Australian Government

Attorney-General's Department

Office of Legislative
Drafting and Publishing

Drafting services for legislative instruments and other instruments

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Part 1 Welcome to OLDP

1.1 The Office of Legislative Drafting and Publishing drafts instruments such as Regulations, Proclamations, Rules, Ordinances, Determinations, Declarations, Orders, Guidelines and Principles. We also draft instruments such as delegations and instruments of appointment.

1.2 We administer the Federal Register of Legislative Instruments (***FRLI***), which is the electronic record of legislative instruments that have been made by the Governor-General, Ministers or Commonwealth officials, and we publish Commonwealth law on the ComLaw website (http://.comlaw.gov.au) and in hard copy.

1.3 We are a division of the Attorney-General's Department, located in Deakin, ACT. We have 3 branches which draft instruments for particular agencies, and units dealing with our registration and publishing functions. More information about what we do is set out from paragraph 2.14.

What does this document cover?

1.4 This document is a guide that explains our legislative drafting services and how we can help you with your requirements. If you have any questions about what we do, or how we can work with you to put your policy proposals into law, we're happy to discuss your requirements. There is a contact list at the end of this guide.

1.5 We know that our clients range from people who are familiar with the legislative process to people who have never encountered it before. Our aim is to make sure that everyone receives the best possible service, designed to meet their needs and also their level of familiarity with what we do.

1.6 This guide does not relate to the preparation of Acts of Parliament, Executive Council paperwork or explanatory material for legislation.

1.7 Acts are drafted by the Office of Parliamentary Counsel (http://.opc.gov.au) and special arrangements apply for their approval and drafting. The arrangements are explained in the Legislation Handbook published by the Department of Prime Minister and Cabinet and available on the Department's website (http://.dpmc.gov.au).

1.8 Executive Council paperwork and related explanatory material are prepared by the agency that is sponsoring the proposed legislation. The Executive Council Handbook is also available on the Department of Prime Minister and Cabinet website (http://.dpmc.gov.au) to explain the Council's requirements.

Part 2 What we do

What are 'instruments'?
(and what happened to delegated, subordinate and disallowable instruments?)

2.1 Parliament is the principal rule-making body of the Commonwealth. If Parliament wishes to allow a person or body other than itself to make rules about a subject, Parliament must specifically delegate to the person or body its power to make those rules.

2.2 Parliament delegates its powers by specific provisions that are included in Acts. These specific provisions often take the form of a statement like:

- *The Governor-General may make regulations prescribing matters …*
- *The Minister may declare in writing …*
- *The matter must be done in accordance with requirements determined by the Secretary …*

2.3 The Act identifies who the delegate is, the kind of instrument that the delegate is allowed to make, and what the instrument is allowed to deal with. If there is language of this kind in an Act, there is authority to prepare an instrument to deal with the matter.

2.4 The document containing those rules will be an instrument of either legislative character or administrative character. It will have a particular name (such as Regulations), but in this guide we call it an 'instrument'. Not all instruments made under a law are legislative instruments: legislative instruments have particular characteristics relating to the effect they have on people's rights and entitlements. Section 5 of the *Legislative Instruments Act 2003* explains the general concept of a legislative instrument:

> 5 Definition—a legislative instrument
>
> (1) Subject to sections 6, 7 and 9, a ***legislative instrument*** is an instrument in writing:
>
> (a) that is of a legislative character; and
>
> (b) that is or was made in the exercise of a power delegated by the Parliament.
>
> (2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:
>
> (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
>
> (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.
>
> (3) An instrument that is registered is taken, by virtue of that registration and despite anything else in this Act, to be a legislative instrument.
>
> (4) If some provisions of an instrument are of a legislative character and others are of an administrative character, the instrument is taken to be a legislative instrument for the purposes of this Act.

2.5 The Legislative Instruments Act and the *Legislative Instruments Regulations 2003* explain the concept further with examples of what are, and are not, legislative instruments.

2.6 These instruments have traditionally been called 'delegated' or 'subordinate' instruments to reflect Parliament's role as the principal rule-maker. The concepts of 'legislative' and 'administrative' instruments are newer terms that have been used in the Legislative Instruments Act.

2.7 Another traditional expression that has been superseded by the Legislative Instruments Act is a 'disallowable' instrument (an instrument that needs to be tabled in Parliament and that Parliament is able to disallow if it disagrees with the instrument). Although that expression still appears in a number of older Acts, a disallowable instrument is now treated as a legislative instrument.

