

Making legislation more accessible: Legislation users survey and complexity flags

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Drafting features covered in the OPC 2010 Legislation Users Survey

- 1 The following 16 features were set out in the Office of Parliamentary Counsel 2010 Legislation Users Survey, conducted in February and March 2010.
- 2 A report of the results of the survey is available on OPC's website www.opc.gov.au.

Feature 1—commencement provisions

Description

The general approach is to have commencement clauses drafted in table format with the commencement of each provision specified in the order that the provisions appears in the Bill. In contrast, older forms of commencement provision relied on a “catch-all” provision, such as subsection 2(1) of the *Crimes Legislation Amendment Act (No. 2) 1991*.

The standardised commencement table contains a column into which information about commencement dates will be inserted as it becomes available after the Act is passed.

Example

Old format	Current format												
<p>Section 2 of the <i>Crimes Legislation Amendment Act (No. 2) 1991</i></p> <p>Commencement</p> <p>2. (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.</p> <p>(2) Sections 5 to 10 (inclusive), Parts 3, 4, 5, 6, 7 and 9 and sections 40 to 50 (inclusive) commence 28 days after the day on which this Act receives the Royal Assent.</p> <p>(3) Subject to subsections (4) and (5), section 51 and Part 8 commence on a day or days to be fixed by Proclamation.</p> <p>(4) If the commencement of Part 8 is not fixed by a Proclamation published in the Gazette within the period of 6 months beginning on the day on which this Act receives the Royal Assent, the Part is repealed on the first day after the end of that period.</p>	<p>2 Commencement</p> <p>(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.</p> <hr/> <p>Commencement information</p> <table border="1"> <thead> <tr> <th>Column 1</th> <th>Column 2</th> <th>Column 3</th> </tr> <tr> <th>Provision(s)</th> <th>Commencement</th> <th>Date/Details</th> </tr> </thead> <tbody> <tr> <td>1. Sections 1 to 4 and anything in this Act not elsewhere covered by this table</td> <td>The day this Act receives the Royal Assent.</td> <td></td> </tr> <tr> <td>2. Sections 5 to 10</td> <td>The 28th day after this Act receives the Royal Assent.</td> <td></td> </tr> </tbody> </table>	Column 1	Column 2	Column 3	Provision(s)	Commencement	Date/Details	1. Sections 1 to 4 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.		2. Sections 5 to 10	The 28th day after this Act receives the Royal Assent.	
Column 1	Column 2	Column 3											
Provision(s)	Commencement	Date/Details											
1. Sections 1 to 4 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.												
2. Sections 5 to 10	The 28th day after this Act receives the Royal Assent.												

(5) If section 51 does not commence under subsection (3) 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.

3. Parts 3 to 7	The 28th day after this Act receives the Royal Assent.
4. Part 8	A day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they do not commence at all.
5. Part 9	The 28th day after this Act receives the Royal Assent.
6. Sections 40 to 50	The 28th day after this Act receives the Royal Assent.
7. Section 51	A day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.
8. Schedule 1	The 28th day after this Act receives the Royal Assent.

Note: This table relates only to the provisions of this Act as originally passed by both Houses of 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 contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

Feature 2—Overviews

Description

An overview or summary is included to give readers a brief introduction to a large unit of legislative text.

The purpose of overviews and summaries is to assist readers in beginning to understand complex or lengthy legislation, as well as assisting the reader to determine the relevance of the unit of legislation to them.

Division 3 of Chapter 1 of the *Aged Care Act 1997* is an example of an overview designed to assist and guide readers to obtain an overall idea of the scheme of the Act before confronting the detail

Example

Current format

Aged Care Act 1997

Division 3—Overview of this Act

3-1 General

This Act provides for the Commonwealth to give financial support:

- (a) through payment of subsidies for the provision of aged care; and
- (b) through payment of grants for other matters connected with the provision of aged care.

Subsidies are paid under Chapter 3 (but Chapters 2 and 4 are also relevant to subsidies), and grants are paid under Chapter 5.

Feature 3—Guides

Description

Guides are included to summarise a large unit of legislative text for readers.
Guides are given prominence by appearing in boxes.

Example

Current format

Aged Care Act 1997

Division 44—What is the amount of residential care subsidy?

