

# The Australian Approach in the New Drafting Environment

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[First draft—not to be quoted without author’s permission].....	I
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<b>Part 1—Introduction and background</b> .....	1
Introduction—the new drafting environment .....	1
Tight deadlines .....	1
Less-experienced instructors .....	1
Use of plain language assumed .....	1
Increased responsibility for the state of the statute book.....	1
Electronic form of legislation is significant.....	2
“Politicisation” of the drafting process.....	2
Retention of drafters is more difficult than recruitment .....	2
Background.....	2
Australasian drafting offices.....	3
Office structures—how do drafters work? .....	3
Office structures—documentation of drafting style and practices.....	3
Office mission statements and outcomes.....	4
The federal Office of Parliamentary Counsel .....	4
<b>Part 2—Changes in drafting practices</b> .....	4
Examples .....	4
Implementing changes in drafting practices—a spectrum of possibilities.....	5
Consistency and standardisation in OPC—the fundamental premises .....	6
Consistency makes life easier for users in general .....	6
Consistency in electronic formats makes life easier for users of electronic versions.....	6
Consistency in electronic formats may permit automatic consolidations.....	7
Standardisation frees drafters to focus on problems that don’t have easy answers .....	7
Standardisation furthers the application of best practice .....	7
The OPC model for implementing changes in drafting practices .....	8
An idea .....	8
A written proposal.....	8
Consultation.....	9
The decision .....	10
Implementation.....	10
Promulgating the decision.....	10
Monitoring and enforcing the decision.....	11
A special case—diagrams .....	12

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Comments on the process .....	14
Not all ideas survive .....	14
Not all proposals achieve consensus .....	14
Successful implementation doesn't require consensus .....	15
Improved drafting practices v reduced productivity .....	15
Improved drafting practices v reduced independence for drafters .....	16
<b>Part 3—Recruitment and training</b> .....	16
Recruitment .....	16
Retention .....	18
Training .....	18
On-the-job training .....	18
Other training resources .....	19
Accelerated training .....	20
<b>Part 4—Other roles in the drafting process</b> .....	21
Editors .....	21
Translators .....	21
Instructing officials .....	22
Departmental legal advisers .....	22
Ministerial staff .....	23
Ministers and other members of Parliament .....	23
<b>Part 5—Conclusions</b> .....	24
<b>Attachment A—Background information</b> .....	26
Australasian drafting offices .....	26
Office structures and processes (OPC) .....	26
Office outcomes (OPC) .....	27
<b>Attachment B—Significant changes in drafting practices</b> .....	29
New format for Bills .....	29
The approach .....	29
The process of developing the approach .....	29
Asterisking .....	30
The approach .....	30
The process of developing the approach .....	34
Commencement provisions .....	36
The approach .....	36
The process of developing the approach .....	38
Outline and overview provisions .....	39
<b>Attachment C—Office Procedural Circular No. 70 Drafting-related matters—</b>	
<b>Compliance with OPC rules—Change-management processes</b> .....	42
Introduction .....	43
Status of OPC drafting and formatting rules and practices .....	43
The basic rule .....	43
Exemption from particular rules for particular cases .....	44
The change-management process .....	44
Not all proposals will proceed to implementation .....	45
Process won't be identical for every proposal .....	45
Responsibility of proponents of change .....	46
Documentation of change to include explanations .....	47
<b>Attachment A—Background to development/documentation of change-</b>	
<b>management processes</b> .....	48
1 Why is it necessary to have documented and centralised control over various	
aspects of Bills drafting? .....	48
Benefits .....	48
Disadvantages .....	49
2 How can I work out why OPC has a rule about a drafting or formatting matter?	
.....	49
Why do we have a rule at all? .....	49

Why do we have this particular rule? .....	49
How to find out .....	50
..why there is a rule at all .....	50
..why there is a particular rule.....	50
3 What happens if drafters ignore the rules to deal with particular cases? .....	51
4 How does the change-management process as described in the Office Procedural Circular affect OPC's operations? .....	52
Benefits.....	52
Disadvantages.....	52
<b>Attachment D—Results of checking macros.....</b>	<b>54</b>



## **Part 1—Introduction and background**

### **Introduction—the new drafting environment**

1 In the paper I shall outline some important aspects of how Australian drafting offices operate currently in what has been referred to as “the new drafting environment”. To start with, it may be useful to reflect on the characteristics of “the new drafting environment”. These are the characteristics I would nominate for the Australian environment; I suspect that the Canadian environment has many similarities, and a few differences.

### **Tight deadlines**

2 All drafting is done in too much of a hurry. This makes it increasingly important to have good internal systems for any necessary research, and for the production of Bills.

### **Less-experienced instructors**

3 Instructors are less experienced in legislative projects. In some cases, projects do not progress at all until drafters are involved. In particular, instructors often have no understanding of what the drafting process involves and how long it is likely to take.

### **Use of plain language assumed**

4 There is an assumption that legislation will be written in relatively plain language, and that we will do our best to make it clear and user-friendly. While not everyone accepts that we always succeed in these aims, there is a general acceptance that we are trying.

### **Increased responsibility for the state of the statute book**

5 In my office at least, we have accepted more responsibility for the state of the statute book as a whole.<sup>1</sup>

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<sup>1</sup> In the context of a disposition among governments to outsource as much work as possible, the level of responsibility for the state of the statute book taken by a drafting office may have consequences for the continued existence of the office.

### **Electronic form of legislation is significant**

6 The electronic form of legislation is highly significant, because of its impact on the publication of legislation and public access to legislation.

### **“Politicisation” of the drafting process**

7 The drafting process increasingly has a seriously political element (quite apart from the obvious fact that legislation is about implementing government policy). Recent cases in which Bills have been titled to reflect particular political perspectives have been the subject of comment<sup>2</sup>.

### **Retention of drafters is more difficult than recruitment**

8 While recruitment of talented lawyers to train as legislative drafters is not too difficult, it is increasingly difficult to retain trained legislative drafters for extended periods. In particular, many recruits belonging to the so-called “generation X” are disinclined to contemplate devoting the whole of a 35-year career to legislative drafting.

9 Against that background, I will talk about our approach to implementing innovations in drafting practices, recruitment, training and retention in a drafting office, and the contribution of those other than drafters to the development of legislation.

### **Background**

10 In discussing the Australian approach to change and innovation in drafting, it is useful to have some background information about the context in which Australian drafters work. Some background information can be stated briefly. More information on these matters is at Attachment A.

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<sup>2</sup> Graeme Orr, ‘Names Without Frontiers: Legislative Titles and Sloganeering’ (2000) 21 Stat. LR 188; Graeme Orr, ‘From Slogans to Puns: Australian Legislative Titling Revisited’ (2001) 22 Stat. LR 160.

### **Australasian drafting offices**

11 Like Canada, Australia has a significant number of drafting offices and drafters. There are 10 drafting offices in Australia. Together with the New Zealand office, there are around 200 drafters working in Australasia.

12 Although there is little movement among the 11 Australasian drafting offices, there is a reasonable amount of interaction between drafters from different offices.

13 This means that there is a lot of scope for innovative drafting practices to be developed, and there is also some scope for such practices to spread from office to office.

### **Office structures—how do drafters work?**

14 All the drafting offices are structured so that the work of more junior drafters is settled by more senior drafters. In most offices, senior drafters are also expected to supervise the more junior drafters, and in some offices senior drafters are also expected to provide intensive training to junior drafters.

15 These structures ensure that, to some degree at least, drafting practices developed and refined over time are handed down to new drafters. They also ensure some degree of consistency in the drafting approach of the office as a whole.

### **Office structures—documentation of drafting style and practices**

16 Most offices have some kind of documentation recording certain aspects of the office's drafting style and practices. Some offices have documentation of this kind that is issued in a more or less formal series, that covers a wide range of drafting matters, or that must be complied with.

17 This means that most offices have some method of documenting and disseminating innovative drafting practices adopted within that office.

## **Office mission statements and outcomes**

18 Some offices have some kind of mission statement or outcome statement that reflects their responsibility for the state of the statute book.

## **The federal Office of Parliamentary Counsel**

19 The rest of this paper will deal almost exclusively with my own organisation, the federal Office of Parliamentary Counsel (OPC), so it is worth identifying our position in relation to most of the attributes mentioned above.

20 OPC is one of the largest drafting offices (even though we draft only primary legislation). The State, Territory and New Zealand offices all draft at least some of the subordinate legislation required in their jurisdictions.

21 OPC uses a formal “drafting teams” arrangement, under which senior drafters are required to provide substantial supervision and training to the less experienced drafters.

22 OPC has formal sets of documentation relating to various aspects of drafting, and conformity with documented practices is expected and enforced (to the extent possible having regard to the nature of the drafting practices concerned).

23 OPC has an outcome statement that refers to “an effective statute book”. We treat this as requiring us to pursue not just a statute book that is legally effective to implement government policies, but a statute book that, in the interests of users, has as much internal consistency as possible.

## **Part 2—Changes in drafting practices**

### **Examples**

24 Nick Horn’s paper covers a range of developments and innovations that have been introduced in Australian drafting offices over recent years. In the context of my general discussion about implementing changes, I will refer to several significant changes that



OPC has implemented in the last few years. The changes involve the introduction of the following drafting practices:

- a new format for Bills;
- a method of highlighting defined terms in Bills (using asterisks);
- a new approach to commencement provisions;
- the use of outline and overview provisions.

25 Descriptions of these changes are set out in Attachment B.

### **Implementing changes in drafting practices—a spectrum of possibilities**

26 In implementing changes in drafting practices in OPC, we recognise that there is a spectrum of possibilities for implementing change, and that different kinds of drafting practices tend to fall at different points on that spectrum (thus requiring different implementation approaches).

27 At one end of the spectrum is implementing change on a fairly flexible and discretionary basis. Change that is suitable for this kind of implementation involves providing another approach for drafters to consider, and use as appropriate, in their drafting (or, as some OPC drafters describe it, adding another tool to the drafter's toolbox). In recent years we have permitted practices such as the use of outlines, summaries, notes, examples or diagrams on such a flexible and discretionary basis.

28 At the other end of the spectrum is implementation that is rigorous and across the board, allowing no scope for unorthodoxy on the part of individual drafters. This kind of implementation is required for what might be called mechanical practices such as electronic formatting, amending forms, and wording and structure for certain provisions that are common to all or most of our legislation (eg commencement provisions).

29 In the middle of the spectrum is another form of implementation, under which a particular practice is treated as the default practice but can be varied with good reason. This kind of implementation approach is particularly suitable for drafting practices that include a policy element. For instance, we have a set of standard provisions covering the establishment and operation of statutory bodies. It is expected that drafters will offer these provisions, in the

standard forms, to instructors who want legislation to establish a statutory body. It is also expected that a drafter will not rewrite the standard provisions for reasons of personal preference. However, if there are policy reasons for departing from the standard provisions, the drafter is not in any sense obliged to push for adoption of those standard provisions.