2.8 If you are unsure whether Parliament has created a power to make a legislative instrument or an administrative instrument, the Australian Government Solicitor is able to help you work out the character of the instrument (http://.ags.gov.au).

The quality and standard of instruments

2.9 The volume and importance of legislation that has been delegated by Parliament increase each year. Instruments are now used to deal with many complex and high-profile policy matters that would have been included in Acts not long ago. This change has happened because of the limitations on Parliamentary time available for the consideration of legislation and the preference of many agencies for using instruments that can be amended more quickly than Acts.

2.10 These instruments often have consequences for business or the general public that are significant enough to justify using the services of a professional drafter to make them as clear and readable as possible.

2.11 Successive governments have insisted that both Acts and instruments must be prepared to the highest possible standards of clarity, legal effectiveness and usefulness to the people whose rights and duties are affected by those laws. Section 16 of the Legislative Instruments Act describes this policy:

> 16 Measures to achieve high drafting standards for legislative instruments
>
> (1) To encourage high standards in the drafting of legislative instruments, the Secretary [of the Attorney-General's Department] must cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments.
>
> (2) The steps referred to in subsection (1) may include, but are not limited to:
>
> (a) undertaking or supervising the drafting of legislative instruments; and
>
> (b) scrutinising preliminary drafts of legislative instruments; and
>
> (c) providing advice concerning the drafting of legislative instruments; and

(d) providing training in drafting and matters related to drafting to officers and employees of other Departments or agencies; and

(e) arranging the temporary secondment to other Departments or agencies of APS employees performing duties in the Department; and

(f) providing drafting precedents to officers and employees of other Departments or agencies.

(3) The Secretary must also cause steps to be taken:

(a) to prevent the inappropriate use of gender-specific language in legislative instruments; and

(b) to advise rule-makers of legislative instruments that have already been made if those legislative instruments make inappropriate use of such language; and

(c) to notify both Houses of the Parliament about any occasion when a rule-maker is advised under paragraph (b).

2.12 A government's ability to achieve its objectives will be reduced whenever its laws and other rules are ambiguous or unusable. Governments continue to be well aware of the public criticism that laws are too complicated and too hard to use, and it's part of OLDP's legal obligations to find ways of making legislation clearer and more user-friendly.

2.13 We prepare drafts using design and plain language policies that deal with the presentation and clarity of instruments.

Where OLDP fits in

2.14 OLDP is available to draft instruments that are required by any Commonwealth agency.

2.15 OLDP was established in 1990 (as the Office of Legislative Drafting) to draft instruments for all government agencies. The Office was drawn from a unit in the Attorney-General's Department that dealt with a number of legal responsibilities so that it could concentrate on drafting instruments.

2.16 We became the Office of Legislative Drafting and Publishing in 2005 to reflect our registration and publication responsibilities under the Legislative Instruments Act.

2.17 OLDP's drafting role was defined in 1997, when the Commonwealth government accepted the Logan Report (the *Report of the Review of the Attorney-General's Legal Practice*). The Logan Report made recommendations to clarify how the drafting of instruments should be done and the extent to which agencies could make their own arrangements for drafting services. The main outcomes of the Report were:

- OLDP was given the sole responsibility for drafting Regulations, Proclamations and other legislative and administrative instruments that are made by the Governor-General. These instruments are regarded as core government instruments requiring a consistency of preparation and continuity of drafting expertise that comes from having a sole provider of drafting services located within the government.

This work is funded from the OLDP budget and is provided at no charge to the instructing agency.

We describe this as ***tied work***.

- For drafting other legislative and administrative instruments, the agency administering the instrument decides whether to draft the instrument itself or to engage someone to do the drafting. Although many of these instruments are as important as instruments submitted to the Governor-General, the decision not to present an instrument to the Governor-General takes it outside the concept of core government business and allows the agency to choose how to undertake the drafting.

  Under the government's user-pays principles, if the instructing agency chooses to use a provider from outside the agency it will be required to pay the provider for the drafting. We are happy to explain our charging rates on request.

  We describe this as ***discretionary work*** or ***choice-and-charge work***.

2.18 So an agency must use OLDP for the drafting of any instrument that will be made by the Governor-General. The agency can choose how other instruments are to be drafted. It may draft the instrument itself, ask OLDP to draft it, or ask another provider to draft it.

