

From policy to legislation A guide to legislative drafting

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Background

- Role of PCO in drafting legislation
- Quality of legislation depends on appropriate collaboration between instructor and drafter
- Avoiding role confusion and role reversal

Legislative process

drafting

Policy formation

Cabinet approves policy

Cabinet approves legislation

Introduction

First reading

amendments

Select committee

Second reading

amendments

Committee of whole House

Third reading

Implementation

What does PCO draft?

- All Government Bills (except IRD Bills)
- All Government regulations
- Local bills (if asked)
- Members bills (if AG directs)
- Court rules
- Speaker's directions

What do we do?

General

- Take instructions
- Give legal effect to policy
- Try to produce plain English drafts
- Try to identify and solve problems
- Test policy and undertake legal analysis



Who does PCO act for?

- We act for the Minister in charge of a portfolio to which a project relates
- Ministry derives its authority to instruct us from the Minister
- Independent of the department
- Privilege (like solicitor and client)

Where are we coming from?

Workings of the drafter's mind

- Often thinks about the “statute book” as a whole
- Often the first external person to “test” the second-level (implementing) policy

Where are we coming from?

- PCO style
- Plain English drafting
- Conscious of current and future hurdles (LAC, BORA vetting, and parliamentary procedure)
- Whole of government perspective

Some recent trends

- Large ongoing demand from Ministers for more legislation
- Difficulties with Parliament processing legislation do not seem to act as a brake on that demand
- Time for drafting is being compressed undesirably (this is affecting the overall “quality” of the product)

Some recent trends: cont'd

- More instructions received in tranches: often problematic as each tranche may be inconsistent with the last
- If instructions in tranches, careful thought needed to avoid redoing things
- Instructions that summarise the Cabinet minute don't add value
- Some instructions have insufficient detail as what changes are required to be actionable

Some recent trends: cont'd

- More legislation passed under shortened timetables
- More pressure on officials/parliamentary counsel at select committees to meet short deadlines for reports/revision-tracked versions of bills
- Somewhat greater use of regulations to amend primary legislation in a transitional setting or to deal with emergencies



The role of instructor:

- Provides PCO with comprehensive instructions
- Deals with legal and legislative issues arising from a legislative proposal (usually performed by a lawyer)
- Co-ordinates comments
- Resolves, or is responsible for resolving differences of opinion within that organisation
- Has authority to speak on behalf of its organisation
- Manages the timetable for the project
- Manages relationship between PCO, policy advisers, other agencies, and operational people or other experts

Initial instructions

- Ask yourself “ **What information would I need in order to understand what this project is all about?**”
- The answer to that question is what the instructions should contain

OR

- This is something we **want** to happen
- This is **why** it cannot happen without legislation or a change to existing legislation
- This is **how** we think the law needs to be changed in order for it to happen

Initial instructions: what should they contain?

- All relevant
 - policy approvals
 - Cabinet papers and papers to the Minister
 - background information
 - legal opinions and cases
 - proceedings that are in contemplation
- An indication of
 - the anticipated time frame
 - when any further instructions are likely to come (if not all provided in first instance)
- Pointers to related legislation

Responding to drafts

- Read for internal consistency
- Read for readability
- Identify new issues (will almost certainly become apparent)
- Identify mistakes
- Run the draft through practical scenarios: does it work?
- Is anything missing?

Responding to drafts Cont'd

- Say why something is wrong (not just that it is wrong)
- Give examples of scenarios (paint us a picture)
- Main instructor should co-ordinate and filter all comments
- Main instructor should add value
- Main instructor should advise of final outcome (organisation's view) on issues (PCO may not need all preliminary views)
- Try not to let your response drift, provide it when the matter is fresh in the drafter's mind

When does the instruction process fail?

- When expectations are not clear
- When instructions are not comprehensive enough
- When matters are left too late
- When the personnel running the project are insufficiently experienced or engaged
- When key personnel leave the project before enough information is provided
- When matters are not explained clearly
- When people are not clear about their roles



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Issues with undeveloped instructions or unengaged instructors

- Drafter is left to develop the policy and take responsibility for both the drafting and the policy
- “Post box” syndrome “policy vacuum” where no one will take responsibility for resolving policy or other problems
- Instructor’s organisation may be formally responsible for administration of legislation but subject matter knowledge rests mainly in another organisation
- Inefficient use of drafting resources and limited refinement as policy never settles (problems of continuous redesign)

Issues with overly directive instructors

- Role of drafter can be reduced to that of editor, without sufficient understanding of what is proposed and why
- Role confusion can occur with instructor trying to do drafter's job and drafter ending up doing instructor's job
- Commissioned drafts may result in neither drafter nor instructor understanding fully and clearly the policy intended to be implemented

Bill management at select committee stage

- Mutual information sharing between instructing organisation and PCO is crucial
- Departmental report suggesting changes should recommend concepts, not specific words
- Showing PCO the departmental report can avoid differences of opinion before select committee
- Apply the same process when reading RT documents as when reading drafts of bills

Bill management at committee of the Whole House

- Last chance for change - but only if needed
- Advise as soon as possible if SOP is necessary
- Avoid substantial changes at this stage, because substantial amendments risk muddling the overall scheme of the legislation and making it practically unworkable
- Special considerations apply if the opposition begins a filibuster

Avoid this

policy stages

drafting

legislative stages

Amendments

Mar Apr May Jun Jul Aug Sep Oct Nov Dec Jan Feb Mar Apr May Jun



Achieve this

policy
stages

drafting

legislative
stages a

Mar Apr May Jun Jul Aug Sep Oct Nov Dec Jan Feb Mar Apr May Jun



Central aims

- Create shared vision
- Avoid nasty surprises
- Identify what needs doing
- Convey what needs doing
- Maximise drafting time

Key results

- Smooth sailing
- Timely & tailored solutions
- Accurate & effective products
- Desired outcomes

Problems with urgent amendments

- Requests for urgent amendments usually come at the most inconvenient time
- Requests for urgent amendments are often confused and lack clarity
- Particular problems arise when persons giving instructions not present at discussions leading to agreed change

Urgent amendments: Damage limitation

- Try to negotiate and where possible extend deadlines for production of the amendment
- Aim for minimum legislative changes to give effect to policy (limits the scope for error)

Urgent amendments: Damage limitation-cont'd

- Use several pairs of eyes to critique draft amendments at short notice
- Confirm details of meetings not attended by officials (as a cross-check of any discrepancy between written communications and oral agreements)

Urgent amendments: Damage limitation-cont'd

- Make judgement calls on what is or is not workable. Vary a clearly unworkable instruction to make the amendment workable (even if it needs subsequent amendment to meet political expectations)
- Have a back-up person to fill in for your role (if you are not available)

Online resources

PCO guide online:

www.pco.parliament.govt.nz/instructing-the-pco/

LAC tips online:

www.justice.govt.nz/lac/

