Guide, but they do so in more detail, and they also cover other topics. Attendees get to engage directly with drafters, and to participate in a number of interactive exercises.

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## Chapter 2—Roles and responsibilities of instructors and drafters

### ***Introduction***

22 A successful drafting process requires close collaboration between instructors and drafters. A good understanding of their respective roles and responsibilities will contribute to:

- (a) a high quality product; and
- (b) meeting the priorities of the government and its agencies; and
- (c) a smoother and more efficient drafting process.

### ***The instructors***

23 The instructors are the officers selected by the instructing agency to instruct OPC on a project. The agency should ensure that these officers have a thorough understanding of the policy that is to be implemented, and have a knowledge of the legislative process (or have access to someone within the agency who does). Also, these officers should have 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 very inefficient for drafters to be dealing with someone whose instructions are routinely overruled by a supervisor.

24 If the instructing agency has a legal or legislation area, officers from that area should be involved in both the preparation of the drafting instructions and the processes of working with OPC to develop and finalise the legislation.

25 The key aspects of an instructor's role in dealings with OPC are:

- (a) developing comprehensive policy which can be expressed as drafting instructions; and
- (b) ensuring that requirements relating to priorities and policy authority are met; and
- (c) preparing drafting instructions, explaining them to the drafters and answering questions from the drafters about the instructions and the policy; and
- (d) examining drafts and plans provided by the drafters, checking that they give effect to the instructions (and the policy), and providing comments to the drafters, particularly if the instructor considers there are any problems of any kind with the drafts or plans; and
- (e) preparing explanatory statements and memorandums, statements of compatibility with human rights and other supporting documents.

26 Often, the initial policy proposal for a legislative project will be in quite general terms, but it can only be implemented by a detailed legislative scheme. The instructors need to be in a position to tell the drafters about all aspects of the scheme, from the big picture to

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matters of relatively minor detail. The instructors must know, and be able to brief the drafters on, the aims of the project.

27 In developing the detail of the policy, the instructing agency may need to consult various other agencies that have a whole-of-government responsibility for particular matters (such as the responsibility of the Attorney-General's Department (*AGD*) for many legal policy matters). For more information about this see the [Legislation Handbook](#) of the Department of the Prime Minister and Cabinet (*PM&C*).

28 Chapters 3, 4 and 6 contain more information about priorities and policy authority, drafting instructions, and explanatory statements and memorandums, statements of compatibility with human rights and other supporting documents.

### **The drafters**

29 The key aspects of a drafter's role are:

- (a) analysing drafting instructions, and seeking clarification from the instructors as necessary; and
- (b) assisting in solving problems and reducing complexity; and
- (c) producing clear and legally effective drafts that give effect to the instructions; and
- (d) considering and responding to instructors' comments on drafts and plans.

30 Drafters generally do not start work on a project until written drafting instructions have been provided. An important part of a drafter's role is to thoroughly analyse the instructions. 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.

31 Drafters do not make policy. However, they do have a lot of experience which can be helpful in solving problems identified in the drafting process. Often, the instructors and drafters will work through problems together to find solutions that work for the instructors from a policy/administration point of view and that the drafters are satisfied will be legally effective.

32 Drafters will raise issues of complexity in the drafting process with instructors, and will be proactive in suggesting ways that complexity might be reduced. For this purpose, "complexity" includes anything that appears to be inconsistent with the aims of reducing the regulatory burden, and achieving clearer, less complex laws.

33 Drafters may decide to include a "complexity flag" (which is a specially formatted note) in a draft if they think that the policy creates or adds to complexity. In some cases flags relate to the basic policy or fundamental aspects of how the policy is to be implemented. In other cases flags relate to matters of detail or particular provisions. Instructing agencies need to consider the flags and advise the drafters what they wish to do. Each instructing agency

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has a complexity contact officer who is responsible for giving the agency's response to complexity flags that are not resolved between the instructors and drafters.

34 If a complexity flag is included, drafters will work with their instructors to try to remove or reduce the complexity. It is hoped that the raising of complexity flags will lead to a reduction in the complexity of some Bills and instruments. But in some cases there may be little that instructors can do to reduce the complexity, particularly if the complexity is inherent in the fundamental policy.

35 A draft must be legally effective. It must achieve the policy in a way that is legally complete and that can withstand legal challenge. It should do this in a way that is as clear and simple as possible.

36 Producing legislation is a team effort. Drafters try to accommodate instructors' comments, and instructors should feel free to comment on any aspect of a draft. But there are some matters (for example, standard features and formatting of Bills and instruments) that are usually non-negotiable. Shortage of time can also be a critical factor in limiting the drafters' ability to fully accommodate instructors' comments.

37 Chapters 5, 7 and 8 contain more information about various aspects of the role of drafters, and how they go about their work.

### ***Some things that drafters don't do***

38 Drafters are not responsible for preparing or settling explanatory memorandums, explanatory statements, statements of compatibility with human rights or other supporting documents.

39 OPC drafters generally do not draft legislation for non-government parties or backbenchers, except when working under outposting arrangements with the Senate and the House of Representatives. Another exception can be where the government negotiates a compromise with non-government members to get their agreement to a government Bill. In this situation, the instructing agency may decide to instruct OPC to draft parliamentary amendments of the Bill, with a view to the government then providing the draft to those non-government members for one of them to move.

40 OPC drafters do not normally appear before parliamentary committees. In rare cases, it may be appropriate for a drafter to appear before a parliamentary committee to address drafting issues relevant to legislation that is being considered by the committee. FPC can advise on whether a particular drafter's appearance before a committee might be appropriate. All requests for drafters to appear before parliamentary committees (other than estimates committees) must be referred, through FPC, to the Attorney-General.

41 OPC drafters do not provide formal legal advice on issues that arise in drafting projects. Responsibility for obtaining legal advice is discussed in more detail in paragraphs 164 to 166.

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## **Reducing regulation and complexity**

42 Unnecessary, lengthy and complex legislation reduces accessibility and creates uncertainty and transaction costs for individuals, business, government and the judiciary. The government is committed to reducing the regulatory burden, improving the quality of policy decisions and achieving clearer, less complex laws. Instructing agencies and OPC both have important roles to play in achieving these aims.

43 In developing policy, instructing agencies should consider whether legislation is needed, or whether there are options that would involve less legislation or simpler legislation. Instructors are welcome to discuss these matters with OPC client advisers (see paragraphs 52 to 57), or with the drafters allocated to their project. Instructing agencies should also review drafts that are provided to them, not just to check that they are in accordance with the instructions, but to test how well they meet the aims of reducing the regulatory burden, and achieving clearer, less complex laws.

44 The drafters will endeavour to ensure that their drafts use clear structures, and clear and simple language. OPC has done substantial work on expressing drafts clearly, and on reducing complexity, and is now recognised as a leader among drafting offices in this area. The drafters will also be proactive in raising with instructors any areas where giving effect to the instructions seems to be at odds with the aims of reducing the regulatory burden and achieving clearer, less complex laws.

45 The [OPC website](#) contains more information and ideas about reducing complexity in legislation.

## **Rewriting existing legislation**

46 OPC has been involved in various projects to rewrite major pieces of Commonwealth legislation. Some rewrites have involved a whole piece of legislation, while others have just focused on specific parts of a piece of legislation. If a rewrite just focuses on specific parts, this may be because they are the only parts seen as needing change, or because a complete rewrite is seen as logistically difficult or impossible. Some rewrites have been aimed purely at improving the drafting of the legislation concerned, while others have reflected a sponsoring agency's view that the policy and operation of the legislation require a complete reconsideration.

47 Various issues need to be addressed by an agency considering whether its legislation should be rewritten.

48 A rewrite to improve the drafting may be quicker and easier than a rewrite involving a complete reconsideration of the legislation, but the benefits may be correspondingly smaller. Rewrites intended only to improve the drafting of legislation routinely turn out to raise difficult policy issues which must be resolved before the drafting can be improved. Some agencies have found that improving the drafting of their legislation simply reveals the policy deficiencies of the legislation more starkly.

49 Some agencies focus their attention on the availability of drafting resources for their proposed rewrite. This makes sense, because drafting resources may be difficult to obtain,

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especially for a rewrite not involving policy changes. However, rewrites require a substantial input of resources from the sponsoring agency as well. OPC's experience suggests that it can take up to 10 instructors to keep a single drafter occupied in a rewrite project. A project involving a whole drafting team may need 20 or more full-time staff working within the sponsoring agency.

50 If the agency's long-term commitment to the project is not clear, consider whether the project can be split up into smaller projects requiring less time for completion. If the project can be split up, the early work need not be wasted even if the agency's priorities change and the project is never finished.

51 In the case of an instrument, the trigger for seeking a rewrite may be the impending sunset of the instrument under the *Legislation Act 2003*. Chapter 8 contains more information about this.

### ***Client advising arrangements***

52 OPC has arrangements under which an agency can obtain quick informal advice, from a drafter (a ***client adviser***) who is allocated to the agency, about matters in which OPC has expertise that may not be readily available in the agency. For example, advice may be obtained about:

- (a) options for legislative approaches; or
- (b) matters necessary, desirable or acceptable for inclusion in legislation; or
- (c) the form of drafting instructions.

53 There is a full [list of client advisers](#) on OPC's website, showing which advisers are allocated to which agencies.

54 While the provision of more in-depth advice early in development of all legislative proposals would be generally desirable, OPC is only able to provide such a service in limited situations (see paragraphs 58 to 62).

55 The client adviser service is not a substitute for the development, maintenance and use of legislative expertise within agencies.

56 Client advisers will not necessarily end up drafting the legislation to which their advice relates. This is because the actual drafting project will not be formally allocated to a drafting team until OPC receives the drafting instructions. At that point, decisions about allocation will be made in accordance with priorities and drafter availability.

57 Advice on programming and prioritisation issues can be sought from:

- (a) for Bills—FPC (rather than Bill client advisers); or
- (b) for instruments—FPC or an agency's [instrument client adviser](#).

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## **Early access to drafters**

58 OPC generally does not become involved in legislative projects until it receives written drafting instructions from the instructing agency.

59 But in some situations, instructors may be able to obtain access to a drafting team in advance of providing written instructions. The sort of assistance that drafters can provide under an early access arrangement goes beyond the kind of quick informal advice that is provided under the client advising arrangements. An agency that is interested in obtaining early access to a drafting team should contact:

- (a) for Bills—FPC (rather than Bill client advisers); or
- (b) for instruments—FPC or the agency’s [instrument client adviser](#).