2.19 OLDP's drafters are all lawyers who have been recruited from a number of legal backgrounds, including a substantial number of drafters who have previously worked in agencies in policy development, in-house legal services or giving drafting instructions. This gives us an understanding of the client's responsibilities, from the client's perspective, that helps us to prepare instruments that meet your requirements and the objectives of our Charter (which is set out at the end of this guide).

Priority-setting in OLDP

2.20 OLDP regularly writes to all agencies asking them to identify their forthcoming drafting requirements and the priority for each project. We use the responses to help us to set drafting priorities that accord with this whole-of-government legislative program.

2.21 When OLDP receives instructions for drafting, we may need to discuss with you the timeframes for drafting the matter and its priority.

Part 3 The drafting process

Identifying the issues

3.01 Drafting is usually required because of:

- the passage of a new Act, or the amendment of an existing Act, that introduces instrument-making powers; or
- the need to amend an existing instrument, or create a new instrument, to introduce a change of agency policy; or
- the need to change an existing instrument to remove or update old content.

3.02 In these cases, your agency has probably identified the issues that need to be addressed in a drafting project, and may have ideas about how to solve them. We are happy to provide any help you may need to clarify any of these details and to see how (or whether) particular options are the most effective ones for you.

3.03 We are also happy to discuss a project if the issues don't seem to you to be clear enough. One of the reasons for having a legally-trained drafting office separate from the daily working of agencies is to give us an opportunity to see problems from a different perspective, and with legal and problem-solving knowledge that can identify solutions or opportunities that may not be as visible from other perspectives.

3.04 The timeline for drafting an instrument can be tight, especially if the drafting is connected with the passage of an Act or a pre-planned target date. Early consultation with us can help to avoid potential problems and a last-minute rush to meet the deadline.

3.05 We encourage early contact with us to give the drafting process the best chance of running smoothly for you.

3.06 Some of the issues that may arise as part of your project are unlikely to have been major issues in the policy development stage, but they are important issues for Commonwealth legal policy. They are mentioned in the drafter's checklist at the end of this guide, and it is part of our drafting service to work with you to make sure that they have been covered properly.

The instructor

3.07 The instructor's role in the drafting process is:

- to develop comprehensive policy which can be expressed as drafting instructions; and
- to prepare drafting instructions and to explain them to the drafter; and
- to examine drafts; and
- to provide comments on drafts; and

- to review the underlying policy supporting the legislation to decide whether the policy is still appropriate.

3.08 Being familiar with the role, and performing it efficiently, will make a significant contribution to the legislation process:

- It will contribute to the production of a good quality product.

  The instrument will give effect to the policy in a satisfactory way, and it will be well organised and clearly expressed. Unclear instructions or careless checking of drafts can have a significant detrimental effect on quality and can result in a lot of time being wasted.

- It will contribute to meeting the Government's legislation program.

  If the drafting process proceeds efficiently, there is then more time to draft other instruments that the Government wants drafted.

- It will give sufficient time for further policy development because policy changes are often needed to respond to issues that arise during drafting.

- It will contribute to a smoother, more efficient process that is less stressful for all concerned.

Agency approval

3.09 The drafting of a legislative instrument requires approval from the Minister or the head of a non-Departmental agency. This approval should be obtained before drafting instructions are issued: although we can start drafting while approval is being sought, doing work on a proposal that is rejected by the Minister or agency head is not an efficient use of our combined resources.

3.10 If you have any expectation that your Minister or agency head may not agree with a drafting proposal, it would be prudent not to start the drafting process. We draft for a number of agencies at the same time, so setting priorities is an important part of our work. It is important for us to be able to set appropriate priorities so that all Commonwealth agencies can progress their legislation as efficiently as possible.

3.11 Also, if your drafting project needs to depart substantially from the original proposal that was approved, it would be prudent to keep your Minister or agency head updated. On occasions, projects that have been presented without adequate advance notice of this kind have been rejected or delayed because the final instrument doesn't match the original approved proposal.

3.12 Drafting legislative and administrative instruments does not need Cabinet approval or the level of formal documentation and briefing that is required for Acts. This is done for Parliamentary legislation because of the pressure on Parliament's time and on the priorities that Cabinet sets for the Office of Parliamentary Counsel. The drafting of legislative and administrative instruments does not raise the same issues, and drafting can be approved by an in-house briefing to the Minister or agency head that complies with your agency's procedures.

When should you send drafting instructions?

