

PARLIAMENTARY COUNSEL

Drafting Direction No. 4.5 Legal advice on issues arising during drafting

Note: This Drafting Direction contains references to the “head drafter”. It is a reference to the senior person who is responsible for matters of drafting policy. This form is used to enable the Drafting Directions to be applied in other organisations. In OPC the head drafter is FPC for Bills and PLC for instruments.

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Part 1—Introduction

1 Legal issues routinely arise during the drafting of legislation. Some kinds of issues are dealt with by drafters, while other kinds of issues are more appropriately referred to the Australian Government Solicitor (**AGS**).

2 This Drafting Direction provides some guidelines for when it is appropriate for drafters to refer legal issues to AGS and sets out the process that is to be followed once it is decided to refer a matter to AGS. It also deals with finding confidential AGS opinions and giving opinions from the AGS Opinions database to instructors. It also sets out some procedural matters relating to obtaining legal advice about legislation administered by another agency.

Part 2—Office’s role and AGS’s role

3 The drafter’s role routinely involves answering instructors’ questions about things such as the interpretation of a particular provision in the draft, the interpretation of the legislation being amended or of other legislation, the constitutionality of the draft or any part of it, or how the general law might apply in particular circumstances. The issues can range from straightforward to extremely complex, and from relatively unimportant to issues crucial to the draft’s legal effectiveness.

4 Under the *Legal Services Directions 2005* (the **Legal Services Directions**), legal work is tied to AGS and the Attorney-General’s Department if it involves:

- (a) constitutional law issues; or
- (b) national security issues; or
- (c) legal advice which is to be considered by Cabinet or relied on in preparing a Cabinet submission or memorandum; or
- (d) legal advice on a legislative proposal to be considered for adoption by government or on draft legislation for introduction into Parliament.

5 Similarly, advice on compliance with treaties is tied to the Attorney-General’s Department, AGS or the Department of Foreign Affairs and Trade.

6 Questions about the rules for tied work should be directed to the Office of Legal Services Coordination (**OLSC**) in the Attorney-General’s Department.

7 The office is a tied provider for “drafting work”, not legal advice. While drafters can employ their knowledge of constitutional law and other issues to inform the drafting process, they should not, for example, provide constitutional law advice.

8 It is a matter for judgement whether a particular legal issue is one that can be properly dealt with by the drafter, or one that should be referred to AGS for advice.

9 However, generally, drafters should refer a legal issue to AGS if any of the following apply:

- the issue is not completely clear-cut and its resolution may have serious, or politically significant, consequences;
- there is a real issue of constitutional law;
- the instructors intend or would expect to refer to or rely on the advice they receive in the course of legal or parliamentary proceedings or public debate;
- the instructors require written advice on the issue for their records (unless, for example, the issue is closely related to drafting, such as the effect of a commencement provision);
- it is a request for a drafter to interpret a provision that he or she drafted, once the legislation has been passed or made.

10 When answering instructors' questions, drafters should clarify with the instructors the use to which they intend to put the answer.

11 The guidelines in paragraph 9 assume that the legal issue is one that must be resolved in order for drafting to proceed. Sometimes, it might be possible to draft in such a way that it is no longer necessary to resolve the issue. Other times, resolving the issue may not be particularly relevant to the drafting process.

12 The guidelines should not inhibit drafters' use of their legal qualifications and drafting experience to answer straightforward legal questions that routinely arise throughout the drafting process.

Part 3—Referral to AGS

Payment by sponsoring agency

13 Legal advice on matters referred to in paragraphs 4(c) and (d) is charged to the agency sponsoring the legislation.

14 It is the responsibility of the instructing agency to meet the cost of any legal advice required in the drafting process. This means that the office is not able to seek advice on legislation it is drafting unless the instructing agency agrees. This is because a reference by the office will have financial consequences for the instructing agency.

15 However, this does not affect the practice under which drafters can discuss an issue with AGS staff informally before deciding whether to refer the issue for formal advice. AGS has advised that "we are more than happy to discuss legal issues with your drafters prior to any formal requests for advice, and at no charge".