44-1 What this Division is about

Amounts of residential care subsidy payable under Division 43 to an approved provider are worked out under this Division in respect of each residential care service. The amount in respect of a residential care service is determined by adding together amounts worked out, using the residential care subsidy calculator in section 44-2, in respect of individual care recipients in the service.

Feature 4—Decentralised tables of contents

Description

Decentralised tables of contents are often used in very large principal Acts in order to assist in the navigability of large units of legislative text.

These tables of contents appear in addition to the main table of contents included at the beginning of the Act.

Example

Current format

Table of Subdivisions

44-A	Working out the amount of residential care subsidy
44-B	The basic subsidy amount
44-C	Primary supplements
44-D	Reductions in subsidy
44-E	The income test
44-F	Other supplements

Feature 5—Objects provisions

Description

Objects provisions are sometimes included at the beginning of Acts. Some objects provisions give a general understanding of the purposes of the legislation. Other objects provisions set out general aims or principles that help the reader to interpret the detailed provisions of the legislation.

Objects provisions are readily identifiable by section headings or other obvious formatting.

Example

Current format

Fuel Quality Standards Act 2000

3 Objects of Act

The objects of this Act are to:

- (a) regulate the quality of fuel supplied in Australia in order to:
 - (i) reduce the level of pollutants and emissions arising from the use of fuel that may cause environmental and health problems; and
 - (ii) facilitate the adoption of better engine technology and emission control technology; and
 - (iii) allow the more effective operation of engines; and
- (b) ensure that, where appropriate, information about fuel is provided when the fuel is supplied.

Feature 6—Examples

Description

Examples are often a good way of explaining the operation of a complex provision. Worked examples may be particularly useful for provisions requiring complex calculations.

Example

Current format

Aged Care Act 1997

30-3 Meaning of distinct part

- (1) For the purposes of this Part, ***distinct part***, in relation to a residential care service, means a specific area of the service that:
- (a) is physically identifiable as separate from all the other places included in the service; and
 - (b) includes sufficient living space for the care recipients to whom residential care is provided in respect of the places in the area; and
 - (c) meets any other requirements specified in the Extra Service Principles.



Example: A wing of a service with a separate living and dining area for residents living in the wing might constitute a “distinct part” of the service.

Note: If the Secretary approves an application for extra service status for a distinct part of a service, all the places in that distinct part will be extra service places at a particular time as long as the requirements of section 31-1 are met.

- (2) The Extra Service Principles may specify characteristics that must be present in order for an area to be physically identifiable as separate for the purposes of paragraph (1)(a).

Feature 7—Notes

Description

Notes to provisions are now often included in legislation. They might explain, the purpose, origin or operation of the provision, or refer the reader to related provisions or to defined terms used in the provision.

Example

Current format

Aged Care Act 1997

30-3 Meaning of distinct part

- (1) For the purposes of this Part, ***distinct part***, in relation to a residential care service, means a specific area of the service that:
- (a) is physically identifiable as separate from all the other places included in the service; and
 - (b) includes sufficient living space for the care recipients to whom residential care is provided in respect of the places in the area; and
 - (c) meets any other requirements specified in the Extra Service Principles.

Example: A wing of a service with a separate living and dining area for residents living in the wing might constitute a “distinct part” of the service.



Note: If the Secretary approves an application for extra service status for a distinct part of a service, all the places in that distinct part will be extra service places at a particular time as long as the requirements of section 31-1 are met.

- (2) The Extra Service Principles may specify characteristics that must be present in order for an area to be physically identifiable as separate for the purposes of paragraph (1)(a).

Feature 8—Use of asterisks

Description

Some legislation uses asterisks to identify defined terms, with a standard footnote on every page referring the reader to a Dictionary at the back of the Act. Every definition used in the Act is either set out, or signposted, in the Dictionary.

At the beginning of the Act, interpretative provisions are included to explain how asterisks are used.

Example

Current format

Aged Care Act 1997



8-6 States, Territories and local government taken to be approved providers

- (1) Each of the following is taken to have been approved under this Part as a provider of *aged care:
- (a) a State or Territory;
 - (b) an *authority of a State or Territory;
 - (c) a *local government authority.

The approval is taken to be in respect of all types of aged care.