3.13 It's time to prepare drafting instructions when you feel that:

- you know why you want to have the instrument made; and
- you know where the power to make the legislation is located, and what it does (and doesn't) allow you to do; and
- you have workable ideas that you want to include in the instrument to give effect to your policy; and
- you have obtained approval from the Minister or agency head; and
- you have a reasonable estimate of the timetable for completing the instrument.

What do drafting instructions have to look like?

3.14 This is one of the most common questions we are asked. In our experience, the best way to tell us your story, with as much context and background as is reasonable in your circumstances, is to address a number of themes as explained in the following list.

3.15 Using a list allows us to bring together two key parts of the relationship between an instructor and a drafter:

- The policy issues have been debated repeatedly by the time you prepare drafting instructions, and you know your story as well as possible because it has been told, retold, debated and refined through a number of in-house processes and possibly external consultation as well. We need to learn as much of that story as we can in the time available.
- OLDP drafters have extensive training in a number of legal and policy areas relevant to legislative drafting, but we will not have the same background in your specific project as you have. To help us understand your requirements as fully as possible, it will help if you can give us more background and context than was probably required between the participants in the policy process. Without that extra help, we will probably take more of your time than necessary getting up to speed about the project.

We recommend the use of the list because instructions which address the items in the list are likely to tell your story more clearly than instructions which don't. However, if you think that another form of instructing may tell the story even more clearly, we would be happy to discuss it with you before the instructions are sent to us.

Do instructions always have to be in writing?

3.16 Initial instructions, and long and complex instructions, should always be in writing.

3.17 The drafter will be able to use the written instructions, and any background or context material in the instructions, to make sure that he or she is understanding your requirements. Oral briefings make it harder for the drafter to keep this information clearly in mind.

3.18 However, it is not necessary to put minor comments or corrections in writing. We are happy to receive that information by phone to save time.

Matters which should be covered in instructions

General background	A short summary of what the agency wishes to achieve, and why there is a need for the legislation.
Timetable	A clear and realistic explanation of the drafting timetable, including recognition of any issues that may affect the time (for example, future consultations). If a deadline has been chosen on the basis of a pre-arranged media release, or another event, about which we have not been consulted, we cannot guarantee to meet the deadline.
Instructions	An explanation, in ordinary language, of what the agency wishes to have drafted. The instructions should identify the power in the Act for making the instrument that is being relied on. The instructions should identify existing provisions that will be affected by the new legislation, including consequential amendments of other legislation. The instructions should also assume that the drafter is not a policy expert, and has not participated in the development of the policy. In-house shorthand should be explained clearly (or avoided), to avoid the instructor needing to translate it to the drafter. The legal or practical consequences of the proposals should also be identified, to avoid the drafter revisiting settled material.

Examples in other legislation	If you want to refer to other legislation as an example of the outcome you want to achieve, please draw it to our attention rather than quoting the text in the instructions. (see paragraph 3.23)
Related or future projects	If the project is the first part of a larger one, or relates to other instructions which the Office has already received, an explanation of the relationship will assist in coordination of the drafting.
Application, savings or transitional provisions	Please advise if these provisions are needed. They are often complex to draft, and instructors should be aware that they can add considerably to the drafting time.
Legal background	Please advise if there are court decisions, or advice from the Australian Government Solicitor or elsewhere about the reasons for the legislation or possible consequences.
Administrative or judicial review	The Attorney-General's Department is responsible for policy development and advice to the government about administrative and judicial review. Our specialist policy areas will need to scrutinise and agree to legislative proposals that affect review rights. Early contact with those areas, preferably while instructions are being prepared, will save time later in the drafting project.
Criminal law issues	The Attorney-General's Department is also responsible for policy development and advice about criminal law, including the creation of criminal offences and appropriate penalties. Early contact will ensure that offences and penalties are drafted in a way which will meet the requirements of the government and the Parliament.
Privacy issues	If the policy involves the disclosure or use of personal information, advice from the Attorney-General's Department should be sought as soon as possible.
Consultation	If consultation with government agencies, client groups or the public is required or appropriate, the instructions should advise whether the consultation has been carried out.
Commencement	The commencement date needs to be considered carefully, to ensure that enough time is available to finalise the draft and implement any related administrative procedures and for any affected groups to be sufficiently aware of new obligations, rights or procedures.

