

Drafting for Private Members

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Since the introduction of self-government in the ACT in 1989, the governing party has had a majority of members only in the 6th assembly (2004-2008). This has led to the establishment and indeed entrenchment of a culture in which non-government members, including members of the opposition party, enjoy greater influence on assembly business than is perhaps the case in other jurisdictions.

A consequence of this is that non-government bills and assembly amendments are more likely to become law in the ACT than elsewhere. Since self-government, every government has directed that drafting resources be made available for private members, in part to maintain cordial relations with people whose support it might later need, and also to ensure that legislation that is passed conforms with the drafting style and general standard of the statute book.

This does raise an issue of professional ethics. A lawyer is obliged to do the best for his or her client, subject to certain constraints. Our primary client is the government, so is there a conflict of interest providing professional services to a private member? A private member, especially an opposition member, may have the intention of embarrassing the government, or frustrating its legislative intent, so helping further this aim would seem to be inconsistent with our ethical duty to do the best for our client. If a drafter has knowledge of an assembly amendment that could embarrass or frustrate the government (our client), surely there is an ethical duty to at least advise the client.

Our standing instructions are to treat communications from private members as professional in-confidence, in other words they enjoy the same confidentiality as if they were the client. Never has a drafter been referred to the ethical standards committee of the bar association or law society for withholding relevant information from our actual client, so how is this to be explained?

Quite simply, the client is presumed to know where its own best interest lies, so if we are instructed to treat communications from private members in confidence by our client, the government, that settles the issue. Implicitly, our instructions are to sacrifice the short term interest of the government in, for example, securing passage of a bill without amendments, to the longer term interest of maintaining both a good working relationship with non-government members and the integrity of the statute book.

Of course the government is not willing to suspend its own legislative program so that private members can get on with their own bills and amendments, so if there is a shortage of drafting resources, government work takes priority. Private members often do not appreciate how much time drafting takes, still less that other business might have priority over their own, and from time to time we receive instructions for assembly amendments hours before the bill is to come on for debate. Our office has made it a practice to conduct seminars for new members outlining the kind of help we are able to provide, and when some of the demands which might be put on us may not be realistically met.

Our primary client, the government, has extensive resources for developing policy. Private members have much more modest means at their disposal, and are often tempted to ask drafters to engage in the research needed to develop policy. This is not part of the service we provide, either to the government nor to private members, so we must guard against 'mission creep'. Of course there is sometimes a tendency to adopt a project so that the demarcation line between drafting and policy development blurs, but the principle remains. Other things to be kept in mind are to limit legal advice to matters incidental to the specific project, and to ensure that it is within the legislative power of the Territory under the Self-Government Act and consistent with other territory laws (including the Human Rights Act), unless the member expressly intends to override them.

Government bills presented to the Assembly must be accompanied by a certificate that the bill is compatible with the Human Rights Act. Obviously our Human Rights Branch does not examine private members bills for compatibility, so no certificate is possible, but the Legislative Assembly Scrutiny of Bills Committee does look at all bills, including private members bills, and flags defects and instances where the bill is not compatible with the Human Rights Act. An adverse scrutiny report could lead to a bill being defeated, or subject to amendments that are not acceptable to the client.

It is not the practice of our office to prepare explanatory statements for bills, but we will, if asked, examine statements which have been prepared elsewhere for errors and significant omissions. In the past, private members bills have been introduced without explanatory statements, but the standing orders were recently changed to require an ES for all bills.

In the present Assembly, the ACT Greens holds the balance of power in a unicameral parliament, but is not in government. In return for Greens support, Labor entered into a Parliamentary Agreement with the Greens, one of the terms of which was that the government would 'ensure access for Members to Parliamentary Counsel Office staff to assist Private Members in the preparation of Explanatory Statements, recognising the resource implications of this measure'. This has not changed the practice of the office. We occasionally receive requests to write explanatory statements, however generally we assist by commenting on drafts prepared by the members.

Legislative intent is embodied not only in primary legislation, which is passed by the Assembly, but also subordinate legislation made by the Executive. The Assembly may disallow and, with limitations, amend subordinate legislation in the first 6 sitting days after the legislation is tabled in the Assembly. The Assembly may not amend subordinate legislation in a way that will waive or change any fee, charge, penalty or other amount payable to the Territory. After the 6 sitting days elapse a private member can seek to amend the subordinate law by a private members bill, and the restriction relating to fees and charges payable to the Territory would not apply.

Non-government members have difficulty gaining the attention of the public. They are not in a position to announce good news, like spending initiatives, so the Assembly is probably the best soapbox they have. Introducing a private members bill is likely to boost their profile, and on occasion they may have little interest in the bill's fate. Introducing the bill could be for simple publicity, it might be to exert pressure on the government in an unrelated area, or for some other reason. Not infrequently, the drafter is able to divine the real reason for the bill, sometimes the proposer makes this clear when instructing. Because in these instances the instructions are limited and the time frame short, it can be a temptation to knock out a quick and dirty bill, confident that it won't ever become law, perhaps not even be introduced. Such a temptation must always be resisted. Political

constellations have been known to shift, and the passage of the most unpromising of bills can never be discounted.

Every project that our office undertakes is taken seriously, at least by our office. It has been known for clients, not just private members, to clamour for the urgent preparation of a bill and then, having received a draft which was prepared under great pressure, to do nothing. For months. If at all. This is one of the annoyances of the job, but we are resigned to it. Sometimes you can be quite sure when you are drafting the bill that it will come to nought because you know that the proposal is unlikely to find enough support in the Assembly. But it is a minor consolation if the bill is at least introduced.

Our office has prepared a Guide to Instructing Parliamentary Counsel's Office for Private Members of the Legislative Assembly. It is derived from the South Australian guide, adapted to the local situation.