

How to Prepare Drafting Instructions

2020

How to Prepare Drafting Instructions

FIRST EDITION

PREPARED BY:

Office of the Legislative Counsel
Department of Justice and Public Safety
Government of Newfoundland and Labrador

Table of Contents

1. INTRODUCTION	1
2. ABOUT THE OFFICE OF LEGISLATIVE COUNSEL	1
3. ABOUT THIS GUIDE.....	1
4. THE ROLES OF LEGISLATIVE COUNSEL, THE INSTRUCTING OFFICER AND DEPARTMENTAL SOLICITOR	2
5. PROJECT PLANNING, APPROVALS AND TIMELINES	4
6. CONTACT WITH OLC AND INITIAL DRAFTING INSTRUCTIONS	8
7. THE DRAFTING PROCESS AND FURTHER INSTRUCTIONS	11
8. CHECKLIST FOR DRAFTING INSTRUCTIONS	12
APPENDIX A	30
APPENDIX B	32

1. INTRODUCTION

The purpose of this guide is to help departments provide instructions for the drafting of legislation to the Office of the Legislative Counsel (OLC). Please note that the term “legislation” includes Acts and regulations and the term “regulations” includes regulations and orders of a legislative nature. Departmental officials and legislative counsel perform an important role in the process of translating policy decisions by Government into effective, principled and clear legislation. Well drafted, high quality legislation is the result of a team effort between legislative counsel and departmental officials. A good working relationship is essential and a sound understanding of the process helps to build that relationship.

This guide outlines what can be expected from the OLC and what is needed from departmental officials. Hopefully this guide helps to make the relationship between departmental officials and legislative counsel as productive, efficient and effective as possible in assisting the Government in delivering its legislative program.

2. ABOUT THE OFFICE OF LEGISLATIVE COUNSEL

The OLC is a division of the Newfoundland and Labrador Department of Justice and Public Safety. The OLC’s goal is to provide impartial, high quality legislative drafting services and advice, and to enable easy access to the laws of the province. This guide is concerned specifically with the legislative drafting role.

The OLC is responsible for drafting all Government legislation. In order to carry out this mandate, the OLC has a Chief Legislative Counsel and two legislative counsel. All of these positions provide drafting services and as a result the terms “legislative counsel” and “drafter” are often used interchangeably. This guide uses the term “legislative counsel”. The OLC also has one staff person that supports the work of legislative counsel.

In addition, one legislative counsel also has the role of Registrar of Subordinate Legislation. The Registrar is responsible for the filing, indexing, publication and maintenance of all statutory instruments as required under the **Statutes and Subordinate Legislation Act**.

3. ABOUT THIS GUIDE

This publication is intended as a guide to providing drafting instructions for both Acts and regulations. It does not cover all situations nor does it set down rigid rules.

Drafting instructions are a department's way of communicating the Government's policy objectives to the OLC and how the law needs to be changed or developed to achieve these objectives. A proposed policy must be effectively communicated to Cabinet so that it can be properly considered for approval, and it must be effectively communicated to legislative counsel so that it can be placed into legislative form.

This guide is intended to provide departmental officials with information about preparing drafting instructions by

- providing background information on the roles and responsibilities of legislative counsel and the departmental official responsible for the legislative project (referred to as the instructing officer);
- outlining project planning, approval and timeline issues that need to be considered;
- providing general information about contact with the OLC, the purpose, form and content of drafting instructions as well as the drafting process; and
- setting out key matters that will need to be considered along with background information to assist in the department's decision making.

Appendix A to the guide sets out a summary of the drafting instructions checklist found at section 8 of this Guide and Appendix B sets out "Tips for Preparing Good Drafting Instructions".

It is important to note that this guide is not intended to describe or provide detailed information about the internal Government processes for obtaining appropriate approvals for the drafting of legislation or approval of financial arrangements that may be required to implement legislation.

4. THE ROLES OF LEGISLATIVE COUNSEL, THE INSTRUCTING OFFICER, AND THE DEPARTMENTAL SOLICITOR

(1) Legislative counsel

Legislative counsel's job is to produce a draft of legislation that gives effect to the Government's policy, is legally correct and is expressed as clearly and simply as possible. Legislative counsel will

- ask questions to clarify the issues;
- help identify issues and suggest options associated with the proposal;
- consider department's comments carefully;
- be aware of the legislative process and the statute law of the province;
- work within the requirements established by the OLC for layout and style of legislation; and
- draft to a timetable that has been agreed upon and that fits within the project plan.

In broad terms, legislative counsel is responsible for the way that legislation is expressed and presented while responsibility for the policy lies with the department. In practice, policy and drafting are not mutually exclusive but form a continuum.

(2) The instructing officer

The role of the instructing officer is to develop (perhaps with assistance of others from within the department or from other departments) and obtain approvals for the policy proposals that form the basis of the legislation to be drafted.

Once the policy proposal is developed and appropriate approvals have been obtained, the instructing officer's role is to provide drafting instructions to legislative counsel and approve the final draft of legislation before it goes forward to Government for consideration.

An instructing officer will also be responsible for responding to drafts of the legislation provided by legislative counsel. In this regard it is the instructing officer's responsibility to

- read the draft legislation critically;
- check the draft legislation against the instructions to ensure that nothing is missing;
- check the draft legislation for internal consistencies and readability;
- confirm that the draft legislation meets the policy intentions of the department; and
- answer any questions that legislative counsel has raised.

It is important to try to respond promptly to draft legislation so that matters are still fresh in the minds of legislative counsel and everyone else involved. If the department has questions regarding the draft or there is a problem with the draft, it is important that it be promptly brought to legislative counsel's attention.

An instructing officer should also collect comments on a draft from others within the department and other departments, where appropriate. The instructing officer should analyze and consolidate those comments and filter out those comments that are unhelpful.

An instructing officer's feedback on a draft is essential. The feedback can be provided in various forms but significant comments should be in writing. This can be done, for example, through email or hand annotated comments on the draft.

In response to feedback legislative counsel will then produce a next draft for review. This iterative process of drafting and feedback continues until a satisfactory result is achieved.

(3) The departmental solicitor

The role of the departmental solicitor is to review and approve draft legislation and to provide legal opinions regarding any legal issues that arise before or during the drafting process.

It is the responsibility of the instructing officer to advise the departmental solicitor of legislative projects and engage the departmental solicitor early in the process.

