



Australian Government

Office of Parliamentary Counsel

Giving written drafting instructions to OPC

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Introduction

1 This document provides guidance about giving written instructions to the Office of Parliamentary Counsel (*OPC*) for drafting Bills and instruments.

2 Most of this document is devoted to a checklist of matters to cover in drafting instructions.

3 The best way for the instructions to make the process of drafting a Bill or instrument as easy as possible for you and the drafters is for the instructions to address the issues raised in the checklist. Following the structure in the checklist may also help the process, but is less important than making sure the instructions address the issues thoroughly.

4 Much more information about the process of drafting a Bill or instrument, and the role of written drafting instructions in that process, is given in:

- (a) *OPC's drafting services: a guide for clients* (the [Client Guide](#)); and
- (b) [Legislation Process Courses](#) offered by OPC.

The Client Guide and details of the courses are available on OPC's [website](#).

Client advising arrangements

5 OPC has arrangements under which an instructing 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.

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

When to send instructions

7 *Bills:* For each parliamentary sittings, the Parliamentary Business Committee of Cabinet (*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 First Parliamentary Counsel (*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.

8 *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.

9 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 Executive Council 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

10 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

11 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;
- (b) *instruments*: email the instructions to instrument.instructions@opc.gov.au.

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

13 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.

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

15 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 instructions: some basic matters

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

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

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

19 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 instructions

20 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.

21 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.

Checklist for instructions

1. Preliminary matters

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| 1.1 | Priority | <ol style="list-style-type: none">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.3. For other instruments, include information about any relevant timeframes.4. For more information about priorities, see Chapter 3 of the Client Guide. |
| 1.2 | Policy authority | <ol style="list-style-type: none">1. For Bills, provide details of the policy authority. The details should include:<ol style="list-style-type: none">(a) for Cabinet decisions: the number and date of the relevant Cabinet Minute; or(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 |
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Checklist for instructions

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| | | <p>with the drafting instructions, or as soon as possible after the letters etc. are sent or received.</p> <ol style="list-style-type: none">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.For other instruments, indicate whether the rule-maker has approved the general policy that is to be implemented.If policy authority has not yet been obtained, state what is being done to obtain it.For more information about policy authority, see Chapter 3 of the Client Guide. |
| 1.3 | Timetable | <ol style="list-style-type: none">Set out a timetable for the project. This should include:<ol style="list-style-type: none">the proposed commencement date; andthe proposed week for introduction in Parliament (for Bills), the proposed Executive Council meeting (for ExCo instruments) or the proposed date for making (for other instruments); andif 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; andany other deadlines that the drafters may need to be aware of, and any other matters that may affect the timetable.If you don't know specific dates or weeks, just give a rough indication. |
| 1.4 | Proposed short title or name | <ol style="list-style-type: none">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.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.If you have no particular preference for the short title or name, the drafters will suggest one.The short title or name may change during the drafting process. |
| 1.5 | Instruments only: source of power | <ol style="list-style-type: none">If the instructions are for an instrument, state:<ol style="list-style-type: none">the name and provision of the Act or instrument (the enabling legislation) that confers power to make the proposed instrument; andthe title of the person who will make the instrument, and (for an ExCo instrument), the title of the Minister sponsoring the instrument. |
| 1.6 | Consultations with other agencies | <ol style="list-style-type: none">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 particular matters (for example, the responsibility of AGD for Commonwealth criminal law policy).For more information, see Chapter 5 of the Client Guide, and the PM&C Legislation Handbook. |
| 1.7 | Legal opinions | <ol style="list-style-type: none">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 | <ol style="list-style-type: none">Mention any related projects, whether recent, current or proposed (including any such projects for which another agency is responsible). |

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- 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.

2. The instructions: core matters

- 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 [Clearer Law page of the OPC website](#) 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.

3. The instructions: other specific matters

- 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

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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 or notifiable 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. A provision of a legislative or notifiable instrument may commence (or apply) before the day the instrument is registered under the *Legislation Act 2003*: see subsection 12(3) of that Act. However, such a provision does not apply in relation to a person (other than the Commonwealth or a Commonwealth authority) to the extent that as a result of the provision commencing before the day of registration, the person's rights as at that day would be adversely affected, or liabilities would be imposed on the person in respect of anything done or omitted to be done before that day: see subsection 12(2) of that Act. The rules in subsections 12(2) and (3) may be overridden by the instrument's enabling legislation, if the enabling legislation is an Act: see subsection 12(4) of that 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

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| | | with the drafters after providing the initial drafting instructions. |
| 3.3 | External Territories and outside Australia | <ol style="list-style-type: none">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 | <ol style="list-style-type: none">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 Drafting Direction 3.5A.3. There is also useful guidance on some of these matters in the AGD Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. |
| 3.5 | Powers to make administrative decisions | <ol style="list-style-type: none">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:<ol style="list-style-type: none">(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 Australian Administrative Law Policy Guide. |
| 3.6 | Powers to make instruments | <ol style="list-style-type: none">1. If the Bill or instrument on which you are instructing (the primary Bill or instrument) is to confer power to make an instrument (the proposed subordinate instrument), the following issues need to be considered:<ol style="list-style-type: none">(a) What is the scope of the power that is needed: what kinds of things or matters do you want the proposed subordinate instrument to be able to do or deal with?(b) Is the proposed subordinate instrument to be a legislative or notifiable instrument for the purposes of the <i>Legislation Act 2003</i>, and, if it is to be a legislative instrument, are there to be any exemptions from that Act (for example, from the disallowance or sunseting regimes in that Act)? The Courts, Tribunals 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 subordinate instrument to be able to do any of the following, this should be specifically mentioned in the instructions for the primary Bill or instrument:<ol style="list-style-type: none">(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); |

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- (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 218 of the [Client Guide](#)).

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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 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.</p> |

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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 Federal Register of Legislation](#) 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.

3.10 Transitional provisions

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:

(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?

(b) Should the current law continue to apply to certain people or situations?

(c) Should the new law apply only to certain people or situations?

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.

4. Amending Bills or instruments: additional matters

4.1 Identify provisions to be amended

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).

4.2 Bills and instruments that implement several separate policy proposals

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.

4.3 Amending legislation administered by another agency

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.