60 One situation in which early access may be arranged is when complex legislation is required extremely urgently. In this situation, a drafting team may work closely with instructors from an early stage in the project’s development. There might never be any written instructions (although important policy decisions should generally be confirmed in writing).

61 Another situation is that a drafting team may be able to spend several hours or days giving advice about legislative issues in the very early stages of a project, leaving the instructors better placed to work on the project to the point at which written instructions can be sent to OPC. The drafting team providing the advice will not necessarily draft the legislation to which the advice relates. The actual drafting project will not be formally allocated to a drafting team until OPC receives the drafting instructions. If instructors are sufficiently keen to continue working with the same drafters, there may be scope for the instructing agency to sacrifice priority and wait until the team concerned is available. Obviously, this will depend on the urgency of the project and the instructors’ assessment of any efficiencies to be gained from continuing with the same drafters.

62 Requests for early access will be assessed having regard to the nature and time-frame of the project and the project’s priority.

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## Chapter 3—Priorities and policy authority

### *Priorities*

#### **Bills**

63 For Bills, the government’s priorities are formally determined by the Parliamentary Business Committee of Cabinet (*PBC*). At the end of each parliamentary sittings, PBC approves a parliamentary legislation program for the next sittings. This process determines the relative priorities of projects for the government. Bills for which Ministers have bid are rated as T (“time-critical”, requiring introduction and passage in the same sittings), or as A, B or C (for introduction in the next sittings and passage some time later). The priorities determined are initially relevant to the allocation of drafting resources and then, when Bills are drafted, to the allocation of parliamentary time.

64 Category T Bills usually have to be ready for introduction in one of the first 2 sitting weeks (in the case of the Autumn or Winter sittings), or in one of the first 4 sitting weeks (in the case of the Spring sittings). So it is particularly important to get the instructions to OPC early.

65 If a Minister wants to change the priority determined for a particular Bill, or to add new Bills to the program with a particular priority, the Minister needs to seek a variation to the program by letter to the Prime Minister. Advice on variations to the program can be obtained from the Legislation Section in PM&C.

66 If a Bill that has been introduced into Parliament needs changes before it is passed (for example, because the government’s policy has changed, because a compromise has been negotiated with non-government members or to correct errors), drafting the necessary parliamentary amendments is usually treated as a high priority project, depending on when the Bill is required for debate.

67 However, sometimes a Bill in Parliament is seen as a convenient vehicle for further material that was not ready (or that was not even contemplated) when the Bill was introduced. Material of this kind has no automatic priority just because its sponsors would like to include it in an introduced Bill. Projects involving substantial parliamentary amendments of this kind should be bid for inclusion on the parliamentary legislation program (usually by seeking a variation, as mentioned above).

68 Sometimes, a Bill does not end up being introduced into Parliament in the sittings for which it has been given a priority. If this happens, and it is proposed instead to introduce the Bill in a later sittings, the Minister will need to bid for the Bill for that later sittings. The previously allocated priority does not carry over to the later sittings.

69 The material in the [Legislation Handbook](#) about developing the legislation program contains more information about these matters.

#### **ExCo legislative instruments**

70 For legislative instruments made or approved by the Governor-General (*ExCo legislative instruments*), OPC has introduced a sittings-based prioritisation system similar to

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that for Bills. The priority categories are 1 (critical), 2 (high priority), 3 (medium priority) and 4 (low priority). Departments bid for ExCo legislative instruments that they expect they will need OPC to allocate drafting resources to during a sittings period. For this purpose, the Autumn sittings period starts on 1 January, and the Winter and Spring sittings periods start as soon as Parliament rises at the end of the previous sittings period.

71 Bids do not have to be made for commencement Proclamations.

72 Bids can only be made by portfolio Departments. They cannot be made by other agencies within a portfolio, even if such an agency may ultimately instruct OPC on the drafting of an instrument covered by a bid.

73 Bids should cover all ExCo legislative instruments that are expected to need drafting resources during the sittings period, even if the instruments are needed because of a Bill drafted, or being drafted, by OPC, and even if the need for the instruments has already been mentioned in a bid to PBC for that Bill.

74 In addition to the priority sought, bids should list the instruments in their relative order of priority within each priority category.

75 OPC then develops a legislative program for the drafting of ExCo legislative instruments, based on the information in the bids.

76 If a Department wants to change the priority that has been allocated to a particular instrument, or to add new instruments to the program with a particular priority, the Department needs to lodge a variation form.

77 Sometimes, the drafting of an instrument is not completed in the sittings period for which it has been given a priority. If this happens, then, in order for drafting work to continue and be completed in a later sittings period, the Department will need to bid for the instrument for that later sittings period. The previously allocated priority does not carry over to the later sittings period.

78 More information about the priority system (including a template for bids) is available on the [Client Information page of the OPC website](#). Also, FPC and [instrument client advisers](#) are available to discuss the system.

### **Order of work on Bills and ExCo legislative instruments**

79 The primary factor determining the relative order in which drafting instructions for Bills and ExCo legislative instruments are allocated and worked on in OPC is priorities, as discussed above. So for Bills, this means that instructions for category T Bills are allocated and worked on ahead of A Bills, which are allocated and worked on ahead of B Bills, and so on. Similarly, for ExCo legislative instruments, instructions are allocated and worked on in priority order.

80 However, the priority rules do not apply to commencement Proclamations.

81 In addition to priority, other factors may also be taken into account. These include the following:

- 
- (a) whether policy authority for the project has been obtained yet (noting that, as mentioned in paragraph 97, instructions for an ExCo legislative instrument will generally not be allocated to a drafter until a copy of the authority from the Minister (or the Cabinet Minute number and date) has been provided to OPC);
  - (b) the real political or legal significance of the project (particularly if there are a number of projects that otherwise appear to have the same priority);
  - (c) the apparent commitment of the sponsoring Minister or instructing agency to the legislative project (for example, are policy decisions delayed in the Minister's office or at senior levels in the agency, or do promised delivery dates for instructions repeatedly pass without any instructions appearing);
  - (d) the date of receipt of instructions (all other things being equal, an earlier set of instructions will be allocated to a drafting team before a later set);
  - (e) the need to ensure that drafting resources are not wasted by being left idle waiting for particular drafting instructions (however high-profile) to arrive;
  - (f) the particular expertise of the available drafting teams (while drafters need to be able to draft in any area of law, sometimes it is desirable for drafters with experience of a subject matter to draft legislation in that area—for example, a drafter with experience in taxation law may be allocated projects that involve amendments of that law in preference to other available drafters).

### **Other instruments**

82 For instruments other than ExCo legislative instruments, there is no formal priority system. OPC will always do its best to ensure that these instruments are drafted in accordance with the instructing agency's timeframes.

### ***Policy authority for Bills***

#### **The need for policy authority**

83 In addition to having a priority allocated by PBC, each Bill drafting project needs to be supported by policy authority.

84 There are 4 kinds of policy authority for Bills:

- (a) *Cabinet decisions*: A Cabinet decision is needed to authorise matters with major policy implications. A Cabinet decision can also authorise matters of lesser significance. The Legislation Section of PM&C can advise whether a matter has major policy implications.
- (b) *Prime Minister's approval*: The Prime Minister, or a Minister or Assistant Minister/Parliamentary Secretary on the Prime Minister's behalf, can authorise matters of minor policy significance.

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- (c) *Minister's approval*: The Minister responsible for a particular Act can authorise changes to the Act that are merely technical amendments within the existing policy of the Act.
  - (d) *approval by FPC*: FPC can authorise technical corrections of the kind that would be suitable for inclusion in a Statute Law Revision Bill.

85 The material in the [Legislation Handbook](#) about policy approval contains more information about the different kinds of policy authority.

86 If draft legislation contains provisions of a kind identified in the [AGD Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), and the provisions:

- (a) depart from a fundamental principle of Commonwealth criminal law set out in that Guide; or
- (b) are likely to be sensitive or contentious;

the Criminal Justice Division of AGD may advise the instructing agency to seek the approval of the Attorney-General for the provisions. The requirement for approval of the Attorney-General applies in addition to the normal requirement for policy authority.

87 On rare occasions, drafters advise instructors to obtain express policy authority for draft provisions that may appear already to be covered by existing policy authority.

88 Drafters would give this advice if they consider that:

- (a) the legislative method chosen to implement the authorised policy may be controversial or expose the government to criticism; and
- (b) that legislative method, or its political consequences, would not have been contemplated when the original policy authority was given.

### **Check on authority as drafting progresses**

89 As drafting progresses, it often becomes apparent that further policy authority will be needed. The drafting process often reveals situations or possibilities that were not contemplated when the original authority was sought. The instructors should ensure that they have or will obtain policy authority for all matters on which they instruct, monitor the need for further authority as drafting progresses, and discuss any policy authority problems with the drafters. A Bill cannot be introduced into Parliament unless it is fully authorised by appropriate policy authority.

90 Usually, any extra policy authority that is needed is sought by the responsible Minister writing to the Prime Minister. Instructors are encouraged to give the drafters the opportunity to comment on a draft of any such letter before it is finalised. Doing this will ensure that both drafters and instructors are satisfied that the content of the letter is adequate.

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## Expiry of policy authority

91 Once a Bill is introduced in reliance on a particular policy authority, that authority is generally regarded as having expired. Any later changes to the Bill, whether by way of parliamentary amendments or revision before reintroduction, will require further authority, even if those later changes could have been adopted under the original authority. The only exceptions are:

- (a) changes or amendments to correct drafting errors or other errors which mean that the Bill as introduced would not in fact implement the approved policy (but this exception would not cover changes to provide for a different implementation approach which has gained favour since the original introduction of the Bill); and
- (b) changes or amendments to add provisions implementing policy that was covered in an authority document but that had not been addressed at all in the original Bill (but this exception would not cover a case where the original Bill, or other official action, had indicated an intention not to proceed with that policy or to defer its implementation indefinitely).

92 If, after an election or otherwise, a government is formed by members of a political party or parties different from the party or parties that formed the previous government, all previously given policy authorities are regarded as having expired. But if the same political party or parties form a government after an election, policy authorities that were current immediately before the election will generally be treated as having survived the election (though if in doubt, instructors should check on this with the Legislation Section of PM&C). See also the material in Chapter 10 about reintroduction of Bills after an election.

## Exposure drafts

93 Generally, a Bill is required to have the following approvals before being released as an exposure draft (either for general public exposure or for any more limited release to any entity that is not a Commonwealth agency):

- (a) approval from the Prime Minister or the Cabinet for exposure of the draft;
- (b) policy authority for the measures contained in the Bill.

