Speech: Parliamentary Counsel and Constitutional Law

Introduction

1 I have been asked to speak on Parliamentary Counsel and Constitutional Law. When I received the invitation I had a flashback to my job interview when I first applied to join the Office of Parliamentary Counsel at which one of the questions was “What is a recent constitutional law case that is relevant to legislative drafters?” I am not sure how good my answer was, but I got a job anyway. A more general question that we often use is “What is an aspect of constitutional law that is particularly relevant for legislative drafting?” Since that first interview, I have asked variants of this question, and been asked it, at almost every interview that I have participated in for the last 25 years.

2 I did wonder whether the organisers of today’s conference might be considering a career change to drafting and thought that this would be a good way of finding the answer to this question.

3 Before I address the specific question, I would like to give some brief background on the drafting of legislation. The Office of Parliamentary Counsel, which we refer to as “OPC”, is a separate statutory office that was established under the Parliamentary Counsel Act 1970. Its functions are set out in section 3 of that Act. They are (basically):

- the drafting of Bills for introduction into either House of the Parliament;

- the drafting of legislative instruments that are to be made by the Governor-General in Council; and
- the drafting of some other legislative instruments on a billable basis; and
- the publication of Commonwealth legislation through ComLaw (which will soon be renamed the “Federal Register of Legislation” and will move to legislation.gov.au)

4 Our office only drafts Commonwealth legislation. There is an equivalent office in each State and Territory to draft their legislation.

5 Before each parliamentary sittings, the Government formulates the program of Bills that it requires to be drafted for the sittings. Since it may not be possible for all Bills on the program to be drafted, a drafting priority is given to each Bill. A similar process is undertaken for instruments to be made by the Governor-General.

6 On the basis of the programs, departments or other agencies instruct drafters in OPC on the policy to be implemented by the proposed Bills and instruments.

7 In consultation with instructing officers, the drafters consider the constitutional and legal background against which the legislation is to be framed, analyse the policy and determine the structure of the legislation. Then they draft the legislation in terms intended to give effect, as precisely as possible, to the policy in as clear a manner as possible.

8 If the Government decides to amend Bills during their passage through the Parliament, drafters in OPC prepare the necessary amendments and provide copies to the Parliament.

9 OPC is part of the executive government, not the legislature, and is in the Attorney-General’s Portfolio. We almost exclusively draft for the Government, although we do draft a small number of amendments that are moved by the Opposition, minor parties or independents.

10 OPC has about 100 staff, of whom about 50 are drafters.
The role of drafters

11 As I mentioned, agencies approach OPC because they have policy concerns which, they believe, can only be addressed by legislative action.

12 It sometimes happens that the instructors’ legislative wishes are straightforward and the means by which they are to be achieved is obvious: all that is required is the writing work. However most policy objectives are complex and, at their conception, are at a high level of generality. The role of the drafter is to assist the instructor to unravel the key implications of the policy objectives, and this invariably involves close and prolonged analysis.

13 Having identified the key issues, the drafter is then in a position to assist the instructor to arrive at a satisfactory solution to his or her legislative concerns in a way that meets the instructor’s intentions and OPC’s service standards.

14 The relationship between drafters and instructors is an ambiguous one. Instructors are basically in the role of clients: they ask for and receive drafting services, and it is their statement of Government policy that OPC drafters must turn into law. However, while the instructor’s statement of policy is the starting point of the drafting process, drafters have a major role in determining the outcome, especially in refining instructions and on matters of law, Parliamentary procedure and deadlines. OPC also has a responsibility to the Government as a whole and, where instructions from a particular agency appear to be at odds with broader government policy, drafters need to ensure that the conflict is brought to notice and resolved.

15 Instructing agencies are usually represented by small teams led by an Executive Level or SES officer. Ministers or their offices are often involved (although not generally directly with OPC), especially at the early or late stages of Bill preparation or where amendments are required at a result of Parliamentary consideration.

