



ACT
Government

ACT LEGISLATION

DEVELOPING LEGISLATION
AND WORKING WITH PCO

ACT PARLIAMENTARY COUNSEL'S
OFFICE

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ABOUT THIS GUIDE

WHO THIS GUIDE IS FOR

This guide is for officers of the ACT public service who are instructing the Parliamentary Counsel's Office (PCO) to draft legislation. It is for both regular and inexperienced instructors.

WHAT THIS GUIDE COVERS

Topics covered by this guide include:

- **Preliminary considerations:** This guide gives you an overview of some of the preliminary considerations when developing a legislative proposal, including whether legislation is needed, who to consult and how long it might take. This guide does not address how to develop legislative policy.
- **Working with PCO:** This guide outlines PCO's role—what we do, how we can help and what we need from you to translate your legislative proposal into effective legislation.
- **Common issues:** This guide gives you guidance about some common legislative issues that arise in developing legislative proposals, including options for ensuring compliance with legislation, how functions will be exercised and consequential amendments or transitional arrangements that might be needed.

ABBREVIATIONS USED IN THIS GUIDE

An explanation of abbreviations used in this guide are set out in Table 1.

ABBREVIATIONS GUIDE

Table 1 Abbreviations used in this guide

Term	Meaning
ACAT	ACT Civil and Administrative Tribunal
Assembly amendments	amendments of bills being considered by the Assembly
Chamber Support	Chamber Support for the Office of the Legislative Assembly
Criminal Code (or Code)	Criminal Code 2002
Executive	the Australian Capital Territory Executive established under the Self-Government Act, s 36
Human Rights Act (or HRA)	<i>Human Rights Act 2004</i>
JACS Scrutiny Team	Advisers within LPP who provide advice on compatibility of legislation with human rights
Legislation Act (or LA)	<i>Legislation Act 2001</i>
Legislation Register (or Register)	ACT Legislation Register ¹
Legislative Assembly (or Assembly)	Legislative Assembly for the ACT, established under the Self-Government Act, s 8 (1)
LPP	Legislation, Policy and Programs in the Justice and Community Safety Directorate
MLA	Member of the Legislative Assembly
PCO	ACT Parliamentary Counsel's Office
Public Sector Management Act (or PSMA)	<i>Public Sector Management Act 1994</i>
Scrutiny Committee	Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
Self-Government Act	<i>Australian Capital Territory (Self-Government) Act 1988</i> (Cwlth)
Standing Orders (or SO)	Standing Orders and Continuing Resolutions of the Assembly (December 2016) ²

¹ <http://www.legislation.act.gov.au/a/default.asp>

² https://www.parliament.act.gov.au/in-the-assembly/standing_orders

OTHER INFORMATION ABOUT LEGISLATION AND CABINET

- [Assembly Process Handbook](#),³ published by the Chief Minister, Treasury and Economic Development Directorate.

The Assembly Process Handbook outlines the processes and procedures in relation to Government Business in the Legislative Assembly.

- [Cabinet Office website](#)⁴ publishes information about Cabinet processes, including the Cabinet Handbook and the Cabinet Paper Drafting Guide.
- [Cabinet Handbook](#),⁵ published by the Chief Minister, Treasury and Economic Development Directorate as part of the ACT Machinery of Government series.

The Cabinet Handbook outlines the procedures and conventions for the operation of the Cabinet and its support processes. Those procedures and conventions encompass the entire Cabinet process through preparation, lodgement and consideration of Cabinet business, as well as ongoing administrative aspects of the maintenance of Cabinet records.

- [Governance Principles—Appointments, Boards and Committees](#),⁶ published by Chief Minister, Treasury and Economic Development Directorate as part of the ACT Machinery of Government series.

The principles outline procedures for Ministerial and Executive appointments including for boards and committees.

- [Guide for Framing Offences](#),⁷ published by the Justice and Community Safety Directorate.

The guide provides information about drafting offences, including strict liability offences, setting penalties and creating infringement notices (on-the-spot fines), and about creating civil penalties.

- [Legislative Assembly website](#)⁸ has useful information about the various activities of the Assembly, including the legislative process.