Instructors	Contact details are required for the instructors, and advice if any of them will be unavailable for any period.
Other matters	We need advice about any further instructions that are to be provided as part of the matter or any related projects. As well, clear numbering of pages and paragraphs in instructions can help to facilitate discussions with instructors by allowing quick cross-referencing.

Is it better to write instructions that include a suggested version of the final provision?

3.19 For the reasons set out below, we ask agencies not to prepare the text of provisions. It often takes more time for us to work out why the agency chose particular words and options (and rejected others) than it would take us to draft a provision based on more general instructions; and taking that time is an avoidable drain on everyone's time.

3.20 In some cases, the description of what you wish to achieve can almost write itself into the final instrument. It may be a straightforward alteration of a specific thing (for example, changing a specified fee, address or name) or the addition of new material that is very similar to existing material (adding a new fee that is similar to an existing one). In other cases, it may be that the ideas you have to deal with an issue can easily form the basis of legislative provisions because the ideas start, proceed and finish in a clear and uncomplicated way. In other cases, an agency is usually better placed than we are to provide an accurate and user-focussed description of important technical matters such as scientific processes and industrial systems.

3.21 However, this isn't the case as often as may be thought. The more complicated the problem or the policy, the more likely it is that there will be multiple options available to deal with it and multiple consequences to be covered. While you will choose a particular option as your preferred position, our responsibility is to make sure that the option is the most effective one for both your needs and the Commonwealth's legal obligations. It is harder to do that if we don't have some context as to why other options were not appropriate, and if we don't know whether the legal implications of the options were considered thoroughly.

Examples

Changing the amount of an application fee seems straightforward as an idea, but the drafter will need to consider whether arrangements have to be made to cover applications that have been made but not yet completed. Which application fee should be paid for an application that is in progress when the change takes effect?

Changing the content of an application form may also seem straightforward, but there may be problems if existing applicants have not provided the details required by the new version of the form. If the new decision-making rules rely on information that was not required by the old form, the legal status of the old form and the old application are likely to be in doubt unless clear arrangements are made.

3.22 If we believe that a particular option may not be the most effective one, our responsibility is to discuss it with you and to review what can be done. If the drafting instructions don't give us background about the choice of options then we risk taking your time to re-cover ground that you consider settled. Therefore, the more comprehensive the instructions, the easier it is for us to discuss the drafting with you quickly and efficiently.

3.23 A particular problem is referring to other legislation as an example of the outcome you want to achieve. While we are happy to consider the other legislation, it is not efficient to simply reproduce its text as an instruction. The other legislation would have been drafted in different circumstances, and may include material that is either unsuited to the new project or that is no longer consistent with Commonwealth legal or drafting policy. If you want to refer us to an example that has influenced your thinking, please draw it to our attention as part of preparing instructions that follow the list after paragraph 3.18.

Part 4 What is drafting?

4.01 Our job is to understand the issues in your drafting instructions as quickly and as well as we can, and to prepare legislation that meets your requirements — while also meeting our obligation to you and the government to draft legislation that is clear, legally sound and consistent with the government's legal policy.

4.02 We have set out our role in our Office Charter, which is set out at the end of this guide.

4.03 In this way, we work for your agency while working under the government's requirement to comply with whole-of-government policy about the content, design and presentation of legislation.

The drafter's role

4.04 The drafter prepares a draft on the basis of your instructions and with the help of any questions and discussions that may be necessary to clarify his or her understanding or identify problems or issues. The checklist at the end of this guide identifies some of the legal and policy issues that the drafter might discuss, but the drafter may also have questions about the meaning of parts of your policy or whether the components of the policy fit together logically or as efficiently as possible.

4.05 The process of putting the words onto paper is a combination of the drafter's knowledge of your requirements, experience in designing documents to deliver the message effectively, analytical skill to identify issues that may not have been recognised during policy development, and ability to write clear and user-friendly statements of the law. We need to emphasise that we understand that the ideas in your instructions come from your policy development process, and it isn't our job to rewrite your policy. However, one of the services we offer is an ability to look at the policy from an independent position and suggest different ways of expressing the proposals as clearly as possible.

4.06 There will usually be one sole or main drafter for the project, unless it is such a large project that it needs a drafting team. Having one drafter as your principal contact is intended to build a consistent working relationship with you and reduce the risk of misunderstandings caused by drafters moving in and out of the project.