16 The basic operating units of OPC are 2 or 3 person drafting teams comprising a senior drafter and one or two assistant drafters.
These teams have complete operational autonomy, apart from general management oversight exercised by the First Parliamentary Counsel. Their work is intellectually demanding, requires high skill levels, is essentially technical, is provided against tight deadlines and requires attention to detail as well as a clear perception of the bigger picture. The need to meet deadlines and to deal with sometimes difficult instructors in very senior positions in Government can lead to stress. Responsibility for the final product lies with the senior drafter. The duties of assistant drafters vary according to experience but usually encompass research, drafting of some Bill or instrument provisions, administrative arrangements and some negotiations with instructors.

17 One of the major responsibilities of senior drafters is the training of assistant drafters. This training must be such that drafters who are at the threshold of promotion into the SES will have had enough independent legislative drafting experience to cope successfully with the autonomy of the senior drafter’s role.

18 The need for intra-agency coordination is currently relatively limited, in part because OPC is small but mainly because, in an operational sense, drafting teams are largely autonomous. Overall management of OPC services (work priorities, project allocation, performance monitoring, quality control) lies with the First Parliamentary Counsel.

19 Drafters are almost entirely engaged in drafting. They have little role in the management of budget, physical assets, travel etc. that are handled by specialist Corporate Services staff.

**Legislative problem solving**

20 A major part of the role of legislative drafters is problem solving. The extent to which a drafter has to do this on a particular job will depend on a number of factors including:

(a) the level of experience and skill of the instructing team;

(b) the level of understanding that the instructing team has of legislation and the process of preparing legislation;
(c) the time that has been available to prepare the drafting instructions;

(d) the complexity of the policy;

(e) the complexity of the existing legislation.

21 Problem-solving ability is the ability to find and apply the means by which a desired outcome may be attained. Although it may seem surprising, in a number of drafting jobs the instructing department will have done little work on either of these, or the work they have done will have major flaws.

22 Most policy objectives are complex and at their conception are at a high level of generality. This can disguise whether legislation is the only, or the most desirable, policy implementation option; but also can disguise the logical, legal, policy and implementation implications of the detailed articulation of the policy. The role of the drafter is to assist the instructor to unravel these implications and this invariably involves close and prolonged analysis.

23 The kinds of issues that such analysis can reveal are as follows:

(a) legal issues e.g. is already existing legislation sufficient? is the policy issue best dealt with via legislation? does the policy have unintended legal consequences?;

(b) logical issues e.g. internal inconsistency, confusion of means and ends, circularity of concepts;

(c) policy and implementation issues e.g. does detailed legislative analysis throw up unforeseen policy and implementation options and problems? how do the individual provisions of the proposed Bill interact with each other? does the proposal conflict with broader Government policy (e.g. retrospectivity of legislation), or federalism?

24 It is the role of the drafter, having identified the key issues, to assist the instructor to arrive at a satisfactory solution to his or her legislative concerns in a way which:
(a) addresses both the broad thrust and the detail of the instructor’s intentions;
(b) draws on necessary and sufficient powers and is consistent with constitutional and general law;
(c) does not have undesired legal consequences;
(d) is both legally and practically effective;
(e) does not conflict with broad government policy, is cognisant of political realities, and reflects OPC’s responsibility to the Government as a whole;
(f) is internally coherent, comprehensive, includes nothing that is irrelevant and is right in matters of detail;
(g) is readily understandable by potential audience(s) and those who administer the law;
(h) conforms with Parliamentary requirements and meets the instructor’s and/or Parliamentary deadlines.

Assisting our clients to avoid potholes

25 One of the important roles of the drafter is to assist our clients to avoid problems with their legislation. There are many of these. High on the list is constitutional issues. It is surprising how often constitutional issues arise in drafting Bills and instruments. I will come back to this in more detail.

26 In addition to the constitutional issues that may come up, we need to be mindful of matters that may be raised by the Senate Scrutiny Committees. In the context of Bills, this is the Senate Scrutiny of Bills Committee. This committee examines every Bill that is introduced into Parliament and assesses the Bill against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety. Instruments are reviewed in a similar way by the Senate Standing Committee on Regulations and Ordinances.
27 We also try to avoid uncertainty. That is, if we are aware that there is an uncertainty in the law we will usually try to draft in a way that overcomes this (unless uncertainty is desirable from a policy perspective). (When drafting to overcome uncertainty, we try to balance this with the need to have clearer laws.) In an area like constitutionality and the Principle of Legality, there are many cases where this uncertainty may be avoided by including additional express provisions. For example, to avoid problems related to the acquisition of property, we may include what we describe as an Historic Shipwrecks clause. This is a clause providing compensation if there would otherwise be an invalid acquisition of property.