- (2) Subsection (1) ceases to apply in relation to a State, Territory, *authority of a State or Territory or *local government authority if the approval:
- (a) lapses under section 10-2; or
 - (b) is revoked under section 10-3; or
 - (c) is revoked or suspended under Part 4.4.
- (3) If a State, Territory, *authority of a State or Territory or *local government authority to which subsection (1) has ceased to apply subsequently applies under section 8-2 for approval as a provider of *aged care, for the purposes of the application:
- (a) the applicant is taken to be a *corporation; and
 - (b) if the applicant is a State or Territory—paragraphs 8-3A(a) and (b) do not apply.

Feature 9—Use of tagging of concepts

Description

Tagging of concepts can be done by using a label (appearing in bold, italicised text) to create a definition for a limited part of the Act. The label appears immediately after the thing that it describes. This device relies on a narrative flow of text, in which the reader will begin reading from the beginning of the appropriate unit, and will keep the label in his or her head while reading the unit.

Example

Current format

Aged Care Act 1997

57-21AA Refunding of accommodation bond balance—former approved providers

- (1) If:
- (a) an accommodation bond is paid to a person by a care recipient for entry to a residential care service or flexible care service conducted by the person; and
 - (b) the person ceases to be an approved provider in respect of the residential care service or flexible care service;



the person (the ***former approved provider***) must refund the accommodation bond balance in respect of the accommodation bond to the care recipient.

- (2) The accommodation bond balance must be refunded under subsection (1):
- (a) if the care recipient dies within 90 days after the day on which the former approved provider ceased to be an approved provider in respect of the residential care service or flexible care service that provided the care recipient with care (the ***90 day period***)—within 14 days after the day on which the former approved provider is shown the probate of the will of the care recipient or letters of administration of the estate of the care recipient [...]

Feature 10—Questions as headings

Description

Section (or subsection) headings are posed as questions, as a means of directing the reader to the issue to be addressed by the provision.

Example

Current format

Aged Care Act 1997

27-1 When do classifications cease to have effect?



- (1) A classification that has an expiry date under section 27-2 ceases to have effect on that date, unless it is renewed under section 27-6.
- (2) A classification that does not have an expiry date under section 27-2 continues to have effect but may be renewed under section 27-6 if a reappraisal is made under section 27-4.

Feature 11—Subsection headings

Description

Subsection headings are included in italicised text before the relevant subsection. This is a way of breaking up longer sections and improving navigability, particularly in Acts where rewriting whole sections is undesirable.

Example

Current format

27-4 Reappraisal at initiative of approved provider

- (1) A reappraisal of the level of care needed by a care recipient may be made at the initiative of an approved provider in accordance with this section.



Reappraisal after first year of effect of classification or renewal

- (2) A reappraisal of the level of care needed by a care recipient may be made if:
- (a) the classification of the care recipient has been in effect for more than 12 months; or
 - (b) if the classification of the care recipient has been renewed—the most recent renewal of the classification has been in effect for more than 12 months.



Reappraisal if needs of care recipient have changed significantly

- (3) A reappraisal of the level of care needed by a care recipient may be made if the care needs of the care recipient change significantly.
- (4) The Classification Principles may specify the circumstances in which the care needs of a care recipient are taken to change significantly.



Reappraisal if care recipient enters another aged care service

- (5) If a care recipient enters an aged care service (the **later service**) that is a residential care service or a flexible care service within 28 days after another residential care service or flexible care service ceased to provide residential care or flexible care to the care recipient (other than because the care recipient was on leave), a reappraisal of the level of care needed by the care recipient may be made during the period:
- (a) beginning 7 days after the day on which the care recipient entered the later service; and
 - (b) ending 2 months after the day on which the care recipient entered the later service.

Feature 12—Use of tables

Description

Tables are a useful way of organising a large volume of information. In particular, tables allow quick recognition of the similarities and differences in different cases dealt with in the legislation, and may also reveal the conceptual basis for those similarities and differences very readily. Tables may be operative, or merely an explanation or summary of operative provisions.

Example

Current format

5-2 Which approvals etc. may be relevant

The following table shows, in respect of each kind of payment under Chapter 3, which approvals and similar decisions under this Chapter may be relevant.