³ <http://www.cmd.act.gov.au/policystrategic/cabinet/assembly-liaison>

⁴ <http://www.cmd.act.gov.au/policystrategic/cabinet/cabinet-office>

⁵ <http://www.cmd.act.gov.au/policystrategic/cabinet/cabinet-office>

⁶ <http://www.cmd.act.gov.au/policystrategic/cabinet/governance>

⁷ <http://www.justice.act.gov.au/publication/view/184/title/guide-for-framing-offences>

⁸ <https://www.parliament.act.gov.au/>

OTHER PCO GUIDES

- [ACT Legislation—Legislation Basics](#)⁹

This guide sets out the basics about ACT legislation, for example, where the ACT derives its law-making power, what laws apply in the ACT and what are the different kinds of ACT legislation.

- [ACT Legislation—Reading Legislation](#)¹⁰

This guide explains how to navigate, read and understand ACT legislation. It describes the typical structure of ACT legislation, explains common provisions and identifies interpretation principles and aids.

WHO TO CONTACT ABOUT THIS GUIDE

Parliamentary Counsel's Office

✉ pco@act.gov.au

☎ 6205 3700

⁹ <http://www.pco.act.gov.au/pages/aboutactleg/legbasics.htm>

¹⁰ <http://www.pco.act.gov.au/pages/aboutactleg/readingleg.htm>

ABOUT PCO

OVERVIEW

PCO is responsible for drafting and publishing ACT legislation. The Legislation Act guides our work, dealing with the following key topics:

- **Public access to legislation:** PCO achieves this in the following key ways:
 - PCO maintains the Legislation Register—the authorised, electronic statute book for the ACT.
 - PCO republishes the law as currently in force, ensuring the availability of the law in an up-to-date form.
 - PCO manages a technical amendments program for ACT legislation to ensure, as far as practicable, ACT legislation forms a cohesive statute book of the highest standard. This includes preparing statute law amendment bills for presentation in the Legislative Assembly and making editorial changes for consistency across the ACT statute book in format, layout and printing style, as well as a standard approach in, for example, the use of spelling, punctuation, numbering systems and provision references.
 - PCO notifies all legislative events to facilitate the public’s knowledge about when laws have been made, amended, repealed etc.
- **Life cycle of legislation:** PCO undertakes the processes set out in the Legislation Act for numbering, notifying, commencing, amending and repealing legislation.
- **Interpretation and other common provisions:** PCO drafts and edits legislation taking into account the interpretative and other common provisions in the Legislation Act and otherwise in accordance with established drafting practices.

DRAFTING SERVICES

PCO's drafters are lawyers with the combination of legal expertise and analytical and drafting skills to translate your legislative proposal into effective legislation.

Our drafting services include:

- drafting bills for the ACT Government and individual members of the Legislative Assembly
- drafting Assembly amendments for the ACT Government and individual members of the Legislative Assembly
- drafting regulations for the ACT Government
- drafting rules for the ACT Law Courts
- analysing legislative proposals and giving advice on the policy, legal and constitutional implications of proposals, and alternative ways of achieving the policy objectives.

We encourage you to contact us at an early stage in the process of developing your legislative proposal to see how we can help you (see *Contact details—drafting services*, page 8).

While PCO does not draft statutory instruments (eg, disallowable instruments, notifiable instruments, appointments or delegations), we are available to answer any questions you may have about preparing instruments.

OUR ROLE

Generally, PCO is responsible for how the legislation is expressed, and you are responsible for the policy.

In practice, however, this is not always easy to distinguish. In carrying out our role, we may:

- need to discuss fundamental parts of your instructions
- advise on established government policy underlying standard drafting approaches (for example, in the drafting of offences), or administrative and legal considerations that need to be taken into account
- consider that your objective could be achieved in a better way
- assist you to develop or refine your policy as we analyse and tease out the details during the drafting process.

In doing any of these things, we are not seeking to assume responsibility for the policy behind the instructions or raise unnecessary obstacles. Rather, we give this guidance as impartial advisers interested in achieving the best legislative outcome.

Our relationship with you is analogous to that of a lawyer and client. Our communications with you are protected by legal professional privilege and you can be confident that we will not disclose any confidential information about the drafting of particular legislation with anyone outside of government.