### **Consistency and standardisation in OPC—the fundamental premises**

30 As indicated above, we implement changes to drafting practices in different ways, and with different levels of enthusiasm, depending on the kinds of drafting practices concerned. In doing so, we start from the premise that a degree of consistency across the statute book is a significant contributor to “an effective statute book”. That premise reflects several other premises that, in many cases, tend to bias us in favour of standardisation of practices rather than flexibility.

### **Consistency makes life easier for users in general**

31 Consistency across the statute book makes life easier for everyone who works across a range of different Acts (or even within one of the larger Acts). This includes Members of Parliament and their staff, people engaged in consolidating Acts, administrators applying or trying to comply with Acts, lawyers advising on the operation of Acts, and judges interpreting Acts.

32 All of these people will find it easier to work with our Acts if they know where to look for the definitions and how to read a standard commencement clause. They will find it easier if they can assume that we use standard forms of words to distinguish between a power that must be exercised and a power that may be exercised. They will find it easier if they can assume that provisions authorising searches expressed in the same words are intended to permit the same kind of search, and that a search provision that uses different words is intended to permit something different.

Consistency in electronic formats makes life easier for users of electronic versions

33 Consistency in electronic formats makes life easier for people who have to work with electronic versions of our legislation. This includes the parliamentary staff who have to edit our Bills to incorporate parliamentary amendments and to finalise the Bills for Royal Assent, the Attorney-General’s Department staff who prepare

consolidations of Acts (ie versions of Acts incorporating all amendments made by later Acts), and the staff of commercial publishers who also publish versions of legislation.

### **Consistency in electronic formats may permit automatic consolidations**

34 Standardising electronic formats makes it possible to contemplate the development of software to produce automatic consolidations of amended legislation.

### **Standardisation frees drafters to focus on problems that don't have easy answers**

35 Standardisation of things that are capable of being standardised frees drafters to apply their skills and creativity to the things that can't be standardised, like solving new drafting problems. Certainly there is an overhead for the drafter in making sure that draft legislation conforms with office standards, but if those standards are properly documented (and especially if they are supported by electronic checking), that overhead may be no greater than the effort involved in reinventing each approach every time a drafter drafts a new Bill. Furthermore, properly documented standards can often be applied or checked by people other than trained drafters.

### **Standardisation furthers the application of best practice**

36 Standardisation can ensure that drafting approaches developed on the basis of the best available information and expertise are available to all drafters, and to all readers. For instance, as described in Attachment B, developing our new format for Bills in 1995 involved a synthesis of the ideas of communications experts, IT experts, users and drafters.

37 The significance of this process is that most of the drafters had access to little of the expertise involved in producing the new format; none of the drafters had access to all that expertise. There is no way any individual drafter, reinventing the format wheel for him or herself, could ever have come up with anything that gave effect to so much of the then existing knowledge about document design and about the technical capabilities of word processing systems.

38 As will be apparent, we insist on rigid adherence to OPC rules covering a range of drafting practices (described above as mechanical).

39 However, we try to balance this fairly rigid approach to the application of those rules by a very participative approach to the original development of the rules, and an approach to the documentation and implementation of those rules that seeks to maintain a shared understanding of the rules and why we have them. The participative approach is also applied to the development of the other kinds of drafting practices discussed above, for instance those providing default precedent provisions and those that can be seen as tools in a drafter's toolbox.

40 The obligation to comply with OPC rules, and the participative approach to developing those rules, is set out in an Office Procedural Circular issued in 2000. This records our processes, and gives detailed explanations for the approach adopted (see Attachment C). That approach is outlined next.

## **The OPC model for implementing changes in drafting practices**

### **An idea**

41 Ideas may come from anywhere, and may be for any kind of change. They may be for a change to a drafting practice that is rigorously enforced (eg our Bills formatting), or a change consisting of permitting the use of a new drafting technique (eg the inclusion of examples in Bills). Any drafter in OPC, and indeed any other staff member, is free to make suggestions, and these will be considered seriously. Most suggestions are made by the drafters. Other suggestions may come from OPC's Editorial Checkers, or from outsiders (in the early days of plain English we took ideas from a range of experts publishing in the area).

### **A written proposal**

42 An idea is then developed into a written proposal. This provides a basis for consultation within OPC (and outside, if appropriate). The preparation of a written proposal in itself often reveals weaknesses and gaps in the original idea; sometimes this will be enough to kill the idea, but generally the weaknesses and gaps can be addressed by further thought.

43 The person proposing the original idea will often be invited to prepare the written proposal. Especially where the proposal will

involve a significant change in drafting practice, it is generally worthwhile to test the proponent's commitment to the idea first. This is done by expecting the proponent to put in some more rigorous effort before other drafters are expected to consider the idea and its implications for their drafting work. At the same time, this approach ensures that, if the idea takes off, the proponent will receive proper recognition for that idea.

44 On the other hand, if a drafter's idea might provide a solution to a recognised problem (as distinct from an improvement in a practice that is in any case satisfactory), but the drafter is not keen to put in the further effort, it may be appropriate to find another drafter to prepare the written proposal. This also ensures that drafters who see possible solutions to problems are not deterred from mentioning them because they don't want to be given the task of turning the possible solution into some sort of discussion paper.

45 There may also be cases in which a drafter has come up with an idea, but doesn't have the other expertise (for instance, IT skills) to know whether the idea is feasible or how it might be implemented. In such a case, the proposal might be taken over by another drafter with appropriate expertise, or the person with the idea might be invited to develop the proposal with help from other staff (eg the IT staff).

46 Also, if the person with the idea is not a drafter, it will generally not be appropriate to expect that person to take the idea on to the next stage. That person (whether a member of the editorial staff or an outside consultant) should not be expected to do the work of thinking through the drafting implications of the idea.

## **Consultation**

47 The next stage is consultation. This consultation may take various forms.

- Minor proposals may be the subject of an e-mail to all affected staff inviting comments.
- For more substantial proposals, the written proposal would be circulated to all affected staff (this might include editorial staff or other staff who provide support to the drafters), again with an invitation to comment. One or more meetings of affected staff may be held to discuss the proposals.

- A major proposal, or one that involves complex issues or a range of options, may be the subject of several consultation papers and meetings.

48 Consultation might also involve people outside OPC. For instance, a formatting proposal might affect how the Parliament deals with our Bills, so we would consult the Clerks of the two Houses.

49 Sometimes, we obtain legal advice about our proposals. For instance, our new commencement provisions include a 3-column table. One column is expressed not to be part of the Act, and it may be changed after the Act is passed by publishers preparing consolidated versions of Acts. Before introducing the new approach, we sought legal advice to confirm that there were no legal difficulties with it.

50 The consultative process may be an iterative one—the first round of comments on a proposal may lead to significant changes in the proposal, which would then be the subject of further consultation.

### **The decision**

51 Eventually, the consultation process draws to an end, and the proposal reaches a final form. First Parliamentary Counsel makes a decision on whether the proposal is to be implemented. When the decision is announced, reasons are usually given for any aspects of the decision that might seem controversial, and for rejecting any particular arguments that were made during consultations. In some cases, written reasons are circulated with the decision, in other cases reasons may simply be discussed with particular people who expressed views that have not been taken up.

### **Implementation**

#### **Promulgating the decision**

52 A decision to implement a new drafting practice is usually promulgated in the form of a Drafting Direction or a Word Note. All drafters are expected to comply with the new practice so far as is relevant. For instance:

- All drafters must use the new commencement forms for all their Bills.

- Drafters may choose whether to use asterisking in a Bill for a new Act, but if they do they must use it in accordance with the relevant Drafting Direction.
- Drafters may choose to include an outline in any draft Bill. If they do, they must comply with certain formatting requirements but are not restricted as to the contents of the outline.

### **Monitoring and enforcing the decision**

53 Compliance with Drafting Directions and Word Notes is monitored and enforced in various ways, most of which involve our editorial checking process. Except in the direst emergency, a Bill can't be printed for introduction unless it has been signed off by one of our Editorial Checkers.

### **Macros**

54 Preparing a Bill for editorial checking involves a range of operations, which include running several macros on the Bill.

55 One of these macros checks the Bill against a range of Drafting Directions and Word Notes (generally by searching for particular words or phrases). The macro generates a table that lists suspect provisions along with references to possibly applicable Drafting Directions and brief questions, reminders, or advice to the drafter about matters to be considered (see Attachment D). After the drafter has checked this printout, it is attached to the draft of the Bill that is sent for editorial checking.

56 Another macro checks for a range of formal errors, and generates a table drawing attention to these (see Attachment D). This too is attached to the draft Bill after the drafter has looked at it.

57 Also attached is another printout generated by yet another macro, which identifies every style used in the draft Bill (see Attachment D).

### **Role of Editorial Checkers**

58 The Editorial Checker checks the various printouts attached to the Bill (including checking that every element of the Bill has the

correct style). He or she also reads the Bill, checking it against a range of criteria (see Attachment E). As well as checking for things like correct grammar and numbering, the Editorial Checker also looks for breaches of Drafting Directions and anything else that looks unorthodox. Initially any problems that are discovered are drawn to the drafter's attention, but if the drafter doesn't address the problems, or convince the Editorial Checker that they aren't really problems, the Editorial Checker is entitled to raise the matter with First Parliamentary Counsel, and sometimes that does happen.

### **Role of First Parliamentary Counsel**

59 Drafters don't very often deliberately breach our rules just for fun, so it's rare that the outcome of a matter being raised with First Parliamentary Counsel is the drafter simply being directed to change the Bill. More commonly, an apparent breach is resolved when everyone properly understands the context in which the non-complying provision has been drafted. Sometimes this will involve a change to the Bill, and sometimes it will involve consideration of a change to the rules. Occasionally, a proper consideration of the issue reveals a more fundamental problem with the particular draft or with an office practice.

### **A special case—diagrams**

60 One special case that should be mentioned is the use of diagrams in draft Bills. Over the last 10 or so years, some drafters have experimented with using diagrams to help readers understand legislative provisions. Some of the diagrams have been quite good, but others have been fairly ugly. This is hardly surprising given that none of us has any particular expertise in graphic design, or in using graphics to convey abstract concepts.

61 Some years ago, we instituted a requirement that all diagrams had to be cleared by First Parliamentary Counsel. While I don't claim any serious expertise in these matters either, over the years I have put together a set of tests against which to assess diagrams, and an assessment against those tests usually produces improvements in the diagrams (or leads to them being abandoned).