**Providing constitutional advice**

28 One point that I did want to make is that it is not OPC’s role to provide formal legal advice, including advice on constitutional law issues. This is the role of the Australian Government Solicitor and the Solicitor-General.

29 OPC’s role is to identify the issues and ensure that advice is sought. OPC will also often be actively involved in developing a legislative solution to legal and constitutional issues, however, it is ultimately for Australian Government Solicitor and the Solicitor-General to provide advice about the probable validity of legislation.

**Constitutional law issues**

30 One of the first things that drafters would consider when looking at a job for the first time is the constitutional aspects of it. In this way, they are answering the question that is asked at every OPC interview: what aspects of the constitution are relevant;

31 We have a document that is a Constitutional Law Checklist, although I suspect that drafters have most of this in their heads. The checklist would basically be used to make sure that you haven’t forgotten anything.

32 The checklist has 4 parts which go through the main topics that a drafter would consider:
Constitutional heads of power

It is no doubt obvious to everyone in this room that the Commonwealth can only legislate in areas in which it has been given the power under the Constitution. I am not always convinced that all members of Parliament and all people developing policy are aware of this limitation.

Anyway, the relevant head of power is certainly the first thing that OPC drafters would look at when asked to draft something.

Some powers (such as taxation) are used very regularly. Others, like lighthouses, are rarely the basis for legislation.

Where the core subject matter is not obviously under a particular power, we may put together a patchwork quilt to cover the legislation. This will often include the territories power, the trade and commerce power, the corporations power and the external affairs power (relying on a relevant treaty).

In the handout I have included three examples of patchwork quilts. The first (the extract from the Personal Properties Securities Act) is one which lists a range of constitutional heads of power and limits the Act to actions covered by one or more of those heads of power. This is used where there is no single power supporting the Act. I particularly like this example as they managed to include my favourite constitutional head of power — lighthouses.

The other approach which is shown in the second (from the Broadcasting Services Act 1992) and third examples (from the Airports Act 1996) are used where it is considered that there is
probably power for the whole Act but where, if it turns out that there is not, we want to save as much operation as possible. You will see that the second takes the approach of providing “alternative” or “additional” operation of the law. I met Mr Charles Comans QC, who is a former First Parliamentary Counsel, a few years ago and he proudly told me that he had done the first one of these — I think that it was the one in the Trade Practices Act in 1974. He was very pleased that this style was still being used.

40 These two styles of provision seem to be the main approach to ensuring constitutionality (where there is some doubt) that we have used for the last 20 years or so. The list of constitutional heads of power that are included in each individual Act is always considered carefully although there are a few favourites such as constitutional corporations and territories that would appear in nearly all of them.

41 While we include object or purpose provisions in some Acts, I think that it is fair to say that we would not generally rely on these to bring legislation within a constitutional head of power. To the extent that we hope that Courts would make use of object or purpose provisions it is in the interpretation of the legislation rather than determining its validity.

**Constitutional limitations**

42 Having ensured that legislation is covered by a Constitutional head of power, we then need to keep an eye out for issues relating to constitutional limitations such as:

(a) acquisitions of property;

(b) impositions of taxes;

(c) infringing of judicial powers (Chapter III of the Constitution);

(d) many others.

43 Where drafters consider that there may be a risk of contravening one of these limitations they may seek advice from the Australian Government Solicitor about whether there is a problem and look at
how to remove or minimise the risk. For example, for acquisitions of property, the draft could be changed to remove the acquisition or an historic shipwrecks clause could be included.

44 A limitation that seems to be becoming more relevant is the principle of legality. In a previous speech I have described this as provisions that make the drafter (or later a court) exclaim “You have got to be kidding”. In other words, provisions that are draconian or will conflict with fundamental rights and for which your initial reaction is “surely they don’t mean that”.