WHAT YOU CAN EXPECT FROM US

In drafting your proposal, you can expect that we will:

- constructively analyse your instructions and identify where we need clarification or more information
- help you to solve problems and find the best possible legislative solution
- work to achieve the most appropriate expression of your objective
- draft legislation that is clear and drafted applying principles of plain English
- ensure the legislation is legally effective and fits within the ACT statute book as a whole.

CONTACT DETAILS—DRAFTING SERVICES

To discuss a legislative proposal or provide drafting instructions on a matter, please feel free to contact the Parliamentary Counsel, Mary Toohey, or one of the Deputy Parliamentary Counsel, David Metcalf or Bianca Kimber.

Table 2 Contact details for drafting services

Contact details	Oversight
<p>Mary Toohey Parliamentary Counsel ✉ mary.toohey@act.gov.au ☎ 6205 3490</p>	<p>General oversight of legislative drafting and publishing services</p>
<p>David Metcalf Deputy Parliamentary Counsel ✉ david.metcalf@act.gov.au ☎ 6205 3779</p>	<p>Legislative drafting and instrument notification for the following directorates:</p> <ul style="list-style-type: none"> • Chief Minister, Treasury and Economic Development • Transport Canberra and City Services • Environment, Planning and Sustainable Development <p>Legislative drafting for Liberal MLAs</p>
<p>Bianca Kimber Deputy Parliamentary Counsel ✉ bianca.kimber@act.gov.au ☎ 6205 3705</p>	<p>Legislative drafting and instrument notification for the following directorates:</p> <ul style="list-style-type: none"> • Justice and Community Safety • Education • Health • Community Services <p>Legislative drafting for Greens MLAs and individual Executive MLAs</p>

PRELIMINARY CONSIDERATIONS

WHAT CAN BE LEGISLATED

The source of the ACT's power to make laws is the Self-Government Act.

Section 22 gives the Legislative Assembly a broad power to make laws 'for the peace, order and good government of the Territory'. There are limits on that power, including restrictions on the ability to make laws for the acquisition of property, coining money or classifying material for censorship (see Self-Government Act, s 23).

Another important qualification on the ACT's law-making power is the inability to make laws that are inconsistent with other non-ACT laws that apply in the ACT—primarily Commonwealth laws (see Self-Government Act, s 28).

IS LEGISLATION NEEDED?

When developing government policy, the first question to ask yourself is whether legislation is needed. Often, policy can be implemented by non-legislative means. Other times, legislation is needed or is the most appropriate way to implement policy.

Legislation is needed for:

- an appropriation of public money
- a new or amending policy that imposes taxes, levies, fees or charges
- an amendment of an Act or subordinate law
- a provision that imposes an obligation, or confers an enforceable right on citizens or organisations (eg to provide information or submit documentation, to prohibit an activity or impose penalties).

Legislation may be appropriate for a policy that has a significant impact on a person's rights, including human rights.

WHEN ARE REGULATIONS ETC NEEDED?

Generally, it is acknowledged that it is not necessary or appropriate for all the details of a legislative scheme (particularly large and complex schemes) to be included in an Act. In those cases, it is common to delegate the power to make legislation to the Executive, in the form of regulations or other legislative instruments.

Below is a useful statement of the main reasons why you may use regulations or other statutory instruments¹¹:

- to reduce pressure on parliamentary time
- legislation is too technical or detailed for parliamentary consideration
- legislation needs to deal with rapidly changing or uncertain situations, or should be flexible and responsive to changing needs.

For information about regulations and different kinds of statutory instruments, see PCO's [ACT Legislation—Legislation Basics](#).¹²

WHEN ARE ASSEMBLY AMENDMENTS NEEDED?

There are times when a bill may be amended during its debate, for example:

- the MLA who presented the bill or another MLA may wish to move amendments of the bill
- amendments may be moved to address comments of the Scrutiny Committee on the bill, or another committee of the Legislative Assembly that the bill has been referred to.

PCO drafts Assembly amendments, so please provide us with your instructions if you need Assembly amendments of a bill. In doing so, be aware that time restrictions for finalising and circulating Assembly amendments apply:

- a proposed Assembly amendment must be lodged with Chamber Support by 12 noon on the day before it is proposed to be moved (see SO 178A)
- a copy of a proposed Assembly amendment of a bill must be given to the Scrutiny Committee at least 14 days before the detail stage of debate of the bill, as all Assembly amendments of all bills must be considered and reported on by the Scrutiny Committee before they are moved (see SO 182A).

