

Giving written drafting instructions

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Introduction

1 This document provides guidance about giving written instructions to the Office of Parliamentary Counsel (*OPC*) for drafting Bills. (Similar considerations apply to instructions for drafting parliamentary amendments of Bills.)

2 Most of this document is devoted to a checklist of matters to cover in drafting instructions and a discussion of particular points in the checklist.

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

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

- (a) *Working with the Office of Parliamentary Counsel: A guide for clients* (the *Client Guide*), especially in paragraphs 48 to 57; and
- (b) Legislation Process courses offered by OPC.

You can get the text of the Client Guide and details of the courses from OPC's website, www.opc.gov.au (look under OPC Documents for the Guide and About OPC for courses).

Overview of drafting instructions

5 There is no single form which drafting instructions must take. The important thing is that they tell the drafters:

- (a) what has to be done;
- (b) why it has to be done;
- (c) when it has to be done by.

6 Drafting instructions are almost always given in writing, but in urgent cases, oral instructions may be sufficient. (Paragraphs 85 to 87 of the Client Guide give more information about when to give instructions in writing and when to give them orally.)

7 A reasonably common kind of Bill is a Bill that will make a number of discrete amendments to an existing Act, or to a number of existing Acts. The checklist and related discussion focus on providing drafting instructions for this kind of Bill.

8 Some aspects of the suggested approach may not be appropriate for other kinds of Bills—e.g. a Bill implementing a new legislative scheme or making major changes to an existing scheme. In that sort of case, preliminary discussions with OPC may be useful (e.g. about the general drafting approach and about how to provide the instructions) before too many policy details are settled and drafting instructions are issued. Preliminary advice on significant legislative proposals is available from the OPC client adviser assigned to your Department. (Paragraphs 70 to 74 of the Client Guide give more information about circumstances in which drafters will be available for preliminary discussions, and Part E of the Client Guide lists OPC client advisers and their telephone numbers.)

Checklist of matters to cover in drafting instructions

Proposed short title of Bill (if known):

1 Item number and possibly brief title	Use item numbers for amending Bills that implement a number of items.
2 Authority	Give details of the policy authority (including whether there are matters for which policy authority has not yet been given).
3 Legislative priority	State the priority allocated by Parliamentary Business Committee of Cabinet, or the priority for which your Minister will bid.
4 Timetable	Indicate what the timetable for the Bill is, including whether there are any matters that may affect the timetable for the Bill (for example, are consultations on the draft required, is the Bill to be prepared as an exposure draft?)
5 Background	A few short summary paragraphs.
6 Instructions	In ordinary language outline the legislative proposal.

1	Item number and possibly brief title	Use item numbers for amending Bills that implement a number of items.
7	Related proposals	For example, let the drafter know if the provision is part of a package of similar amendments.
8	Affected provisions and consequential amendments	Identify the provisions that will need to be amended, including consequential amendments.
9	Application, savings and transitional provisions	Will any be needed?
10	Legal opinions	Are there any opinions from the Australian Government Solicitor, the Department or other lawyers that are relevant to the proposal?
11	Administrative or judicial review	The Department's view on whether review is needed. Mention consultations (if any) with the Attorney-General's Department.
12	Consultations with other Departments	Have any consultations with other Departments been conducted? Are any further consultations required?
13	Commencement	Give instructions on the commencement provision.
14	Instructors	Name and phone and fax numbers for each. Also advise of any planned absences.
15	Other matters	Number the paragraphs and pages. Date the instructions. Mention if the instructions are incomplete, or are subject to possible change.

9 For amending Bills that implement a number of discrete proposals (“items”), apply this format separately to the instructions on each item.

10 If the instructions replace an earlier set of instructions, make sure this is clearly indicated.

Discussion of checklist

Checklist item 1: Item number and possibly brief title

11 Give the amendment proposal an item number—this makes discussing the proposal easier. You may also like to give each proposal a brief title (again for ease of reference). Use the item numbers and titles consistently in communications with the drafters.

Checklist item 2: Policy authority

12 The policy authority for the proposal should be specified:

- (a) Cabinet approval for major policy initiatives;
- (b) Prime Minister’s approval for minor policy;
- (c) Minister’s approval for drafting or technical matters;
- (d) First Parliamentary Counsel’s approval for statute law revision type amendments.

Include all relevant dates of approvals, Cabinet Minute numbers etc. Provide copies to OPC of all requests to the PM for approval and copies of approvals (if received). If authority has not yet been sought, indicate the type of authority that is to be sought.

13 Don't forget to provide copies of requests for approval and approvals to OPC if they are sent or received later.

Checklist item 3: Legislative priority

14 Indicate the proposal's priority as given by the Parliamentary Business Committee of Cabinet. If this has not yet been given, advise what priority is being sought and what is being done to obtain that priority.

Checklist item 4: Timetable

15 Set out the timetable for the Bill.

16 Indicate whether there are any matters that may affect the timetable for the Bill (for example, are consultations on the draft required, is the Bill to be prepared as an exposure draft?).

17 The drafter will take any such matters into account in working out with you the timetable for drafting the Bill.

Checklist item 5: Background

18 One or more brief paragraphs stating the reasons why the amendments are necessary, and what you want to achieve by the amendments. You may need to attach background papers.