62 The tests are fairly broad and basic, but often they haven't been addressed by the drafters. They include the following:



- What is this diagram for? What is its message? Can the reader work out easily what he or she is supposed to be learning from the diagram?
- What benefit does the reader get from the diagram that isn't available from plain text (eg does the diagram show patterns or relationships that wouldn't be obvious from the plain text?)?
- Is the diagram helpful at all (I see a surprising number of complex diagrams that turn out to be “explaining” remarkably simple concepts)?
- Is the diagram as simple as it can be, or does it contain random design variations that are likely to be misleading or confusing (eg using different shapes to represent equivalent concepts, or different forms of arrows to represent identical relationships)?

63 It is probably fair to say that the requirement for First Parliamentary Counsel approval has put something of a damper on the use of diagrams in our legislation. It is also fair to say that drafters working to tight deadlines are generally disinclined to spend much time devising diagrams; because diagrams necessarily double up on the text of the legislation, they can easily be seen as dispensable. These days, in fact, it is often our instructors who request the inclusion of diagrams in legislation, and the drafters are generally quite happy to see me applying the tests outlined above to the instructors' diagramming efforts.

64 I think there is some scope for using diagrams in legislation to help readers, and to that extent it may be a pity that we have done relatively little recently to practice and refine our diagramming skills. However, I also believe that a bad diagram in legislation is worse than no diagram, so we have probably struck the right balance in adopting reasonably strict control over what diagrams can be included in legislation<sup>3</sup>.

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<sup>3</sup> For more on diagrams in legislation, see Hilary Penfold, 'When words aren't enough: Graphics and other innovations in legislative drafting' (2001) (Paper for University of Texas at Austin conference, *Language and the Law*, December 2001, to be published—copies currently available from the author)

## **Comments on the process**

### **Not all ideas survive**

65 The first point that should be made is that not all ideas finish up being implemented in any form. An idea may die at any stage of the process described above.

66 If First Parliamentary Counsel can see no merit in a proposal, it may not move on even to the written proposal stage. On the other hand, First Parliamentary Counsel support for an idea doesn't guarantee that it will eventually be adopted; in particular, it does not guarantee that the idea will be adopted in its original form, although it may make it more likely that some version of the idea will eventually be adopted.

67 In some cases, a staff member who has an idea will not in the end bother to pursue that idea even if invited to prepare a written proposal.

68 If a consultation process reveals widespread opposition to a proposal, or serious flaws in the proposal, the proposal may be abandoned.

### **Not all proposals achieve consensus**

69 Next, it must be recognised that even an extensive consultation process will not necessarily result in consensus. However, we don't restrict ourselves to proposals that do obtain consensus support, if senior members of the office believe that the proposal is worth implementing.

70 This means that sometimes a proposal is implemented against the opposition of some drafters (sometimes including quite senior drafters). If the proposal involves changes to our electronic formatting, then it is nevertheless implemented on the basis that strict compliance is required. Some other proposals are also implemented on that basis (for instance, changes to the form of amending Bills and changes to commencement provisions), reflecting our view that if these kinds of changes are not implemented rigorously and across the board, they will do more harm than good.

71 Other kinds of proposals can be implemented on an optional basis—for instance, drafters need not use outlines or asterisks if they don't wish to. However, the optional nature of some drafting practices can be overstated, given that the use of a particular practice in a Bill

will often oblige the drafters of amendments of the resulting Act to maintain the practice. For instance, if a drafter uses asterisking in a Bill for a new Act, drafters who amend that Act later must insert asterisks as required by our asterisking rules.

### **Successful implementation doesn't require consensus**

72 What we generally find, however, is that even if there is no consensus, most drafters respect the consultation process, accept that their views have been fairly considered, and simply get on with doing their work in accordance with office requirements irrespective of their personal views. The drafters' usual willingness to co-operate is reinforced by the fact that, if strong views have been expressed for and against a particular proposal, or if a new approach might turn out to affect drafters' workloads substantially, we would usually provide for a review of the new practice after a trial period (say twelve months).

73 The practice of allowing review of a new practice is linked to our belief that continuous improvement of our drafting methods requires a willingness to experiment with new practices even in the absence of clear evidence that a new practice will necessarily be an improvement. Certainly it is hard to improve without doing anything new or different. As well, to my knowledge OPC has never been publicly criticised for trying new approaches, even when some of those approaches are later abandoned or significantly modified—but we were roundly criticised in the early 1980s for being resistant to change.

### **Improved drafting practices v reduced productivity**

74 Another issue that is relevant in decisions about proposals for change is that there is often a conflict between what may be good for our readers and what may be easiest for the drafters.

75 In many cases, a proposed new practice will impose an extra burden on the drafters, at least in the early stages, and sometimes on an ongoing basis. The perceived extra burden on the drafters may influence the reaction of some drafters to the proposal.

76 This is not meant to suggest that the drafters are influenced by any desire to avoid extra work, but they do recognise that OPC's workload requires us to maintain a high level of productivity, and that therefore we need to be careful about introducing "improvements" that may compromise that productivity. Thus, in deciding on a proposal for

change, we must balance the likely improvement in the quality of our product against any risks to productivity and drafter satisfaction.

### **Improved drafting practices v reduced independence for drafters**

77 Sometimes drafters resist a new approach not because they are worried about reduced productivity but because they feel that their professional independence and their scope for exercising their creativity and judgement is being eroded by yet another new set of rules.

78 It will be apparent from my earlier comments that I have little sympathy with this view in the contexts in which it is usually raised. This is because, almost by definition, the areas in which new rules are introduced are areas that neither require nor justify the repeated application of independent creativity and judgement.

79 For instance, how to structure amending Bills, or how to structure commencement provisions, are questions that are best answered through a process that harnesses the creativity and experience of a wide group of drafters and users. However, once those structures have been devised, they should be used consistently across the statute book, and should not be constantly reinvented by individual drafters. Readers of legislation are best served by a consistent approach to such provisions, and by drafters applying their skills and creativity to the unique and difficult problems that are raised by individual Bills.

## **Part 3—Recruitment and training**

### **Recruitment**

80 In Australia, at least, there is little scope for recruiting trained legislative drafters. Since on-the-job training in a drafting office is effectively the only kind of training available in Australia, trained legislative drafters are generally only found in drafting offices. There is little movement between drafting offices. By and large, drafters in a particular office tend not to move between offices in search of promotions.

81 In general, then, we expect to recruit lawyers with no previous drafting experience and to train them as legislative drafters. Often this means recruiting lawyers straight out of law school, but in recent years we have also been able to recruit some very good lawyers with a few

years experience in other parts of the public sector or sometimes the private sector.

82 In our recruiting processes, we are looking for highly intelligent people with analytical and problem-solving abilities who are enthusiastic about learning a new skill. In pursuit of highly intelligent people, we tend to look first at an applicant's academic results. It is rare (but not unknown) for us to recruit a recent graduate without an honours degree. However, success in certain other kinds of work, whether in another legal area or elsewhere, may also evidence the kind of abilities we are looking for. We recognise that a good academic record does not guarantee an aptitude for legislative drafting (we've recruited some extremely well-qualified disasters) but a poor academic record needs to be outweighed by other evidence of talent before we would risk engaging an applicant with such a record. Interestingly, we have also found that applicants who have studied subjects such as literature, linguistics or philosophy tend to bring an extra dimension to their drafting work.

83 Our recruiting efforts over the last ten years have produced quite good results. Many of our recruits have demonstrated a real aptitude for legislative drafting and are developing well. A number of them have moved into senior drafting positions and several more are well-placed for promotion very soon. However, our recruitment results could usefully be improved further, so in the last couple of years we have done some focussed work on recruitment processes.

- We have improved the material available for potential applicants.
- We have expanded our pool of possible recruits by advertising vacant positions with all law schools in Australia as well as in the press. Of course, all our vacancies also appear on our web site.
- We make presentations to students at the Australian National University (one of two universities in Canberra, and a good source of recruits since the office was established), and we are looking at giving these presentations at other universities.

84 The next stage in our work on recruitment issues is the development of a brochure extolling the virtues of legislative drafting as a career. We are about to sign a contract with a design firm to produce such a brochure.

## **Retention**

85 Our retention rates for new recruits are fairly satisfactory, especially compared with other Australian drafting offices, and with similar organisations such as the federal Attorney-General's Department. However, long-term retention rates are an issue for us.

86 We expect to lose a few (sometimes up to 50%) of our new recruits in the first couple of years, as we and they work out whether they have any aptitude for drafting and whether OPC can offer the right career for them. Losing people later on is more of a problem. Even a good recruit may take five to seven years of fairly intensive training to develop independent drafting competence; we really need to keep such a person working at the independent level for at least another five to seven years to justify our training investment.

87 While many of our successful drafters are happy to make legislative drafting in OPC their career, others have moved on, either for personal reasons or in search of different career options.

88 We have made some advances in dealing with retention issues. For instance, we now have a salary structure that gives greater recognition to trained drafters who wish to focus on drafting work rather than pursuing promotions that will necessarily involve them in management work as well.

89 As well, we remain conscious of retention as a general issue for the office; from time to time significant policy decisions are influenced by our assessment of their possible impact on retention of trained drafters.

## **Training**

### **On-the-job training**

90 Currently, the training we provide to new recruits is largely on-the-job training. New recruits work in a drafting team that is headed by a senior drafter and that may contain another trainee drafter. Each trainee drafter within the team receives close supervision and intensive on-the-job training from the senior drafter. The division of work within the team is worked out by the senior drafter, in consultation with First Parliamentary Counsel as appropriate, having regard to the developing competence of the trainee drafter.

91 A new recruit can expect to work on whatever jobs are assigned to the drafting team right from the beginning. We tend not to give the simple work to new recruits initially. Instead, they are likely to start by working as an apprentice on the higher profile and more complex work assigned to the senior drafter.

92 As a new recruit develops skills, he or she may be given some more straightforward tasks, and more independence to work on those, although the Bills will still be settled by the senior drafter.

93 Trainee drafters generally work with a particular senior drafter for 6 to 18 months before being moved to another drafting team. During the average 5 to 7 year training period, a trainee drafter will work with at least 3 or 4 different senior drafters, and may work with most of the senior drafters in OPC.

94 In one way, this may slow the trainee drafter's progress; each time a trainee is assigned to work with a new senior drafter, the senior drafter will want to assess the trainee's level of skill and competence before working out how much independence the trainee can be given on a particular project. Thus, after several months working together, a senior drafter might be happy to allow the trainee to conduct his or her own conferences with clients to obtain instructions. On moving to a new team, the trainee might find that the new supervisor wants to observe the trainee in conference before allowing him or her to conduct conferences alone.

95 On the other hand, working with a number of different senior drafters provides trainee drafters with a much broader range of training and experience than they would get staying with one senior drafter throughout their training period. The trainee is likely to work in more areas, will come across more approaches to drafting work and to dealing with clients, and will pick up more in the way of drafting lore than if he or she had worked with the same senior drafter for the whole period.