94 If in doubt, instructors should contact the Legislation Section of PM&C about the approvals that are needed.

95 The Legislation Approval Process (see Chapter 7) does not apply at the exposure draft stage, but the drafters will generally seek an assurance from the instructors that the approval and authority mentioned in paragraph 93 have been obtained.

96 If instructors consider that an exposure draft of a Bill will be required, it is highly desirable to advise the drafter early in the drafting process.

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## **Policy authority for instruments**

### **ExCo legislative instruments**

97 To assist in ensuring that OPC's drafting resources are able to meet the demand for drafting of ExCo legislative instruments, OPC requires instructing agencies to obtain general policy authority from the Minister (or the Cabinet) for the measures to be included in such instruments before sending drafting instructions to OPC. Instructions will generally not be allocated to a drafter until a copy of the authority from the Minister (or the Cabinet Minute number and date) is provided to OPC.

98 This requirement does not apply to commencement Proclamations.

99 If an instructing agency has a particularly urgent matter where it would be more efficient to engage OPC in the development of an ExCo legislative instrument before general policy authority is obtained, drafting instructions, or a request for OPC services, may be sent to OPC by an SES officer in the instructing agency. The instructions or request should explain the reasons for the urgency, why it has not been possible to obtain the policy authority and when the policy authority will be obtained.

100 If fundamental changes to the policy emerge during the drafting process, OPC may require that further policy authority be obtained before proceeding with drafting. If the matter is urgent, an SES officer in the instructing agency may confirm the changed instructions and explain why drafting must proceed in advance of further authority being obtained.

### **Other instruments**

101 For other instruments, there is no requirement to have policy authority in place before sending drafting instructions. However, in the interests of ensuring resources (both in the instructing agency and OPC) are efficiently used, it is advisable to ensure that the Minister or other rule-maker has approved the general policy to be implemented in the instrument.

### **Exposure drafts**

102 For instruments, there is no requirement to have specific authority or approval for release of an exposure draft.

103 However, if it is proposed to release an exposure draft of an ExCo instrument to any entity that is not a Commonwealth agency, the instructors should provide the ExCo Secretariat in PM&C with a brief description of what the instrument does and who the draft is being released to. The information will then be forwarded to Government House for information. The Secretariat does not formally approve the release of exposure drafts. This providing of information to the Secretariat (and Government House) is just a courtesy, and agencies do not need to wait for a response from the Secretariat before releasing an exposure draft.

104 If instructors consider that an exposure draft of an instrument will be required, it is highly desirable to advise the drafter early in the drafting process.

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## Chapter 4—Drafting instructions

### ***When to send instructions***

105 *Bills:* For each parliamentary sittings, PBC sets a date by which drafting instructions for Bills to be introduced in that sittings should be sent to OPC. The date set is usually a date near the end of the previous sittings. For example, for a Bill for introduction in the Winter sittings, the date for providing instructions would be a date near the end of the immediately preceding Autumn sittings. An instructing agency that is having difficulty meeting this deadline should contact FPC to discuss the options. It may be viable to instead send provisional drafting instructions (clearly labelled as such) to OPC, and to provide further detailed instructions later as and when firm policy decisions are made.

106 *Instruments:* There is no single date by which drafting instructions for instruments must be provided. As a general rule, initial instructions should be issued as soon as possible or at least 6 weeks before a finalised version of the instrument is required. But bear in mind that if the instrument or policy is complex, or if the instrument is large, it may take significantly longer than 6 weeks to complete a final draft.

107 In working out when a finalised version of an instrument is required, factors that need to be taken into account include the following:

- (a) for instruments to be made or approved by the Governor-General (*ExCo instruments*)—the proposed ExCo meeting date, and the “Cut-off for Final Papers” deadline for that meeting (as notified by an Executive Council Circular);
- (b) for other instruments—the proposed date for making;
- (c) whether there is to be an exposure draft of the instrument before it is finalised.

### ***Clearance of instructions***

108 It is desirable for instructions to be cleared within the instructing agency at SES level before they are sent to OPC.

### ***How to send instructions***

109 The preferred method for sending drafting instructions to OPC is by email as follows:

- (a) *Bills:* email the instructions to [bill.instructions@opc.gov.au](mailto:bill.instructions@opc.gov.au);
- (b) *instruments:* email the instructions to [instrument.instructions@opc.gov.au](mailto:instrument.instructions@opc.gov.au).

110 If instructions are sent by email, please don't also send a paper copy.

111 Instructions that are classified as protected, or that are required to bear a dissemination limiting marker (such as “sensitive legal”), should not be sent by email unless the instructing agency is on Fedlink at the appropriate security level.

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112 If instructions cannot be sent by email, please contact OPC to discuss delivery arrangements.

113 Receipt of instructions will be acknowledged by OPC. If instructions have been sent to OPC, and the instructors have not received an acknowledgement of receipt within 2 working days, they should contact:

- (a) for Bills—FPC (rather than Bill client advisers); or
- (b) for instruments—FPC or the agency’s [instrument client adviser](#).

### ***Form and content of drafting instructions: some basic matters***

114 Initial drafting instructions should almost always be given in writing, but in extremely urgent cases oral instructions may be sufficient.

115 It is helpful if instructions are set out in numbered paragraphs and on numbered pages. They should also be dated.

116 If there is any aspect of the instructions that is incomplete, or that is subject to possible change, this should be mentioned.

117 Separate drafting instructions should be provided for Bills and for instruments (even on projects where both Bill and instrument drafting will be needed).

### ***Checklist for drafting instructions***

118 A checklist for drafting instructions is set out below. Using this checklist will help instructors ensure that they consider and address all appropriate matters. There will be elements of the checklist that are not necessary, or that need to be adapted, for particular projects.

119 Bear in mind that the drafters are not policy insiders, and they are therefore likely to need more detail and explanation than would be needed for the purpose of in-house communications within the instructing agency. Delays and misunderstandings can occur because officers of the instructing agency have become so familiar with the policy that they treat some matters as common knowledge, and develop an in-house language that compresses information into an informal shorthand. The drafting instructions will need to communicate any relevant “common knowledge”, and explain the meaning of any “shorthand” that is used.

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## **Checklist for drafting instructions**

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### **1. Preliminary matters**

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| 1.1 | Priority | 1. For a Bill, state the priority allocated by the PBC. If priority has not yet been allocated, state what priority will be sought and what is being done to obtain that priority.   |
|     |          | 2. For an ExCo legislative instrument, state the priority sought for the instrument in a bid to OPC. If a bid has not yet been submitted, state what priority will be sought and what is being done about bidding for that priority. |
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## Checklist for drafting instructions

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		<p>3. For other instruments, include information about any relevant timeframes.</p> <p>4. For more information about priorities, see Chapter 3.</p>
1.2	Policy authority	<p>1. For Bills, provide details of the policy authority. The details should include:</p> <p>(a) for Cabinet decisions: the number and date of the relevant Cabinet Minute; or</p> <p>(b) for other kinds of authority: the name and title of the person who gave the authority, and date on which the authority was given; also, please provide copies of any letters etc. seeking or granting authority either with the drafting instructions, or as soon as possible after the letters etc. are sent or received.</p> <p>2. For ExCo legislative instruments, provide a copy of the policy authority from the Minister, or (if Cabinet has given authority) the number and date of the Cabinet Minute.</p> <p>3. For other instruments, indicate whether the rule-maker has approved the general policy that is to be implemented.</p> <p>4. If policy authority has not yet been obtained, state what is being done to obtain it.</p> <p>5. For more information about policy authority, see Chapter 3.</p>
1.3	Timetable	<p>1. Set out a timetable for the project. This should include:</p> <p>(a) the proposed commencement date; and</p> <p>(b) the proposed week for introduction in Parliament (for Bills), the proposed ExCo meeting (for ExCo instruments) or the proposed date for making (for other instruments); and</p> <p>(c) if it is intended to undertake consultation on a draft of the Bill or instrument (for example, by release of an exposure draft)—the timetable for that consultation and for instructing OPC on the outcomes of the consultation; and</p> <p>(d) any other deadlines that the drafters may need to be aware of, and any other matters that may affect the timetable.</p> <p>2. If you don't know specific dates or weeks, just give a rough indication.</p>
1.4	Proposed short title or name	<p>1. If you would like the Bill or instrument to have a particular short title or name, please specify it (this only needs to be indicative). There are certain conventions that apply, and the drafters will discuss options with you if your proposal does not comply with the conventions.</p> <p>2. If the proposed short title or name is different from the one that has been used in a bid for the Bill or instrument, please state this.</p> <p>3. If you have no particular preference for the short title or name, the drafters will suggest one.</p> <p>4. The short title or name may change during the drafting process.</p>
1.5	Instruments only: source of power	<p>1. If the instructions are for an instrument, state:</p> <p>(a) the name and provision of the Act or instrument (the <i>enabling legislation</i>) that confers power to make the proposed instrument; and</p> <p>(b) the title of the person who will make the instrument, and (for an ExCo instrument), the title of the Minister sponsoring the instrument.</p>
1.6	Consultations with other agencies	<p>1. Mention any significant consultations with other agencies that you have had or intend to have. This is particularly important in the case of other agencies that have whole-of-government policy responsibility for</p>

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## Checklist for drafting instructions

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		particular matters (for example, the responsibility of AGD for Commonwealth criminal law policy).
		2. For more information, see Chapter 5, and the PM&C <a href="#">Legislation Handbook</a> .
1.7	Legal opinions	1. Mention and attach any relevant legal opinions from AGS, the instructing agency's legal area or elsewhere. Don't assume that the drafters will be aware of relevant opinions or particular legal issues. OPC will respect the confidentiality of all legal opinions that are provided.
1.8	Related projects	1. Mention any related projects, whether recent, current or proposed (including any such projects for which another agency is responsible).
1.9	Instructors' details	1. Nominate at least 2 instructors. They should be people who have sufficient knowledge of the detail of the project to answer the drafters' questions and to check whether drafts meet the instructing agency's requirements and the policy. 2. It is helpful if you also state whether the instructors have any planned absences, because the drafters can then plan their work knowing when the instructors will be available. The drafters will also let the instructors know of their own planned absences.