4.07 However, each draft is checked by a second, experienced, drafter before being given to you, as a quality control measure that we call settling. This step picks up issues such as typographical errors and mistakes that may, for example, be made when drafting at speed, and it also gives the drafter the ability to check whether he or she has come up with the most effective solutions. It can be a frustration at times when you are waiting for a draft during this settling process, but we emphasise its value for quality control: it would be more frustrating for you to be given a draft only to receive a replacement version with better solutions a short while later.

4.08 The drafter is likely to give you a series of drafts over time to reach an agreed form of the instrument. The drafter will also be happy to use the forms of communication that work best for you, from written correspondence to meetings, telephone conferences, consultation drafts and so on. The drafter will discuss the preferable communication system with you at the start of drafting.

Drafting plans

4.09 The drafter may feel it is appropriate to develop what we call a drafting plan, which is a document outlining how he or she expects the final draft to develop and showing where possible problems may exist. It is an analytical tool used by the drafter to ensure that he or she understands your instructions correctly.

4.10 A drafting plan can be useful to show you, in the project's early stages, how the draft will be laid out in logical sequence and to give you some familiarity with the structure of the document before the formal draft is completed. A drafting plan lists the instructions one by one, analyses what is required, identifies and explains any issues and possible solutions, and discusses any related or consequential issues that may need to be addressed.

4.11 The preparation of a drafting plan may involve detailed discussions with the drafter, in order to resolve as many issues as possible before the draft is completed. The time invested in the discussions and preparing the plan will more than pay off if it takes fewer drafts (sometimes, substantially fewer drafts) to achieve the results you want.

How long does it take?

4.12 The time taken to prepare a first draft, and then subsequent drafts if necessary, depends on a number of factors.

4.13 As noted above, our drafters are usually working on a number of projects at the same time, so we need to prioritise our workload. The busiest drafting periods are May–June (for the end of the financial year) and October–December (for the end of the calendar and Parliamentary years), and priority is given strictly to the completion of instruments over the preparation of drafts. We understand the competing needs for consultations with stakeholders and other timing issues, but the need to finalise instruments comes first.

4.14 The timing of drafting also depends directly on the complexity of the policy and the instructions on which we are working. Complex policy will usually result in complex legislation, which requires the appropriate period of time to put into legislative form.

4.15 Taking these matters into account, we do not guarantee to be able to complete any draft within 8 weeks.

4.16 While we will make every effort to complete drafts as quickly as practicable, you should not assume that we are in a position to meet the timing you want — particularly if you haven't discussed that timetable with us in advance of issuing your instructions. We regret any inconvenience this may cause, but it's an unavoidable part of our workload.

What to look for when you receive a draft

4.17 When examining a draft:

- check that it gives effect to the policy, as proposed in the instructions;
- check that you understand the draft — if there is any part that you do not understand, raise it with the drafter;
- check whether any additional policy authority will be needed;
- consider any questions raised by the drafter;
- check the draft for any inconsistencies, grammatical errors, typographical errors etc; and
- get back to the drafter with comments.

The drafter's checklist: some of the things that OLDP drafters think about while drafting

Is there a deadline for the first draft?

If the instructions don't identify a deadline, the drafter will ask you as part of the phone call making contact with you.

What is the deadline for the project?

The deadline includes the time needed to submit the instrument to the maker (for example, the time needed to obtain the Minister's signature and/or the deadline for submitting regulations to the Federal Executive Council). It also includes the time required for registering the final instrument if registration is required under the Legislative Instruments Act.

Does the agency have the authority, under Administrative Arrangements Order, to sponsor the instrument?

If the agency is preparing the instrument on behalf of another agency, we will require advice that the other agency has agreed to the drafting.

Have any special statutory preconditions been met?

For example, the empowering Act may require consultation with industry before an instrument can be made.

Is the instrument necessary, or is there already a solution in the agency's legislation? Could there be a non-legislative solution?

Do the Constitution and the parent Act allow the instrument to be made?

We check the parent Act carefully to make sure that the instrument doesn't fail because there's no power to make it, or a particular part of it.

Is the subject matter appropriate for delegated legislation? Should the content have been debated by Parliament as part of a proposed Act?

The Senate Standing Committee for the Scrutiny of Bills may have considered this issue in general, but the Senate Standing Committee on Regulations and Ordinances will also ask this question when it examines any legislative instruments made under the Act.

Is there other legislation, or draft legislation, that may affect the instrument?

This covers Bills being drafted by OPC and other instruments that may be drafted by OLDP or by another drafter (such as the agency in-house).