### **Other training resources**

96 In addition to this on-the-job training, there are various other training resources available in OPC. While some Drafting Directions simply lay down rules (as discussed earlier), others provide a summary of legal issues or other information that is useful in particular cases. As well as the Drafting Directions, we have a substantial body of what we call Drafting Notes. These are papers prepared, usually by drafters within OPC, on a wide range of topics relevant to drafting. Unlike the Drafting Directions, they are not subject to consultation and are not

formally issued by First Parliamentary Counsel, so they are informative rather than authoritative. Recently we have begun a program for subjecting these notes to a form of peer review, so that they will become more reliable. All this material is available electronically, so it is readily searchable.

97 We also run seminars from time to time on issues of interest to drafters. Some of these are presented by OPC drafters, and deal with such things as:

- the operation of a new substantial piece of legislation;
- a particular legal issue that often comes up in legislation;
- a particular drafting technique (eg simplified outlines or the narrative style); or
- aspects of working methods (eg dealing with clients, stress management).

98 Other seminars may be presented by other government legal advisers (eg staff of the Australian Government Solicitor might give a presentation on recent developments in constitutional law) or by outside experts (eg an academic talking about reading techniques and the implications for reader-friendly writing).

### **Accelerated training**

99 So far, we have not done a lot of work in the area of articulating and recording drafting knowledge with a view to accelerating the training process. Given the time that it currently takes to train a drafter, and the implications of that time for retention of drafters, it seems likely that there are some efficiencies to be gained from accelerating the training process.

100 One approach would be to try to draw together the work that has been done elsewhere (famously in Canada by Elmer Driedger but also by people such as Professor Patchett in his recent work for the Commonwealth of Learning) with the tacit knowledge existing within a particular drafting office, with a view to creating some kind of training course that could be worked on by new recruits in parallel with the on-the-job training they are also receiving.

101 The main virtue of such a course would be to ensure that, within the first few years in the office, all new recruits would have



come across all the basic drafting issues, in a theoretical even if not in a practical context.

102 A secondary benefit might be to increase the number of new recruits who could be trained by our senior drafters at one time. Currently, the number of lawyers who can be trained as drafters is limited by the number of senior drafters available to provide the training. Our preferred senior to trainee ratio is one to one; we regard one senior drafter to two trainee drafters as manageable, but asking a senior drafter to supervise more than two trainee drafters significantly reduces the quality or quantity of training provided, and tends also to affect the senior drafter's productivity and job satisfaction. If much of the preliminary training could be provided more efficiently through written or computer-based training modules, senior drafters might be in a position to supervise and provide higher level training to more trainees.

#### **Part 4—Other roles in the drafting process**

103 Various other people play a role in the process of developing a Bill and turning it into an Act.

##### **Editors**

104 Editorial Checkers, who are employed within OPC, have already been mentioned in the context of enforcing drafting rules (see paragraph 58). As well as their role in checking compliance with drafting rules, they also check for spelling and grammatical errors (which are less common in these days of spell checkers, but still occur). An experienced Editorial Checker will also sometimes draw attention to a clumsy sentence structure or something that is difficult to read; however we don't expect our Editorial Checkers to have any particular qualifications as plain language experts, so there is a limit to what they are likely to do in this area.

##### **Translators**

105 In Australia we draft only in English, so translators are not a part of our experience.

### **Instructing officials**

106 Instructing officials (generally called instructors or even clients in Australia) are responsible for developing the general policy to be implemented by legislation, and ideally should also develop the policy details. In practice, many policy details, and occasionally some fundamental issues, are worked out by the instructors and drafters working together after the project starts.

107 In many cases this is because the need for particular policy decisions only becomes apparent as the drafting process moves from general statements of macro policy down to detailed provisions for how those policies are to be implemented. In some cases this is because the instructors are incompetent, or more commonly just inexperienced in legislative projects. Whatever the cause, the result is that preliminary drafts or plans of the Bill throw up a range of questions that had not been considered in the initial policy development work. Inevitably the drafters get involved in formulating the further questions that need to be considered, and often the drafters are also involved in suggesting the answers.

108 A good instructor will read successive drafts of the Bill carefully, to ensure that they give effect to the policies as they have been worked out. A really good instructor will also make intelligent comments about the drafting approach that has been adopted, and will sometimes make constructive suggestions for improving the drafting of the Bill. A really good instructor, and even a good instructor, can be a joy to work with.

### **Departmental legal advisers**

109 Departmental legal advisers are often involved with the development of legislation<sup>4</sup>. The nature of their involvement is determined by their department's own arrangements.

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<sup>4</sup> The Australian Government Solicitor (a statutory body within the Attorney-General's portfolio) has a statutory monopoly on providing legal advice on draft bills for the federal Parliament. Some years ago, large areas of government legal work were opened up to private sector lawyers, and many government departments now get most of their legal advice from private law firms. The statutory monopoly, which operates against both private sector lawyers and in-house departmental legal advisers, was created to ensure that there was some consistency in the legal advice given about draft legislation.

110 In some departments they are the instructors, providing a bridge between the drafters and the policy officers. If the departmental legal advisers have experience with legislative projects, and a good knowledge of the department's legislation, they can be very useful instructors. If not, they can be a very frustrating impediment to communications between the drafters and the policy makers.

111 In other departments the legal advisers and the policy makers act as joint instructors. This usually works well, although sometimes drafters find themselves in the middle of a disagreement between the department's lawyers and the policy makers. Some drafters have felt obliged to send the warring departmental officers away to resolve matters before taking up more of the drafter's time.

112 More rarely, policy officers provide instructions to the drafters and successive drafts of the Bill are commented on by the department's legal advisers. This also can be a frustrating experience, if the policy officers are not able to explain the views of each group of lawyers to the other group.

### **Ministerial staff**

113 Ministerial staff do not routinely get involved in the details of draft legislation. However, if the legislation has political sensitivity, ministerial staff may well be involved, and may take over some of the instructing work. For instance, drafters in OPC have recently dealt directly with ministerial staff on counter-terrorism legislation and legislation to regulate human cloning and stem cell research.

### **Ministers and other members of Parliament**

114 It is difficult to generalise about the involvement of members of Parliament in the development of legislation.

115 Some Ministers are heavily involved in the policy-making process, and from time to time Ministers have even attempted to read draft legislation before clearing it. Other Ministers have no interest in policy-making except at the highest level (if that), and would not dream of reading legislation at any stage.

116 Recently, however, some Ministers have insisted on choosing the names of Bills, with a view to making those names serve a political function (see paragraph 7).

117 It is also difficult to generalise about the involvement of government backbenchers and members of the non-government parties. However, the federal Parliament has a committee system that enables such people to get involved in scrutinising legislation. Both the committee system and the upper house (the Senate) can be remarkably effective at influencing the content of legislation in certain circumstances.

- A Senate committee consisting of government and non-government backbenchers (the Scrutiny of Bills Committee) reviews all Bills for breaches of certain human rights criteria, and regularly persuades Ministers to agree to changes.
- Recently a government backbench committee forced the government to make important changes to the detail of its counter-terrorism Bills.
- Because the government does not have a majority in the Senate, the non-government parties regularly force changes to government legislation as the price of passing the legislation.

118 In many such cases, the changes made to the legislation probably improve the policy effected by the legislation; unfortunately, the processes are such that the changes often don't improve the drafting. The parliamentary amendments necessary may be drafted outside OPC (especially if non-government members are involved) and wherever they are drafted they are often drafted in a considerable hurry.

## **Part 5—Conclusions**

119 In summary, the “new drafting environment” has affected our approach to doing our job in several different ways. There are several observations to be made about that environment and how we have reacted to it.

120 Increasingly tight deadlines and increasingly inexperienced instructors have forced us to look for efficiencies in many aspects of drafting practice. Such efficiencies have been found through the increased use of a customised IT system to provide research tools, Bills production tools and automated checking tools, and increased use of standardisation in certain drafting practices.

121 The search for efficiencies sometimes influences our attitude to innovative drafting practices, but this is balanced by a recognition that

continuous improvement must apply to our products as least as much as to our processes.

122 The rate of innovation in our drafting practices has slowed somewhat, partly because we don't feel under the same external pressures as we did 10 or 15 years ago, and partly because of the efficiency constraints already mentioned.

123 The significance of the electronic form of legislation has also pushed us in the direction of increased reliance on our IT system as fundamental to Bills production, and an increased focus on achieving standardisation and consistency at least in the electronic form of our Bills.

124 Constant pressure to recruit and retain good people has led us to focus on recruitment policies and retention issues. Retention in particular needs to be kept in mind in dealing with other issues already mentioned. For instance, we realise that rigorous standardisation and the constant search for efficiencies can have an impact on drafter satisfaction, and that they therefore require very careful implementation and management.

125 Spanning almost all these issues, one way or another, is the responsibility we have accepted for the state of the statute book. Trying to maintain any kind of standards across the statute book is a thankless task, and particularly difficult in the context of each individual Bill. My own view, however, is that the importance of trying in this area may be directly proportional to the difficulty of the task.

## **Attachment A—Background information**

### **A.1 Australasian drafting offices**

Australia has a drafting office in each of the six States and each self-governing territory (the Northern Territory and the Australian Capital Territory). In the federal sphere, we have two drafting offices, the Office of Parliamentary Counsel (OPC), an independent statutory office that drafts primary legislation (ie Bills for the Parliament) and the Office of Legislative Drafting, a division in the Attorney-General's Department that drafts subordinate legislation such as regulations and rules.

In total, there are 10 drafting offices in Australia. These days, we have a fair bit of contact with the New Zealand drafting office as well. This means that in Australasia there are 11 drafting offices, staffed by a total of around 200 legislative drafters who have a reasonable opportunity to exchange ideas, to assess each other's experiments, and to learn from each other.

All offices divide their drafters into senior drafters and other drafters. Some offices, including OPC, use a "pairs" or "teams" system, under which a senior drafter works with, supervises and trains one or more less experienced drafters (referred to in OPC as "Assistant Drafters"). Other offices have a more hierarchical structure, where more experienced drafters settle the work of less experienced drafters, but there is no particular concept of teamwork, nor any particular obligation on the more experienced drafters to provide training (as distinct from settling of work).

### **A.2 Office structures and processes (OPC)**

In OPC we issue several series of documents that affect different aspects of office operations. For present purposes, the most important are the Drafting Directions, which deal with various aspects of drafting practices, and Word Notes, which deal with our use of a customised version of Microsoft Word to produce Bills and other office documents.

Drafting Directions are issued in a numbered series (eg Drafting Direction No. 3, 2001) and are formally withdrawn when superseded by a later Direction or overtaken by events. Each staff member has a hard copy set of all current Directions, and the current

Directions are also available on our intranet in a searchable form, and on our web site.