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## 2. The instructions: core matters

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2.1	What is to be done and why	1. This is the core of any set of drafting instructions. Start with an explanation of the key policy objectives that are to be implemented, and why legislation is needed to implement them. If the Bill or instrument is to remedy a problem with the existing state of affairs, mention this and consider including one or more examples of the problem. As mentioned above, attach any relevant legal opinions, and attach other background papers if you think this will be helpful. 2. Go on to give a complete and accurate description of how the Bill or instrument is to implement the objectives. It is not sufficient merely to paraphrase the wording of a Cabinet Minute or other policy authority. 3. Express this in clear and simple language. Try to: (a) avoid specialised terms or technical jargon if possible but, if specialised terms or technical language are necessary (because of the subject matter), include an explanation of their meaning; and (b) be consistent: for one concept, use the same word or phrase throughout the instructions; and (c) avoid unnecessary detail or complexity (generally, it is not necessary to try to identify and address all conceivable fact situations). 4. Don't attempt to provide the exact words to be used. Instructions proposing exact words don't give the drafters the necessary information and context to help them understand why particular wording was chosen. It can also affect the amount of drafting time required to complete a project because the drafters will need to seek further instructions to understand the policy intention in order to ensure that it is being implemented effectively.
2.2	Complexity	1. Consider whether any aspects of the proposed approach may add complexity, and whether there are any acceptable alternative approaches that would be less complex. The documents on the <a href="#">Clearer Law page of the OPC website</a> may help you with this. In analysing your instructions the drafters will look for areas that add complexity and will work with you to reduce complexity where possible.

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## Checklist for drafting instructions

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### 3. The instructions: other specific matters

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3.1 Commencement

1. Give instructions on when the Bill or instrument should commence. Different measures in the same Bill or instrument can be given different commencements.

*Bills*

2. For Bills, the main options for commencement are:

- (a) on the day of Royal Assent, the day after Royal Assent or the 28th day (or some other specified period) after Royal Assent; or
- (b) on some other specified day; or
- (c) on a day to be fixed by Proclamation (generally with a 6 month limit on the power to proclaim); or
- (d) on the commencement of a related piece of legislation; or
- (e) on the happening of some other specified event (for example, when a treaty enters into force for Australia).

3. There are risks in specifying a future day, and consideration should be given to whether some other option might be better (eg commencement by Proclamation). The main risk with specifying a day is that this may become problematic if passage through Parliament takes longer than envisaged and the specified day could end up being before Royal Assent to the Bill (resulting in retrospectivity). Parliamentary amendments may be needed to change the commencement provision in some way.

4. Provisions that adversely affect rights or impose liabilities should not be given a retrospective commencement otherwise than in exceptional circumstances and with explicit policy authority.

5. In considering what commencement should be specified, factor in time for the preparation and making of any associated instruments or appointments, and for dealing with practical matters (such as IT systems changes), that will be needed to ensure the effective operation of the scheme. Bear in mind that section 4 of the *Acts Interpretation Act 1901* allows for the exercise of powers between the passing of an Act and its commencement. So (for example) if an Act is expressed to commence on a day to be fixed by Proclamation, powers to make instruments or appointments can be exercised as soon as the Act has received the Royal Assent, even though it has not yet commenced. The instruments or appointments will not take effect until the Act has actually commenced.

*Instruments*

6. For instruments, the main options for commencement are:

- (a) on the day after the instrument is registered on the Federal Register of Legislation (if it is a legislative instrument); or
- (b) on some other specified day; or
- (c) in accordance with a commencement notice or instrument; or
- (d) on the commencement of a related piece of legislation; or
- (e) on the happening of some other specified event (for example, when a treaty enters into force for Australia).

7. As with Bills, factors such as time for preparation and making of any associated instruments and appointments, and for dealing with practical matters (such as IT systems changes) need to be considered when working out what commencement should be specified.

8. Provisions of a legislative instrument that adversely affect rights of, or

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## Checklist for drafting instructions

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		that impose liabilities on, a person (other than the Commonwealth or a Commonwealth authority) should not be expressed to commence (or apply) before the registration of the instrument under the <i>Legislation Act 2003</i> : see subsection 12(2) of that Act. However, this rule may be overridden by the instrument's enabling legislation, if the enabling legislation is an Act.
3.2	Binding the Crown	1. Is the Bill or instrument to bind the Commonwealth, State and Territory governments? This is quite a technical issue and you can instead discuss it with the drafters after providing the initial drafting instructions.
3.3	External Territories and outside Australia	1. Is the Bill or instrument to apply in any of the external Territories? 2. Is the Bill or instrument to have any application to persons, or matters occurring, outside Australia and the external Territories? 3. These are quite technical issues and you can instead discuss them with the drafters after providing the initial drafting instructions.
3.4	Compliance with obligations	1. If the Bill or instrument will impose obligations, what is the consequence of non-compliance with those obligations to be? For example, is there to be a loss or denial of a benefit, or a criminal or civil penalty? 2. Are monitoring and enforcement powers needed to check on compliance? If yes, consider whether it would be appropriate to link in to any aspects of the <i>Regulatory Powers (Standard Provisions) Act 2014</i> . For more information about that Act see <a href="#">Drafting Direction 3.5A</a> . 3. There is also useful guidance on some of these matters in the AGD <a href="#">Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</a> .
3.5	Powers to make administrative decisions	1. If the Bill or instrument will confer power to make decisions of an administrative character, the following issues need to be considered and addressed: (a) Is the Bill or instrument to specify criteria governing the exercise of the power to make the decisions? If not, should provision be made for someone (eg the Minister, by legislative instrument) to determine principles for the exercise of the power? These questions are particularly relevant if the decisions are to be reviewable. (b) Is there to be administrative or judicial review of the decisions? Judicial review as guaranteed by the Constitution cannot be excluded. 2. There is useful guidance on these matters in the AGD <a href="#">Australian Administrative Law Policy Guide</a> .
3.6	Powers to make instruments	1. If the Bill or instrument on which you are instructing (the <b>primary Bill or instrument</b> ) is to confer power to make an instrument (the <b>proposed subordinate instrument</b> ), the following issues need to be considered: (a) What is the scope of the power that is needed: what kinds of things or matters do you want the instrument to be able to do or deal with? (b) Is the instrument to be a legislative instrument for the purposes of the <i>Legislation Act 2003</i> , and are there to be any exemptions from that Act (for example, from the disallowance or sunset regimes in that Act)? The Commercial and Administrative Law Branch of AGD can assist with this, and can advise on any relevant process requirements for exemptions. 2. If you want the proposed new instrument to be able to do any of the following, this should be specifically mentioned in the instructions for the primary Bill or instrument:

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## Checklist for drafting instructions

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- (a) create offences, civil penalties or other penalties;
- (b) confer powers to arrest or detain people, or powers of entry, search or seizure;
- (c) determine the tax base or rate of a tax (or an aspect of the tax base or rate);
- (d) determine the amount of money to be appropriated by a standing appropriation;
- (e) modify an Act;
- (f) apply, adopt or incorporate material in some other instrument or document as in force from time to time (for example, to require compliance with an industry code or standard as in force from time to time);
- (g) confer power on a person or body to deal with, or to delegate the power to deal with, matters (rather than the instrument itself directly dealing with those matters);
- (h) confer judicial power;
- (i) confer power to charge fees;
- (j) commence or have effect from a day before the instrument is registered or notified (or before it is made).

3. [Drafting Direction 3.8](#) contains more information about OPC's approach to drafting instrument making powers.

4. The PM&C [Legislation Handbook](#) contains some useful guidance about when it is appropriate for a Bill to confer a power to deal with matters by making an instrument, and when matters should instead be dealt with in the Bill itself.

5. If you want an *instrument* to confer power to make another instrument, this may raise the issue of subdelegation of legislative power (see paragraph 216).

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3.7	Delegation	<p>1. If the Bill or instrument will confer powers on a person or body, should they be able to delegate any of those powers, and if so to whom? There may be some powers which are of such significance that they should not be able to be delegated at all (for example, the power of a Minister to make an important legislative instrument), and there may be other powers which should be able to be delegated only to sufficiently senior officials. Both the range of powers that may be delegated, and the class of persons to whom powers may be delegated, should be specified, and should be as limited as practicable. Allowing for delegation of all powers to any person is generally not appropriate.</p> <p>2. For instruments, there is an additional issue whether any proposed capacity to delegate powers conferred by the instrument is within the scope of the power under which the instrument is made (see item 3.6).</p>
3.8	Appropriations, spending and contracting	<p>1. If the Bill or instrument will involve expenditure by the Commonwealth, is that expenditure to be budget-funded, or is there to be a standing appropriation? The Department of Finance must be consulted about any proposed standing appropriations. Standing appropriations can only be included in Bills.</p> <p>2. Consideration may also need to be given to whether the Bill or instrument needs to specifically authorise spending and contracting.</p>
3.9	Consequential amendments	<p>1. Consider whether consequential amendments of any existing legislation will be needed (this may include legislation administered by another</p>

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## Checklist for drafting instructions

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agency). The instructing agency is generally responsible for identifying any necessary consequential amendments and instructing on them. The drafters don't expect to receive detailed instructions on all matters (such as updating cross-references) if the consequential amendments that are needed are obvious, but it is still useful if the instructions at least identify all the provisions that will need to be amended.

2. Consequential amendments may range from purely technical changes, to substantial changes required by introducing new concepts or abandoning old ones.

3. Searches of the [FRL](#) or other electronic databases are a useful, but not infallible, way to find the provisions that need consequential amendments. A thorough search is also useful because it may reveal problems that need to be taken into account when working out the strategy for implementing the policy.

4. In some cases, OPC may be able to help with, or advise on, electronic searches. But the instructing agency should not rely on drafters to do searches that should be able to be done by the agency. The drafters will conduct any necessary searches of OPC's own databases to check the contents of Bills and instruments that are still being drafted.