5. PROJECT PLANNING, APPROVALS AND TIMELINES

In planning legislative projects, there are a number of steps to be undertaken and factors to consider which will affect both the content and timelines for the proposed legislation. The drafting instructions checklist at section 8 of this Guide sets out details that will need to be considered. The department may wish to discuss some of these matters with the OLC in the initial stages of planning the project.

(1) Before obtaining Cabinet approval to draft

(a) Background work, internal discussions and analysis

The department will need to make sure adequate time is allotted for

- the department's research into the issues including, where appropriate, consideration of relevant legislation from other jurisdictions, academic writings, publications of other governments or organizations and comments from any relevant consultations;
- consideration of relevant policies of the Government;
- a discussion with operational people to ensure that the proposal will work in relevant practical scenarios;
- consultation with other departments that may be impacted by the proposal;
- a discussion with the departmental solicitor, where appropriate, regarding the problem the legislation is to address and the proposed solution;
- an analysis of who may be affected by the proposal;
- an analysis as to whether new legislation is required or if amendments to existing legislation are required;

- an analysis of what legislation, in addition to the target legislation, may be affected and how it should be amended;
- a consideration of whether transitional provisions will be needed; and
- an analysis of the regulations that will be required so appropriate authorizing language can be prepared.

(b) Commitments to consider

The department will also need to consider whether there are any public commitments that have been made that will affect the content of the proposed legislation.

The Government or a minister may have made a specific commitment about how the proposed policy or law would be structured. This will need to be considered as it may significantly restrict the options available for framing the legislation. Even if a formal commitment has not been made, consideration must be given to whether the proposal has been publicly discussed in specific terms that may affect how the legislation is framed (for example, by referring to a new regulatory proposal as a “licensing scheme”).

(c) Consultations

Are there requirements or commitments for consultation that will affect the time required to prepare drafting instructions or to draft the legislation?

Commitments are often made regarding stakeholder consultations. These may have been specific to the legislative proposal or a general commitment to consult.

In some cases, consultation is required by law. For example, the Labrador Inuit Land Claims Agreement imposes consultation obligations in specific circumstances. Also where legislation has the potential to adversely affect the treaty rights of Indigenous groups, a common law duty to consult may exist.

Proposals that have access to information or privacy aspects will need to be discussed with the Information and Privacy Commissioner. Section 112 of the **Access to Information and Protection of Privacy Act, 2015** requires that a minister consult with the commissioner on a proposed Bill that could have

implications for access to information or protection of privacy, as soon as possible before, and not later than, the date on which notice to introduce the Bill in the House of Assembly is given.

Consultations during the drafting process can significantly extend the time required to prepare draft legislation.

If the purpose of the consultations is to reach a “negotiated agreement” on the wording that is to be reflected in the legislation, legislative counsel must be consulted before that wording is finalized and likely should be involved directly in the consultations. However, best practice is to discuss the objectives the department is trying to achieve through the legislation as part of the consultation, rather than negotiating the wording that will be used to implement the objectives.

(2) Obtaining approval of the legislative project

Once the department has completed all its background work and developed a proposed approach, the appropriate approvals for the project must be obtained. All Bills must be approved by Cabinet for introduction into the House of Assembly. Cabinet must be informed of the policy intent of the legislative proposal in sufficient detail to make an informed decision. The drafting instructions checklist covers a wide range of matters and prompts the department to think about the details that will be needed to draft the legislation. Many of these details do not need to be specifically included in the Cabinet Submission but they will need to be developed as part of the instructions for legislative counsel to complete drafting.

When setting out a description of the legislative proposals in a Cabinet Submission, the department should strive to find a middle ground between too much and too little detail. On the one hand, it should be general enough to provide flexibility to allow minor policy questions to be worked out in the drafting process. On the other hand, it should not be so generalized that they are only broad statements of policy objectives with minimal indication of how the objectives are to be achieved.

For example, if the proposed legislation will include an appeal process, the Cabinet Submission should indicate who is to be the appeal tribunal, who will be entitled to appeal and the proposed basis for appeal. Additional details that will be required during the drafting process include

- the timelines and method for starting an appeal;
 - whether an appeal acts as a stay of the original decision;
 - who is to get notice of the appeal;
 - who can appear before the appeal tribunal;
 - the nature of the decision on an appeal; and
 - any special procedural rules.
-

In all cases the department will need to ensure that Cabinet is provided with the following information:

- a clear description of the problem as described through the issue statement;
 - a clear description of the solution being proposed to solve the problem;
 - the rationale for why the proposed solution has been chosen over other options;
 - the rationale for choosing to use legislation to help solve the problem;
 - a clear description of the objective of the legislation;
 - any implications for the chosen solutions;
 - any proposed consultations, including the sharing of any draft legislation; and
 - implementation, including financial costs associated with implementation.
-

It is best not to seek Cabinet approval of specific phrases or a set form of words as this may limit legislative counsel's ability to find better alternatives. Drafting instructions should not be attached to the Cabinet Submission as the purpose of the Cabinet Submission is to gain approval of the substantive policy choices and authority for the OLC to commence drafting.

(3) Drafting of the legislation

Once the department has approval from Cabinet, the instructing officer will then be able to provide drafting instructions which include a clear articulation of the problem to be addressed and the goal to be achieved, and an explanation of the policy direction created for that purpose. Other matters to be considered in developing drafting instructions are set out in the drafting instructions checklist.

(4) Considerations that may affect timelines

While planning a project is very important, there are a number of other factors that may affect drafting timelines that need to be considered:

- **Cabinet sets the priorities for drafting projects** - This means that no matter how important a project is from the sponsoring department's perspective and no matter how prepared the department is for providing drafting instructions, a project may not get the drafting time it needs until other ones have been completed.
- **Acts take precedence over regulations** - The House of Assembly generally sits twice a year and Acts must be tabled in the House of Assembly. As a result, the drafting of Acts will generally take priority over the drafting of regulations while the House of Assembly is sitting and for the month or two before the start of the sitting.
- **Legislative counsel often have a substantial number of drafting projects underway at the same time** - If there is too much time between drafts on a complex project, legislative counsel will need to get back up to speed on the issues involved before starting the next draft. Best practices from the sponsoring department's perspective will have the instructing officer reviewing a new draft promptly after it is received and providing the needed instructions on the next draft as quickly as possible.
- **Policy details will need to be addressed during the drafting process as well**
 - Sometimes apparently minor issues can be very complex, even when the final legislative statement is very short. The time required to prepare the draft legislation may be much greater than the department expects.