Word Notes are issued in a single numbered series (eg Word Note No. 32) and are reissued when updating is required.

A Drafting Direction or Word Note must be consulted on within OPC before it is issued. Consultation on Drafting Directions routinely involves issuing a draft Drafting Direction and allowing 2 weeks for staff to comment. Consultation on Word Notes may involve only an e-mail to all staff outlining the proposed changes, and a shorter comments period.

We also issue IT Circulars, dealing with the use of our IT system more generally, and Office Procedural Circulars, which deal with administrative aspects of office operations.

All the documents in these series must be complied with by the drafters and other office staff according to their terms. Some documents lay down detailed rules that must be complied with in all drafting projects. Others set out rules that only need to be complied with if a drafter chooses to do something in a particular way. Compliance with these rules is monitored by our Editorial Checkers, and may be enforced (although there is usually scope for seeking First Parliamentary Counsel's approval for a breach of the rules if there is a good reason). Yet other documents simply set out matters that drafters should be aware of, or should consider, in dealing with a particular issue, without indicating how the issue should be resolved in any particular case.

### **A.3 Office outcomes (OPC)**

As part of the federal government's financial management arrangements, all agencies including OPC are required to identify their outcomes. Our outcome is expressed as "Parliamentary democracy and an effective statute book".

Parliamentary democracy is a grand aim, and OPC's contribution largely amounts to ensuring that government policies are put to Parliament in the form of draft legislation.

Our ability to contribute to an effective statute book is much more substantial, and a number of the activities undertaken in OPC in the last few years owe something to our pursuit of an effective statute book. The pursuit of an effective statute book provides an important

justification for our approach to implementing changes in drafting practices.



## **Attachment B—Significant changes in drafting practices**

### **B.1 New format for Bills**

#### **The approach**

The main features of the new format for Bills introduced in 1996 are these:

- There is a substantial increase in the amount of ‘white space’ on each page. This makes the pages look less forbidding, and this in turn contributes to the reader’s confidence in dealing with the text.
- Running headers are used on the top outside corner of each page. The inclusion of section numbers in the running headers will make searching for particular provisions easier. The inclusion of Chapter, Part and Division headings in the running headers will make it easier for readers to interpret individual provisions in context.
- Section and subsection numbers are separated out from the text, to make searching for particular provisions easier.
- Vertical spacing, variable font sizes and different margins give visual clues to the hierarchical relationships between different elements of the text.
- The text of Bills is no longer right-justified. The use of a ‘ragged’ right-hand margin makes text easier to read because it means that the spacing between words is the same in each line, rather than varied to ensure a straight right-hand margin.
- All Bills contain a table of contents. Among other things, the table shows all Acts amended or repealed by the Bill.
- The first page of a Bill is a cover page including the long title. The table of contents starts on the inside cover page.

#### **The process of developing the approach**

In 1993, OPC did some preliminary work on a project to improve the design and layout of our Bills.

Late in 1993, the Government established task forces to rewrite our Income Tax Assessment Act and our Corporations Act.

Communications experts (including Professor Robert Eagleson) developed new formats for the two new Bills, and Bills were introduced in 1994 using the experimental formats. Both formats had been tested with users during the design process. Although developed largely independently and involving experts with somewhat different approaches to user-friendly writing, the new formats had much in common. However, they were not identical, so further work was necessary to produce a final version that could be applied to all future OPC Bills.

This work was undertaken in 1995. Within OPC, staff with some document design knowledge (mainly acquired through reading in the area) and staff IT experts designed a format using all the common elements of the two formats. Decisions were made on areas of difference having regard to further testing, intuition and the capabilities of the word-processing software we were planning to use.

We then consulted parliamentary staff and drafters about the new design. Further minor refinements were made.

The revised version of the design was then reviewed by another communications expert (interestingly, one with yet another different approach to issues of user-friendly writing). This review produced a few more minor refinements, resulting in the final version of the format, which was implemented in 1996.

## **B.2 Asterisking**

### **The approach**

Asterisking is a way of highlighting defined terms in an Act. The general rule is that every occurrence of a defined term has an asterisk at the beginning of the defined word or phrase (eg \*market value). Every page of the Bill has an asterisked footnote directing readers to a complete list of definitions (sometimes called a “Dictionary”). There are a number of exceptions and qualifications to the general rule, including the following:

- Fundamental concepts are not asterisked at all (eg in the Income Tax Assessment Act, “taxpayer” is not asterisked).
- Defined terms are not necessarily asterisked on the second or subsequent occurrence in a single sentence.

A Bill that uses asterisking must contain a provision explaining the approach to readers. Set out below are an example of such a provision, and an example of a page from an asterisked Bill.

### 3 Identifying defined terms

- (1) Many of the terms in this Act are defined in the Dictionary in Chapter 6.
- (2) Most of the terms that are defined in the Dictionary in Chapter 6 are identified by an asterisk appearing at the start of the term: as in “\*proceeds”. The footnote with the asterisk contains a signpost to the Dictionary.
- (3) An asterisk usually identifies the first occurrence of a term in a section (if not divided into subsections), subsection or definition. Later occurrences of the term in the same provision are not usually asterisked.
- (4) Terms are not asterisked in headings, notes, examples, explanatory tables, guides, outline provisions or diagrams.
- (5) If a term is not identified by an asterisk, disregard that fact in deciding whether or not to apply to that term a definition or other interpretation provision.
- (6) The following basic terms used throughout the Act are not identified with an asterisk:

Terms that are not identified		
Item	This term:	is defined in:
1	charged	section 338
2	convicted	section 331
3	deal	section 338
4	derived	section 336
5	property	section 338

## 18 Restraining orders—people suspected of committing serious offences

*When a restraining order must be made*

- (1) A court with \*proceeds jurisdiction must order that:
- (a) property must not be disposed of or otherwise dealt with by any person; or
  - (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

if:

- (c) the \*DPP applies for the order; and
- (d) there are reasonable grounds to suspect that:
  - 126 (i) a person has committed a \*serious offence; and
  - 127 (ii) if the offence is not a \*terrorism offence—the offence was committed within the 6 years preceding the application, or since the application was made; and
- (e) any affidavit requirements in subsection (3) for the application have been met; and
- (f) the court is satisfied that the \*authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds.

Note: A court can refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

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\*To find definitions of asterisked terms, see the Dictionary, at section 338.

## **The process of developing the approach**

In 1993 the federal government set up the Tax Laws Improvement Project (TLIP). This was an ambitious program to rewrite the federal Income Tax Assessment Act. Drafters from OPC were outposted to work with the project team. The program lasted for five years, until in 1998 resources were redirected to the introduction of a goods and services tax. During the five years, large parts of the Income Tax Assessment Act 1936 were rewritten in a new style and placed in a new Act, the Income Tax Assessment Act 1997.

Especially in the early stages of the project, the project team put a lot of effort, into considering, and developing improvements to, OPC's tax drafting style. Among other things, they worked on how to highlight defined terms.

Ensuring that readers recognise when they are dealing with expressions that are defined for the purposes of the legislation had been an issue for Australian drafters since at least the early 1980s, when the current "plain English" push began in Australia. Various suggestions for highlighting defined terms had been made, both by drafters and by outside commentators, but none had so far been adopted.

The TLIP team came up with the idea of asterisking the beginning of a defined word or phrase. The asterisk referred the reader to a note at the bottom of the page (an identical note appeared at the bottom of every page of the new legislation). That note in turn referred the reader to the "Dictionary", which was located at the end of the Act, and which would, for all asterisked terms used in the Act, either set out the definition or provide a cross-reference to the provision where the definition was located.

The asterisking approach was developed by the project team over some months. It was worked on by staff of the ATO, outposted OPC drafters and consultant communications experts. On at least one occasion the drafters made a presentation to their OPC colleagues, and there was considerable discussion about the approach.

When the asterisking approach was sufficiently refined, it was introduced in the new Income Tax Assessment Act. The approach was further refined over the next couple of years during which the project continued, and the project team prepared a lengthy note explaining how to use asterisks in TLIP Bills. At that stage, asterisking was not generally used in Bills drafted within OPC itself.

Over time it became apparent that some drafters wanted to be able to use asterisking in non-tax Bills, but that other drafters were opposed to its use. It also became apparent that a more comprehensive set of guidelines was needed; among other things, Parliament House staff were having trouble inserting asterisks appropriately when they were needed as a result of parliamentary amendments of tax legislation.

A draft Drafting Direction was prepared, which attached a revised version of the TLIP note, and set out a few constraints on the use of asterisking in OPC Bills (the main one was that asterisking could only be used in Bills for new Acts—it could not be used in new provisions being added to an existing, non-asterisked, Act). The draft Drafting Direction was circulated to all drafters for comments, and several drafters raised significant questions about the approach.

The drafters involved in devising asterisking in the tax context were asked to develop further guidelines addressing the questions that had been raised. A meeting of all interested drafters was held to discuss ways of addressing these questions. Eventually a new draft Drafting Direction, incorporating expanded guidelines dealing with the questions that had been raised, was circulated for further comments and in due course issued.

The Drafting Direction makes it clear that no drafter is required to use asterisks in a Bill for a new Act, but that if asterisking is used it must be used in accordance with the Direction. A drafter amending an asterisked Act must also comply with the Direction in preparing amendments.

### **B.3 Commencement provisions**

#### **The approach**

At the beginning of 2002, we introduced a new model for commencement provisions.

Commencement provisions in federal legislation have become increasingly complex.

Some of the complexity was unavoidable, in the sense that the policy required, for instance, a series of amendments to commence one after the other, with the first amendment commencing as a result of another event such as Australia's ratification of an international agreement.

Some complexity has arisen from the fact that for at least 20 years, successive federal Governments have not controlled the upper house in the federal Parliament (the Senate). At the stage a particular Bill is drafted, it might be unclear whether another related Bill will be passed, or will be passed in a particular form. The later Bill might therefore need alternative versions of particular amendments, with conditional commencements (only one of which would operate depending on the form in which the earlier Bill was passed).

A third kind of complexity emerged when individual drafters went off on frolics of their own, for instance by reinventing particular commencement provisions without checking the precedents. As we discovered on a couple of occasions, a very small change in a standard commencement provision might change the date of effect by a day (which may be unimportant in the particular case but confusing for people who are used to working with standard forms of commencement provisions).

The new model provides strict rules for commencement provisions, and requires that the drafters use the standard forms provided, unless First Parliamentary Counsel approves a departure from standard forms. Such approval is given if there is a good reason for a departure, but this enables First Parliamentary Counsel to assess whether the reason is likely to arise again, in which case an additional standard form should be provided.

An example of the new form is set out below.