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3.10	Transitional provisions	<p>1. Consider how the transition from the current law to the regime to be provided for by the Bill or instrument should be handled. Will any provisions be needed to ensure that the transition occurs in the way you want? Issues to consider include:</p> <p>(a) Is a special legislative regime needed to transition certain people or situations from the current law to the new law? For example, do things done under the current law need to be "plugged in" to the new law?</p> <p>(b) Should the current law continue to apply to certain people or situations?</p> <p>(c) Should the new law apply only to certain people or situations?</p> <p>2. Provisions dealing with these kinds of matters are known as transitional provisions (sometimes also classified as saving or application provisions). Resolving transitional issues involves making policy decisions and is part of the instructing agency's role. These matters should be formally instructed on (either in the initial drafting instructions, or in supplementary instructions provided later). The drafters will often help identify the issues and suggest possible solutions to them.</p>
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### 4. Amending Bills or instruments: additional matters

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4.1	Identify provisions to be amended	<p>1. Identify the provisions of the Acts or instruments that are to be amended. You should provide instructions for each amendment, but don't attempt to provide the exact wording of any amendment. If amendments of both Acts and instruments are needed, separate sets of instructions should be provided (one set for the amendments of Acts, and a separate set for the amendments of instruments).</p>
4.2	Bills and instruments that implement several separate policy proposals	<p>1. If the Bill or instrument will implement several separate policy proposals, the matters in this checklist should be separately addressed in relation to each of those proposals. Number the proposals and use those numbers to identify the instructions on each proposal.</p>
4.3	Amending legislation administered by another agency	<p>1. Mention if any legislation administered by another agency will need to be amended. If amendments of another agency's legislation are needed, you need to consult and seek agreement from that agency on the instructions for those amendments.</p>

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## Chapter 5—How drafting work is done

### *Introduction*

120 The respective roles and responsibilities of drafters and instructors are discussed in Chapter 2. This Chapter sets out some additional information about how drafters go about their work.

### *Value adding by OPC*

121 OPC sees drafting as a value-adding activity. The value-adding consists of the drafters ensuring that all the gaps between the instructors' position when they come to OPC and the final requirements for the project are filled. The value-adding that the drafters need to do in any particular project depends on what position the instructors have got to in developing the project by the time they come to OPC.

122 If the instructors have a clear idea of where they want to go, but not many ideas about how to get there, the drafters' job is to help them clarify and develop that idea down into successive levels of detail and eventually into a detailed legislative structure set out in a Bill or instrument.

123 For instance, instructors may start with a policy decision that a particular activity needs to be regulated, but they may have no clear ideas about what kind of regulation might be practical or effective. The drafters would draw on their experience with other regulatory schemes, and on their own creativity, and suggest a range of regulatory options, with advice about the benefits and drawbacks of each one (for example, prohibition of an activity without a Commonwealth licence, or a limitation of government benefits if the activity is carried on in certain circumstances).

124 Once the instructors choose an approach, the drafters would again identify the kinds of choices that need to be made at the next level of detail (for example, if a Commonwealth licensing scheme is chosen, are the licences to be indefinite, subject to cancellation or renewable annually).

125 Alternatively, if the instructors think that they need a licensing scheme to regulate a particular activity, but haven't clearly articulated why the activity needs to be regulated or the details of the licensing scheme, the drafters' job would be:

- (a) first, to establish why it is thought that the activity needs to be regulated; and
- (b) next, to check that a licensing scheme is the appropriate method of regulation, having regard to what has emerged about the reasons for regulation; and
- (c) finally, to help the instructors design the details of a licensing scheme which will be implemented by or under the legislation (for example, identification or creation of a licensing authority, criteria for granting of licences, duration of licences, enforcement of the licensing scheme, etc.).

126 In performing this value-adding role, drafters are always mindful of the aims of reducing the regulatory burden, and achieving clearer, less complex laws.

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## **Project management by OPC**

127 OPC drafters often make a valuable contribution to the management of legislative projects, especially if the project is unusually large or urgent. Drafters can advise on matters such as:

- (a) critical paths for the project (for example, policy decisions which must be made before legislative details can be developed or before drafting can commence); and
- (b) timetables (for example, realistic timeframes for finalising drafting, referring the draft for consultation, obtaining legal policy advice, arranging for Royal Assent to a Bill after it is passed by the Parliament or for submission of an instrument to ExCo); and
- (c) coordination and liaison requirements (for example, ensuring that all necessary consultation is undertaken and all necessary policy authority and clearances from other Ministers are sought well before the Bill or instrument is intended to be introduced or made); and
- (d) whether splitting the content of a legislative project between a Bill, and instruments made under provisions of a Bill, will facilitate meeting overall deadlines (particularly if the deadlines for completing drafting of the Bill will come earlier than the deadlines for completing the drafting of the instruments); and
- (e) time and workload implications from intended exposure of a draft to other Commonwealth agencies, State and Territory agencies or the general public.

## **Written v oral communication**

128 As mentioned in Chapter 4, initial drafting instructions are almost always given in writing, but in urgent cases oral instructions may be sufficient.

129 After the initial provision of drafting instructions, communications between drafters and instructors may be by email, by phone discussions or at meetings. Most drafters find oral communications more productive than relying solely on written exchanges. Any important further instructions that are provided orally should be confirmed in writing.

130 Producing written comments on drafts or plans often helps instructors to clarify their views, and may also ensure that individual instructors are properly conveying the views of the instructing agency. However, drafters will often want to discuss written comments with the instructors.

## **Drafts and drafting plans**

131 The traditional work method of drafters involves starting work in a draft Bill or instrument which, in the early stages, is often incomplete. The drafting process consists of repeatedly revising the draft to take account of policy development until there is a complete and settled Bill or instrument. The draft is the main vehicle for that policy development. This

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is still a common and appropriate work method used by drafters, particularly for simple projects, and for projects that are very urgent.

132 Another work method that drafters use is to work in drafting plans (also called blueprints). In this work method, drafting starts with a written plan for the Bill or instrument, not an actual draft. The plan is usually in the form of one or more tables. This work method is particularly effective for large and complex projects that benefit from being broken down into chunks, and each chunk thoroughly analysed, before actual drafting begins.

133 The drafting plan work method involves the bulk of the interactions between the instructors and drafters being focused on developing the plan to the stage where it records most (or all) of what the Bill or instrument needs to do and how it is going to do it. After the drafters and instructors are satisfied with the plan, the drafters convert it into an actual draft Bill or instrument. This conversion is often a fairly mechanical process. Depending on how detailed the plan is, the first actual draft Bill or instrument produced by this method may be close to the final version.

134 Instructors should treat a drafting plan just as seriously as they would treat an actual draft.

135 If the work method chosen by the drafters is causing the instructors concerns, the instructors should raise this with the drafters as early as possible.

### ***Techniques for drafting effective legislation***

#### **What is effective legislation?**

136 OPC is committed to drafting legislation that:

- (a) is legally effective; and
- (b) is effective in communicating its purpose and operation.

137 While these are expressed as separate aims, OPC recognises that legislation that is not effective in clearly communicating its purpose and operation cannot be said to be effective.

138 OPC does not believe that a single set of drafting techniques (whether described as “plain English” drafting or anything else) will always be appropriate to achieve legal effectiveness and effective communication.

139 A range of different drafting techniques and tools have been developed and refined over many years. OPC believes that careful use of techniques and tools appropriate to individual drafting projects will give the best results in each case. At the same time, to ensure consistency across Commonwealth legislation and to ensure that the various techniques and tools are used properly, OPC maintains generally applicable standards and rules about when and how particular approaches may be used. To ensure continuous improvement in our drafting techniques, there is some scope for experimental use of new approaches in particular cases.

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140 Some of the main techniques and tools used in OPC are described below. In addition, there are also many documents that explain and prescribe the standards and rules for the way in which OPC drafts, including the [Drafting Manual](#) and the [Drafting Directions series](#).

### **Use of plain language**

141 OPC is keen to replace old-fashioned language, complex sentence structures, legalese and jargon with modern, idiomatic language. However, we recognise the need for care in abandoning legal language which has been subject to judicial consideration, and we also recognise that in some cases it is appropriate to use technical terms (even if these might be described as jargon).

### **The importance of structure**

142 OPC gives careful consideration to how each draft should be structured, because a well-structured draft significantly assists a reader's ability to understand and absorb information.

### **Some specific techniques to aid comprehension**

143 There are various other techniques that OPC drafters use to help readers understand legislation. These include:

- (a) *Simplified outlines:* These give readers a brief introduction to the effect of the operative provisions of legislation.
- (b) *Objects provisions:* These are used to give readers a general understanding of the purpose of legislation, or to set out general aims or principles that help readers to interpret the detailed provisions of legislation.
- (c) *Notes:* These can be used to explain the purpose, origin or operation of a provision, or to refer the reader to related provisions or to definitions of terms used in the provision.
- (d) *Examples:* These can be used to explain the operation of a provision, or to illustrate the intended effect of a provision. Worked examples may be particularly useful for provisions requiring complex calculations.
- (e) *Tables:* These are a useful way of organising a large volume of information. Tables can make it easier to spot the similarities and differences in different cases dealt with in the legislation, and may do so in a way that indicates the conceptual basis for those similarities and differences.

### **Coherent principles drafting**

144 The traditional drafting approach involves attempting to deal exhaustively and in detail with every possible case. This approach has a philosophical basis, in that it requires the lawmaker (whether Parliament, or the maker of an instrument) to approve a detailed statement of the intended operation of the law, rather than leaving this detail to be worked out by the non-elected courts. However, this approach can lead to long and complex legislation,

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and it also risks the creation of loopholes (which, when discovered, tend to be filled with yet more long and complex legislation).

145 A coherent principles approach involves a more general and less detailed expression of the law, often more reliant on references to the purpose of the law rather than to its specific operation. The application of the law to specific cases may need to be determined in the courts. Under coherent principles drafting, the lawmaker's input consists of statements of general principle, and the courts may play a substantial role in determining the coverage and the operation of the law.

146 In some cases, a limited or even major use of coherent principles drafting may be appropriate or desirable. OPC can advise instructors on the issues that must be considered and the risks that might be involved, and help instructors decide whether coherent principles drafting is suitable for their project.

## ***Standardisation of legislation***

### **Introduction**

147 OPC has put considerable energy into the standardisation of legislation (both in its appearance and content). OPC sees standardisation as having benefits both for users of legislation, and for drafters.

### **Standard format**

148 Legislation drafted by OPC uses a standard format, which was developed in conjunction with communications experts. The format is standard in its appearance on the page, and also in its electronic form.

149 Electronic standardisation is achieved through the use of word processing "styles". The fact that legislation has a standard electronic form means that it is relatively easy for it to be converted into other electronic forms (for example, for loading onto the internet). It is important that standardisation is maintained.

### **Commencement provisions**

150 OPC uses standardised commencement provisions, in table form, that are intended to make it easy for readers to find the commencement details for each legislative provision. For more information on commencement provisions, see [Drafting Direction 1.3](#).

### **Amending Bills and instruments**

151 Amendments of Acts and instruments are set out in Schedules to the amending Bill or instrument and are made using standard amending forms set out in the OPC [Amending Forms Manual](#). Amendments can be grouped into Schedules by reference to topics, by reference to the Acts or instruments being amended, or in any other convenient way.