Referral to AGS

16 If a drafter forms the view that an issue should be referred to AGS, he or she must discuss the need for a referral with the instructors. The drafter must tell the instructors that their agency will be billed for the advice.

Who should request the advice?

17 The advice may be formally requested by either the office or the instructing agency. Sometimes it is more efficient for the office to formulate the questions to be put to AGS, but this should not prevent the agency making the request if instructing officers prefer this approach (the drafter can simply give the agency material to be included in the formal request).

18 If the request is made by the office, it must include the name of the instructing agency and the name and contact details of the instructing officers (phone numbers, and fax numbers or (for agencies on FedLink) email addresses).

What will AGS do on receiving the request?

19 When AGS receives a request for advice, AGS will write to the instructing agency about their charging approach and related matters.

Copies of certain requests and advice to be provided to Attorney-General's Department

20 Under paragraph 10A of the Legal Services Directions, agencies seeking legal advice on constitutional law issues from AGS are required to provide a copy of the request for advice to the Secretary of the Attorney-General's Department. AGS is then required to provide a copy of the advice to the Secretary.

21 If the office requests advice from AGS in relation to a constitutional law issue, it must ensure that a copy of the request is provided to the Office of Constitutional Law in the Attorney-General's Department. This can be done by emailing a copy of the request for advice to AGD.conrequests@ag.gov.au.

22 If an agency requests constitutional law advice at your request, you should advise your instructors of their obligation to provide the copy of the request to the Office of Constitutional Law in the Attorney-General's Department.

23 Further advice on this process can be found in OLSC Guidance Note 10 at www.ag.gov.au/olsc.

Part 4—Disputes between the office and instructing officers

Disputes about need for legal advice, who should pay or who should advise

24 Most instructors want legislation that is valid and effective, and will pay for any AGS advice that is necessary to achieve that. However, there will be cases in which an instructor will resist the office's advice that legal advice should be obtained on some aspect of a draft that the office thinks is necessary for the proper preparation of the draft.

Need for legal advice

25 If the dispute is about the need for legal advice at all, or the kind of advice or the form in which it is sought, the drafter's first step is to properly explain the issues to the instructors.

In general, this requirement will not be satisfied until the drafter has written to the instructors setting out clearly the legal advice that is needed, and explaining why it is needed.

Who should pay or who should advise

26 If the instructors agree about the need for legal advice but disagree about who should pay for it or who should give it, the drafter must ensure that the instructors are aware of the source of the relevant requirements:

- (a) longstanding Commonwealth practice that instructing agencies are responsible for meeting the cost of any legal advice required in the drafting process; and
- (b) the Legal Services Directions (which can be accessed through ComLaw and FOLIO Office Documents) are the source of the requirement to use AGS.

Raising the matter with the head drafter

27 If the matter is not resolved, the matter should be raised with the head drafter, who may raise it with OLSC and, if it cannot be resolved, the Attorney-General.

Part 5—Confidential AGS opinions

28 Confidential opinions classified protected and above have been removed from the AGS Opinions database. A normal search of the database will not produce any reference to these opinions. First Parliamentary Counsel has a copy of some of the affected opinions. You should see First Parliamentary Counsel if you think he or she may have a copy of an opinion that might be relevant to a drafting project you are working on.

Part 6—Giving opinions from the AGS Opinions database to instructors

29 From time to time drafters come across opinions in the AGS Opinions database that would be helpful to instructors on particular projects. The question then arises whether the office should provide a copy of the opinion to the instructors.

The basic rules

30 There are 2 basic rules:

Rule 1: The office should not give any instructor an opinion that is marked as “confidential” in the AGS Opinions database, in any circumstances.

Rule 2: The office should not give any other opinion to an instructor, except in the following cases:

- Opinions obtained by the office on its own behalf.
- Opinions obtained by or on behalf of other agencies, where the area of the agency that obtained the opinion, or on whose behalf it was obtained, agrees to it being provided. This agreement should be arranged by your instructor (although you may wish to confirm the agreement yourself).