## 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day after the day on which this Act receives the Royal Assent	
2. Schedule 1, Part 1, items 1 to 113	A single day to be fixed by Proclamation, subject to subsection (3)	
3. Schedule 1, Part 1, items 114, 115 and 116	The later of: (a) the commencement of the provisions covered by item 2 of this table; and (b) the start of the day on which Part 2 of Schedule 1 to the Quarantine Amendment Act 2002 commences	
4. Schedule 1, Part 1, items 117 to 143	A single day to be fixed by Proclamation, subject to subsection (3)	
5. Schedule 1, Parts 2 and 3	The day after the day on which this Act receives the Royal Assent	
6. Schedule 2	The day after the day on which this Act receives the Royal Assent	
7. Schedule 3	The day on which this Act receives the Royal Assent	

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table is for additional information that is not part of this Act. This information may be included in any published version of this Act.
- (3) If a provision covered by item 2 or 4 of the table does not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

### **The process of developing the approach**

This new approach was originally proposed by one of the Second Parliamentary Counsel, in the context of the growing complexity of commencement provisions as outlined above.

He prepared a draft Drafting Direction, which was circulated for written comments. The proposal and the draft Drafting Direction were both substantial, and would inevitably affect all drafters, so meetings of all the drafters were held at which the proposal was explained in detail. These meetings generated considerable discussions.

As a result of these meetings, the draft Drafting Direction was extensively revised by the Second Parliamentary Counsel in conjunction with First Parliamentary Counsel. In the course of this revision, the draft Direction was restructured to cover not just the proposed new form for commencement provisions, but all other OPC rules and guidelines about commencement provisions. Material was also prepared explaining why certain approaches were preferred over others that had been proposed by staff.

Legal advice on certain aspects of the proposal was obtained from the Australian Government Solicitor. This advice confirmed the legitimacy of the approach, but included some suggestions about other aspects of the proposal that were taken up in a further revision of the draft Drafting Direction.

The revised draft Drafting Direction (including explanatory material and a reference to the legal advice) was again issued for comments, and was issued in final form shortly afterwards<sup>5</sup>.

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<sup>5</sup> Available at [www.opoc.gov.au/about/documents.htm](http://www.opoc.gov.au/about/documents.htm) (Drafting Directions 2002).

## **B.4 Outline and overview provisions**

Over the last few years, drafters have developed various kinds of introductory statements for Bills and parts of Bills. This development reflects a view that it is easier for readers to come to grips with the details of a complex legislative scheme if they have a general understanding of what the scheme is intended to achieve and how it is intended to operate.

These introductory statements have been described as “Readers’ guides”, “Overviews”, “Theme statements” and “Simplified outlines”. They differ from purpose or objects provisions, which refer to the aims to be achieved by the legislative provisions concerned, in that they focus on explaining in general terms how the legislative scheme operates.

The use of such introductory statements has spread through OPC in a fairly unstructured way. Trainee drafters come across them when they work with a senior drafter who favours their use. On a couple of occasions, senior drafters have presented seminars to their OPC colleagues about using particular forms of such statements.

A rough estimate is that around half the OPC drafters use some kind of outline or overview provisions from time to time, usually when drafting a Bill for a new Act. Theme statements, which tend to be applied to smaller parts of Bills (eg a section or Subdivision rather than a whole Bill or a Chapter or Part), are used sometimes in tax legislation. Readers’ guides have largely fallen out of fashion.

There are rules about how outline or overview statements must be formatted (either as an ordinary section or subsection, or using a style designed for this purpose that puts the statement into a box). There are no rules about when an outline or overview statement may be used, or what it should contain. This has caused some embarrassment on a couple of occasions in the past when over-enthusiastic drafters have produced introductory statements running over several pages.

Examples of outline and overview provisions are set out below.

## **Division 1A—Managing National Heritage places**

### **Subdivision A—Preliminary**

#### **324A Simplified outline of this Division**

The following is a simplified outline of this Division:

The Minister may only include a place in the National Heritage List if the Minister is satisfied that the place has one or more National Heritage values.

The Minister must ask the Australian Heritage Council for an assessment of the place's National Heritage values and invite public comments on the proposed inclusion of the place in the National Heritage List.

The Minister must make plans to protect and manage the National Heritage values of National Heritage places. The Commonwealth and Commonwealth agencies must not contravene those plans.

The Commonwealth must try to prepare and implement plans for managing other National Heritage places, in co-operation with the States and self-governing Territories.

The Commonwealth and Commonwealth agencies have duties relating to National Heritage places in States and Territories.

The Commonwealth can provide assistance for the identification, promotion, protection or conservation of National Heritage places.

## **Division 8A—Secret ballots on proposed protected action**

### **Subdivision A—General**

#### **170NBA Object of Division and overview of Division**

##### *Object*

- (1) The object of this Division is to establish a transparent process which allows employees directly concerned to choose, by means of a fair and democratic secret ballot, whether to authorise industrial action supporting or advancing claims by organisations of employees, or by employees.

##### *Overview of Division*

- (2) Under Division 8, industrial action by employees is not protected action unless it has been authorised by a secret ballot held under this Division (a protected action ballot). This Division establishes the steps that organisations of employees, or employees, who wish to organise or engage in protected action must take in order to:
  - (a) obtain an order from the Commission that will authorise a protected action ballot to be held; and
  - (b) hold a protected action ballot that may authorise the industrial action.
- (3) The rule that industrial action by employees is not protected action unless it has been authorised by a protected action ballot does not apply to action in response to an employer lockout (see section 170MQ).

**Attachment C—Office Procedural Circular No. 70  
Drafting-related matters—Compliance with OPC rules—Change-  
management processes**

## **PARLIAMENTARY COUNSEL**

### **Office Procedural Circular No. 70 Drafting-related matters—Compliance with OPC rules— Change-management processes**

#### **Introduction**

1 This circular documents:

- the status of internal OPC rules and practices for drafting-related matters; and
- the process by which those rules or practices may be changed.

2 Drafting-related matters are those relating to the drafting of Bills, including both the contents and formatting of Bills, and the processes by which Bills are developed. In general, the matters covered by this circular are the kinds of matters dealt with in:

- Drafting Directions;
- cc:mails that are added to the “FPC cc:mails” Folio database; or
- Word Notes.

#### **Status of OPC drafting and formatting rules and practices**

##### **The basic rule**

3 The basic OPC rule is that all Bills, parts of Bills and parliamentary amendments (Bills) must conform with the Drafting Directions, the Word Notes and any applicable FPC cc:mails by the time they are lodged for editorial checking.

4 Drafters who use non-standard formatting or special features in early versions of their Bills must ensure that these things have been removed before the Bill is lodged for editorial checking.

5 A secondary rule (intended to ensure that OPC’s IT resources are used most effectively) is that any problems arising from non-

standard formatting or use of special word-processing features in a draft Bill or other document must be raised with the originator of the document, not the IT staff.

### **Exemption from particular rules for particular cases**

6 A drafter who wishes to use a drafting or formatting approach that is inconsistent with a Drafting Direction, a Word Note or an FPC cc:mail must seek First Parliamentary Counsel's approval for the approach.

7 FPC may approve the particular approach if that approach:

- would be used for good reason in a case that is clearly a "one-off"; and
- could be used without creating problems within OPC or for users of our Bills.

8 Any such approval would be given on the basis that the use of the particular approach in the particular Bill does not set a precedent or detract from the status of the rule that is breached.

9 If the particular approach seems to have a more general application within OPC, then FPC's approval, or refusal of approval, for the particular case may be accompanied by a decision that the approach should be put through the change-management process described below, with a view to deciding whether the approach should be generally permissible and, if so, providing appropriate documentation of the approach for the benefit of all staff.

### **The change-management process**

10 OPC has a policy of continuous improvement, and such a policy requires change on an ongoing basis. However, a presumption in favour of change doesn't mean that change should be implemented hastily or without due consideration. Changes that are implemented in such a way may turn out to be unsustainable; this in turn can have a negative effect on continuous improvement.

11 To ensure that desirable change is sustainable, the following processes are set down for changing drafting-related rules and practices:



- Step 1: When a potentially good idea or constructive suggestion emerges (from an individual, a committee, or a source outside OPC), it should be raised with First Parliamentary Counsel or, for IT-related issues, the Director of IT (who may discuss the suggestion with First Parliamentary Counsel before taking it further). This may be done orally, in writing or by cc:mail.
- Step 2: The idea or suggestion will then undergo a preliminary appraisal, which may include experimental application of the idea or suggestion.
- Step 3: If this preliminary appraisal/experimentation indicates that the idea is worth pursuing, the proponents will be asked to prepare a detailed proposal. The detailed proposal ensures that there can be proper assessment of the implications of the idea or suggestion, proper consultation with affected members of the Office, and documentation of the proposal if it is to be implemented. Paragraphs 19-23 give more information about this step.
- Step 4: The detailed proposal will be refined through consultation and then implemented, with the documentation issued as an official document (generally as a Drafting Direction or Word Note). The existence of documentation helps the implementation of the change within OPC, and is vital for changes that affect people or agencies outside OPC (eg Parliament House staff handling our Bills).

12 This is a very general description of the process. There are a number of points that should be made about how the process works in practice.

### **Not all proposals will proceed to implementation**

13 The above description does not indicate that every proposal taken through this process would necessarily be implemented. A proposal may be rejected or abandoned, or may die of neglect, at any stage of the process.

### **Process won't be identical for every proposal**

14 The detailed operation of the change-management process will be different for different kinds of proposals.

15 The preliminary appraisal process will take different forms for different kinds of proposals. It may involve discussions between the

proponent and First Parliamentary Counsel or the Director of IT, or in a wider group within OPC (eg a drafters' seminar). An experimental application of a proposal may involve a particular Bill or a small group of staff.

16 The “detailed” proposal required to be prepared for consultation may take a range of forms. It may consist of a 2-paragraph explanation in a cc:mail, a formal paper canvassing the background and origins of the proposal, its advantages and disadvantages, and various options for implementing it, or something in between. The development of a detailed paper may be achieved through an iterative consultation process in which each round of consultation contributes another layer of detail to the proposal.

17 The form and timing of consultation required will also vary. It may range from a cc:mail to all staff with a short deadline for comments, to a substantial consultation process involving such things as longer deadlines for comments, circulation of comments within OPC, discussion sessions, and consultation with people outside OPC. In rare cases the process may involve implementing a change as a matter of urgency, with scope for the change to be reconsidered depending on a subsequent consultation process.

18 However, except in extraordinary circumstances, all steps of the change-management process will be undertaken. Fast-tracking a particular proposal because it is either minor or urgent will have an impact on how, and how quickly, the steps are undertaken, but will not justify the omission of any step in the process.