45 OPC’s role in the situation where the drafter exclaims “You have got to be kidding” having seen instructions is to try to ensure that the instructor is aware that what they are doing is something that should only be done in special circumstances.

46 Occasionally, instructors may ask for something without realising that it is not an appropriate thing to include. More often, there has been in-depth consideration given to the matter and it has been decided that such an approach is necessary to achieve the desired outcome.

47 In these cases, the OPC drafter will try to craft a provision that addresses the principle of legality by making it clear on the face of the provision that it is intended to affect the relevant rights and override common law presumptions about what provisions will do.

48 To give an example, if we were instructed to override legal professional privilege, (after exclaiming “You have got to be kidding” and ensuring that our client really wanted to do this) we would ensure that the provision was explicit in overriding legal professional privilege. Our view would be that if it was not explicit, a court would be likely to read it down so as not to abrogate legal professional privilege.

49 Having drafted the provision, we would advise our clients that they would need to justify the provision in the Explanatory Memorandum. If they did not, it would be very likely that the Senate Scrutiny of Bills Committee would comment on the provision. Even if
it is justified in the EM, it is likely that the Committee would draw it to the attention of Senators.

50 We would also refer it to the relevant area of the Attorney-General’s Department. That area would consider the issue in the context of whole-of-Government policy. This ensures that such provisions do not get inserted simply because it would be convenient for the administering Department.

**Constitutionally mandated form or process**

51 The Constitution also contains provisions which require Acts to be structured in particular ways and for specific processes to be followed in Parliament. These are areas in which OPC is the main provider of advice to the Government.

52 In relation to the structuring of Acts, an example is the restriction on what can be included in an Act that imposes taxation. Because of this, OPC separates the imposition provisions from the other provisions of the taxation law. The restriction on dealing with single subjects of taxation leads to multiple imposition Acts to impose certain taxes.

53 There are also Constitutional requirements that control certain aspects of how Parliament deals with legislation. In some areas there are different views between the two Houses of Parliament (and the Government) on the operation of these requirements. While OPC provides advice to the Government and works with the Senate and the House of Representatives, the final decision on these matters is one for the Houses and the Government to work out.

**Commonwealth-State interactions**

54 Some projects involve the interaction of Commonwealth and State laws. These projects can be quite fraught as there are often conflicting political aims and, more relevantly for today, the constitutional issues can be very difficult.
55 These projects will invariably involve the Australasian Parliamentary Counsels Committee (or PCC). PCC is made up of the heads of each of the drafting offices in Australasia.

56 When working on these projects, the perspective brought by the different members of PCC may differ markedly. A feature of PCC and a reason for its success is its ability to have robust but respectful discussions on these matters and to work to a mutually satisfactory conclusion.

Parliamentary committees

57 I was asked to comment on the relevance to OPC of parliamentary committee deliberations, regarding the constitutionality of proposed legislation in particular.

58 When considering this it is important to realise that parliamentary committees generally only get to comment on legislation that has been introduced into parliament. Also, it is very rare for the Government to introduce legislation where they have been advised that there is a real risk of it being unconstitutional. In those rare cases, the Government will have weighed up the risks and decided that it is worthwhile proceeding.

59 Therefore, any issues that are raised before Parliamentary committees should be ones that OPC and the Government’s other legal advisers have thought about and, where necessary, advised the Government about.

60 OPC will look at reports by Parliamentary committees that raise constitutional issues, although it would be the role of the Australian Government Solicitor rather than OPC to provide advice. Where the Government decides that it is appropriate, OPC would prepare Parliamentary amendments to address issues that are raised.

61 There will, of course, be cases where submissions are made to Parliamentary committees that raise constitutional law issues where the Government considers that the submissions are not correct or that it is worthwhile to proceed despite the risk.
Conclusion

62 Constitutional law issues are a fundamental part of the role of legislative drafters.

63 I hope that I have been able to provide an overview of how we deal with these issues as well as provide you with background on the work of drafters.

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[insert date]