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## Greater standardisation of other kinds of provisions

152 OPC is committed to developing and using consistent provisions as much as possible. For example, OPC has developed standard provisions for the establishment of statutory bodies and for dealing with various constitutional law issues.

153 OPC is keen to find other ways to improve the consistency of Commonwealth legislation, and to reduce its volume. A recent initiative is the *Regulatory Powers (Standard Provisions) Act 2014*. The Act provides a framework of standard regulatory powers (such as monitoring and investigation powers) that can be applied for the purpose of different legislative regimes, rather than each legislative regime that needs such powers containing its own unique set of provisions.

## Referral of drafts to other agencies

154 Various provisions in draft legislation will raise policy issues for which the Attorney-General has responsibility (for example, provisions conferring administrative discretions that might require review, or provisions exempting legislative instruments from sunseting).

155 To ensure that these issues are properly considered on behalf of the Attorney-General, drafters refer the relevant draft provisions to AGD. OPC has a responsibility to the Attorney-General to see that the provisions are referred (even if an instructing agency might have reservations about the referral).

156 Drafters also refer relevant provisions to other Commonwealth agencies that have a right or responsibility to provide policy input in relation to the provisions (generally because the agency has a coordinating or whole-of-government responsibility for a matter dealt with in the provisions). For example, a provision that contains an express appropriation of Commonwealth revenue, or that creates a special account or other fund, will be referred to the Department of Finance.

157 This referral process is undertaken in accordance with [Drafting Direction 4.2](#). That Drafting Direction identifies the kinds of provisions that will be referred and the agencies to which they will be referred. Usually, draft legislation is referred by the drafters, but the instructors may instead do some or all of the referral (particularly if they have already established contacts in a relevant agency).

158 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. In the case of a Bill, the drafter would mention an outstanding issue of this kind in the memo OPC prepares for the Legislation Approval Process (see Chapter 7).

159 For instrument drafting work that OPC does on a billable basis, the referral process described above is not required to be followed. 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.

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## **Parliamentary committees**

160 Much of the legislation that OPC drafts will end up being subject to scrutiny by the following committees:

- (a) the Parliamentary Joint Committee on Human Rights;
- (b) the Senate Standing Committee on Regulations and Ordinances;
- (c) the Senate Standing Committee for Scrutiny of Bills.

161 OPC drafters are familiar with the kinds of issues that these committees comment on, and will advise instructors if particular aspects of policy proposals or draft provisions are likely to receive adverse comment. Drafters may be able to suggest ways in which the possibility of comment could be reduced, whether by taking a different approach or by explaining the reasons for an approach in the relevant explanatory memorandum or statement.

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

163 More information about these committees, including their terms of reference and how they operate, is available on the [Parliament of Australia website](#).

## **Responsibility for obtaining legal advice**

164 If a drafter believes that legal advice about any aspect of draft legislation or a drafting project should be obtained from the Australian Government Solicitor (**AGS**), the drafter will discuss this with the instructors. Requests for advice may be made by OPC on behalf of the instructing agency, or by the instructing agency itself. If the instructing agency will make the request, the instructors are encouraged to give the drafters the opportunity to comment on a draft of the request before it is finalised. Doing this will ensure that both drafters and instructors are satisfied that the content of the request is adequate.

165 If the drafter and the instructing agency cannot agree on the need to obtain legal advice from AGS, OPC may need to raise the matter with the Office of Legal Services Coordination (**OLSC**) in AGD. If OLSC cannot resolve the matter, OPC must then raise it with the Attorney-General (through FPC).

166 Legal advice obtained from AGS about draft legislation must be paid for by the instructing agency.

## **Feedback**

167 After drafting on a project has been completed, OPC sends the instructors a request for feedback on the drafting process and the draft legislation. We encourage instructors to be both frank and constructive in their responses to this request (individual drafters do not see

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the actual responses without the consent of the responding instructors). OPC, and the individual drafters, value feedback, and appreciate the time that instructors take to provide it.

168 As well, OPC welcomes feedback in any other form. In particular, OPC is keen to receive information about how our legislation actually works in practice. For instance:

- (a) Do particular legislative structures, or particular drafting approaches, make legislation especially difficult, or especially easy, to work with?
- (b) Has the legislation been interpreted by a court or tribunal in a way that is inconsistent with the original policy intentions?

169 Feedback of the kind mentioned in paragraph 168 may be given, in writing or otherwise, to FPC, to the agency's Bill or instrument [client adviser](#), or to the drafters of the legislation concerned. Alternatively, the feedback can be sent to [feedback@opc.gov.au](mailto:feedback@opc.gov.au).

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## Chapter 6—Explanatory memorandums, explanatory statements and other supporting documents

### *Explanatory memorandums and explanatory statements*

170 There must be an explanatory memorandum for each Bill, and an explanatory statement for each legislative instrument. The explanatory memorandum or explanatory statement is a companion document to the Bill or instrument. Its main purpose is to help people to understand the objectives and detailed operation of the Bill or instrument.

171 The instructing agency is responsible for preparing the explanatory memorandum or explanatory statement. OPC is not involved in preparing or settling it.

172 Information and guidance relating to the form and content of explanatory memorandums and explanatory statements is available from the following sources:

- (a) for Bills:
  - (i) the [Legislation Handbook](#);
  - (ii) the report of the Senate Standing Committee for the Scrutiny of Bills on the [Quality of Explanatory Memoranda Accompanying Bills](#);
- (b) for instruments:
  - (i) section 15J of the *Legislation Act 2003* (available on [the FRL](#));
  - (ii) the [Federal Executive Council Handbook](#);
  - (iii) the OPC [Legislative Instruments Handbook](#);
  - (iv) guidelines published by the Senate Standing Committee on Regulations and Ordinances on [General requirements for preparing explanatory statements](#) and on [Addressing consultation in explanatory statements](#).

173 Preparation of the explanatory memorandum or explanatory statement may reveal flaws or weaknesses in policy proposals, or errors in the draft legislation. It is therefore advisable for the instructing agency to start preparation of this document fairly early in the drafting process.

174 Even though the explanatory memorandum or explanatory statement is the responsibility of the instructing agency, the drafters may suggest to instructors particular matters that should be explained in the memorandum (for example, to address possible concerns of the Senate Standing Committee for Scrutiny of Bills or the Senate Standing Committee on Regulations and Ordinances).

175 For parliamentary amendments of a Bill, there should be a supplementary explanatory memorandum. Similar considerations apply as for an explanatory memorandum.

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## **Statements of compatibility with human rights**

176 The *Human Rights (Parliamentary Scrutiny) Act 2011* requires a statement of compatibility to accompany all Bills when they are introduced into Parliament (this is usually done by incorporating the statement into the explanatory memorandum for the Bill), and to be included in the explanatory statement for all disallowable legislative instruments. A statement of compatibility is an assessment of whether the Bill or instrument is compatible with Australia's human rights obligations under 7 core international human rights treaties to which Australia is a party.

177 The instructing agency is responsible for preparing the statement of compatibility. OPC is not involved in preparing or settling it. The Parliamentary Joint Committee on Human Rights has issued material that will assist the instructing agency in preparing the statement of compatibility, including the following (available on the [Parliament of Australia website](#)):

- (a) a *Guide to Human Rights*;
- (b) *Guidance Note 1—Drafting Statements of Compatibility*.

178 Information and guidance on the preparation of statements of compatibility is also available on the [AGD website](#).

## **Other documents**

179 Various other documents are required to be prepared in relation to Bills (and parliamentary amendments), and ExCo instruments. For more information, see:

- (a) for Bills—the [Legislation Handbook](#); and
- (b) for ExCo instruments—the [Federal Executive Council Handbook](#).

180 If, after looking at the material in the relevant Handbook, instructors still have questions about these requirements, then the Legislation Section in PM&C may be consulted about the requirements for Bills, and the ExCo Secretariat in PM&C may be consulted about the requirements for instruments.

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## Chapter 7—Additional information relating to Bills

### *Legislation Approval Process and other pre-introduction clearances*

#### Legislation Approval Process

181 Before a government Bill can be introduced into Parliament, it must first be cleared through the Legislation Approval Process (*LAP*). The clearance is by a Minister or Assistant Minister/Parliamentary Secretary designated for this purpose by the Prime Minister. The process is coordinated by the Legislation Section in PM&C. The process also applies to government amendments of Bills.

182 The usual timetable for LAP is as follows:

- (a) if a Bill is to be introduced into Parliament in a particular sitting week, it will be considered by LAP on the Monday of that sitting week;
- (b) to be considered by LAP on the Monday of that sitting week, the Bill (and supporting papers) will need to be lodged with PM&C by 11 am on the Wednesday of the preceding week.

183 LAP focuses on 2 matters:

- (a) ***policy authority***: LAP is a check on whether a Bill has sufficient policy authority; and
- (b) ***text clearance by Ministers***: LAP is a check on whether:
  - (i) the text of a Bill has been approved by the sponsoring Minister; and
  - (ii) if the Bill amends any legislation administered by other Ministers—the text of those amendments has been approved by those other Ministers.

184 If the drafters believe that there is inadequate policy authority for a Bill, they will raise this with the instructors. If the instructors agree with the drafters' assessment, the instructors will need to arrange for further policy authority to be sought, usually by a letter from the sponsoring Minister to the Prime Minister. Instructors are encouraged to give the drafters the opportunity to comment on a draft of any such letter before it is finalised. Doing this will ensure that both drafters and instructors are satisfied that the content of the letter is adequate.

185 If the instructors do not accept the drafters' view on policy authority, the matter should be discussed with the Legislation Section, and possibly also the relevant policy area, in PM&C. Discussions may be initiated by the instructors or by the drafters. If the PM&C officers are satisfied that there is adequate policy authority, the drafters will generally proceed on that basis.

186 A Bill can be lodged for LAP in advance of full policy authority and text clearance having been obtained. For example, a Bill can be lodged on the basis that the responsible Minister is writing to the Prime Minister for further policy authority, or on the basis that the

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Minister will be asked to approve the text of the Bill. However, the Bill will not be able to be introduced unless and until full policy authority and text clearance have been obtained.

187 When the instructors on a Bill advise the drafters that they are satisfied with all aspects of the Bill, the drafters will lodge copies of the Bill with PM&C for LAP. The drafters also prepare a memorandum from OPC (commonly referred to as the LAP memo) to accompany lodgement of the Bill. The LAP memo addresses the issues of:

- (a) policy authority for the Bill; and
- (b) Ministerial approval of the text of the Bill.