- **Unforeseen issues arise, and ones that have been identified turn out to be more complex** - It is not uncommon for issues to come up during the drafting process that require additional legal opinions, outside consultation or review of new cost implications.
- **Complex law benefits from reflection** - Implications of the legislation may not be immediately apparent. It is therefore best to allow time for both legislative counsel and the instructing officer to think through the possible implications of the legislation.
- **Editing and proofreading takes time** - Doing final edits and proofreading legislation involves checking grammar and numbering. It also requires substantive review of the text for logic, clarity and readability. In addition, cross references need to be confirmed and it is important to ensure that necessary consequential amendments have been prepared. This takes time. The result is that proofreading and editing a large piece of legislation may take a number of days, and require a couple of further drafts back and forth between legislative counsel and the instructing officer to deal with the issues raised.

A department should therefore avoid promising other people when drafts will be ready. If the department has a target date for a draft, let legislative counsel know as early as possible to ensure that adequate time is provided for drafting.

6. CONTACT WITH OLC AND INITIAL DRAFTING INSTRUCTIONS

(1) Contact with the OLC

Staff from the OLC work closely with Cabinet Secretariat and departments on legislative matters. As a result, the OLC is usually aware of the legislative proposals that will be coming forward to the Government for approval. Legislative counsel often provide assistance to departments even in these initial stages of the legislative development process.

After Cabinet has given approval to begin drafting, the Chief Legislative Counsel will assign the file to a legislative counsel.

Legislative counsel and the instructing officer will need to discuss the project including

- how soon drafting can start;
- whether there are any special considerations for the project; and
- whether there will be consultations with other persons (e.g. departmental program officials) during the drafting process.

(2) Purposes of drafting instructions

In order to commence drafting, the OLC requires drafting instructions from the instructing officer. Drafting instructions form the basis on which Government legislation is prepared. They describe and limit what the draft legislation is to contain.

Drafting instructions serve a number of purposes including

- allowing the sponsoring department to think through its proposal in detail;
- guiding legislative counsel; and
- serving as a benchmark for determining whether the draft legislation does what Cabinet authorized in approving the policy initiative.

(3) What drafting instructions need to cover

For very simple changes, often a Cabinet Submission can serve as drafting instructions. Such simple changes would include amendments required to change a date, increase the number of members on a board or decrease a tax rate.

For anything more complex, the drafting instructions need to cover the following information (and while some of this information will have been in the Cabinet Submission, the instructing officer will need to provide it in the form of detailed drafting instructions):

- a clear description of the problem;
 - a clear description of the solution being proposed to solve the problem;
 - the rationale for why the department has chosen the proposed solution over other options;
 - the rationale for choosing to use legislation to help solve the problem;
 - a clear description of the objective of the legislation; and
 - the specifics of the proposal (that is, the details of how the department intends to accomplish the objective).
-

(4) What form should drafting instructions take?

Drafting instructions should be written in clear, straightforward, and as far as the subject-matters allows, non-technical language, keeping in mind the purposes and providing the information described above.

Drafting instructions may be written out in descriptive prose or provided in point form. Topic headings are often helpful. Flow charts, diagrams and tables may also be helpful to include with the instructions in order to illustrate a proposed process or to indicate the intended relationship between concepts.

(5) What form should drafting instructions not take?

Instructions in the form of draft legislation will not be accepted. OLC does not accept instructions in the form of draft legislation for the following reasons:

- Draft legislation rarely describes the policy objectives that underlie it. In consequence, legislative counsel receiving draft legislation must elicit these matters from its provisions and then try to work out whether the provisions are in fact the best to secure those objectives. This is a difficult and time-consuming exercise.
 - Draft legislation contains legislative solutions that the department has decided upon. Legislative counsel cannot know what factors have led to this choice and it is difficult to assess whether other options that legislative counsel might prefer, were considered. This may result in missed opportunities to put better alternatives forward for consideration.
 - It is difficult to analyze problems when presented with a preconceived solution. Draft legislation tends to create a mind-set that is not easy to escape.
 - Draft legislation is often based on precedents acquired by the department or legislation from other jurisdictions. Even if these are appropriate to the new circumstances, they usually need skilled adjustment to suit the local circumstances and the statute law of the province.
-

(6) Other relevant documents

Cabinet Secretariat provides a copy of the Cabinet Submission to OLC. Documents that the department should provide to legislative counsel include

- all relevant precedents, cases, legal opinions and reports;
- copies of any relevant agreements; and
- any other relevant background information.

(7) How much detail should be included?

The checklist in section 8 of this Guide covers a wide range of matters and prompts the department to think about the details that will be needed to draft the legislation. Of course not all of these matters will need to be addressed in every legislative project. Although many of these details do not need to be specifically included in the Cabinet Submission they will need to be developed as part of the instructions for legislative counsel to complete drafting.

7. THE DRAFTING PROCESS AND FURTHER INSTRUCTIONS

(1) Starting to draft

Whether drafting can begin immediately will depend on Government priorities and the other drafting projects being carried out by the OLC. The drafting process itself will depend on the legislation, legislative counsel and the time frame.

For simple amendments, legislative counsel may be able to prepare a full draft based on the initial instructions provided. Any comments or questions will be highlighted on the draft. The legislation can then be finalized through a few exchanges of response and clarification, sometimes without requiring a direct meeting between the instructing officer and legislative counsel.

In other cases, legislative counsel will prepare a preliminary draft based on the instructions, identifying issues that need to be addressed and asking for directions. Direct meetings between legislative counsel and the instructing officer may be the speediest way of moving to a draft that reflects the department's intentions. The framework of the preliminary draft may well change significantly through the course of this development.

In other cases (particularly for major Acts or major regulations), legislative counsel will want to meet with the instructing officer before beginning to draft. This meeting may cover planning and process issues, as well as discussion on substantive legal issues related to the proposal. After this, outlines and drafts will be prepared, sent for review, discussed and revised through a process that may take a number of months or more.

(2) Development of further drafts

Most legislation will usually go through a number of drafts before it is ready for consideration by the Government. Drafting is a process of refinement.