Which approvals etc. may be relevant				
Approvals or decisions		Kind of payment		
		Residential care subsidy	Community care subsidy	Flexible care subsidy
1	Approval of providers	Yes	Yes	Yes
2	Allocation of places	Yes	Yes	Yes
3	Approval of care recipients	Yes	Yes	Yes
4	Classification of care recipients	Yes	No	Yes
5	Decisions relating to extra service places	Yes	No	No
6	Certification of residential care services	Yes	No	No

Note 1: Classification of care recipients is relevant to flexible care subsidy only in respect of some kinds of flexible care services.

Note 2: Allocation of funding for residential care grants, community care grants and flexible care grants is dealt with in Parts 5.1, 5.2 and 5.2A respectively, and not in this Chapter.

Feature 13—Diagrams

Description

Diagrams can provide a useful method of communicating complex information. For instance, a flow chart may give a simple overview of lengthy provisions detailing a complex process or the structure of an Act.

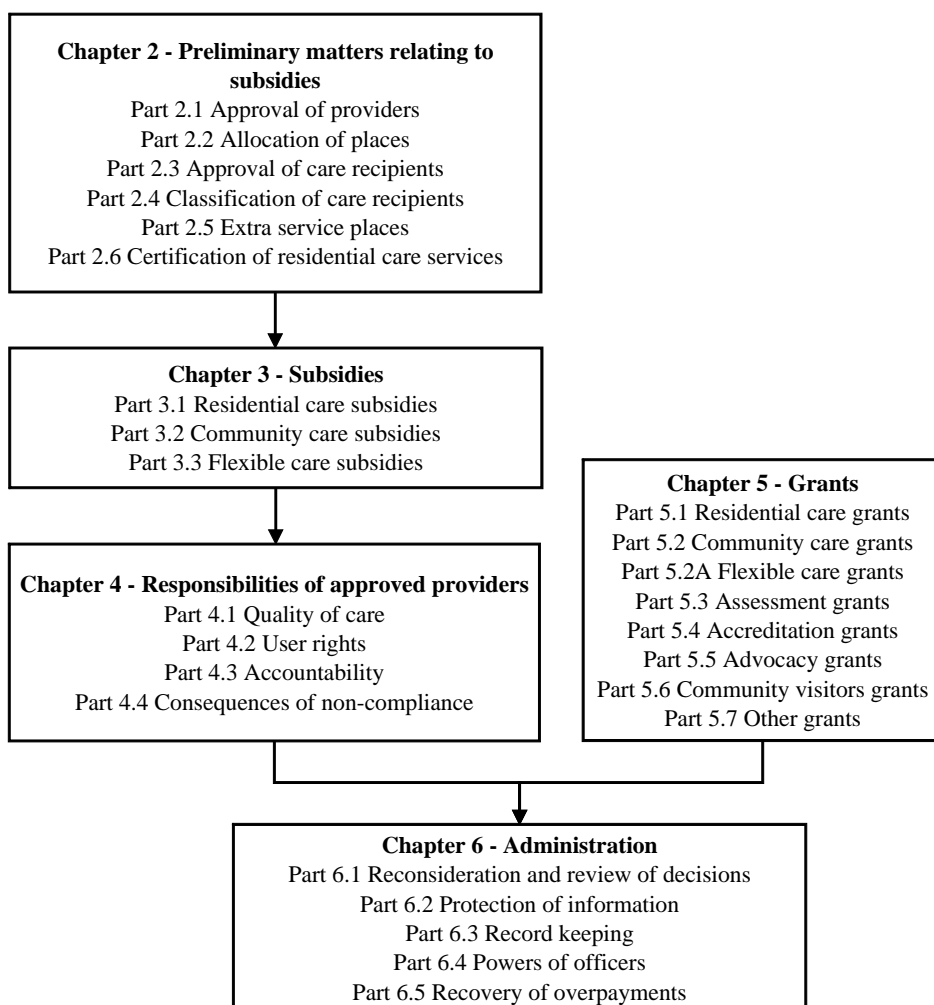
Example

Current format

Aged Care Act 1997

3-6 The structure of this Act

This diagram sets out the basic structure of this Act.



Feature 14—Method Statements

Description

Method statements can be used if a number of steps are needed to determine an entitlement or calculate an amount (which might otherwise be presented as a formula). Method statements can be particularly useful in cases where the calculation is not a straightforward, single process but has alternative outcomes depending on the circumstances.