31 Rule 2 applies even if it appears that, under the Legal Services Directions, the opinion should have been provided to the instructor's agency at the time it was obtained. Drafters should bring any of these cases to the attention of the Assistant Secretary, OLSC.

32 The reason for the rules is that we have access to the AGS Opinions database under special arrangements that have been negotiated with AGS and the Attorney-General's Department. Our access to the database is supported by an authorisation made by the Attorney-General on 29 August 1999 under subsection 55ZH(2) of the *Judiciary Act 1903*, but this authorisation does not allow disclosure by the office to other people. In any case, it would not be appropriate for the office to give other agencies copies of work done by AGS or other legal services providers without reference to the agency to whom the advice was originally given.

Alerting instructors to the existence of relevant opinions

33 Although you should not give the opinions themselves to other agencies, you may alert your instructors to the existence of a relevant opinion (including a confidential opinion) by giving them the reference number, author and title. This will make it easier for your instructors to arrange access if they wish (which should be done through AGS).

34 Paragraph 10 of the Legal Services Directions is intended to ensure that agencies administering legislation are aware of legal advice provided in the interpretation of that legislation. You should draw this to your instructors' attention if it might be relevant to their ability to access the advice you have mentioned to them. You should also point out to your instructors that if the agency that obtained the advice provides it to the instructors in accordance with the obligations under paragraph 10 of the Legal Services Directions, any legal professional privilege in the document is maintained (see subsection 55ZH(4) of the *Judiciary Act 1903*).

35 You should also advise your instructors, if necessary, that OLSC may be able to help them if they run into problems with getting access to relevant opinions.

Which opinions were obtained by the office on its own behalf?

36 The office obtains a small number of opinions on its own behalf, and instigates requests for a larger number of opinions on behalf of our clients in relation to particular drafts. Some of the latter kind of opinions are formally sought by, and provided to, the office. The fact that an opinion is addressed to the office does not therefore prove that it was obtained on behalf of the office.

37 If you are dealing with an opinion addressed to the office, you will need to determine whether the opinion was obtained by the office on its own behalf, or on behalf of an instructor.

38 For opinions obtained since 2000, it is likely that the agency that paid for the opinion is the agency that "owns" the opinion. For opinions given before 2000, or opinions for which the payer is not apparent, you need to consider the content of the opinion.

- If the opinion is addressed to the office, and was obtained for general purposes (e.g. in connection with the issue of a Drafting Direction), you may assume that it was obtained by the office on its own behalf.

- If the opinion is addressed to the office, but was obtained in connection with a particular draft, you should assume that it was obtained by the office on behalf of the agency sponsoring, or instructing on, the draft.

Opinions informing the drafter's general approach

39 Drafters routinely read AGS opinions, and absorb information about the AGS views on a whole range of legal issues that might arise in drafting legislation. There is no barrier to a drafter relying on this information in his or her drafting work—indeed, it is vital that we do so. Further, there is no barrier to a drafter advising an instructor that a drafting approach has been adopted having regard to the views of AGS.

40 However, from time to time in such circumstances, an instructor will ask to see a copy of the relevant opinion. At this point, any relevant opinion should be dealt with in accordance with this Drafting Direction.

Other matters

41 Note that staff of the Attorney-General's Department can access the AGS Opinions database (subject to an internal process for approval of access).

42 If you have any queries about this general policy, or its application in a particular case, please see the head drafter.

Part 7—Legal advice about legislation administered by another agency

43 Paragraph 10.1 of the Legal Services Directions sets out the steps that a non-corporate Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*) is to follow if it proposes to seek legal advice on the interpretation of legislation administered by another such entity. The steps include:

- providing the administering entity with a reasonable opportunity to consult on the proposal to seek advice; and
- giving the administering entity a copy of the request for advice and the advice.

44 The Australian Public Service Commission would also like corporate Commonwealth entities subject to the *Public Governance, Performance and Accountability Act 2013* to cooperate in the same way in relation to legal advice about the operation of the *Public Service Act 1999*.

45 You should bear these matters in mind in relation to any relevant advice obtained by the office. You should also advise your instructors of these matters if they arise in a drafting project you are working on.

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