The first draft produced by legislative counsel will likely have a number of questions and comments. These questions and comments may include

- asking for instructions on further detail needed to complete the legislative scheme;
- explaining how a legislative provision, as prepared in accordance with the initial instructions, will operate in its legal or practical effect and asking for confirmation that this was the intended result; or
- noting that the instructions result in a variation from similar legislative schemes in other Acts and asking whether this variation is necessary.

The issues raised may be new ones for the instructing officer, requiring further research, a request to the departmental solicitor for a legal opinion or outside consultation. The responses back to legislative counsel may lead to new issues for legislative counsel. As the detail is obtained and the issues resolved, the questions and comments will disappear from the draft.

(3) Drafting meetings

Drafting meetings between legislative counsel and instructing officers, and perhaps other departmental program people, are an opportunity to

- discuss issues raised by or in the previous draft; and
- provide legislative counsel with instructions for the next draft.

(4) Finalizing the draft

It is the role of the instructing officer to approve the final draft of the legislation before it goes forward to Government for consideration. Once the legislation is ready it will have to go through the Government approval processes. Before being prepared in final form, the draft legislation will be proof read and reviewed for editorial purposes by other legislative counsel. The editorial review will consider such matters as: format, grammar, style, cross-references and consequential amendments and will identify any provisions that may require further clarification.

8. CHECKLIST FOR DRAFTING INSTRUCTIONS

The following is a list of some of the key matters that a department will need to consider as part of a legislative project. There may be others as well which will be very specific to the legislation. While the instructing officer and department should, to the extent possible, consider all of these matters, it is recognized that some of the issues will be quite complex. Legislative counsel will assist as required in working through the issues with the department.

A. GETTING STARTED

- **Identify the instructing officer**

The legislation will be drafted by the assigned legislative counsel working closely with the person assigned to be the instructing officer.

Experience has shown that the process works best if the instructing officer

- is a senior level official in the department and has ready access to the deputy minister and through the deputy to the minister;
- has the authority to make decisions or obtain decisions quickly;
- was directly involved in the policy development that led to the legislative proposal and has a good general knowledge of the subject matter of the proposal;
- is readily available to legislative counsel on an ongoing basis; and
- is able to provide the necessary support to legislative counsel and ensure that the draft accurately reflects the approved policy. (For this, the instructing officer should be able to see the ramifications of a proposed provision, be able to spot deficiencies in the draft and provide legislative counsel with the critical commentary needed to ensure that the draft legislation fulfills its intended purpose).

If the proposal is a major drafting project, the instructing officer should be able to spend a significant amount of time on the project and should have some project management skills.

- **Estimate (in consultation with legislative counsel) the time needed for drafting**

Details will need to be addressed during the drafting process. Sometimes apparently minor issues can be very complex, even when the final legislative statement is very short. The time required to prepare the draft legislation may be much greater than the department expects. As a result it is best to avoid committing to or communicating forecast dates for drafts.

B. GENERAL MATTERS

- **Describe and explain the principal objectives**

It is essential that the Cabinet Submission and the drafting instructions clearly articulate the precise purpose of the proposed legislation, so that Cabinet and legislative counsel can clearly understand what the legislation is supposed to achieve.

It is often helpful if the problem that is being addressed and the proposed solution are separately identified.

If amending legislation has a number of different objectives, the instructions should explain these separately in relation to the provisions to be amended.

- **Decide how to implement the objectives**

Drafting instructions should provide a description of how the legislation will actually work, including the type of legal mechanism proposed, the related powers and duties and how compliance with the legislation is to be monitored and enforced.

In some cases there may be more than one option for implementation. The department needs to be clear on the option it wishes to pursue.

- **Assess the legal content**

An assessment of the law related to the proposal is required in order to ensure that the resulting legislation will operate effectively in its legal context. While legislative counsel will assist with these matters, consideration should be given to the following issues:

- Does the Legislature have constitutional authority to enact the proposed legislation?
- Is the proposal consistent with the **Charter of Rights and Freedoms**? Is it consistent with the **Human Rights Act, 2010**?
- Is the proposal consistent with important Acts of general application, such as the **Access to Information and Protection of Privacy Act, 2015** and the **Financial Administration Act**?
- Are there implications relating to the Canadian Free Trade Agreement or international trade agreements?
- Are any of the proposed provisions unnecessary repetitions of provisions in Acts of general application, such as the **Interpretation Act**?
- If there are provisions that vary from provisions in an Act of general application, is there a good reason for the difference?
 - Conflicting legislation needs to be specifically identified. It should not be dealt with by a general statement of "Notwithstanding any other Act".
 - Does the proposed legislation deal with matters that are also dealt with by other legislation that already exists or that is being prepared? If so, the department responsible for the other legislation should be consulted about the overlap.
 - Is the proposal intended to respond to a specific court decision or legal opinion? If so, a copy of the decision or opinion should be included with the initial drafting instructions.

C. LEGISLATIVE ELEMENTS

- **Consider the key legislative design questions**

In developing instructions for a specific provision, consideration should be given to the following basic components:

- **Who?** - Who is subject to the rule?
 - **What?** - What is the basic rule? What is it that the subject?
 - “may” do (empowering/permissive);
 - “shall” do (obligation);
 - “may not” do (limiting power); or
 - “shall not” do (prohibition)?
 - **Where?** - Is there a geographical component to the rule?
 - **When?** - Is there a time component to the rule?
 - **Why?** - What is the purpose of the rule?
 - **How?** - Is there a means or method aspect to the rule?
 - **How much?** - Is there a cost or charge aspect to the rule?
 - **If?** - Are there limits to when the rule will apply?
 - **If not?** - Are there sanctions (fines, administrative penalties, something else) if the rule is not followed?
 - **But?** - Are there exceptions to the rule?
-

D. LEGISLATIVE STRUCTURE

- **Consider whether the proposal belongs in an Act, in regulations under an Act, in administrative instruments or some combination**

In developing a proposal for approval by Cabinet and providing drafting instructions, the department will need to determine which legislative instruments the department will use to implement the policy - a new or amending Act, a new or amending regulation or administrative instruments.