Example

Standard format	Alternative format
<p>58-2 Maximum daily amount of resident fees</p> <p>The maximum daily amount of resident fees payable by the care recipient is the amount worked out as follows:</p> <p>Resident fee calculator</p> <p>Step 1. Work out the standard resident contribution for the care recipient using section 58-3, 58-3B, 58-3C or 58-4 (whichever is applicable).</p> <p>Step 2. Add the compensation payment reduction (if any) applicable to the care recipient on the day in question (see section 44-20).</p> <p>Step 3. Add the daily income tested reduction (if any) applicable to the care recipient on that day (see sections 44-21 to 44-23).</p> <p>Step 4. Subtract the amount of any hardship supplement (expressed as a daily amount) applicable to the care recipient on the day in question under section 44-30.</p> <p>Step 5. Add any other amounts agreed between the care recipient and the approved provider in accordance with the User Rights Principles.</p> <p>Step 6. If, on the day in question, the place in respect of which residential care is provided to the care recipient has extra service status, add the extra service amount in respect of the place worked out under section 58-5.</p> <p>The result is the maximum daily amount of resident fees for the care recipient.</p>	<p>44-2 Amount of residential care subsidy</p> <p>The maximum daily amount of resident fees payable by the care recipient is the amount worked out using the formula:</p> $\begin{array}{ccccccccc} \text{standard} & & \text{compensation} & & \text{daily income} & & \text{agreed} & & \text{extra} & & \text{hardship} \\ \text{resident} & + & \text{payment} & + & \text{tested} & + & \text{amount} & + & \text{service} & - & \text{supplement} \\ \text{contribution} & & \text{reduction} & & \text{reduction} & & & & \text{amount} & & \end{array}$ <p>where:</p> <p>compensation payment reduction means the compensation payment reduction (if any) for the care recipient in respect of the day in question, as worked out in accordance with section 44-20.</p> <p>agreed amount means an amount agreed between the care recipient and the approved provider in accordance with the User Rights Principles.</p> <p>extra service amount means the amount in respect of a place worked out under section 58-5 if, on the day in question, the place in respect of which residential care is provided to the care recipient has extra service status.</p> <p>hardship supplement means the amount of any hardship supplement (expressed as a daily amount) applicable to the care recipient on the day in question under section 44-30.</p>

Feature 15—Use of the second person

Description

In some legislation, the provisions are drafted in the second person, that is by referring directly to “you” as the person upon whom an obligation is imposed or an entitlement is conferred or in relation to whom rights are determined.

Example

Current format

Part 2—Entitlement to product stewardship (oil) benefits

8 Registration must precede a claim for product stewardship (oil) benefit

- (1) Despite the other provisions of this Part, you are not entitled to a product stewardship (oil) benefit unless you were registered for entitlement to product stewardship (oil) benefits when you made a claim for payment of the product stewardship (oil) benefit.

Note: You register for product stewardship (oil) benefits under the *Product Grants and Benefits Administration Act 2000*.

- (2) For the purposes of subsection (1), if you make a claim in respect of an entitlement that is referred to in subsection 9(1):

- (a) after, or at the same time as, you apply for registration; but
- (b) before you are registered;

the claim is taken to have been made immediately after you are registered.

- (3) For the purposes of subsection (1), if you make a claim in respect of an entitlement referred to in subsection 9(3):

- (a) after the introduction into the Parliament of the Bill for the *Product Stewardship (Oil) Legislation Amendment Act (No. 1) 2003*; but
- (b) before you are registered;

the claim is taken to have been made immediately after you are registered.

Feature 16—New format including indenting conventions

Description

The current format for Bills was adopted in 1996. It was developed in response to the realisation that the layout of the print on the page can be a significant factor influencing how effectively the legislative message is communicated.

The current format has the following features (when compared with the previous formatting):

- (a) wider left and right margins;
- (b) greater line spacing between units;
- (c) section numbers appearing before section headings;
- (d) greater prominence given to section headings;
- (e) standardised tables of contents for every Act;
- (f) definitions appearing in bold, italicised font;
- (g) simplified enacting words in more prominent text.

