

Relating to Instructors

Common forms of instruction in New Zealand

- copies of policy papers and Cabinet decision with limited amplification:
- fuller prose instructions accompanied by enclosures and full or partial suggested drafts:
- drafts commissioned from external consultants accompanied by covering letter and enclosures:
- oral instructions (occasionally).

Mix of instructors

- “policy” people in departments:
- lawyers in departments:
- a mixture of the above:
- external consultants commissioned by the department (usually but not always lawyers):
- some trend to less involvement by inhouse lawyers in preparation of instructions.

My personal perspective of drafters (as an instructor)

- valued those drafters who did what they were told:
- appreciated drafters who used as much as possible of my “lay” drafts:
- did not like to be asked questions about things I did not want to address:
- did not appreciate suggestions of alternative approaches:
- valued quick turnaround above accuracy and clarity.

My personal perspective of instructors (as a drafter)

- valued those instructors who were not possessive about their own preferred forms of expression:
- valued those instructors who were knowledgeable about the area of law they were instructing in:
- valued those instructors who had thought through the policy and were able to answer questions:
- irritated by instructors who are just a “post box” for other officials:
- irritated by instructors who don't take “ownership” of the policy or who frequently change their minds.

Issues associated 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 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 as policy never settles:
- it can be rewarding for the drafter to develop bills from inadequate instructions but only if there is sufficient time and there are not constant policy changes.

Issues associated with overly directive instructors

- role of drafter can be reduced to a mere editor, without sufficient understanding of what is proposed:
- role confusion can occur with instructor trying to do the drafter's job and drafter ending up doing the instructor's job:
- commissioned drafts often lead to a situation where neither the department nor the drafter have a clear understanding of the policy intended to be implemented.

PCO seminars to departments on giving instructions

- presentation given to one department attached as Appendix 1:
- primarily directed at inexperienced instructors who provide inadequately detailed instructions:
- seminars stress that providing a good workable piece of legislation involves a partnership between instructors and drafters where each respects one another's role.

Success of seminars

- more successful with motivated instructors who have time to spend developing their skills and who wish to produce a quality product:
- less successful with departments with a split between policy and legal roles where lawyers are carrying out a wide range of other duties which are perceived to have a higher priority.

Purpose

- To let you know our expectations.
- To listen to your expectations and questions.
- To enhance our relationship and communication.

AND ULTIMATELY

- To produce a better product.

What this talk will cover

- A brief summary of how a Bill becomes law.
- What is PCO and what do we do?
- Who we think you are and what we think you do.
- The role of instructor.
- What are instructions?
- How raw instructions can be filtered and analysed.
- A reality check (identifying some of the constraints we are working under and how they affect the instruction process).

How a Bill becomes law

- Pre-introduction.
- Introduction.
- First reading.
- Select committee.
- Second reading.
- Committee of the whole House.
- Third reading.
- Assent.

What is PCO and what do we do?

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

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.

Where are we coming from?

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

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.
- Privilege (like solicitor and client).

Who we think you are

- Employees of the Comptroller of Customs.
- Experts in customs and border security issues.
- Our link to the Minister and “the field”.
- Very busy people.

Constraints and pressures

Practical

- Time
- Resources
- Political pressures
- What will work “in the field”

Procedural

- Legal
- Constitutional
- Policy (LAC guidelines)
- Style and formatting
- Parliamentary matters

When does the instruction process fall over?

These go both ways:

- When the constraints are in conflict.
- When expectations are not clear.
- When matters are left too late.
- When the personnel running the project are insufficiently experienced.
- 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.

The role of instructor

General

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

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.
- Remember it is the drafter’s first contact with the project.
- If you don’t tell us something we won’t necessarily know about it.
- More is better (but it needs to be filtered).

Initial instructions: what should they contain?

Raw material

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

Filtering and analysis: 3 basis filters

- Initial instructions are not just raw material. The raw material needs to be filtered and analysed.
- Filter 1: Object and purpose.
- Filter 2: Legal analysis.
- Filter 3: Practical analysis.

Filter 1: Object and purposes

- Description of objective of the project generally: “This Bill will do A”.
- Identifying the basic concepts involved: “This Bill will affect or is related to persons/agencies/situations A and B”.
- A **narrative** of how you think that might be done: “We intend to do A by amending the X Act in the following ways”.
- Road map of where we need to go.
- Once you have written the narrative, ask yourself “**If I knew nothing about this project, would the road map I’ve drawn give me a clear picture of where the project is intending to go?**”
- Drafts and tables another option.