188 The instructing agency must also lodge various documents with PM&C. For more information about what is required, see the [Legislation Handbook](#).

### **Other pre-introduction clearances**

189 A government Bill must also go through party clearance (by the Coalition Joint Party, or the Labor Party Caucus) before being introduced. There may also need to be clearance or consideration by a relevant party policy committee. OPC is not involved in these processes.

### ***Finalising and printing Bills***

190 When a Bill is ready for introduction, OPC arranges the printing of bulk copies (commonly referred to as supply copies) in the quantities required for introduction into the Parliament. The drafters will routinely offer the instructors up to 10 copies of this print run. Further copies can be ordered from OPC's Bills Officer by sending an email to [legislation@opc.gov.au](mailto:legislation@opc.gov.au) at least one week before the Bill is to be printed. Those further copies will be charged to the requesting agency at the run-on price. Agencies can also make standing arrangements for the automatic ordering of additional copies of their Bills. An agency that wants to do this should send an email to [legislation@opc.gov.au](mailto:legislation@opc.gov.au).

191 OPC arranges for the supply copies of a Bill to be delivered to the Table Office of the House of Parliament into which the Bill is to be introduced. The copies will then be held under embargo until the Bill has been read a first time, after which copies will be circulated to members and senators.

192 A similar process applies if OPC drafts government amendments of Bills. After the amendments are finalised, OPC arranges for the delivery of copies of the amendments, in the required quantities, to the House in which the amendments are to be moved. Unlike Bills (which are sent to the printer), the copies of the amendments are prepared in OPC on A4 paper. OPC arranges for the copies to be delivered to the Table Office of the House in which they are to be moved, which then holds them under embargo until the responsible Minister authorises their circulation.

193 After a Bill is introduced, control of printing the Bill moves from OPC to the House of Parliament into which the Bill was introduced (the *originating House*). If the Bill is amended in Parliament, the amendments will be incorporated into new prints of the Bill prepared by the Table Office of the originating House as follows:

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- (a) If the Bill is amended in the originating House, the effect of the amendments will be incorporated into a new print (the third reading print) that is prepared for the purpose of introduction in the other House.
  - (b) If the Bill is amended in the other House, and the amendments are agreed to by the originating House, the effect of the amendments will be incorporated into a new print (the Assent print) that is prepared for the purpose of obtaining Royal Assent.

194 The following are available on the [Parliament of Australia website](#):

- (a) Bills as introduced;
- (b) amendments of Bills (when circulated);
- (c) third reading prints (if applicable);
- (d) “as passed by both Houses” prints of Bills (these are non-authoritative prints of Bills as passed by both Houses and incorporating any parliamentary amendments that have been agreed to by both Houses);
- (e) explanatory memorandums and supplementary explanatory memorandums.

195 After a Bill has received Royal Assent it becomes an Act. Acts are available on [the FRL](#), and prints can be ordered through [the FRL Print on Demand facility](#).

## ***Introduction and passage of Bills***

### **Stages a Bill goes through in Parliament**

196 To become an Act, a Bill must be passed by both Houses of the Parliament: the House of Representatives and the Senate. Both Houses have to agree to the same version of a Bill before it can become an Act. So if one House amends a Bill that the other House has already passed, the other House must consider whether it agrees to the amendments.

197 Generally, a Bill can originate in either House of the Parliament, and both Houses have full power to amend any Bill. There are some important exceptions to this set out in section 53 of the Constitution:

- (a) Bills appropriating money or imposing taxation must originate in the House of Representatives; and
- (b) the Senate cannot amend Bills imposing taxation or appropriating money for the ordinary annual services of Government; and
- (c) the Senate cannot amend a Bill so as to increase any proposed charge or burden on the people.

198 The Senate can request the House of Representatives to make most amendments that the Senate cannot actually make itself.

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## Parliamentary amendments

199 After a Bill has been introduced, the government may decide that it wants parliamentary amendments of the Bill:

- (a) to deal with a new matter that has arisen since the Bill was introduced and that needs to be dealt with urgently; or
- (b) to correct defects in the Bill (whether or not these were known when the Bill was introduced); or
- (c) to accommodate changes that arise during negotiations with non-government parties or independents, or from acceptance of recommendations of a parliamentary committee's consideration of the Bill.

200 The instructing agency will need to instruct the drafters to prepare the necessary amendments. The process is a condensed version of the drafting of a Bill: all the same requirements and processes apply, but there is some scope for bypassing steps or speeding up the process if time is running short (which is often the case with parliamentary amendments). See also the material in Chapter 3 about priority and policy authority for parliamentary amendments.

201 As soon as the instructing agency knows it is likely that government amendments will be required, the instructors should get in touch with the drafters, and with the Legislation Section of PM&C. It is good to get as much notice as possible.

202 Amendments for non-government members are, generally, not drafted by OPC. If an instructing agency has a copy of other amendments and there is a real possibility that they may be passed, it is a good idea to let the drafters have a look at them. They may be able to point out possible problems, or to suggest better ways of achieving the same result (which could (for example) include preparing an alternative draft of the amendments). Whether or not drafters' suggestions are adopted is, of course, up to whoever will be moving the amendment.

203 As previously mentioned, if the government negotiates a compromise with non-government members to get their agreement to a government Bill, the instructing agency may decide to instruct OPC to draft parliamentary amendments of the Bill, with a view to the government then providing the draft to those non-government members for one of them to move.

## Chair's/Clerk's amendments

204 There is a procedure for fixing minor technical errors (whether found by drafters or instructors) in introduced Bills, without the need for a formal parliamentary amendment. This power to fix errors is given, for Bills originating in the Senate, to the Senate's Chair of Committees ([Senate Standing Order 124](#)) and, for Bills originating in the House of Representatives, to the Clerk of the House acting with the authority of the Deputy Speaker ([House of Representatives Standing Order 156](#)).

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205 These amendments are arranged by OPC writing to the Clerk of the House in which the Bill was originally introduced. This kind of amendment can only be used to fix obvious technical errors—it cannot be used to make changes with any policy significance.

### **Programming in Parliament**

206 The task of managing the Government’s legislation program is handled by the Leader of the House (in the House of Representatives) and the Manager of Government Business (in the Senate).

207 The Parliamentary Liaison Officers (from PM&C) provide support to the holders of these offices in assisting passage of the Government’s legislation. They liaise with officers of the responsible agency to arrange for when a Bill will go through its various stages in each House, and to ensure that officers have prepared any further documentation needed and are ready to attend the Parliament when required.

### **Royal Assent and commencement**

#### **Royal Assent**

208 When both Houses of Parliament have passed a Bill, the Bill goes to the Governor-General for Royal Assent. Assent completes the enactment of the Bill.

209 Assent copies of the Bill are sent to the Governor-General from the House in which the Bill was originally introduced. At the same time, copies are sent to the Attorney-General, and to OPC.

210 When Assent copies of the Bill reach OPC, OPC staff check various aspects of the Bill and prepare a certificate for the Attorney-General’s signature, advising the Governor-General about the Bill. In nearly all cases, the advice is to the effect that there are no amendments that the Governor-General should recommend, and that the Governor-General should not reserve the Bill for the Queen’s pleasure (see section 58 of the Constitution). The Attorney-General signs this certificate on the advice of FPC. OPC is responsible for delivering this certificate to the Attorney-General’s office, collecting it when it has been signed by the Attorney-General, and sending the signed certificate to Government House.

211 Agencies or their Ministers occasionally seek to either expedite or delay Assent. For example, if a Bill is expressed to commence on, or apply from, 1 July in a specified year, but it does not get through parliament until shortly before that date, the instructing agency may seek to have Assent expedited so as to avoid difficulties that would arise if Assent did not occur until after that date.

212 If it appears that Assent may need to be expedited, the instructing agency should contact the Legislation Section in PM&C as soon as possible. The Legislation Section will then determine whether Assent should be expedited and advise OPC. If the advice is that Assent should be expedited, OPC will do as much as it can to speed up the process. However, OPC cannot determine the speed with which Assent copies of Bills are finalised by the relevant House, or the availability of either the Attorney-General or the Governor-General to perform functions in the Assent process.

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213 OPC will not be involved in administratively delaying Assent. If OPC receives a request for Assent to be delayed, the request will be referred to the Attorney-General's staff, who will seek advice from the Attorney-General's Department if appropriate. In such circumstances, OPC will deliver the Attorney-General's certificate to the Attorney-General's office in the ordinary course of business.

### **Commencement**

214 An Act that has received the Royal Assent commences in accordance with its commencement section. If the commencement section requires further action to be taken in order for commencement to occur (for example, the making of a Proclamation), it is the instructing agency's responsibility to arrange this. If a Proclamation is needed, the agency will need to prepare drafting instructions and send them to OPC. The drafting of Proclamations is tied to OPC under the Legal Services Directions.

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## Chapter 8—Additional information relating to instruments

### *Special considerations for drafting instruments*

#### **Working within the scope of the power to make the instrument**

215 The enabling legislation under which an instrument is to be made must provide sufficient power for the instrument-maker to make each proposed provision of the instrument. If the drafters allocated to an instrument-drafting project think that any of the proposed provisions may be outside the scope of the instrument-making power, they will discuss this with their instructors. The instructing agency may need to seek formal legal advice on this issue (see paragraphs 164 to 166).

#### **Subdelegation of power**

216 Legal issues may arise if an instrument purports to delegate legislative power to a person or body (commonly referred to as “subdelegation”, because the making of the instrument is itself an exercise of delegated power). OPC client advisers are available to discuss general principles about subdelegation. Also, if the drafters allocated to an instrument-drafting project think that subdelegation issues arise with a particular proposal, they will discuss this with their instructors. The instructing agency may need to seek formal legal advice on this issue (see paragraphs 164 to 166).

#### **Incorporation by reference**

217 Under section 14 of the *Legislation Act 2003*, a legislative instrument may apply, adopt or incorporate some or all of another document, with or without modification (commonly referred to as “incorporation by reference”). The document may be applied, adopted or incorporated as it is in force or existing when the instrument commences. However, future versions of the document can only be applied, adopted or incorporated if:

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

218 For instruments that are not legislative instruments, section 46AA of the *Acts Interpretation Act 1901* contains a similar rule.

219 If a legislative instrument incorporates 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*).

#### **Making an instrument after Royal Assent to an Act but before the Act commences**

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

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## **Disallowance-related limits on remaking instruments**

221 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. An instrument generally cannot be remade pending tabling or for a period after tabling (see section 46 of that Act), while open to disallowance (see section 47 of that Act) or (if the instrument is disallowed) for 6 months after disallowance (see section 48 of that Act).