- **Consider where to place specific provisions**

In developing a proposal and providing drafting instructions, the department will also need to consider which provisions will be in the Act, which provisions will be in the regulations, and which provisions are best dealt with in administrative instruments. Processes for making Acts, regulations and administrative instruments differ as follows:

- Acts are laws made through the parliamentary process of the House of Assembly.
- Regulations are laws made under an express delegation in an Act. The Act will determine who may make the regulations and what the regulations can do. The process for giving effect to the regulations is governed by the **Statutes and Subordinate Legislation Act**.
- Administrative instruments do not involve legislative processes and are not drafted by legislative counsel, but may be subject to particular legal requirements such as those relating to natural justice in public decision making.

Generally speaking, an Act contains the fundamental framework of the legislative scheme. The underlying principles expressed by that framework (either directly or by implication) will govern how the courts interpret the Act and, thus, how it may legally be implemented. The following additional matters are also usually dealt with in an Act:

- controversial matters that should be addressed by the House of Assembly;
- provisions establishing the structure of public bodies or providing for senior appointments;

- provisions that substantially affect personal rights (e.g. search and seizure powers, penalties for serious offences, expropriation);
 - taxing provisions (including fees that raise revenues substantially above the cost of the services provided);
 - transitional provisions; and
 - consequential amendments to other Acts.
-

Regulations deal with matters of a legislative nature that are subordinate to the main principles of the Act. Regulations are appropriate to deal with

- procedural matters (e.g. how to apply for a licence);
 - matters that need frequent adjustment (e.g. interest rates);
 - technical matters that involve scientific or other expertise (e.g. prescribing classes of organic pollutants); and
 - matters that cannot be finalized until there is experience with the new legislation (e.g. establishing the time limits for when certain steps must be taken).
-

Often many of the elements of a proposal (particularly a regulatory scheme) should be dealt with by administrative instruments. Examples of administrative instruments include permits, licences, contracts, guidelines and directives. Examples of when it is appropriate to use administrative instruments include

- legal requirements that are to be imposed individually on a case-by-case basis;
- non-binding guidelines for eligibility; and
- internal directives on administrative matters.

The provisions of the Act, the regulations under the Act and any related administrative instruments must fit together in a coherent scheme that accords with the framework established by the Act.

E. POWERS AND DUTIES

- **Decide who powers and duties should be given to**

Drafting instructions will need to indicate who is to exercise a power or duty under the legislation. The nature of the power or duty often determines who is best to exercise it. The following powers and duties should be considered:

Regulation-making powers

- Most regulation-making powers are exercised by the Lieutenant-Governor in Council.
- Ministers may be authorized to make regulations in relation to matters that are not of concern across Government generally.
- In some cases, a specialized tribunal may be authorized to make regulations in its area of expertise.
- If regulation-making authority is given to an outside individual or body, approval of the Lieutenant-Governor in Council or a minister may be required. (For example, the **Medical Regulations** under the **Medical Act, 2011** must be approved by the Minister of Health and Community Services).

Judicial and quasi-judicial powers

- Judicial and quasi-judicial powers must be exercised with impartiality.
- The persons who are chosen to exercise these powers should have the qualifications and security of tenure to ensure this impartiality.

Administrative powers

- Most administrative powers are given to Ministers who, in turn, have implied authority to authorize officials in their departments to exercise the powers. There are however limits on this implied authority to delegate.

- Inspection and enforcement powers are usually given to classes of officials created to exercise these powers.

- **Consider whether to allow powers or duties under the legislation to be delegated, and if so to whom**

Drafting instructions should indicate whether a person or entity on whom powers and duties are conferred in an Act is to have the ability to delegate those powers or duties.

If an Act establishes the powers or duties of a specified person or body, this person or body is considered to be acting as a delegate of the Legislature. Further delegation to another person or body is known as “sub-delegation”. The general rule is that statutory powers cannot be sub-delegated unless this is expressly authorized by statute. The department should contact its solicitor if an issue of delegation arises during the drafting process.

F. EXTRAORDINARY PROVISIONS

- **Identify any extraordinary provisions that require specific Cabinet approval**

Certain types of provisions should be specifically identified in the Cabinet Submission and in the drafting instructions because they are an extraordinary exercise of legislative authority. Cabinet must be made aware of them so that a proper assessment can be made of whether they should be included in the legislation. Some examples of these provisions are

- provisions that affect rights or freedoms protected by the **Charter of Rights and Freedoms** or that significantly affect other personal rights or freedoms;
- retroactive provisions;
- validation of provisions that have been struck down by a court;
- power to expropriate property;
- power to grant exemptions from the legislation;
- provisions that exclude the jurisdiction of the courts;

- regulation-making powers for matters that are usually dealt with in Acts;
- provisions that are to operate “Notwithstanding the **Access to Information and Protection of Privacy Act, 2015**” or “Notwithstanding the **Financial Administration Act**” for example; and
- provisions that are not usually found in legislation in the province.

- **Determine whether regulations to be made under the Act will include extraordinary provisions that should be identified in the Cabinet Submission**

As with the Act itself, if it is expected that the regulations will involve the extraordinary use of legislative authority, the Cabinet Submission in addition to the drafting instructions should specifically request this authority and state why it is needed. Examples are regulations that would

- affect the rights or freedoms protected by the **Charter of Rights and Freedoms** or that would significantly affect other personal rights and freedoms;
- determine important matters of policy or principle;
- operate retroactively;
- exclude the ordinary jurisdiction of the courts; or
- amend the enabling Act.

G. SPECIFIC ISSUES

- **Decide on a proposed title for the legislation**

In Newfoundland and Labrador, Acts are given a long title and a short title and regulations are only given one title.

A proposed title should reflect the content of the legislation in a neutral form. The title of an Act or regulation is part of the legislation and can be used by courts in interpreting its provisions.

For Acts, the first word of the title determines the Act's placement in the statute book so general words such as "Newfoundland" or "Government" should be avoided if possible.

OLC will work with the department to help choose a title for the legislation.

- **Consider whether the legislation's application needs to be expanded or limited in any way**

It may be necessary to expand or confine the application of legislation in a number of ways such as

- geographically (e.g. to certain parts of the province);
- temporally (e.g. to certain periods of time); or
- by subject matter (e.g. by excluding matters that are regulated under another piece of legislation).

Application provisions often raise complex legal questions that must be more fully explored before the proposed application provision can be included in the legislation.

- **Plan for any required regulations**

Regulations are often a key component of the legislative scheme. Because they are a form of delegated law (someone other than the Legislature is making law), regulations must be authorized by an Act of the Legislature.