### **Responsibility of proponents of change**

19 In many cases, the proponents of a particular change will be expected to prepare the detailed proposal for consultation, and to manage part or all of the consultation process.

20 This is not intended to inhibit staff in proposing change. Rather, it is intended to ensure that bright ideas are developed into serious proposals by people who have both a proper understanding of the bright ideas and some enthusiasm for them to be implemented. It is also intended to ensure that people who propose changes are willing to put some effort into thinking through the implications of their proposals.

21 However, this doesn't mean that staff should only admit to a bright idea if they are sure that they can answer all the questions that might be asked about the idea. The consultation process can be used to

raise unresolved issues, perhaps by way of presenting options, seeking views on the importance of identified disadvantages, or simply asking for possible solutions to particular problems with the proposal. How well this approach works would generally depend on the apparent value of the basic idea, and how much support it gathers among other staff.

22 Equally, staff shouldn't feel inhibited about raising bright ideas that they don't personally have the technical expertise to document or implement. The technical resources of OPC, or indeed of outside organisations if appropriate, can be made available to help a staff member with what appears to be a good idea. In particular, staff should feel free to discuss ideas for our IT system with any member of the IT staff. At the same time, staff need to understand that the potential value of the idea, and the other demands on relevant staff, will determine how much help can be given at different stages of a project, and how quickly it can be given.

23 In other cases (for instance where a staff member proposes a solution to a recognised problem), it may be appropriate for First Parliamentary Counsel to assign other OPC resources to develop the proposed solution, irrespective of the particular staff member's enthusiasm for the idea.

### **Documentation of change to include explanations**

24 The final documentation of a proposal that is to be implemented should include at least a general explanation of why the matter needs to be regulated, and why the particular approach has been adopted. The explanation of why the matter needs to be regulated will often refer to one or more of the general reasons for regulation set out in Part 1 of Attachment A. The explanation for adopting the particular approach will presumably reflect material included in the original proposal or material developed during the consultation process.

## **Attachment A—Background to development/documentation of change-management processes**

The change-management process documented in the Office Procedural Circular largely reflects the process that was used in OPC for some time before the issue of the Circular. It was documented for future reference after discussions within OPC about the following questions.

### **1 Why is it necessary to have documented and centralised control over various aspects of Bills drafting?**

#### **Benefits**

1.1 The existence of well-documented centralised control has the following benefits for the operation of a drafting office:

- All staff work within the same set of rules in the relevant area; this reduces the scope for conflict among staff, it makes training of new staff easier and it makes the job easier for support staff involved in producing work for the drafters (eg Executive Assistants who may be working with 7 or 8 different drafters on a day-to-day basis, and editorial staff who work with all the drafters on a day-to-day basis).
- In areas subject to centralised control, staff do not need to spend time individually re-inventing wheels (eg devising amending formulae to cope with each new amendment). This is particularly useful for staff producing draft legislation to tight deadlines or in otherwise difficult circumstances.
- Standardisation of basic drafting approaches reduces the costs of developing and supporting systems (especially IT systems), because the systems don't have to deal with a wide range of possible approaches.
- This standardisation also enables valuable automation of parts of the drafting process, because the drafting approaches and the resulting documents follow a recognised and consistent form (eg the operation of the ASS macro and the renumbering macro depends on the consistent use of particular drafting approaches).
- The users of our product (Bills) can be confident that each example of that product will follow the standard rules in relevant respects; for instance, members of Parliament can always find a table of

contents, and know that the table of contents always lists all Acts amended by the Bill.

- Centralised control makes it easier to maintain minimum standards across the board; all Bills, no matter which drafters work on them, will satisfy the minimum standards required by centralised control.

1.2 It is recognised that these benefits may be more significant in some areas than others.

### **Disadvantages**

1.3 The main disadvantage of centralised control is that it may stifle creativity and prevent drafters developing innovative solutions to particular issues arising in particular Bills.

1.4 It is recognised that this disadvantage is more significant in some areas than others.

## **2 How can I work out why OPC has a rule about a drafting or formatting matter?**

2.1 There are 2 aspects to this question. You might wonder why there is a rule about a particular drafting or formatting matter. Alternatively, you might recognise the need for a rule but wonder why the particular rule has been adopted.

### **Why do we have a rule at all?**

2.2 In many cases, OPC has a rule about something for one or more of the general reasons set out in paragraph 1.1. In such cases current documentation may not go into these reasons in any detail (or at all). Future documentation will be expected to provide at least a general explanation of the need to provide a rule to deal with a particular matter.

### **Why do we have this particular rule?**

2.3 In some cases, current documentation provides at least a general explanation of the content of a particular rule. In other cases there is little or no explanation. Future documentation will be expected

to provide at least a general explanation for the content of the particular rule.

### **How to find out ...**

2.4 If the document recording the rule doesn't provide an explanation of the existence or contents of a rule, you can pursue the reasons for the rule in various ways, including by asking other members of the Office, or by thinking the question through from first principles.

2.5 Note that working out why there is a rule or a particular rule will sometimes require technical or background knowledge that may not be readily available to you. In some cases this knowledge may be available among your colleagues. In other cases, this may indicate that the particular rule might have lost some of its legitimacy, and that a reconsideration might be in order.

### **... why there is a rule at all**

2.6 To work out from first principles why there is a rule about something at all, you may need to consider an Office-wide (or even wider) perspective (not "how does this matter affect me, or this Bill, now?" but "how might it affect other drafters/other Office staff/other direct users of this Bill/all Bills/wider groups of users of Bills now or at some time in the future?").

2.7 You may need to ask what would be the results for you, and for each of those groups, of not having a rule about the matter.

### **... why there is a particular rule**

2.8 To work out from first principles why there is a particular rule, you may need to consider an Office-wide (or even wider) perspective (not "how does this rule affect me now?" but "how might this rule affect other drafters/other Office staff/other direct users of Bills/wider groups of users of Bills now or at some time in the future?").

2.9 You may need to ask what would be the impact of other versions of the rule on you and on each of those groups.

2.10 Note that there will be many cases in which the content of the particular rule doesn't really matter, as long as there is a rule that is available to, and applied by, all affected groups. In such cases, a reconsideration of the particular rule may be appropriate if the rule appears to create undesirable consequences or to have passed its use-by date.

### **3 What happens if drafters ignore the rules to deal with particular cases?**

3.1 There is no doubt that, for any rule about, say, formatting or amending forms or Bill structure, there will be cases in which a different approach would appear to give a better immediate result. However, there is still a question whether the better immediate result is worth the broader or longer-term consequences. For instance, if drafters were allowed to depart from OPC's formatting rules whenever they felt that those rules didn't handle a particular case very well, this would quickly cause difficulties for:

- Executive Assistants within OPC;
- Editorial checkers within OPC;
- IT staff within OPC;
- Drafters within OPC responsible for later amendments of the Bill or Act concerned;
- Staff in Parliament House who prepare amended/assent prints of Bills;
- Staff in Consol who prepare consolidated Acts;
- Staff in any other organisation that prepares electronic consolidations of Acts;
- Anyone trying to develop an automatic consolidation system.

3.2 Much of a drafter's work involves making careful judgements about what drafting techniques or approaches best suit a particular provision or Bill. However, there are some cases in which an individual drafter's judgement has to give way to a judgement that has been made for OPC as a whole.

3.3 For instance, the development of our current Bills format was done fairly carefully, and involved expert input and a lot of

consultation. Nevertheless, not all drafters like all aspects of it, and some may disagree with the final judgements that were made about the format. However, it would be quite inappropriate to allow individual drafters to redesign the format for their own Bills.

#### **4 How does the change-management process as described in the Office Procedural Circular affect OPC's operations?**

##### **Benefits**

4.1 The benefits of the change-management process as described in the Office Procedural Circular include the following:

- The final version of the proposal for change is usually better than that originally proposed; staff consulted about the proposal may suggest improvements to the original proposal, and any technical bugs in the original proposal are likely to be recognised and fixed during the consultation process.
- Changes implemented through this change management process are usually implemented smoothly; this is partly because giving staff an opportunity to comment on proposed changes minimises resistance to the implementation of the change. It also reflects the fact that the change-management process requires new procedures to be documented, and allows time for training to be provided if necessary.
- Proposed changes incorporated into the existing centralised control mechanisms are then available to all staff; this means that innovations and improvements developed by individual staff members spread through OPC, thus raising the overall standard of our work.

##### **Disadvantages**

4.2 The following disadvantages have also been identified:

- The change-management process is time-consuming. Consultation processes inevitably consume a fair bit of elapsed time, while the requirement to prepare a detailed proposal consumes the actual time of the proposal's proponent.
- The requirement to produce detailed documentation of an innovative proposal may discourage innovation from creative staff



who are not temperamentally inclined to detailed implementation work.

- Possibly desirable changes may be delayed or prevented by opposition from other staff.

**Attachment D—Printouts produced by checking macros**

## Checker Macro Results

**Checked Document:** example Bill.doc

**Checklist:** drafting checklist.doc

**Time:** 04:24 pm, 9 August 2002

*Notes:*

1. *Page, line and column numbers refer to the end of the first Search term*
2. *Only FIRST occurrence of items marked with asterisks (\*) are reported.*

Section	Page	Line	Column	[CheckList #]and comment
3	10	11	29	26: If the Bill affects Norfolk Island, see DD-6/1997 (Australian jurisdictions) and DD-1/2002 (referral)
3	12	5	18	42: If the Bill extends to an external territory, see DD-6/1997 (Australian jurisdictions) and DD-1/2002 (referral)
3	12	2	27	68: DD-6/1997: Standard wording for binding Crown?
3	21	14	39	130: If authorising a search warrant, see DD-5/1982, DD-12/1986, DD-17/1989 & DD-2/1999
2	1	21	20	178: "Attorney-General": Generally, Ministers (and their Departments) should not be specified by name . See FPC e-mail dated 15-10-1998
3	5	21	15	*184: "writing" or "written" will not always attract AIA 33(3). See FPC e-mail dated 20-30-1998. See also DD 10/2001 for Electronic Transactions Act 1999 implications for references to "writing" etc.
3	13	17	59	208: Have you considered including a reference to affirmation too?
3	2	14	9	210*: If a part of your Act will commence when another Act commences, have you made sure that the other Act does not have a split commencement?

## Checker Macro Results

**Checked Document:** example Bill.doc

**Checklist:** editorial checklist.doc

**Time:** 04:31 pm, 9 August 2002

*Notes:*

1. *Page, line and column numbers refer to the end of the first Search term*
2. *Only FIRST occurrence of items marked with asterisks (\*) are reported.*

<b>Section</b>	<b>Page</b>	<b>Line</b>	<b>Column</b>	<b>[CheckList #]and comment</b>
3	10	31	64	704: Unwanted space before .
3	9	15	51	706: Colon should not be followed by space?
3	2	25	41	790: Proclamations by the GG should have an upper case 'P'
3	5	1	32	793: pubic, should be public?