## **Limits on commencing a legislative instrument before it is registered**

222 Provisions of a legislative instrument that adversely affect rights of, or that impose liabilities on, a person (other than the Commonwealth or a Commonwealth authority) should not be expressed to commence (or apply) before the registration of the instrument under the *Legislation Act 2003*: see subsection 12(2) of that Act. However, this rule may be overridden by the instrument's enabling legislation, if the enabling legislation is an Act.

## ***ExCo instruments: finalising and preparing instruments for making***

223 At the end of the drafting process for an ExCo instrument, OPC will provide the instructing agency with a final version of the instrument in a form that is suitable for signature. The instructing agency is responsible for lodging the instrument, and various other documents, with the ExCo Secretariat in PM&C. For more information about the ExCo processes and requirements that must be followed, see the [Federal Executive Council Handbook](#).

## ***Legislative instruments: lodgement on the FRL of instruments and compilations***

224 All legislative instruments, and their explanatory statements, must be lodged with OPC for registration on the Federal Register of Legislation (*FRL*). Lodgement is done online, and different lodgement processes apply depending on whether the instrument is an ExCo instrument or some other kind of instrument.

225 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 FRL. A compilation is also required to be prepared and lodged for registration if a provision of a legislative instrument is disallowed.

226 OPC prepares compilations of tied legislative instruments without charge to agencies. OPC can prepare compilations of other legislative instruments on a billable basis. For more details about compilations, see the [Legislative Instruments Handbook](#).

227 Agencies whose Acts and instruments (as originally made, or subsequent compilations) are registered on the FRL are liable to pay fees to OPC to recover the cost of operating the FRL. These fees are separate from any amount charged by OPC for the drafting of an instrument or the preparation of a compilation.

228 For details about lodgement requirements, and registration on the FRL, see the [Legislative Instruments Handbook](#).

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## **Legislative instruments: tabling and disallowance**

229 Legislative instruments, and their explanatory statements, that have been registered on the FRL must be tabled in each House of Parliament (see section 38 of the *Legislation Act 2003*). OPC is responsible for lodging instruments and their explanatory statements for tabling.

230 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 that Act).

231 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 ceases to have effect at that time.

232 For more information about tabling and disallowance of legislative instruments, see the [Legislative Instruments Handbook](#).

## **Legislative instruments: sunseting**

233 The *Legislation Act 2003* provides for the automatic repeal (commonly referred to as “sunseting”) of legislative instruments on set dates (1 April or 1 October) 10 years after their registration (see section 50 of that Act). The first sunseting date was 1 April 2015. Sunseting ensures that legislative instruments are kept up to date and only remain in force for as long as they are needed.

234 Some legislative instruments are exempt from sunseting by exemptions that are already in place. It is also possible to defer (or “roll over”) an instrument’s sunseting date in limited circumstances and with the consent of the Attorney-General, the Parliament or both.

235 Agencies should plan ahead and, if appropriate, negotiate deferral of sunset dates with AGD. If an instrument is no longer required, it should be repealed without delay. Otherwise the instrument should be reviewed. If the review establishes that the instrument is still required, the agency should:

- (a) have the instrument remade and registered before the instrument sunsets to ensure continuity of the law; or
- (b) seek to have the instrument’s sunseting date deferred.

236 If a request for deferral is unsuccessful, urgent action will need to be taken to have the instrument remade and registered before it sunsets.

237 The scope of a project to remake an instrument can vary, and this needs to be taken into account by agencies in their planning. It may either be an exercise involving taking the current content of the instrument and merely updating its drafting and formatting, or it may involve a more extensive rewrite exercise incorporating policy changes. An extensive rewrite will take longer, and will require more resources (see also the discussion of rewriting existing legislation in Chapter 2).

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238 For more information about sunseting, see the [Legislative Instruments Handbook](#) and the [AGD Guide to managing sunseting of legislative instruments](#).

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## Chapter 9—Engaging OPC to draft non-tied instruments or to provide other services

### *Drafting non-tied instruments*

239 Non-tied instruments are instruments the drafting of which is not tied to OPC (see Chapter 1).

240 Agencies can take advantage of OPC’s extensive specialist drafting skills and expertise by engaging OPC to draft non-tied instruments on a billable basis.

241 An agency that would like more information about OPC’s billable drafting services, including charging rates for drafting non-tied instruments, should contact FPC or the agency’s [instrument client adviser](#).

242 An estimate of the likely cost for OPC to draft a non-tied instrument can be provided, if requested by the instructing agency. Agencies can also ask OPC to provide regular updates on the charges accrued while work is in progress. OPC generally does not provide fixed quotes.

243 OPC issues invoices to instructing agencies on a regular basis while drafting is in progress. Invoices are normally issued monthly. However, agencies may arrange to receive invoices at more or less frequent intervals.

### *Other services that OPC can provide*

#### **Services for agencies that choose to draft non-tied instruments in-house**

244 For agencies that choose to draft non-tied instruments in-house, OPC can still provide a number of useful services on a billable basis. These services include the following:

- (a) drafting advice (including commenting on, or clearance of, instruments);
- (b) instrument design (including template development);
- (c) drafting training;
- (d) instrument preparation (including formatting instruments for remaking);
- (e) instrument editorial services;
- (f) research services (including the development of reports from [the FRL](#)).

245 Agencies are welcome to contact FPC or their [instrument client adviser](#) to discuss ways in which OPC might be able to assist them with in-house drafting of non-tied instruments.

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## Compilations of legislation

246 If an Act or a tied instrument is amended, OPC will prepare a compilation of the amended Act or instrument so that it is ready before, or as soon as practicable after, the amendments commence. There is no charge for preparing the compilation. This is also the case for some limited categories of non-tied instruments, such as rules of court.

247 OPC can prepare compilations of legislation in other circumstances on a billable basis. By engaging OPC to prepare a compilation, an agency can take advantage of the high level of skills and accuracy of OPC's compilers. Circumstances in which an agency might engage OPC to prepare a compilation include:

- (a) *Compilations of non-tied instruments:* If a non-tied instrument is amended, the responsible agency will need a compilation of the instrument as amended (particularly if the instrument is a legislative instrument: see Chapter 8). OPC can be engaged to prepare the compilation, whether or not OPC drafted the instrument or the amendments of the instrument.
- (b) *Future law compilations:* Sometimes, it is helpful for an agency to have a compilation of an Act or instrument as proposed to be amended by a set of amendments that have not yet been enacted or made, or that have not yet come into force. These sorts of compilations can be useful in public consultations about proposed amendments, or to help familiarise agency staff with the impact of proposed amendments to legislation that they administer. OPC can be engaged to prepare such future law compilations.

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## Chapter 10—Effect of elections on drafting work and processes

### *Drafting work during the caretaker period*

248 The caretaker period for an election begins when the House of Representatives is dissolved and continues until the election result is clear or, if there is a change of government, until the new government is appointed.

249 During the caretaker period, OPC continues to undertake limited Bill and instrument drafting work in accordance with the caretaker conventions. More information about the conventions is available in the PM&C [Guidance on Caretaker Conventions](#). FPC can advise whether particular drafting work might be able to be undertaken by OPC during the caretaker period. The caretaker conventions generally have less of an impact on the drafting of instruments (particularly non-tied instruments) than they do on Bills, and a large proportion of instrument drafting work may be able to continue as normal during election periods.

250 The reduced volume of drafting work enables OPC to undertake a range of “housekeeping” projects that are important to maintaining its drafting capacity (such as preparation and updating of manuals and other drafting resource material).

### **Bill processes**

#### **Bills still before the Parliament**

251 When the House of Representatives is dissolved, all introduced Bills still before the Parliament lapse.

252 If the previous government is returned at the election, any Bill that has lapsed may be reintroduced without further policy authority if no substantive changes are made to it. New authority is not needed for formal changes such as changing the year in the Bill’s short title. But any changes of substance would require new authority on the same basis as described in Chapter 3.

253 There is an alternative procedure to reintroduction, in which a lapsed Bill may instead be restored to the notice paper. However this can only be done in limited circumstances and rarely happens.

#### **Royal Assent and Proclamations**

254 There may be Bills that have been passed by both Houses of the Parliament that are still being prepared for Royal Assent when an election is announced. The [Guidance on Caretaker Conventions](#) states that Bills that have passed both Houses of Parliament should be assented to before the dissolution of the House of Representatives. OPC will therefore do everything it can appropriately do to ensure that all such Bills are assented to before dissolution.

255 There may also be Acts that have received the Royal Assent but that depend for their commencement on Proclamations that have not yet been made. The [Guidance on Caretaker Conventions](#) states that legislation can be proclaimed during the caretaker period but, other

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than in exceptional circumstances, Proclamations which have a commencement date after the date of the election should not be made.

## ***Instrument processes***

### **Making and lodging instruments during the caretaker period**

256 The question whether an instrument can or should be made during the caretaker period is affected by the caretaker conventions, and agencies should therefore consider the [Guidance on Caretaker Conventions](#). OPC cannot provide advice on this.

257 The FRL lodgement facility is available for lodgements during the caretaker period.

258 If an instrument is made during the caretaker period and lodged for registration on the FRL, OPC is required to ensure that it is registered and made available to the public.

### **ExCo meetings before and during the caretaker period**

259 A special ExCo meeting may be held after the announcement of an election but before the start of the caretaker period to deal with outstanding appointments and matters of an urgent nature.

260 ExCo meetings are infrequent during the caretaker period and are held only if the matters involved cannot be deferred. An agency that wants an instrument to be considered by ExCo during the caretaker period should contact the ExCo Secretariat in PM&C to check that the instrument will be able to be considered. This should be done before drafting instructions for the instrument are sent to OPC.

### **Tabling and disallowance of legislative instruments during the caretaker period**

261 OPC will continue to lodge new legislative instruments for tabling with the Table Offices during the caretaker period. However, tabling will not occur until the first sitting day of the new Parliament.

262 Legislative instruments that were tabled before the caretaker period will resume their disallowance period on the first sitting day of the new Parliament.

263 If a notice of motion to disallow a legislative instrument was given, but was not dealt with by the previous Parliament, the motion automatically lapses and the instrument is taken to have been tabled on the first sitting day of the new Parliament.

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## **Other information**

### ***OPC contacts***

The [contact us page](#) on the OPC website contains contact details for OPC.

### ***Other relevant documents***

The [OPC website](#) contains various other documents that are relevant to how drafting work is done in OPC.