For a legislative proposal that will have a substantial part of its scheme implemented by regulations, a solid idea of their anticipated content is needed when the Act itself is drafted otherwise there is a risk that the Act will not provide the required regulation-making authority.

- **Provide for any special procedural requirements**

- Generally, regulations are subject to the procedures established by the **Statutes and Subordinate Legislation Act**.

- In some cases, additional procedural requirements are wanted. For example, the authorizing section of the Act might:

- require that the regulation be made only on the recommendation of a specified Minister;

- require that the Minister consult with a specified body before any recommendation is made; or

- provide that a regulation cannot come into force until some specified time after it has been published in the Gazette.

- **Establish authority for the making of any needed appointments (to boards, tribunals or other senior positions), and clarify who will make the appointments**

If appointments are to be made, a decision has to be made as to who the appointing authority will be (e.g. Lieutenant-Governor in Council, Minister etc.) and how the appointment will be made (by Order or by non-legislative means).

All appointments must be made in compliance with the **Independent Appointments Commission Act** and the **Public Service Commission Act** and amendments to the Schedules to those Acts may be required.

- **Provide full details as to any new public body**

The nature and structure of public bodies varies widely, depending on the functions they are to perform. The following are some of the questions to consider when creating a public body:

- What name will it have?

- What are its purposes?

- What is its membership (how many, who, how appointed, term of office)?

- Will it have executive officers (such as a chair and vice chair) and how are they to be appointed?

- Will it be a corporation?

- Will it be an agent of the Crown?
- Will it be able to enter into contracts, either in its own name or in the name of the Government?
- Will it be able to acquire and dispose of land or interests in land?
- What is its financial structure (whether the Minister of Finance has authority over its accounting, who is to be the auditor, what borrowing and investment powers will it have)?
- To whom will it report (for example, the Minister, the Attorney General, the House of Assembly)?
- Where will its headquarters be located?
- Which Minister is to be responsible?
- Will it have the authority to appoint its chief executive officer or will that authority rest elsewhere?
- Will its members and staff be part of the public service and subject to general public service legislation such as the **Public Service Commission Act**, **Public Service Collective Bargaining Act**, **Public Service Pensions Act, 1991**, **Public Sector Compensation and Transparency Act** and **Independent Appointments Commission Act**.
- Will it be subject to Acts that are generally applicable to Government bodies such as the **Financial Administration Act** and **Access to Information and Protection of Privacy Act, 2015**?

- **Provide for the collection or disposition of public money, if required**

Generally, the handling of public funds is dealt with under the **Financial Administration Act**. That Act will apply unless there is an express provision otherwise.

Particular attention should be paid to the **Financial Administration Act** when creating a public body or office.

The Department of Finance should be consulted about any proposal to

- create a special account in the consolidated revenue fund;
 - create a trust fund that would be held outside the consolidated revenue fund;
 - create an on-going statutory appropriation; or
 - authorize borrowing, guarantees or indemnities.
-

- **Consider the need for special rules in relation to access to or disclosure of information**

The disclosure of information by Government and public bodies is governed by the **Access to Information and Protection of Privacy Act, 2015**. In addition, common law principles of confidentiality and privilege should be considered.

Close consideration needs to be given to any provisions that would

- restrict access under the **Access to Information and Protection of Privacy Act, 2015**;
- allow access to personal information otherwise protected by that Act; or
- authorize information sharing agreements between organizations.

Section 112 of the **Access to Information and Protection of Privacy Act, 2015** requires that such proposals be discussed with the Information and Privacy Commissioner.

- **Decide if enforcement mechanisms are required, and what those should be**

Consideration should be given as to whether specific offence provisions and penalties should be included in the Act. Most legislation is enforced by sanctions for non-compliance. The three basic methods of imposing sanctions are

- Prosecution of those who commit offences in the courts;
- Issuance of tickets under the **Provincial Offences Act**; and
- Imposition of administrative penalties (such as monetary penalties, licence suspensions or disqualifications).

If specific offence and penalty provisions are not included in an Act, section 5 of the **Provincial Offences Act** applies. Section 5 of the **Provincial Offences Act** creates a general offence for contravention of an Act or regulation which does not expressly prescribe a penalty or punishment. It also provides a standard penalty of not less than \$100 and not more than \$1,000 or to imprisonment for not more than 30 days or to both a fine and imprisonment.

If the department would like to have the ability to issue a ticket for a contravention of the Act or regulations, the offence provision must be prescribed in section 2 of the **Provincial Offences Ticket Regulations, 1999** under the **Provincial Offences Act**.

Administrative sanctions may require a significant legislative framework. For example

- A scheme that allows suspension or cancellation of licences will need to deal with matters such as notice, opportunity to make presentations and appeals; and
- A scheme that applies monetary penalties for contraventions will need to address a number of administrative law issues.

Provisions establishing sanctions should be reviewed to ensure that

- they will be effective in obtaining compliance;
- they are supported by effective enforcement mechanisms (such as inspection and search powers);
- the sanctions are appropriate to the seriousness of the non-compliance; and
- the sanctions have sufficient flexibility to allow fair treatment of accused persons depending on the circumstances of the non-compliance.

- **Decide whether to include a review process for any decisions under the legislation that affect people's rights**

An Act that authorizes significant decisions respecting specific individuals or organizations often provides for some form of review of those decisions.

Reviews may be mandated by

- authorizing the original decision makers to reconsider their decision;
- authorizing a superior of the original decision maker to review the decision;
- establishing an administrative tribunal to conduct reviews;
- assigning new review responsibilities to an existing tribunal; or
- providing for an appeal to court.

If a review process is to be established, there are many detailed issues that will need to be considered in providing drafting instructions, including:

- what decisions are reviewable;
- who may ask for the review;
- on what basis may the decision be reviewed (e.g. error of law, error of fact, as of right);
- what is the time limit for requesting a review;
- how is the process started;
- who must be given notice;
- what is the nature of the review – is it a completely new hearing, a review on the documented record or something in between;
- what powers does the review authority have in making its decision; and
- how are the costs of the process to be covered and who is responsible for them.

The Supreme Court of Newfoundland and Labrador has inherent authority to review statutory decisions that affect legal rights, duties or eligibility for benefits. Any restriction on this authority must be done expressly by legislation.

