

# From policy to legislation A guide to legislative drafting

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# Recent changes at the PCO

- Now 4 drafting teams
- Justice and Social, Resources and Treaty, Infrastructure, and Commercial
- Reflects need to have drafting team managers devote more time for contact with instructing agencies

# Recent Changes at the PCO cont'd

- Usually 2 drafters will be allocated to large Bills or Bills that are of critical importance to the Government
- More cross team drafting
- More extensive peer review of Bills
- An annual seminar program for all new instructors

## Background

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

# What does PCO draft?

- all Government Bills
- all Government regulations
- local Bills (if asked)
- Members' Bills (if AG directs)
- Court rules

# 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)

# Some recent trends

- Large ongoing demand from Ministers for more legislation
- Difficulties with Parliament processing legislation does 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 (this is often a problematic way of proceeding as each tranche may be inconsistent with the last)
- 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, any differences of opinion within that organisation
- Has authority to speak on behalf of the organisation
- Manages the timetable for the project
- Manages the relationship between PCO, policy advisers, other agencies, 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

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 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

# Initial instructions: what should they contain?

## ➤ Address

- consequential and related amendments (explain changes needed to other legislation)
- transitional and savings provisions (explain what will need to be done to make the transition to the law as it will be eg. what happens to existing licences?)

## ➤ Identify any

- conflicts with Bill of Rights or Privacy Act
- non-compliance with the LAC Guidelines

# 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











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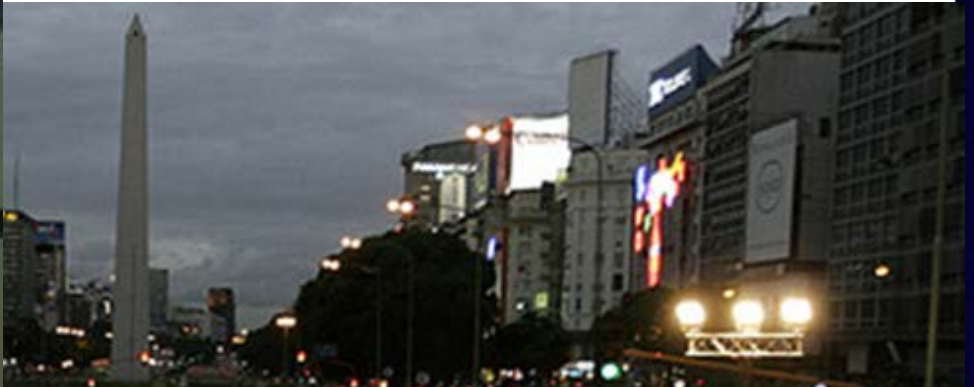




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# When does the instruction process fail?

- 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
- 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)



# 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 rt 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 them 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



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

# 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:

[www2.justice.govt.nz/lac/index.html](http://www2.justice.govt.nz/lac/index.html)

[www.pco.parliament.govt.nz/lac-guidelines/](http://www.pco.parliament.govt.nz/lac-guidelines/)