When we send you the finalised Assembly amendments, we will also provide an electronic copy to Chamber Support. However, you will need to arrange for the Assembly amendments to be signed by the relevant Minister and delivered to Chamber Support within the timeframe (including Assembly amendments given

¹¹ Pearce and Argument, *Delegated Legislation in Australia*, 5th ed, LexisNexis Butterworths, Australia 2017, p 6

¹² <http://www.pco.act.gov.au/pages/aboutactleg/legbasics.htm>

to the Scrutiny Committee). For more information about Assembly amendments, see the Assembly Process Handbook.

CONSULTING ON LEGISLATIVE PROPOSALS

There are a number of people you will likely need to consult when preparing your legislative proposal and before a bill is presented to the Legislative Assembly. Table 3 identifies a range of people you will or might need to consult in developing your legislative proposal.

See also *Consultation drafts of laws*, page 20 for information about the forms of consultation drafts available.

Table 3 *Who to consult on legislative proposals*

Who	Why
PCO	As discussed above, we can offer you advice in relation to developing your legislative proposal, and encourage you to contact us early to discuss your needs.
Affected agencies	If your legislative proposal involves amending legislation administered by another agency, or otherwise affects another agency, you will need to consult with that agency.
Criminal Law Group	We recommend you make early contact with the Criminal Law Group in LPP if your proposal: creates or amends criminal offences or infringement penalty offences; imposes pecuniary or imprisonment penalties; or otherwise deals with criminal issues (eg enforcement/investigation powers, such as powers of entry, search, detention etc). ¹³ We send drafts of bills to the Criminal Law Group throughout the drafting process. The Criminal Law Group can be contacted at JACSLPPCRIMINAL@act.gov.au .
JACS Scrutiny Team	All government bills require a human rights compatibility statement from the Attorney-General to be presented with the bill. The statement is prepared by the JACS Scrutiny Team. We send drafts of bills to the JACS Scrutiny Team throughout the drafting process. The statement will be provided against the Cabinet copy of the bill. If your legislative proposal gives rise to human rights considerations, you should consult with the JACS Scrutiny Team early to work out the best way to address those issues. The JACS Scrutiny Team can be contacted at JACSScrutinyTeam@act.gov.au .
ACT Government Solicitor	Sometimes legislative proposals give rise to legal issues that will require legal advice from the ACT Government Solicitor. It may be that the amendments result from legal advice you have previously received, or we may identify issues on which you should receive legal advice. Please provide copies of any relevant advice to your PCO drafting team.
Treasury	If your legislative proposal might have financial implications, it is a good idea to discuss those implications with Treasury.
Stakeholders	There may be various stages in the process of developing your legislative proposal and drafting the legislation that you will want to consult with stakeholders. You should factor this into your timetable.

¹³ <http://www.justice.act.gov.au/publication/view/184/title/guide-for-framing-offences>

TIMETABLE

To achieve the best legislative outcome, it is important to plan ahead and ensure there is enough time at each stage of developing and drafting your legislative proposal. Bills that are to be presented by a Minister need to be listed in the Legislation Program, which identifies when in a particular sitting period (Autumn or Spring) the bill is to be presented to the Legislative Assembly. Taking into account the following will help you to determine when it will be realistic to present the bill.

- **Drafting:** Drafting almost always takes longer, and is more complicated, than non-drafters expect. Please consider the time that may be needed when factoring drafting into your timetable. PCO is available to discuss the expected timeframes for particular legislative proposals, including how to achieve the best result in shorter timeframes.
- **Quality assurance check:** Before a bill or regulation can be finalised, it needs to go through a quality assurance check, that is, proofreading and editing by PCO's editors to ensure the legislation complies with PCO's drafting standards. (See also *Quality Assurance Check*, page 21 for more information and time estimates).
- **Consultation:** You should consider what consultation you intend to carry out during the course of developing your legislation. If you intend to consult on draft legislation, please let us know so we can prepare the appropriate form of consultation draft for you.
- **Cabinet approval process:** The Cabinet Handbook sets out the process for policy approval and agreement to draft (first pass) and for agreement to present the bill (second pass). In addition, you should discuss with your directorate's ministerial services team about including your bill on the Legislation Program and progressing your legislative proposal through your directorate to the relevant Minister for approval beforehand.