## Checkformat results

**Document:** EXAMPLE BILL.DOC International Criminal Court Act 2002

**Computer:** STATION\_DA by quigginp

**Time:** 04:19 pm, 9 August 2002

NOTE: Line numbers for Style checks refer to the START of the paragraph that contains the error.

Section	Page	Line	Column	Description of error
3	2	20	3	2 spaces not allowed here (ignore if after commencement item no.)
3	2	25	3	2 spaces not allowed here (ignore if after commencement item no.)
3	2	27	3	2 spaces not allowed here (ignore if after commencement item no.)
3	3	29	1	Style s needs ONE double space (0 found)
3	3	29	1	Style s must have NO tabs (1 found)
3	3	31	16	2 spaces not allowed here (ignore if after commencement item no.)
3	4	1	1	Definition order incorrect: 'appropriate authority' should be after 'agent'

## Bill print showing all styles

### 4•Definitions¶{Heading 5,s}

> >In this Act:¶{subsection,ss}

**State prisoner** means a person who:¶{Definition,dd}

- >(a) >is being held in custody pending:¶{indent(a),a}
- 128                   >(i)     >trial for; or¶{indent(ii),aa}
- 129                   >(ii)    >a committal hearing or a summary hearing in  
relation to; or¶{indent(ii),aa}
- 130                   >(iii)   >sentencing for;¶{indent(ii),aa}
- > >an offence against a law of a State; or¶{indent(a),a}
- >(b) >is under a sentence of imprisonment for an offence against a  
law of a State, or is otherwise subject to detention under a law of  
a State;¶{indent(a),a}
- but does not include a person who is at large after having escaped from  
lawful custody.¶{subsection2,ss2}

**strip search** means a search of a person or of articles in the possession  
of a person that may include:¶{Definition,dd}

- >(a) >requiring the person to remove all of his or her garments;  
and¶{indent(a),a}
- >(b) >an examination of the person's body (but not of the person's  
body cavities) and of those garments.¶{indent(a),a}

**superintendent** of a prison means the person for the time being in  
charge of the prison.¶{Definition,dd}

**surrender warrant** means a warrant issued under  
section 28.¶{Definition,dd}

**warrant premises** means premises in relation to which a search warrant  
is in force.¶{Definition,dd}

### 5•Act to bind Crown¶{Heading 5,s}

> >This Act binds the Crown in right of the Commonwealth and in right  
of each of the States.¶{subsection,ss}

### 6•External Territories¶{Heading 5,s}

> >This Act extends to each external Territory.¶{subsection,ss}

## Part 2—General provisions relating to requests by the ICC for cooperation¶{Heading 2,p}

•¶{HEADER}

## 7·What constitutes a request for cooperation¶{Heading 5,s}

>(1) >A **request for cooperation** is a request made by the ICC to Australia, in respect of an investigation or prosecution that the Prosecutor is conducting or proposing to conduct, for:¶{subsection,ss}

>(a) >assistance in connection with any one or more of the following:¶{indent(a),a}

131 >(i) >the arrest (including the provisional arrest), and  
surrender to the ICC, of a person in relation to whom the  
ICC has issued a warrant of arrest or a judgment of  
conviction;¶{indent(ii),aa}

132 >(ii) >the identification and whereabouts of a person or  
the location of items;¶{indent(ii),aa}

133 >(iii) >the taking of evidence, including testimony on  
oath, and the production of evidence, including expert  
opinions and reports necessary to the ICC;¶{indent(ii),aa}

134 >(iv) >the questioning of any person being investigated  
or prosecuted;¶{indent(ii),aa}

135 >(v) >the service of documents, including judicial  
documents;¶{indent(ii),aa}

136 >(vi) >facilitating the voluntary appearance of persons  
(other than prisoners) before the ICC;¶{indent(ii),aa}

137 >(vii) >the temporary transfer of prisoners to the  
ICC;¶{indent(ii),aa}

138 >(viii) >the examination of places or  
sites;¶{indent(ii),aa}

139 >(ix) >the execution of searches and  
seizures;¶{indent(ii),aa}

140 >(x) >the provision of records and documents,  
including official records and documents;¶{indent(ii),aa}

141 >(xi) >the protection of victims or witnesses or the  
preservation of evidence;¶{indent(ii),aa}

142 >(xii) >the identification, tracing, and freezing or  
seizure, of the proceeds of crimes within the jurisdiction of  
the ICC for the purpose of eventual forfeiture, without  
prejudice to the rights of bona fide third parties;  
and¶{indent(ii),aa}

>(b) >any other type of assistance that is not prohibited by Australian  
law, with a view to facilitating the investigation and prosecution  
of crimes within the jurisdiction of the ICC and the enforcement  
of orders of the ICC made after convictions for such  
crimes.¶{indent(a),a}

>(2) >This Act does not prevent the provision of assistance to the ICC  
otherwise than under this Act, including assistance of an informal  
nature.¶{subsection,ss}

### **8•How requests for cooperation are to be made¶{Heading 5,s}**

- >(1) >Subject to section·9, a request for cooperation is to be made in writing:¶{subsection,ss}
  - >(a) >to the Attorney-General through the diplomatic channel; or¶{indent(a),a}
  - >(b) >through the International Criminal Police Organisation or any other appropriate regional organisation.¶{indent(a),a}
- >(2) >If a request for cooperation is sent to, or received by, a person to whom the Attorney-General has delegated a power to deal with the request, the request is taken for the purposes of this Act to have been sent to, or received by, the Attorney-General.¶{subsection,ss}

### **9•Urgent requests for cooperation and requests for provisional arrest¶{Heading 5,s}**

- >(1) >A request for cooperation made in urgent cases, and any request for provisional arrest, may be made by using any medium capable of delivering a written record.¶{subsection,ss}
- >(2) >If a request is made or sent in the first instance in a manner specified in subsection·(1), it must be followed as soon as practicable by a formal request made in accordance with section·8.¶{subsection,ss}



## **Attachment E—Editorial checklists**

### *Check for errors:*

- that the correct Bill template has been used
- that the year of introduction is correct
- that the portfolio appears to be correct
- that the long title starts off “A Bill for an Act...”
- that the long title has “, and for related purposes” or “and for other purposes” in it if the Bill has application, saving or transitional provisions in it
- that the enacting words (“The Parliament of Australia enacts:”) appear before section 1
- the short title (ensure it says “Act” not “Bill” and if the word “Amendment” appears, check its location is correct—i.e. it doesn’t break up an existing Act’s title)
- that the formatting is in accordance with Word Note 3 (Word format samples and tables) (remember to use the Styles and Tabs version to ensure you’ve checked the styles are right)
- that the formatting is in accordance with Word Note 4 (Formatting rules for OPC Bills)
- that none of the “common problems” described in Word Note 5 occur in the Bill
- that the formatting is in accordance with Word Note 10 (Formulas)
- that the formatting is in accordance with Word Note 24 (Tables in Bills)
- that the formatting is in accordance with Word Note 29 (Blank headings)

- that headers are correct for the page they appear on
- that there are no blank lines in the body of the Bill (except as required for headers)
- that any amending forms used in the Bill are in accordance with Appendix 1B of the Amending Forms manual (see pages 18-37 of the manual)
- that all provisions referred to are labelled correctly as sections, subsections, items etc.
- that numbering and lettering runs sequentially, with no gaps, in new provisions
- that each sentence starts with a capital letter
- that if a list of paragraphs is included in a new provision no letters are left out (especially “i” and “v”—drafters used to omit them to avoid confusion with subparagraph letters)
- that “; and” or “; or” is at the end of paragraphs as required or that “;” is used in cases where the opening words to the provision begin “the following” or “these”
- that there is no sexist language (e.g. “he” without “she” is sexist)
- that the word “Chairman” is not used in new provisions (Chair is preferred although “Chairperson” may be used in an amending Bill if the existing Bill uses it)
- that definitions in lists appear in alphabetical order, are in bold italics and end in full stops
- that all quotation marks are smart quotes (curled) and are double quotes, not single quotes
- penalties are terms of imprisonment or numbers of penalty units (not \$ amounts)

- that the word “servant” does not appear in Bills (unless it’s in text being repealed or omitted from another Bill)
- that the names of any States included just give the name of the state (e.g. Victoria), not “the state of Victoria”
- that States and Territories are listed according to their population (at present, the order of precedence based on population is New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, Australian Capital Territory, Northern Territory)
- that State Premiers and Chief Ministers are specified in the same order of precedence as the States
- that minor Territories that are referred to are named correctly (Norfolk Island, Australian Antarctic Territory, Coral Sea Islands Territory, Jervis Bay Territory, Territory of Ashmore and Cartier Islands, Territory of Christmas Island, Territory of Cocos (Keeling) Islands, Territory of Heard Island and McDonald Islands)
- that Commonwealth public servants are referred to as “employees” (not “officers”) and are said to occupy “positions” (not “offices”)
- that there is no incomprehensible text
- that expressions are used consistently (drafters shouldn’t use different words to express the same concept)
- that there are no obviously incorrect cross-references
- that there are no other obvious spelling, grammatical or punctuation errors
- that any errors indicated by the editorial checker macro have been fixed and that any errors indicated by the drafter’s checker macro have been brought to the drafter’s attention

*Other checks*

- (a) **check provisions for compliance with all drafting directions, FPC e-mails and word notes relevant to editorial checking** (either manually or using a macro) and update their own knowledge base as those documents change
- (b) **check the formatting of specialised legislation** (eg: TLIP, Social Security, Corporations and Customs Bills) **and update their own knowledge base** as the rules change
- (c) **read drafts for sense**
- (d) **detect very subtle inconsistencies of expression** (e.g. changing references to “a proceeding” to “proceedings” midway through a Bill)
- (e) **detect headings which are not relevant to their text**
- (f) **use advanced grammatical skills** (e.g. the ability to detect inconsistencies of person or tense, inappropriate use of the passive voice, singular use of verbs with plural subject matter and vice versa)
- (g) **use advanced spelling skills** (e.g. the ability to detect spelling errors due to the changed use of a word (use of verb instead of noun: “affect” instead of “effect”, “practise” instead of “practice”, “license” instead of “licence” etc.)
- (h) **make suggestions for Plain English improvements** (such as avoiding unnecessary archaic language, legalistic jargon, repetition, double negatives, poor sentence construction such as not keeping the verb as close to the subject matter as possible etc.)
- (i) **use advanced skills in checking the correct names of provisions have been used** (e.g. knowing the difference between a proposed section of a Bill and a proposed clause of a non-amending Schedule)

- (j) **use advanced skills in checking amending forms** (e.g. the ability to check amending forms in parliamentary amendments).