What are the arrangements for the commencement provision:

- Does it comply with the rules in section 12 of the Legislative Instruments Act about how to describe the commencement?

- Is the commencement intended to be retrospective, which may violate subsection 12 (2) of that Act?

Subsection 12 (2) prohibits a retrospective commencement provision that would have a detrimental effect on rights or obligations of the public.

If a retrospective commencement does not violate subsection 12 (2), the agency is likely to need written advice of this. The Federal Executive Council and the Senate Standing Committee on Regulations and Ordinances require the advice to be obtained.

Is the instrument being made before the commencement of an Act of Parliament?

Section 4 of the Acts Interpretation Act 1901 allows for the making of instruments in the period between the giving of Royal Assent to an Act and the commencement of the Act, but only under specific conditions.

Is the instrument expected to refer to, or adopt, information contained in another document? Is that document a legislative instrument?

For a legislative instrument, section 14 of the Legislative Instruments Act limits the ability to refer to material contained in another document, rather than including the material in the text of the instrument itself. This ensures that if an instrument refers to other material, the text of that material can be located.

Is the instrument expected to make entitlements or liabilities dependent on either objective criteria or a reviewable administrative decision?

The Commonwealth's administrative law policy expects decisions affecting rights or entitlements to be made in accordance with objective criteria rather than subjective discretions whenever possible. In addition, decisions should be subject to review by an independent body (such as the Administrative Appeals Tribunal).

The Civil Justice Division of the Attorney-General's Department administers this policy, and is available to discuss your project if decisions and review rights are involved. The Division also reviews draft legislation prepared by OLDP to ensure that it is consistent with Commonwealth policy.

Could the instrument raise issues which the Senate Standing Committee on Regulations and Ordinances reviews under its 4 principles?

*The Senate Committee reviews legislative instruments to ensure that they are consistent with the Committee's principles for the fairness and quality of instruments, as explained on the Committee's website (*http://.aph.gov.au/senate/committee/regord_ctte/index.htm*).*

Is the instrument expected to contain offence provisions?

The Commonwealth's criminal law policy requires offences and penalties to be clear, consistent and reasonable.

The Criminal Justice Division of the Attorney-General's Department administers this policy, and is available to discuss your project if decisions and review rights are involved. The Division also reviews draft legislation prepared by OLDP to ensure that it is consistent with Commonwealth policy.

Is the instrument expected to deal with personal information? Does it breach the Privacy Principles?

The Commonwealth's policy on obtaining and using personal information is set out in the Privacy Act 1988 and the related Information Privacy Principles.

The Information Law and Human Rights Division of the Attorney-General's Department administers this policy, and is available to discuss your project if privacy concerns exist. The Division also reviews draft legislation prepared by OLDP to ensure that it is consistent with Commonwealth policy.

Does the instrument provide for the delegation of legislative, or administrative, power? Is the delegation permitted?

If Parliament delegates a law-making power to the Governor-General or a Minister, it is not possible to subdelegate that power unless Parliament has specifically authorised it. An unauthorised subdelegation is invalid.

If the proposed instrument varies an existing delegable power, it will also be necessary to check whether this will affect any existing delegations.

Are there any treaties or government agreements that may affect the instrument?

It would be appropriate, where possible, to refer to the treaty or agreement in the instrument.

Are consequential, saving or transitional provisions needed?

Consequential and transitional material requires careful consideration during drafting to ensure that it will be legally effective and that it will cover all of your requirements.

Is the scope of any delegation power clear, and confined to delegates who have competence to exercise the delegated power competently and under scrutiny of the person who makes the delegation?

A provision that delegates a power to "any person" is likely to attract criticism because it is not clear how a delegate will be chosen and whether the delegate has the appropriate competence to exercise the delegation.

A provision that delegates a power to a person who cannot be adequately supervised by the person giving the delegation (for example, a person who is not an APS employee) may attract criticism because there is no obvious way in which the delegate can be supervised.

OLDP Charter

The Office of Legislative Drafting and Publishing drafts subordinate legislation, gives related advice and provides the public with ready access to the law

Our clients and stakeholders

- Cabinet
- Ministers
- Departments and other agencies
- Federal Courts
- All other users of our products and services
- The general community.

Our roles

- To draft subordinate legislation for Commonwealth agencies
- To provide related drafting and advisory services
- To provide ready public access to legislative and related material.