POLICY AUTHORITY

Generally, PCO will require current policy authority before drafting legislation. However, we encourage you to make early contact with us in relation to legislative proposals, and are happy to discuss what preliminary drafting instructions or other related material we might be able to usefully consider before you receive policy authority.

Policy authority takes one of the following forms:

- for a **bill**—a Cabinet decision
- for a **regulation**—a decision of the sponsoring Minister; a Cabinet decision is not required unless there are sensitive issues or whole-of-Government or cross-portfolio considerations
- for a **court rule**—a decision of the advisory committee under the *Court Procedures Act 2004*.

When preparing your Cabinet submission seeking policy authority to draft, avoid being too specific about the amendments to be made, particularly in the recommendations. For example, identifying provisions to be amended or proposing draft amendments. By focusing on the policy objectives, you reduce the need to seek further policy authority and you give PCO the flexibility to find the most appropriate way of achieving those objectives.

PREPARING DRAFTING INSTRUCTIONS

WHAT TO INCLUDE

As drafting legislation is a detailed exercise, written drafting instructions are important for us to be able to do our work. Initial drafting instructions should be provided in writing to the Parliamentary Counsel or one of the Deputy Parliamentary Counsel.

In order to develop your legislative proposal into effective legislation, it is important that we have a clear understanding of the issue you are looking to address and policy objective you are seeking to achieve.

It is useful to remember the drafter is unlikely to have much if any background about your legislative proposal. The instructions should be set out in a narrative style and include the formal and policy matters, and the relevant supporting material in the instructions checklist on the following page.

WHAT TO AVOID

In drafting legislation, we need to be satisfied that the drafting solutions address the issues and achieve the objectives. As such, it is generally not helpful for your instructions to focus on legislative solutions, and we ask you to avoid the following:

- **Suggested drafting:** This tends to obscure the policy intention and can slow down the drafting process as we will need to understand the thinking behind the drafting.

However, if you have received proposed drafting in the course of receiving legal advice, this can be useful for us to see when accompanied by your explanation of the policy intention.

- **Proposing amendments to be made:** Instructions that set out the amendments you consider need to be made without further explanation can also obscure the policy intention. For example, an instruction to amend a provision by omitting particular words and substituting other words.

However, identifying the provisions you expect will need amendment as an addition to your instructions is often helpful for us.

- **Identifying provisions from other jurisdictions:** It is not helpful if your instructions point to provisions from another jurisdiction without an explanation of the overall policy objective or how your policy may vary from that underlying the other jurisdiction's legislation. Each jurisdiction has its own drafting and publishing practices and individual legislative and legal frameworks, and it is generally not possible to simply adopt legislation of other jurisdictions.

However, it is useful and important to know about legislation in other jurisdictions on the subject matter of your legislative proposal, particularly where you are seeking to align with or model that approach.

INSTRUCTIONS CHECKLIST

In Table 4 we have included a checklist of things to consider and information to provide us when preparing your drafting instructions.

Table 4 Checklist of information for inclusion in instructions

CHECKLIST FOR DRAFTING INSTRUCTIONS		
<input checked="" type="checkbox"/>	Information	Detail
Formal matters		
<input type="checkbox"/>	Contact officers	Details of the contact officer and ideally an alternative contact to discuss the drafting project.
<input type="checkbox"/>	Policy authority	Details of the policy authority for the legislation, including the Cabinet decision number if relevant. (See also <i>Policy authority</i> , page 14)
<input type="checkbox"/>	Timetable	<p>Details of key timeframes, including:</p> <ul style="list-style-type: none"> • when the legislation is to commence • for a bill, when you expect the bill will be presented in the Legislative Assembly • when you require a final draft • if you propose to undertake consultation throughout the drafting process, when you propose to do that. <p>(See also <i>Timetable</i>, page 13)</p>
Policy matters		
<input type="checkbox"/>	Policy objective	<p>Details of the policy objective you are seeking to achieve, and any useful background information. For example, the following information is useful:</p> <ul style="list-style-type: none"> • Are you establishing new policy? If so, what issue are you are seeking to address and how has it arisen? • Are you amending existing policy? If so, what issue are you seeking to address and how has it arisen?
<input type="checkbox"/>	Policy detail	<ul style="list-style-type: none"> • Why is the proposal being pursued? • Who/what will be affected by the proposed law? • Why is legislation needed to give effect to the policy? • What is required to happen under the legislation eg what rights and liabilities are being created? • How are the objectives of the policy and legislation going to be achieved (eg is a licensing scheme being established; do new entities need to be brought into existence; are enforcement or regulatory measures required; what civil or criminal sanctions are needed etc)? • Are there any human rights implications?