Example

Old Format	Current Format
Insert scanned copy of <i>Asian Development Bank (Additional Subscription) Act 1983</i>	Insert <i>Asian Development Bank (Additional Subscription) Bill 2009.</i>

Drafting Direction No. 4.1A Complexity Flag System

Document release 1.0

Issued April 2011

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Background

3 As part of the Access to Justice program of the Government, we are looking for ways to reduce the complexity of legislation.

4 Over the past 2 decades, OPC has done substantial work on plain English drafting and is now recognised as a leader amongst drafting offices in this area. However, legislation continues to be complex.

5 A major reason for the complexity of legislation is the complexity of the underlying policy. The Attorney-General has noted that OPC's central position in the legislation process enables us to have a major role in addressing this complexity. He has asked that OPC use its influence on the policy decisions of instructors, encouraging them to choose the simpler alternatives whenever possible.

6 The complexity flag system is designed to provide a structured approach to raising issues of complexity with instructors. OPC has developed the system as part of implementing the Government's Clearer Commonwealth Laws initiative.

The complexity flag system

Basic description

7 The complexity flag system will mainly consist of comments (**complexity flags**) being included in draft Bills (or drafting plans) raising issues where OPC considers that there is complexity.

8 The instructing Department will then respond to those comments.

9 In some cases the flags will relate to the intent of the basic policy or fundamental aspects of how the policy is to be implemented. In other cases the flags will relate to matters of detail or particular provisions.

10 OPC drafters will work with their instructors to try to get the complexity removed from the Bill.

11 To ensure that senior management in the Department are aware of complexity that remains in Bills, there will be a complexity contact officer in the Department. Where a complexity is not removed on the instructions of the instructor, First Parliamentary Counsel will arrange for a copy of the document with the unresolved complexity flags to be sent to the complexity contact officer in addition to the instructors for the Bill.

12 OPC will maintain a database that will retain all of the complexity comments and the Departmental responses. This database may be useful in identifying systemic causes of complexity. It may also provide suggestions for avoiding complexity in future cases.

Raising a flag

13 As part of the analysis of drafting instructions, OPC drafters will look for areas that will raise complexity. This is something that drafters have always done, although in the past drafters would have been unlikely to raise the matter with instructors if it was clear that it was the fundamental policy that was giving rise to the complexity. Also, drafters would have tended to accept a Department's assurance that they had considered the matter and were comfortable with the complexity.

14 Where a drafter sees a matter that they consider will add complexity, they will raise a complexity flag. The flag will be in the form of a specially formatted note that will be included in the draft Bill or plan.

15 The basic form of the complexity flag will be as follows:

Complexity Flag

The drafter considers that this [provision/Bill] will add complexity. This is because [...]. It may be possible to reduce the complexity by [...]. Please provide written instructions.

16 In some cases, the drafter will not be able to suggest an alternative that will reduce the complexity other than by not implementing the proposed amendment or policy.

17 Many Bills will add complexity simply because they are introducing a new system or adding components to an existing system. Even though this will be the basic policy that the Bill is implementing, it is considered that it is still worth raising these matters. However, it is noted that, in many cases, there will be little that the instructors can do. A more generic flag will be used to indicate that the mere implementation of the policy will add complexity. The form of this flag will be as follows:

Complexity Flag

The drafter considers that this policy will add complexity. This is because the policy requires significant amendment of, or addition to, the Commonwealth statute book. This will add to the length and complexity of the statute book. Please provide written instructions on whether you intend to proceed with the [Bill/measure].

18 Sometimes complexity will be included in the initial instructions but be removed after it is discussed by the drafters and instructors before a draft is produced. To ensure that the existence of the complexity is recorded, the drafter should raise an appropriate flag in the first draft or plan, include a response “Complexity removed after initial discussion with instructors.” and then remove the flag. The status should be changed to Complexity removed.

19 Examples of the kinds of comments that may be raised in complexity flags are set out in Attachment A.

20 Where a drafter raises a complexity flag, the drafter may also want to include in the draft of the Bill or plan an explanatory note about the complexity flag system and this Drafting Direction. A suggested form of the note is as follows:

[Instructors: A complexity flag must be resolved to be removed from the draft. Approval from the instructing department’s complexity contact officer is required if complexity is to be retained. See Drafting Direction 4.1A on the OPC website for details of the complexity flag system (www.opc.gov.au).]

