

# From policy to legislation A guide to legislative drafting

David Noble and Bill Moore  
Parliamentary Counsel Office  
<http://www.pco.parliament.govt.nz/>

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# Overview

- Background – PCO role
- Main points – Instructors
- Central aims and key results

## 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 is PCO?

- Independent Office of Parliament
- Attorney-General (Statutes Drafting and Compilation Act 1920)
- 2 divisions - drafting and access to legislation (compilation)
- 31 drafters



## What is PCO?—cont'd

- draft all Government Bills (other than tax)
- draft all Government regulations
- draft other legislative instructions (eg, Royal Commissions of inquiry)
- local Bills (if asked)
- private Member's Bills (if A-G 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?  
the workings of the drafter's mind

## **The 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? the workings of the drafter's mind—cont'd

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

# PCO guide

- preparing instructions 7-11
- responding to drafts 13-14
- developing RTDs & SOPs 17-18
- checklist 23
- map 32

# Main points

- Shared vision
- Procedural awareness
- Well-developed policy
- Generous instructions
- Ample notice

# 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 lead instructing organisation's comments
- Resolves, or is responsible for resolving, any differences of opinion within that organisation
- Has authority to speak on behalf of that organisation
- Manages the timetable for the project
- Manages the relationship between PCO, policy advisers, and operational people or other experts



# Initial Instructions

- One way of thinking about initial instructions is to 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
- There is another way of thinking about the question
- 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 which are in contemplation
- An indication of
  - the anticipated time frame
  - when any further instructions are likely to come (if not all provided in the first instance)
- Pointers to related legislation

# Responding to drafts

- Read for internal consistency
- Read for readability
- Identify new issues (new issues will almost certainly become apparent)
- Identify mistakes
- Run the draft through practical scenarios: does it work?
- Is there 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 (it may well be unnecessary to advise PCO of all preliminary views)
- Try not to let your response drift, strike while the iron is hot and the matter is fresh in the drafter's mind

# When does the instruction process fail?

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



# 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)
- Rewarding for drafter to draft legislation from inadequate instructions but only if sufficient time and policy stability to produce quality outcome

# 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 the drafter's job and drafter ending up doing instructor's job
- Commissioned drafts may result in neither the drafter nor the instructor understanding fully and clearly the policy intended to be implemented



# Bill management at select committee stage

- Mutual information sharing between the instructing organisation and PCO is crucial
- The departmental report when suggesting changes should recommend concepts, not specific words
- Showing PCO the departmental report often avoids differences of opinion in front of the select committee
- Apply the same process when reading documents as when reading drafts of bills

# Bill management at committee of the Whole House

- Last chance for change - but only if it is needed
- Advise as soon as possible if an SOP is necessary
- Seek to avoid making substantial changes at this stage, because substantial amendments bring with it risks of 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



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Achieve this

policy  
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## 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 frequently characterised by confusion and lack of clarity
- Particular problems arise when the persons giving the instructions were not present at the discussions leading to the agreed change

# Problems with urgent amendments: Damage limitation strategies

- Try to negotiate and where possible extend deadlines for production of the amendment
- Aim for the minimum legislative changes to give effect to the policy (this is a damage limitation strategy as it limits the scope for error)
- 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)

## Problems with urgent amendments: Damage limitation strategies—cont'd

- You need to 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 for some reason you are not available)

# Online resources

PCO guide online:

[www.pco.parliament.govt.nz/instructing-the-pco/](http://www.pco.parliament.govt.nz/instructing-the-pco/)

LAC tips online:

[www.justice.govt.nz/lac/](http://www.justice.govt.nz/lac/)