Information | Detail

Policy matters

- Legislation affected**
 - If the proposal is for the drafting of a bill, are regulations or other legislative instruments required?
 - If you propose an amendment of an existing policy, what legislation is to be amended?
 - Will your legislative proposal impact on other legislation? If so, what legislation? Have you consulted with the relevant directorates that administer the legislation?
 - Does your legislation need to operate with other legislation (ACT or otherwise)? If so, what legislation?

Unresolved issues Are there any unresolved issues in relation to the policy that may impact on the detail set out in your instructions or that you anticipate you will instruct us on?

Other issues Are there any other issues that we should be aware of? Knowing about this will assist us to achieve the best outcome.

Supporting material

Advice Any advice received from the ACT Government Solicitor, whether about the proposal or the current operation of the relevant law. This is essential for us to understand the issues to be addressed by the proposed legislation.

Any other relevant advice you have received in relation to the legislative proposal or that has given rise to the proposal (for example, human rights advice).

Legislative models Details of legislative models from other jurisdictions you have considered in developing your proposal.

Reports If your legislative proposal responds to issues raised in a report, or adopts recommendations in the report, details of the report and the particular recommendations.

Case law Details of any case law that is relevant to your legislative proposal, and if in response to a court judgment, details of the judgment.

Consultation Information about what consultation has been carried out and relevant information coming out of the consultation.

DRAFTING PROCESS

COLLABORATIVE PROCESS

Drafting legislation is a collaborative process. It is unusual for the first draft of legislation to be fully developed. For anything but the simplest pieces of legislation, you should expect that multiple drafts will need to be prepared. The ‘devil is in the detail’ as the saying goes, and it is common to identify issues that had not been anticipated in developing the proposal.

DRAFTING TEAM

Each legislative drafting project has a drafting team allocated to it—usually a primary drafter and a settling drafter. Each draft of the legislation will be drafted by the primary drafter and then reviewed by the settling drafter before it is sent to you. This is important for ensuring quality and assisting the efficient development of the legislation.

COMMUNICATING WITH EACH OTHER

Generally, communication will be by email and telephone, and we require instructions in writing. Meetings are also often an integral part of the drafting process, giving us an invaluable insight into your needs.

A meeting shortly after receiving your instructions is often very useful to discuss the policy objective, identify potential issues and discuss timeframes and expectations. Meetings may then be held throughout the drafting process as needed.

It is important that you keep us informed of any relevant changes or events that affect the development of your legislative proposal. We also encourage you to contact us throughout the drafting process if you would like to discuss any aspect of the drafting job.

DRAFTING PROCESS—WHAT TO EXPECT

- **First draft:** Once we have enough information to start drafting, we will prepare and send you a first draft. We will usually give you a draft within 30 days of receiving your instructions, and often sooner.
- **Drafter's comments:** The draft will likely include comments from the drafter that seek your further instructions on something, raise issues for you to consider further or explain a particular drafting approach. Please respond to the comments as needed.
- **Draft as a whole:** Please also consider the draft as a whole and provide instructions about or ask questions about any other issues.
- **Additional instructions:** You may find that it is necessary or otherwise appropriate to expand the scope of the proposed legislation from that contemplated in the initial instructions. If so, please provide us with those additional instructions. Also, be mindful of your authority to draft—you may need to seek further authority for the inclusion of the new material.