- **Decide whether a special dispute-resolution mechanism is needed**

If the legislation will likely involve disputes between parties with different interests, consideration should be given to including provisions for resolving these disputes without going to the courts. Examples of dispute resolution mechanisms are

- negotiation;
- mediation; and
- arbitration.

H. ANCILLARY MATTERS

- **Provide for any necessary repeals of Acts or regulations**

If a new Act is proposed to replace an existing Act, the existing Act will need to be repealed.

Existing regulations should be reviewed to determine if they are authorized to continue under the new legislation. Where an entire Act is being repealed and replaced the regulations would likely need to be repealed and replaced.

- **Assess the need for consequential amendments**

New legislation often affects existing legislation, requiring consequential amendments to other Acts or regulations.

If the required changes are limited to housekeeping matters (such as changing section cross-references), these can be left to the drafting stage.

If consequential amendments for substantive changes are required, these should be identified in the Cabinet Submission as well as in the drafting instructions. Consequential amendments may include amendments to legislation that is not yet in force.

For legislation that is administered by other departments, consultation with these departments will be required.

- **Decide whether transitional provisions are needed**

Transitional provisions may be needed for

- matters that arose under legislation that is being repealed or amended by the new legislation; or
- matters that need to be dealt with before the new legislation can be effectively implemented.

Many of these transitional matters are governed by the provisions of sections 29, 30 and 31 of the **Interpretation Act**. However, these provisions may not be appropriate in all cases and may not cover all transitional issues that need to be dealt with.

Examples of matters requiring consideration include

- regulations made under the previous law;
- rights or benefits granted under the previous law;
- offences committed under the previous law;
- transfers of assets and liabilities;
- the creation of a replacement administrative body for one existing before the new legislation comes into force;
- appeals, reviews or other administrative proceedings under the previous law that have not been finalized at the time the new legislation comes into force; and
- judicial proceedings involving the application of previous law.

- **Determine when the legislation should come into force**

Drafting instructions will need to indicate when the department wants the legislation to come into force.

Under the **Interpretation Act**, an Act is considered to have come into force at the very start (immediately after midnight) of the day on which it comes into force. If an Act is silent on its commencement date, its provisions will come into force on the date of Royal Assent (the date the Lieutenant-Governor gives assent to the Act).

If one or more provisions of an Act are to come into force on another date, the commencement section of the Act will provide for this by establishing that they are to come into force:

- on a specified date after Royal Assent (e.g. January 1, 2020);
- on the date on which specified circumstances occur (e.g. the date on which another Act comes into force);
- on a date to be proclaimed by the Lieutenant-Governor in Council (referred to as the proclamation date - appropriate, for example, if regulations must be enacted in order for the legislation to be implemented or if a lot of implementation work is required to be ready to administer the Act when it comes into force); or
- retroactively to a specified date (in which case, the legislation actually comes into force on another date determined in accordance with the above options but, once it is in force, is deemed in law to have come into force at an earlier time).

Different provisions of an Act may come into force on different dates. If an Act provides that it comes into force “on a day or days to be proclaimed by the Lieutenant-Governor in Council”, different provisions may be brought into force on different dates and by different proclamations.

Under the **Statutes and Subordinate Legislation Act** and the **Interpretation Act**, a regulation is considered to have come into force at the very start (immediately after midnight) of the day on which it comes into force. If a regulation is silent on its commencement date, it comes into force on the day it is published in the Newfoundland and Labrador Gazette.

If one or more provisions of a regulation are to come into force on another date, the commencement section of the regulation will provide for this by establishing that they are to come into force:

- on a specified date; or
 - on the date on which specified circumstances occur (e.g. the date on which an Act comes into force).
-

I. REVIEWS AND CONSULTATIONS

- **Internal consultation: consider whether other Ministers, departments or Government agencies need to be consulted**

Ministers, departments or agencies that are consulted on the policy proposals leading up to a Cabinet Submission should likely also be given the opportunity to comment on the drafting instructions. This is particularly important when consequential amendments are being proposed to legislation administered by another department.

The following should be considered in determining whether consultation is required:

- is legislation administered by another department affected by the proposed legislation;
- are programs provided or administered by another department affected by the proposed legislation;
- if the proposed legislation assigned duties or powers to another Minister, is there agreement on the extent of these duties or powers;
- have the affected Ministers, departments or agencies had an opportunity to review the drafting instructions; and
- are there any outstanding issues that need to be addressed before final drafting instructions can be given.

- **Joint drafting or review: decide whether other departments or government agencies should participate in the drafting process or review the draft legislation**

Where the department determines that other departments or government agencies should participate in the drafting process or review draft legislation, legislative counsel should be advised at the start of the drafting process as to who will be the responsible officials for these other departments or agencies.

- **External consultation: consider whether the views of other governments, non-governmental bodies or the general public are needed**

Cabinet submissions and draft legislation are confidential Cabinet documents and come within the Cabinet confidences protection of section 27 of the **Access to Information and Protection of Privacy Act, 2015**. At the same time, consultations with persons outside Government may be wanted.

The sponsoring department may not undertake outside consultations without Cabinet approval.

If it is expected that outside consultation may significantly affect policy, further Cabinet approval may be required.

Legislative counsel should be advised if drafts are to be shared outside Government, as this may affect whether legal advice is provided within the drafts themselves or separately.

Drafts of an Act should not be shared in Bill form. In Bill form, issues of parliamentary privilege are added to those of Cabinet confidentiality.

A department must have the appropriate approval from the Government to share draft legislation outside of the Government.

J. FINAL CONSIDERATIONS

- **Identify outstanding policy issues**

It is sometimes not possible to resolve all key policy issues that should be dealt with by Cabinet without unduly delaying the start of drafting.

In these cases, the Cabinet Submission must

- identify the outstanding policy issues;
- indicate how the outstanding policy issues are to be resolved during the drafting process; and
- provide a timeline for resolution.

- **Recommend an implementation schedule**

It is not possible to predict how a Bill will proceed through the House of Assembly. Timing of passage of regulations by Cabinet is also very difficult to predict. Proposed implementation dates are often set as part of the Cabinet Submission.

When determining implementation deadlines, consideration must be given to

- the work required to prepare any necessary regulations or amendments to regulations; and
- any administrative, staffing and training arrangements that will be needed.