19 Give examples of the problems with the existing state of affairs.

20 Any politically sensitive aspects to the proposal should be mentioned.

Checklist item 6: The instructions

21 This should be an outline in ordinary language, and in sufficient detail, of what you think should be done. Paragraphs 48 to 57 of the Client Guide explain how the level of detail in the instructions affects the work that you and the drafters need to do after you give the instructions.

22 There is no need to attempt to provide the exact words of any amendment. The reason OPC does not like to receive instructions that suggest exact words ("lay drafts") is that a lay draft does not give the drafter the background information and context to help him/her understand why the particular language was chosen. It is however helpful to identify the provisions that you think need amendment, and the type of amendment required.

23 Chapter 6 of the *Legislation Handbook* (prepared by the Department of the Prime Minister and Cabinet) sets out a number of matters that may need to be addressed. The Handbook is available at that Department's website: www.pmc.gov.au.

Checklist item 7: Related proposals

- 24 List any other proposals that relate to the main proposal.
- 25 These might be matters that have already been given effect to, are in another Bill before Parliament, are concurrent with the proposal, or are proposed for future legislative action. The related proposal might be one for another Department's legislation.

Checklist item 8: Affected provisions and consequential amendments

26 These provisions are the other provisions of either the Act being amended or other legislation which will need to be amended as a consequence of the proposed amendment. These are commonly known as consequential amendments.

27 Searches of an electronic database are a useful, but not infallible, way to find these. A thorough search may reveal problems with the main proposal, for example, that the strategy proposed in the instructions described in checklist item 6 may not work properly at each place in the Act where it is proposed to operate.

28 Paragraph 78 to 84 of the Client Guide give more information about instructing on consequential amendments.

Checklist item 9: Application, savings and transitional provisions

29 You need to consider how the transition from the current scheme to the amended scheme will be handled—will any provisions be needed to ensure that the transition occurs in the way you want?

Checklist item 10: Legal opinions

30 Any legal opinions from the Australian Government Solicitor, a Department's legal area or elsewhere should be specified and copies attached.

31 Do not assume that the drafter will be aware of relevant opinions.

Checklist item 11: Administrative or judicial review

32 If the proposal involves any decision of an administrative character, the question whether the decision is to be reviewable, and if so by whom, must be addressed.

33 Mention any consultations that you have held with the Attorney-General's Department on this issue.

Checklist item 12: Consultations with other Departments

34 Any consultations with other Departments should be indicated. For example, when and with which Departments have consultations taken place? Will any consultations happen in the future?

35 Consultations with other Departments are required when a legislative proposal impacts on another Department's legislation, or when a legislative proposal involves policy considerations for which another Department is responsible (eg. the Attorney-General's Department's responsibility for matters of legal policy such as criminal law).

Checklist item 13: Commencement

36 You need to consider when the proposed amendment should commence (remember that different amendments in the same Bill can commence at different times).

37 The main options for commencement are:

- (a) on Royal Assent;
- (b) on the day after Royal Assent;
- (c) on a specified future or past (i.e. retrospective) day;
- (d) on a day to be Proclaimed by the Governor-General (generally with a 6 month limit on the power to Proclaim);
- (e) on the commencement of a related piece of legislation.

Checklist item 14: Instructors' details

38 Nominate 2 instructors for the amendment proposal. They should be people who have sufficient knowledge of the detail of the proposal to answer the drafter's queries and to check whether drafts meet the Department's requirements.

39 It is helpful for the drafter to know of the instructors' planned absences, because the drafter can then plan his/her work knowing when the instructors will be available. (The drafter will also let the instructors know of his/her own planned absences.)

Checklist item 15: Other matters

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

41 If instructions are incomplete, or are subject to possible change, point this out in the instructions.

Where to send written drafting instructions

42 Written drafting instructions should be addressed to First Parliamentary Counsel.

43 Written drafting instructions may be sent to OPC electronically via Fedlink (the Australian Government's secure email facility). The email address for this purpose is instructions@opc.gov.au. Before sending instructions by email in this way, instructors should ensure that the email will be sent via Fedlink at a level of security appropriate for the instructions. This can be checked with the IT area of the instructors' agency or with OPC.

44 Alternatively, written drafting instructions may be delivered or sent by fax to OPC. OPC's contact details are as follows:

OPC premises MTA House
 39 Brisbane Avenue
 Barton ACT

Fax (02) 6270 1403

45 Instructions received by OPC will be acknowledged, unless they can be allocated to a drafting team immediately. In such a case the drafters will usually make contact with the instructors within a week or so. If receipt of instructions has not been acknowledged within a week, instructors should check with First Parliamentary Counsel's Executive Assistant (telephone (02) 6270 1468 or 6270 1430).

Giving notice of planned deliveries

46 To reduce security risk, OPC will not accept unsolicited or unexpected deliveries of physical items.

47 Instructors are asked to contact OPC drafters, or First Parliamentary Counsel's Executive Assistant, before sending something to OPC.

48 Unidentified deliveries left unattended at OPC's premises will be destroyed.