CONSULTATION DRAFTS

It is common for an agency to consult on a draft bill before it is presented in the Legislative Assembly. It is less common to consult on other kinds of legislation, but you may wish to. There are many reasons why you may want to consult on proposed legislation. Common reasons include because the subject matter is novel, controversial or technical, or because the proposed legislation will impact on a particular group of people.

If you wish to consult on a draft of the bill before presentation, we can provide you with a version of the bill to suit the consultation you plan to undertake.

- **Exposure draft:** If you wish to consult the general public on the bill, you may wish to publish an exposure draft of the bill on the Legislation Register. The exposure draft should be accompanied by your proposed arrangements for consultation, including the consultation period and the contact details for comments. An exposure draft can be tabled in the Legislative Assembly, but there is no requirement for this to be done.
- **Circulation/consultation copy:** If you want to undertake external consultation on a more limited basis, we can prepare a circulation or consultation copy of the bill for you. A circulation or consultation copy of the bill will not include a confidentiality notice, so if that is something that you would like, please let us know.
- **Clean copy:** A clean copy of the bill is a draft with no comments or other markings. It will include a confidentiality notice and is often used for circulation or consultation within the ACT government or when the draft is to remain confidential.

FINALISING LEGISLATION

QUALITY ASSURANCE CHECK

Once a bill or regulation has been developed to the satisfaction of the agency and drafter, it can be finalised by PCO's editors. The legislation will undergo a quality assurance check—that is, it will be proofread and edited by PCO's editors to ensure it complies with PCO's drafting standards. It is usual for this check to identify editorial changes that do not affect the substance of the legislation.

Estimates of the time required to undertake the quality assurance check are set out in Table 5. These times are of course subject to competing priorities and complexity.

Table 5 *Estimated times for undertaking QAC*

Number of pages	Estimated time required for QAC
0—10	1½ hours
10—20	4 hours—1 day
20—50	1—1½ days
50—100	1½—2½ days
100—200	2½—3½ days
200—300	3½—5 days
300—400	5—6 days

CABINET COPY

If the legislation being finalised is a bill, the editing team will send you a Cabinet copy of the bill. You will be responsible for submitting the Cabinet copy with the Assembly business paper or Cabinet submission for presentation of the bill. For more information about the Cabinet process, see the [Cabinet Handbook](#)¹⁴ and contact your directorate's ministerial services team.

A Cabinet copy is provided once all drafting is finalised and no further changes are expected to the bill before it goes to Cabinet. This is important for a number of reasons, including because the PCO memo and

¹⁴ http://www.cmd.act.gov.au/__data/assets/pdf_file/0017/1002950/FINAL-Cabinet-Handbook-November-2016.pdf

HR compatibility statement will be prepared against this version, and, as a matter of document control, it is important that the correct bill is submitted to Cabinet for approval to present.

PCO MEMO

Once the Cabinet copy of a bill has been prepared, the drafter will issue a ‘Memorandum by Parliamentary Counsel’ (PCO memo) against that copy of the bill. The memo sets out whether the bill gives effect to the policy authority given by Cabinet. You will need to include the PCO memo in your Assembly business paper package.

If the bill is to be considered by Cabinet in a combined pass process (that is, policy authority and agreement to present are considered together), we will not issue a PCO memo as there is no prior policy authority to prepare the memo against.

For more information about the processes for Cabinet approval of legislation, see the [Cabinet Handbook](#)¹⁵.

HUMAN RIGHTS COMPATIBILITY STATEMENT

All bills presented by a Minister in the Legislative Assembly are to be accompanied by a statement of the Attorney-General about whether the bill is consistent with the Human Rights Act (a compatibility statement). This is a requirement under the Human Rights Act, section 37.

A compatibility statement for a bill is issued by the JACS Scrutiny Team against the Cabinet copy of the bill. No compatibility statement is needed for regulations or other kinds of legislation.

During the drafting of a bill or regulation, PCO will provide drafts to the JACS Scrutiny Team. This allows the adviser to review the legislation and identify potential human rights issues as it is being developed.

PRESENTATION COPY

PCO is notified by the Policy and Cabinet Division of CMTEDD once Cabinet has agreed to the program for a sitting week. This usually happens on the Monday of the sitting week. We will then prepare presentation copies of the bills identified in the program to be presented. We arrange for copies to be delivered to Chamber Support and give you an electronic version for information.

