

Chapter 2

The Role of Legislative Counsel

2.1 Analysis and understanding of what the policy-makers require

Although legislative counsel may have been consulted, or even involved, at the policy-making stage, the formal starting point in the process of translating policy into legislation should be the reception of drafting instructions (see **Appendix C** for recommended contents). Counsel should, in obtaining the necessary depth of understanding of the policy, be prepared to ask searching questions. He or she is, however, under a professional duty to look critically at the instructions and to point out where there seem to be aspects of the policy that might be in conflict with the Constitution or other legislation, or where aspects of the proposed legislation might for some reason be difficult to operate or enforce.

2.2 Effective communication of the intentions of the policy-makers

The task is then for counsel to do his or her utmost to effectively communicate the intentions of the policy-makers to those who will use or be affected by the legislation. In determining how a policy statement is to be translated into a legal rule, it is useful for counsel to bear in mind the following rhyme of Rudyard Kipling:

I keep six honest serving men
(They taught me all I knew);
Their names are WHAT and WHY and WHEN
And HOW and WHERE and WHO.

This will help to understand the full extent of the matters that the rule will need to cover. Naturally, some questions are fundamental:

- **Why** is it necessary to legislate as proposed?
- **Who** is to be affected by it?

although the answers to these questions may be obvious from the context. Others will be concerned more with matters of detail:

- **When, where and how** will the persons concerned be affected?
- **What** exactly is required of them?

It needs to be emphasised that, contrary to what many people believe, in legislative drafting **there is no need for special language**. Although there is occasionally a need to use a technical word or expression (e.g. *ex parte*, *mens rea*, *puisne judge*), in general the language of legislation is the same as that used in ordinary formal English, i.e. that of textbooks, newspaper leading articles, professional reports, articles and opinions, and professional and business letters generally.

Appendix D sets out some suggested approaches to the process of translating the relevant policy into workable legislative provisions.

2.3 Specific attributes of effective communication

There are nevertheless greater constraints on the use of language by legislative counsel, and in order to effectively communicate policy it is necessary for it to be:

- **CLEAR**
using direct, modern modes of expression.
- **COMPREHENSIBLE**
to those to whom the legislation is directed so that they can grasp its meaning as quickly as possible.

Aspects relevant to these two attributes will be considered in particular in Chapters 6 ('Plain language drafting') and 7 ('Structuring legislative drafts').

- **CONCISE**
with no unnecessary or repetitious words or phrases.
More than in any other kind of formal writing, it is necessary to write 'tight' prose. This means reducing the text to the minimum number of words needed in a sentence or series of sentences to explain their effect. Loosely drafted sentences incorporating more words than are needed to get a message across can be unduly complex or tiresome to read, and they increase the likelihood of inconsistent use of words and expressions, and hence ambiguity. Note for example the following turgid sentence:

A licensed dealer must always keep displayed in a place where it can easily be seen in the licensed premises the licence authorising him or her to undertake the relevant trade, profession or business.

This can probably be reduced to no more than:

A dealer must display the licence in a prominent place in the licensed premises.

- **CONSISTENT**

using as far as possible the same style throughout, and with the same words or expressions used to mean the same things.

It is an important rule of drafting any type of legal document, and especially legislative rules, that the same words and expressions are used to mean the same things, as there is a presumption that the use of different ones is intentional and indicates a shift in meaning (see ‘judicial approaches’, section 2.4).

The potential for confusion can easily be seen in the commonly required legislative provision for the giving of permission to do certain things in a certain way; it would for example be easy for the drafter to drift into unthinking use of different words to indicate permission – ‘allow’, ‘permit’, ‘license’, ‘consent’, ‘let’, ‘sanction’, ‘recognise’ – whether these words be verbs or, with any necessary modifications, nouns.

In practice, these last two attributes require rigorous consideration and reconsideration of drafted texts. Aspects relevant to them will be considered further in Chapter 5 (‘Modern Commonwealth conventions in legislative drafting’).

- **CERTAIN**

without ambiguity, so that those to be affected are left in no doubt about the extent of their duties, obligations, powers, discretions or rights, or the procedures required to be followed in given circumstances.

- **COMPLETE**

covering all reasonably foreseeable circumstances.

Even more importantly than with other kinds of formal writing, legislative counsel is required to cover everything necessarily needed to be covered, so that the resulting rules are as complete as they reasonably can be and do not contain what drafters call ‘loopholes’. At the same time, he or she must take care to ensure that the rules produced do not inadvertently apply to persons and situations to which they are not intended to apply.

In practice, these latter two attributes of legislation constitute by far the greatest challenge to counsel; but they are attributes relating essentially to analysis rather than use of language.

These ‘6 Cs’ of communication are not necessarily in watertight compartments and there may be some overlap. For example, if **unclear** language is used, the

result may also be to an extent both **incomprehensible** and **uncertain** (for examples, see Chapter 6).

Appendix E sets out the suggested approach legislative counsel need to take to achieve these 6Cs.

2.4 Constraints on legislative counsel

Drafting legislation has been likened to steering a ship around a series of underground obstacles. Some of the main obstacles, or constraints, are:

- **The Constitution**
There must be consistency with fundamental rights and freedoms, and the separation of powers.
These will be considered further in Chapter 3.
- **The existing law**
Inconsistencies in drafting can lead to potential duplication of provisions covering the same areas, and to difficulties with concepts such as dominant and subservient provisions or even implied repeal. These concepts will be considered in Chapters 7 ('Structuring legislative drafts') and 13 ('Final provisions').
- **Judicial approaches** to legislation, and judicial assumptions, including the rules of interpretation, the most fundamental of which are:
 - individual provisions are to be read in the context of the whole statute;
 - each word is to be given a meaning;
 - the same words or expressions are to be given the same meanings, different words or expressions are to be given different meanings;
 - a specific provision overrides a general one.

The last two of these assumptions will be covered in Chapters 5 ('Modern Commonwealth conventions in legislative drafting') and 11 ('Principles governing the order of provisions').

- **Drafting instructions**
Where these are deficient or poorly considered, there may be a greatly increased time taken in preparing legislation as attempts are made to clarify policy issues.

- **Local drafting house style**

This may inhibit a more modern approach to aspects of drafting style, especially where legislation that has been on the statute book for some time is being amended.

- **Available parliamentary time**

If there is a large amount of urgent legislation, and insufficient time for its preparation, there may be the need to attempt to squeeze largely unrelated matters into a single Bill.