In order to perform these roles effectively, we:

- train ourselves as specialists in the skills necessary to perform our roles
- take opportunities to build productive relationships with Commonwealth agencies and other clients to improve our understanding of their needs and our ability to provide timely and effective services.

Our services

Working in partnership with our clients to provide high-quality legislation

We aim to provide our clients with instruments and advisory services of the highest standard. In particular, we assist our Government clients to develop and meet the policy objectives determined by the Government by producing instruments that:

- meet policy objectives in a legally effective and cost-efficient way
- are drafted in plain language
- are accurate and as easy to read and understand as possible
- otherwise meet best practice drafting, legal and parliamentary standards.

We provide our Government clients with advice and support to assist them to prepare their policy and implement their legislation.

Providing ready public access to the law

We provide ready public access to legislative and related materials by ensuring that:

- Commonwealth delegated legislation is made available to the public through efficient and effective tabling, gazettal and publication services
- comprehensive, easy-to-understand and up-to-date information is available about when Commonwealth legislation is made and where it is available
- Commonwealth legislation is readily available in a fully up-to-date consolidated form
- our databases of legislation and related documents are maintained and strategically developed in an effective and cost-efficient way.

We aim to provide our services in ways that:

- are responsive to our clients' needs, and fully meet them
- are proactive, timely, comprehensive and professional.

Our working environment

We aim to provide a challenging, flexible, rewarding and safe working environment for our staff that promotes both:

- continuous improvement in the standard of our services
- career, professional and personal development for all staff members.

In that working environment, we are committed to:

- the highest standards of client service, continuous improvement, and innovation
- working in a collaborative way with our colleagues in other parts of the Department, and contributing to the Department's success
- encouraging team-based and cooperative approaches to work
- promoting a whole-of-Office attitude
- maximising staff involvement in, and responsibility for, creating and maintaining a healthy and safe working environment
- increasing staff commitment to, involvement in and responsibility for the Office's success
- putting our mutual respect and support principles into practice.

Our mutual respect and support principles

- Recognise each team member as an individual, and respect the different contributions each person makes
- Listen to the views and suggestions of team members
- Don't take team members for granted
- Respect the feelings of others
- Give constructive and positive feedback on the work of team members
- Be accessible and supportive to team members
- Behave professionally
- Allocate workload and work level responsibility as evenly as possible taking into account the level of each team member
- Acknowledge a job well done
- Be courteous and remember to say 'thank you'
- Give credit where it is due.

Contact us

OLDP

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Department of Communications, Information Technology and the Arts
- *Australian Communications and Media Authority*

Department of Defence

Department of Education, Science and Training

Department of Employment and Workplace Relations
- *Australian Industrial Relations Commission*
- *Comcare*

Department of Finance and Administration
- *Australian Electoral Commission*
- *ComSuper*

Department of Foreign Affairs and Trade

Department of Immigration and Citizenship

Department of Industry, Tourism and Resources
- *Austrade*
- *IP Australia*

Department of the Prime Minister and Cabinet
- *Australian Public Service Commission*

Department of the Treasury
- *ACCC*
- *Australian Bureau of Statistics*
- *Royal Australian Mint*
- *Perth Mint*

Department of Veterans' Affairs

Australian Customs Service

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Department of Transport and Regional Services
- *National Roads Transport Commission*
- *Civil Aviation Safety Authority*
- *Airservices Australia*
- *Australian Maritime Safety Authority*
- *National Capital Authority*

Department of Agriculture, Fisheries and Forestry
- *Australian Fisheries Management Authority)*
- *AQIS (Australian Quarantine and Inspection Service)*
- *Forum Fisheries Agency*

Department of Employment and Workplace Relations
- *Maritime Policy only*

Department of Environment and Heritage
- *Environment Australia (Central Office)*
- *Environment Australia (Antarctic Division)*
- *Environment Australia (Biodiversity Group)*
- *Environment Australia (Biodiversity Group, Strategic Plan & Mgt)*
- *Environment Protection Agency*
- *Great Barrier Reef Marine Park Authority*
- *Office of Renewable Energy Review*

Pacific Islands Forum

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Attorney-General's Department (other than the Australian Customs Service)

Department of Family and Community Services
- *Office of Indigenous Policy Coordination*
- *Office of the Registrar of Aboriginal Corporations*

Department of Health and Ageing
- *Food Standards Australia New Zealand*
- *Therapeutic Goods Administration*

Department of Human Services

Centrelink

Courts of Federal jurisdiction