



Developing Policy / Preparing Legislation

An Overview

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POLICY → LEGISLATION

Approaching a Policy/Legislative Exercise

- This is a Project
- Project Manage it!

Begin as you mean to continue – with structure and discipline! This exercise is nothing less than a project to build a new statute. It should be treated as such from the start.

Therefore adopt a formal project management approach. That means plan it and resource it.



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Project Team

- Both lawyers and policy advisers
- Joint project team
- Allocate leadership responsibility
- Single point liaison
- Get team together early
- Set clear expectations

Resourcing it properly will always mean that you need both lawyers and policy advisers, and sometimes people from other disciplines such as accountants. They must be tasked with working together as a joint team to work towards the finished product.

They must have a designated leader who takes responsibility for all team activity. Leadership responsibility may be shifted during the process, for example as you move from the policy stage to the drafting stage.

Also, work out who will be key contacts/liaison:

- For PCO (so that there is consistency/clear instructions)
- For Select Committee Clerk
- For Min's Office

Above all, get the team together early and start thinking about legal issues from the earliest possible stage. See Chapter 1 of the Guidelines on this!

And recognise that all those involved will have valid contributions to make in all respects. Legal issues should not be off limits for policy advisers and vice versa.



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Project Management

- Plan/map out structure of exercise
- Plan/map out components/issues
- Allocate responsibilities
- Set timeframes around milestones
- Procedures re LAC Guidelines

BE REALISTIC!

Planning it involves mapping out the structure of the exercise.

What are the policy components/issues?

What are the legislative process components?

Being clear about who is to do what.

In promising a time for a finished product, work backwards from a proposed delivery date. Consider, Cabinet approval, Cab LEG, Caucus approval, coalition partner consultation PCO drafting time (be realistic), preparation of drafting instructions, Cabinet processes around policy decisions, policy development processes including engagement with the Minister, input from central agencies, consultation with other Departments, any public consultation.

In all of that you have to be factoring in compliance with the LAC Guidelines.

Have a transparent process for applying the Guidelines to relevant issues (Next session for actual application).



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Developing the Policy

- Is legislation necessary
(Ch.1, Guidelines)
- Applying the Guidelines
(Prof. Burrows' presentation)
- Writing the Cabinet Papers
 - Construct workable packages of options
 - Don't constrain drafting options
 - Recognise that further issues will emerge
 - Have an agreed process for resolving those

A very early question to be answered is whether a legislative solution is necessary. (Refer to Chapter 1 of the LAC Guidelines). Can the policy objective be properly achieved in other ways?

Once you're on a legislative route you then need to be applying the rest of the Guidelines as you go (refer to Professor Burrows' session, next).

When you get to the stage of writing the Cabinet papers to get Cabinet decisions on the policy direction, you need to take great care.

Options – if giving options, make sure different combinations will work, or be clear which options will/will not work together.

Don't limit the drafting possibilities – recs should decide "what", not "how".

And you need to recognise that there will probably be further policy issues that emerge later as drafting uncovers them. Have a Cabinet endorsed process for dealing with them, eg., a group of key Ministers with decision making power.



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Preparing Instructions for PCO

- Put yourself in PCO's shoes
- Assemble relevant background material
- Drafting not necessary, but sometimes helps
- Always provide a narrative description

Remember that PCO hasn't had the benefit of being privy to all the policy discussions, so your written instructions will be the entire story for them. You need to tell that story well and to do that you need to put yourself in their shoes and think about it from their perspective. What do they need to know to get it right?

Your instructions should include relevant background material to help set the scene and to save PCO valuable research time. This might include copies of relevant cases, copies of analagous legislative regimes, all the policy papers, all the Cabinet minutes.

You do not need to attempt to actually draft the Bill, but sometimes that can help or can be the only way to accurately convey what you intend. You may not need to attempt a draft of all provisions, but expressing how you envisage the key provisions may help PCO.

In all cases you should describe in narrative form what the Bill needs to cover in order to achieve the policy.



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Managing the Draft Bill

- Work as a team still
- Agree on a feedback process with PCO
- Keep good records
- Map scenarios / reality test
- Policy Statement important too
- Commencement dates – achievable?

Even once you have a first draft of a Bill it is still a joint policy/legal exercise. Both disciplines should be critiquing the drafts and working together.

Make sure that you agree with PCO what the preferred way will be to feed back comments on drafts. Will it be a marked up version, a tracked changes version, a narrative commentary, face to face meetings, or a combination of these?

Keep good records of what changes you make and of why you make them.

Then test drive the Bill against some real life scenarios – to ensure it does what it's meant to do!

Don't underestimate the importance of the Policy Statement/Explanatory Note at the front of the Bill. You need to anticipate any potential ambiguities or controversies in the Bill and make targeted, clear statements about what the policy intent is.

When determining commencement dates you need to consider what is do-able not just for your Department in implementing it but also what is reasonable for those out there such as businesses which have to comply with it.



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Cabinet Legislation Committee

- Not just a formality
- LEG paper asserts compliance with LAC Guidelines
- All that's gone before therefore provides assurance for that statement

The LEG paper is often seen as a formality. But it shouldn't be. This is the time when you are verifying to Cabinet that this Bill is up to scratch in terms of the LAC Guidelines, among other things.

This is when good prior process comes into its own and demonstrates that relevant standards have been met.



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Managing a Bill through the House

- LAC Guidelines are still relevant
- Select Committee
 - * Departmental Report
 - * Cabinet Decisions to support Recs
- Committee of the Whole
 - * Amendments on the run
 - * Alert to implications
- Standing Orders
 - * Financial veto

And it's not over once the Bill is introduced.

Many changes can occur as a Bill makes its way through the House, whether at Select Committee or in the Committee of the Whole. So the LAC Guidelines remain highly relevant through those processes. And you need to be careful that you don't cut across or undermine the original policy intent with ad hoc amendments.

Key documents/processes include the Departmental Report to the Select Committee and the Cabinet decisions that support any changes recommended in that Report.

At the Committee of the Whole stage the environment changes and you need to be on your mettle as amendments may need to be considered in very short time.

Standing Orders are also relevant at this time and may impact on what amendments are possible.