Responding to a flag

21 When the Department receives a flag, they will need to consider it and advise OPC what they wish to do. This advice should be provided in writing so that it can be included in OPC’s database.

22 In many cases, drafting will not be able to proceed (or will not be able to proceed in relation to a particular aspect of the Bill) until the flag has been resolved. Therefore, it is extremely important that it be addressed as soon as possible.

Removing the flag

23 Once OPC has received the Department’s response to a flag, the response will be incorporated into the next draft of the Bill or plan. In this way, the Department can check that the response has been recorded correctly.

24 In addition to the Department's written response, the drafter will also record one of the following actions:

- (a) Complexity removed;
- (b) Complexity reduced;
- (c) Complexity remains.

The use of these broad categories will assist with the analysis of the data in OPC's database.

25 Once a draft of the Bill or plan containing the response has been sent to the Department, the flag will be removed from the draft.

26 The response will be recorded in OPC's database.

Complexity flags for parliamentary amendments

27 Generally, drafters will not be required to raise complexity flags when drafting parliamentary amendments of a Bill, due to the short timeframes usually involved for preparing such amendments.

28 However it will be important that, where possible, information is collected about complexity arising after the introduction of a Bill. Therefore, drafters are encouraged to raise flags when drafting parliamentary amendments if time permits. In particular, if a parliamentary amendment resulting from a recommendation of a parliamentary committee is considered to add complexity to a Bill, drafters should raise a flag.

29 A complexity flag relating to a parliamentary amendment can be raised in a separate Bill insert document instead of the parliamentary amendment document.

Use of the collated information

30 It is hoped that the raising of complexity flags will lead to an immediate reduction in the complexity of some Bills.

31 The other major purpose of the system is to enable OPC to collect information about the causes of complexity in legislation. It is considered that this will enable OPC to adopt an evidence-based approach to developing material to assist instructors and policy makers to develop policies that will minimise complexity.

Complexity contact officer

32 The Departments involved in the system will each need to appoint a complexity contact officer. The officer should be an SES officer who is in a position to influence instructors across the Department.

33 The complexity contact officer will need to be able to give high priority to dealing with complexity flags that are raised with them. Bills are often drafted under extreme time pressures and the resolution of flags will have to be done in a very timely manner.

34 If the flags cannot be resolved quickly, it is likely to result in a delay in the Bill being finalised for introduction.

35 In OPC, First Parliamentary Counsel (FPC) will undertake the role of complexity contact officer. Instructors who are concerned that a drafter is taking an approach that is unnecessarily complex will be able to raise the matter directly with FPC. In the normal course of events, this would occur after the matter had been raised with the drafter.

IT aspects

36 Word Note 52 sets out the IT aspects of the complexity flag system.

Peter Quiggin PSM
First Parliamentary Counsel
29 April 2011

Document History		
Release	Release date	Document number
1.0	29 April 2011	s10aa238.v10.doc

Attachment A—Sample complexity comments

37 This attachment contains examples of complexity flags that may be raised. The examples are not intended to be exhaustive—they give an indication of the approach that can be used.

Expands or complicates the statute book

For a policy that requires significant amendment of, or addition to, the statute book:

Complexity Flag

The drafter considers that this policy will add complexity. This is because the policy requires significant amendment of, or addition to, the Commonwealth statute book. This will add to the length and complexity of the statute book. Please provide written instructions on whether you intend to proceed with the [Bill/measure].

Complex approach to implementing policy

For drafting instructions that instruct drafters to take a particular approach to implementing a policy:

Complexity Flag

The drafter considers that this approach to implementing the policy will add complexity. This is because the approach [...]. This will [add to the length and complexity of the Act][make the Act difficult to read and apply][...]. It may be possible to reduce the complexity by [adopting an alternative approach][...]. Please provide written instructions on whether you intend to proceed with the [approach/Bill].

Providing for a “carve-out” or “add-in”

For a provision that provides for a “carve-out” or “add-in” (ie a special case):

Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision, by applying special rules in the case of [.....] will require additional provisions [and impact on the structure of the provisions]. This will make the Act longer and more difficult to read. This inclusion of the special case will also make future amendments more complicated. It may be possible to reduce the complexity by not making special rules for [.....]. Please provide written instructions on whether you intend to proceed with the [provision/Bill].