Advantages of drafts

- Refine thinking and develop the policy.
- Expose issues that need to be addressed.
- Develop skills.

Problems of drafts: The trouble with drafts

- Leave PCO to interpret.
- May lose the overall narrative.
- Focus on words and lose broader view.
- “Sacred phrases”.

Filter 2: Legal analysis

General

- Legal views (experts in customs law).
- We value/need your views.
- What legal problems do you see with the policy?
- Can these problems be addressed before instructions are sent?

Legal analysis of legal constraints

- Relationship with other Acts and international agreements or obligations.
- Known legal difficulties with any of the concepts to be covered by the Bill.
- Try to resolve legal problems or have a view on these before giving instructions.

Legal analysis of constitutional constraints

- The BORA vet comes later, but what can be done now?
- Any human rights issues?
- If there is a breach, establish a view on whether it is justifiable in the circumstances.

Legal analysis of policy constraints (LAC guidelines)

- Offences.
- Penalties.
- Search and entry.
- Delegation of power.
- Cross-border issues.
- Remedies.
- Establishing public bodies.

Structure

- New Act or an amending Act?
- Matters of most significance/priority.
- Views on what might be covered in delegated legislation (think about regulations now).

How do we get from A to B?

- Transitional matters.
- Matters that require saving (these are also practical matters).

Filter 3: Practical analysis

Realities

- Run the policy past scenarios and identify implications.
- Are there any specific issues that needed to be addressed?
- What resource constraints exist?
- What is the political climate/response to this?
- Do the people “in the field” think it will work?

Timing

- When does the Act need to come into force?
- What time constraints exist.

Why do all this?

A better result/law because:

- PCO not left to “make things up”.
- Problems are identified and solved sooner.
- Less stress later on when the political and time pressures are even greater.
- Better communication makes for ease of process.
- Avoids role reversal.
- The more we can get right now, the less often the process may need to be repeated.
- The Government’s legislative programme met.

1st draft and subsequent drafts

- Read it carefully.
- Does it give effect to the policy you have communicated?
- Read for ideas/concepts rather than words (can't see the wood for the trees).
- Mention the words.
- If something doesn't make sense, say so.
- Check against approvals.
- Read for internal consistency.
- Read for readability.
- Go through the filtering process again. Now that you see the draft can you see new "issues" (legal, constitutional, or policy)?
- Identify mistakes.
- Run the draft through practical scenarios: does it work?
- Is there anything missing?

Focus on problem solving

- Say why something is wrong not just that it is wrong.
- Give examples of scenarios (paint us a picture).
- Principal instructor to filter comments of others (but avoid Chinese whispers).
- Principal instructor to add value.
- Principal instructor to advise of final outcome/departmental view on issues (it is not necessary to advise us 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.

At Select Committee

- Keeping each other informed is crucial.
- Departmental report. Suggest concepts not specific words - "sacred phrases".
- Showing us the departmental report often avoids differences of opinion in front of the SC.
- Revision-tracked document (the new slip).
- Read RT document carefully (apply 3 filters).

Select Committee to Committee of the whole House

- Things may go quiet again.
- 2nd reading (no specific PCO involvement).
- Committee of the whole House.
- Last chance for change - but only if it is needed.
- Keep each other informed of developments.
- Advise as soon as possible if a SOP is necessary.
- The filtering process must continue with SOPs.
- Procedural constraints at their peak.
- Room for error.
- Communication is crucial.

A few more steps for PCO

- Work on report back and Royal assent versions of the Bill with Office of the Clerk.
- Check all changes are taken in correctly.

- Office of the Clerk has a discretion to correct minor errors.

Regulations

... and you thought it was all over

- Timing often dependent on the Act.
- Just as important as the Act.
- All of the above relating to “initial instructions” applies to regulations.
- Vires issues (important).

Ultra vires

- “Delegated legislation that falls outside the limits of the empowering provision will be ultra vires and invalid”.
- Thinking about regulations during the Bill process helps to make sure the empowering provision is wide enough.
- We may issue a qualified certificate.

Common vires issues

- Instructions contemplate greater flexibility than permitted by empowering provisions.
- Unauthorised subdelegation of powers sought.
- Desired provisions inconsistent with primary Act or other Act.
- Desired provisions not authorised by empowering provision.
- Over-reliance on catch-all clauses in empowering provisions.
- Regulations inconsistent with BORA.

Questions and comments

- Any questions?
- Any suggestions on how PCO might better assist you?