

PARLIAMENTARY COUNSEL

Drafting Direction No. 4.1 Dealings with instructors

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

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Part 1—Introduction

1 This Direction deals with a number of matters relating to our dealings with instructors.

Part 2—Making contact with instructors when you receive instructions

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

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

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

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

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

Part 4—Disputes with instructors over content of drafts

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

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

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

Part 5—Senate Standing Committee for the Scrutiny of Bills

Scrutiny principles

8 The Senate Standing Committee for the Scrutiny of Bills examines all Bills against the Committee’s scrutiny principles and expects explanatory memoranda to set out reasons for any provisions that are inconsistent with those principles. The Committee monitors the number of times it comments on such provisions, and has on occasion met with OPC to discuss OPC’s role in advising instructors that such provisions should be fully explained and justified in the explanatory memorandum.

9 In June 2023, a number of OPC drafters formed a working group to consider what more OPC could be doing to ensure instructing agencies remain alert throughout the drafting process to the Committee’s expectations in relation to its scrutiny principles and to ensure these deliberations, including any departure from the scrutiny principles, are adequately explained and justified in the explanatory memorandum. The working group conducted a review of the Committee’s recent Scrutiny Digests and found that most of the Committee’s adverse comments related to matters that are either:

- (a) formally referred by OPC to other Commonwealth agencies in accordance with Drafting Direction 4.2, to ensure the matters are being systematically considered from a whole-of-government perspective; or
- (b) routinely flagged by OPC with the instructing agency in accordance with longstanding OPC practice to include in draft Bills drafter’s notes advising the instructing agency to explain and justify in the explanatory memorandum any provision the drafter is aware is likely to be of interest to the Committee.

10 While the content of explanatory materials remains the responsibility of the sponsoring agency, to assist with improving the quality of those materials, you should:

- (a) continue to use drafter’s notes to alert your instructors to any requested provisions that you are aware are likely to be of interest to the Committee and advise your instructors to set out clearly in the explanatory memorandum the reasons for such provisions; and
- (b) retain these drafter’s notes until a near final version of the draft Bill.

11 You can retain the drafter’s notes in any manner you consider appropriate (for example, throughout the body of the Bill or grouped in a single location).

12 You should include the following standard drafter’s note at the beginning of your draft (also available under the standard provisions macro) to remind instructing agencies of the Committee’s scrutiny principles and their responsibility to address scrutiny concerns in the explanatory memorandum:

[Instructors: The Senate Scrutiny of Bills Committee has issued [Guidelines](#) on provisions that raise scrutiny concerns for the Committee. When preparing your explanatory memorandum you should use the checklists in the Guidelines and ensure that any provisions likely to raise scrutiny concerns are thoroughly explained. Where possible, we will aim to draw your attention to provisions that may raise scrutiny concerns, however it

remains your responsibility to identify and keep track of possible scrutiny concerns. We suggest that you maintain a record of such issues raised throughout the drafting process.]

13 In the context of a past meeting with OPC, one member of the Committee also suggested that explanatory memoranda should more clearly identify the “mischief” being addressed by particular Bills. You may consider suggesting this to your instructors in appropriate cases.

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

General rule making powers

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

The Bill enables rules to be made which will *[insert a brief description of what the rules will do, e.g. “specify the types of products to be regulated under the framework and how those products are to be regulated”]*. Specifying these matters in rules rather than regulations accords with the Office of Parliamentary Counsel’s Drafting Direction No. 3.8 – Subordinate Legislation. That Drafting Direction provides that, if legislation is to provide for the making of legislative instruments, OPC’s starting point is that the instruments should not be regulations unless there is a good reason for regulations to be used.

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

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

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

The Drafting Direction states that matters such as compliance and enforcement, the imposition of taxes, setting amounts to be appropriated, and amendments to the text of an

Act, should be included in regulations unless there is a strong justification otherwise. The Bill does not enable the rules to provide for any of the types of matters listed. This is clarified by clause *[insert number of relevant provision]* of the Bill, which specifically prevents the rules from including these types of matters. As rules made under the Bill cannot provide for these types of matters, it is appropriate that the elements of the *[insert a general description of the new legislation, e.g. "emissions standards framework"]* be prescribed in rules rather than regulations.

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

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

16 The Senate Standing Committee for the Scrutiny of Delegated Legislation (*SDLC*) examines all legislative instruments against the Committee's scrutiny principles and expects explanatory statements to set out:

- (a) reasons for any provisions that are inconsistent with those principles; and
- (b) information about particular matters.

17 See the SDLC's [Guidelines](#) for details of the SDLC's work practices, scrutiny principles and expectations for the content of explanatory statements.

18 While the content of explanatory statements remains the responsibility of the sponsoring agency, to assist with improving the quality of those statements, you should:

- (a) continue to use drafter's notes to alert your instructors to any requested provisions that you are aware are likely to be of interest to the SDLC and advise your instructors to set out clearly in the explanatory statement the reasons for such provisions; and
- (b) retain these drafter's notes until a near final version of the draft instrument.

19 You can retain the drafter's notes in any manner you consider appropriate (for example, throughout the body of the instrument or grouped in a single location).

20 You should include the following standard drafter's note at the beginning of your draft (also available under the standard provisions macro) to remind instructing agencies of the SDLC's scrutiny principles and their responsibility to address scrutiny concerns in the explanatory statement:

[Instructors: The Senate Scrutiny of Delegated Legislation Committee has issued [Guidelines](#) on provisions that raise scrutiny concerns for the Committee. When preparing your explanatory statement you should use the checklists in the Guidelines and ensure that any provisions likely to raise scrutiny concerns are thoroughly explained. Where possible, we will aim to draw your attention to provisions that may raise scrutiny concerns, however it remains your responsibility to identify and keep track of possible scrutiny concerns. We suggest that you maintain a record of such issues raised throughout the drafting process.]

21 See also Drafting Direction No. 3.8 on Subordinate Legislation for a drafting note relating to explaining when the necessary or convenient power is being relied on.

22 You should also check the SDLC's [Index of instruments](#) to see if the SDLC has raised a concern about an instrument you have drafted. If the SDLC has raised a concern, you should contact the instructors to offer assistance in preparing the response. You should not wait for the instructors to contact you.

Part 7—Other matters relating to explanatory statements

23 Section 15J of the *Legislation Act 2003* sets out the legislative requirements that explanatory statements for legislative instruments must meet. You may consider adding a line to the standard drafters note above reminding instructors to ensure that explanatory statements comply with section 15J.

24 If you are working on multiple related instruments, it may also be useful to note that under subsection 15(4) of the *Legislation Act 2003*, a single explanatory statement may relate to one or more legislative instruments. For an example of an explanatory statement that relates to multiple instruments, see the explanatory statement for a collection of determinations of first points of entry under the *Biosecurity Act 2015* (see *Biosecurity (First Point of Entry—Port of Albany) Determination 2019*, F2019L01593).

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