Replacing a generic provision with a specific provision

For a provision replacing a generic offence provision with a range of specific offence provisions:

Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision will replace a general offence provision with a range of specific offence provisions. This will add to the length and complexity of the Act. It may be possible to reduce the complexity by reconsidering the need for specific offences. Please provide written instructions on whether you intend to proceed with the [provision/Bill].

Split commencement of provisions

For a provision providing for a split commencement for amendments:

⌘ Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision will require a range of provisions to deal with transitional matters. This will add to the length and complexity of the Bill. It may be possible to reduce the complexity by having a single commencement date for all amendments. Please provide written instructions on whether you intend to proceed with the [provision/Bill].

Use of an unusual index—suggest CPI

For a provision using an unusual indexation index:

⌘ Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision will use an index that is not normally used and that may be difficult for users of the legislation to locate. It may be possible to reduce the complexity by relying on the Consumer Price Index. Please provide written instructions on whether you intend to proceed with the [provision/Bill].

Provision includes too much detail

For a provision including a lot of detail in the Act:

⌘ Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision includes a lot of detail that may be subject to change. This will make the Act longer and more difficult to read and will also make it more difficult to keep up to date. It may be possible to reduce the complexity by including the detail in regulations or another legislative instrument. Please provide written instructions on whether you intend to proceed with the [provision/Bill].

Attempt to overcome legal problem

For a provision included to overcome a possible legal problem:

⌘ Complexity Flag

The drafter considers that this provision will add complexity. This is because [...]. It is noted that the provision has been included in response to legal advice that there “is some risk” that [...]. It may be possible to reduce the complexity by accepting that risk. Please provide written instructions on whether you intend to proceed with the [provision/Bill].

Unnecessary provision

For an unnecessary provision:

⌘ Complexity Flag

The drafter considers that this provision will add complexity. This is because the provision is legally unnecessary [and could be handled administratively].[...]. The inclusion of unnecessary provisions adds to the length of legislation [and can increase complexity]. It would be possible to reduce the complexity by removing the provision. Please provide written instructions on whether you intend to proceed with the [provision/Bill].

Attachment B—Complexity Flags: a quick guide for instructors

Complexity Flags : a quick guide for instructors

The complexity flag system

As part of implementing the Government's Action Plan for Clearer Commonwealth Laws, the Office of Parliamentary Counsel (OPC) has established a complexity flag system. The system aims to reduce complexity in legislation and collect information about sources of complexity.

What is a complexity flag?

Complexity flags are specially formatted notes that are included in a draft Bill or plan where OPC considers there is a matter that adds complexity. The basic form of the flag looks like this:



Complexity:
Pending

Applies to:[provision/Bill]

The drafter considers that this [provision/Bill] will add complexity. This is because [...]. It may be possible to reduce the complexity by [...]. Please provide written instructions on whether you intend to proceed with the [provision/Bill].
--

Why are complexity flags raised?

Raising complexity flags is a routine part of the drafting process. The flags may relate to a particular provision in a Bill, but could also be raised because the mere implementation of the policy in legislation adds complexity. Many Bills will add complexity simply because they introduce a new legislative scheme or add to existing schemes.

A flag will be raised, even where there is little that instructors can do to avoid adding complexity. Doing this gives a more complete picture of the sources of complexity in legislation.

OPC does not expect that every complexity flag raised will result in the complexity identified being able to be removed (but the complexity flag itself must be resolved to be removed). Drafters will work with instructors to identify options for reducing or removing complexity, where possible.

A complexity flag is not a criticism of instructors, Departments or the Government's policies.

What instructors need to do

Instructors must consider and respond in writing to any complexity flags raised in a draft Bill or plan. A flag must be resolved to be removed from the draft. A Bill cannot be finalised if it contains unresolved complexity flags.

Each Department has a complexity contact officer. If a response to a complexity flag is for the complexity to be retained, this must be approved by the instructing department's complexity contact officer.

Instructors are not required to provide OPC with detailed written explanations for retaining complexity.

The instructor's response and the outcome (i.e. whether the complexity was removed, reduced or remains) will be recorded in the draft Bill or plan. The flag will then be removed and the information added to the OPC complexity flag database.

Note: For more details about the complexity flag system, see Drafting Direction 4.1A on the OPC website (www.opc.gov.au).