- **Other considerations**

If an Act is to come into force on a date to be proclaimed by the Lieutenant-Governor in Council, the Proclamation is not prepared automatically. A Cabinet Submission must request that the Act be proclaimed.

APPENDIX A

Quick Reference to Drafting Checklist

A. GETTING STARTED

- Identify the instructing officer
 - Estimate (in consultation with legislative counsel) the time needed for drafting
-

B. GENERAL MATTERS

- Describe and explain the principal objectives
- Decide how to implement the objectives
- Assess the legal content

C. LEGISLATIVE ELEMENTS

- Consider the key legislative design questions
- **Who?** - Who is subject to the rule?
- **What?** - What is the basic rule? That is, what is it that the subject:
 - "may" do (empowering/permissive);
 - "shall" do (obligation);
 - "may not" do (limiting power); or
 - "shall not" do (prohibition)?

- **Where?** - Is there a geographical component to the rule?
 - **When?** - Is there a time component to the rule?
 - **Why?** - What is the purpose of the rule?
 - **How?** - Is there a means/method aspect to the rule?
 - **How much?** - Is there a cost/charge aspect to the rule?
 - **If?** - Are there limits to when the rule will apply?
 - **If not?** - Are there sanctions (fines, administrative penalties, something else) if the rule is not followed?
 - **But?** - Are there exceptions to the rule?
-

D. LEGISLATIVE STRUCTURE

- Consider whether the proposal belongs in an Act, in regulations under an Act, in administrative instruments or some combination
 - Consider where to place specific provisions
-

E. POWERS AND DUTIES

- Decide who powers and duties should be given to
 - Consider whether to allow powers or duties under the legislation to be delegated, and if so to whom
-

F. EXTRAORDINARY PROVISIONS

- Identify any extraordinary provisions that require specific Cabinet approval
 - Determine whether regulations to be made under the Act will include extraordinary provisions that should be identified in the Cabinet Submission
-

G. SPECIFIC ISSUES

- Decide on a proposed title for the legislation
- Consider whether the legislation's application needs to be expanded or limited in any way
- Plan for any required regulations
- Provide for any special procedural requirements
- Establish authority for the making of any needed appointments (to boards, tribunals or other senior positions), and clarify who will make the appointments
- Provide full details as to any new public body
- Provide for the collection or disposition of public money, if required
- Consider the need for special rules in relation to access to or disclosure of information
- Decide if enforcement mechanisms are required, and what those should be
- Decide whether to include a review process for any decisions under the legislation that affect people's rights
- Decide whether a special dispute-resolution mechanism is needed

H. ANCILLARY MATTERS

- Provide for any necessary repeals of Acts or regulations
 - Assess the need for consequential amendments
 - Decide whether transitional provisions are needed
 - Determine when the legislation should come into force
-

I. REVIEWS AND CONSULTATIONS

- Internal consultation: consider whether other Ministers, departments or Government agencies need to be consulted
- Joint drafting or review: decide whether other departments or government agencies should participate in the drafting process or review the draft legislation
- External consultation: consider whether the views of other governments, non-governmental bodies or the general public are needed

J. FINAL CONSIDERATIONS

- Identify outstanding policy issues
- Recommend an implementation schedule
- Other considerations

APPENDIX B

Tips for Preparing Good Drafting Instructions

Is legislation really what the department needs or wants?

Before initiating the legislation development process, be sure that legislation is the solution. Is the department's objective one that legislation can actually accomplish? And even if legislation is feasible, consider whether a policy would be a better choice.

Prepare prepare prepare

This includes both preparation of an in-depth policy analysis and preparation of drafting instructions. As part of this, review the existing law. Read it carefully. See how its parts - Acts, regulations and so on - fit together. Talk to the people who apply it: ask them what works and what does not. Look at other jurisdictions for ideas.

OLC will help the department with this. But the department is the expert - the department needs to take the initiative to know its own legislation.

Have a plan, and make sure it includes giving OLC drafting instructions early

The drafting process works best when the department is prepared and has a good solid plan. This doesn't mean the initial instructions have to be perfect - lots of legal and technical issues arise only when pen is put to paper. But things will go much more smoothly if the department has a plan and a realistic timetable.

Two important things to remember about drafting instructions:

- As important as the Cabinet Submission is, it is not drafting instructions.
 - Don't worry about the specific words to be used in the legislation - OLC will figure that out.
-

Remember: Cabinet sets the priorities

Cabinet sets the priorities of what legislation will be proceeding at any one time. Cabinet has a process for doing that. It includes approvals, forms and procedures. Starting initiatives prematurely can be immensely frustrating to all involved. Remember that legislative counsel, like policy analysts have to prioritize projects in order to meet strict time lines and cannot give priority to a legislative project for which proper approvals have not been obtained.

Choose the instructing officer early

Identify one official to be the "instructing officer" for the legislation. The instructing officer provides the specific instructions to legislative counsel as the work progresses and is legislative counsel's departmental contact for the project.

Some departments use the same instructing officer for all of their projects; others prefer to use a different subject-matter expert for each assignment. It's the department's choice - just tell OLC at the outset who that person is.

Know the context

Even though the department may be strictly focused on solving a particular problem, the department must be careful not to create another problem for someone else.

By making new law or amending existing laws, we may be shifting the greater landscape - either legally, or in terms of programs and policies. Remember to consider how the project may affect other areas. Does another department or agency need to be involved? Are there FPT, Indigenous Land Claims Agreement or international implications? Will the new law require changes to other legislation?

Identifying these areas of overlap early is important.

Technicalities take tedious time

Law, unfortunately, is complicated. Sometimes apparently minor issues can require a lot of attention, even when the final legislative statement is very short.

Recognize that drafting is an art that takes precious time to perfect. Rush jobs do not create the best legislation.

Unforeseen issues do arise

It is not uncommon for issues to come up during the drafting process that require additional legal opinions, outside consultation or review of new cost implications. Be ready to deal with such issues, and have a plan as to how the department will deal with any related delays.

Complex law benefits from reflection

It is very beneficial to allocate time during the drafting process for reflection. Although not always possible, it is a good idea to have in the plan some time for thinking and discussion. Ask a colleague to look over the drafting instructions. Build in a few days where the draft Cabinet Submission is put aside, so that the department can look at it with fresh eyes.

The result will almost certainly be much better instructions at the end of the day.