¹⁵ http://www.cmd.act.gov.au/__data/assets/pdf_file/0017/1002950/FINAL-Cabinet-Handbook-November-2016.pdf

EXPLANATORY STATEMENTS ETC

All bills, subordinate laws (eg regulations) and disallowable instruments are required to be accompanied by an explanatory statement, to be prepared by the agency responsible for the legislation. For more information, see the *Assembly Process Handbook*.

WHAT TO DO BEFORE LAW COMMENCES

There may be a number of things you need to do before a law commences to allow it to operate effectively. The table below sets out the main legislative steps you may need to take. The Legislation Act, section 81 allows certain powers to be exercised, including making appointments, delegations and other statutory instruments, between notification of the law and its commencement.

Statutory instruments are prepared by the agency responsible for administering the law.

Table 6 Steps to take between making of law and its commencement

<input checked="" type="checkbox"/>	Step	Considerations	More information
<input type="checkbox"/>	Commencement notice	<p>If the law is to commence by written notice, consider whether the law needs to commence before the default commencement day.</p> <p>If so, prepare the notice and make sure it is made by the Minister and submitted for notification not later than the day before the law is to commence.</p>	<i>Commencement of legislation, page 29</i>
<input type="checkbox"/>	Appointments	If the law creates any positions (eg a statutory office-holder, board members, authorised officers), make sure that all necessary appointments to those positions are made before the law commences.	<i>Appointments, page 41</i>
<input type="checkbox"/>	Delegations	If any functions given to an official under the law need to be exercised by someone else, make sure any delegations provided for under the law or another law (eg PSMA or LA) are made before the law commences.	<i>Delegations, page 43</i>
<input type="checkbox"/>	Staffing arrangements	If a public sector entity is created, or additional functions are given to the entity, make sure any staffing or other arrangements for assistance, provided for under the law, are in place to allow the entity to perform its functions.	<i>Staffing public sector entities, page 44</i>
<input type="checkbox"/>	Fee determinations	Consider if any fee determinations need to be made or remade.	
<input type="checkbox"/>	Other instruments	Consider if any other instruments need to be made or remade.	

DRAFTING STANDARDS

DRAFTING STANDARDS

PCO drafts legislation in line with our well-established drafting practices that are particular to the ACT. These drafting practices have been developed to reflect a range of considerations, including:

- best practice in legislative drafting
- plain English principles
- interpretation aids and other common provisions under the Legislation Act
- ACT framework legislation, including the Human Rights Act and Criminal Code
- standardisation of the statute book.

DRAFTING GUIDES

Our drafting standards are set out in the following guides, available on [PCO's website](#)¹⁶:

- [Drafting Practice Guide](#)¹⁷

The guide sets out current drafting practice for various provisions, for example, how to draft naming, resignation and fee determination clauses. It deals with the form of legislation, for example how to set out penalty clauses, when to start a new page and how to number provisions.

- [Amending Guide](#)¹⁸

A hands-on guide to the form of amendments.

- [Words and Phrases Guide](#)¹⁹

This is a guide to plain legal language that encourages the use of clear, concise and simple language. It gives advice on the use of words and phrases and provides alternatives, for example, to compound prepositions, euphemisms and legalese.

¹⁶ <http://www.pco.act.gov.au>

¹⁷ <http://www.pco.act.gov.au/pages/draftpubstand/dpg.htm>

¹⁸ <http://www.pco.act.gov.au/pages/draftpubstand/ag.htm>

¹⁹ <http://www.pco.act.gov.au/pages/draftpubstand/wp.htm>

- [Spelling, Abbreviations and Symbols Guide](#)²⁰

This guide promotes consistency in the spelling of words used in ACT legislation. It deals, for example, with usage, hyphenation, words set solid and spaced, italicised words, abbreviations, contractions and symbols.

DEFINITIONS

A definition is a provision of a law that either gives meaning to a term, or limits or extends the meaning of a term (see LA, s 130).

Definitions are often used in legislation to improve the ability to read and understand the law. Definitions can:

- remove ambiguity, for example, if there is some uncertainty about the ordinary meaning of the term
- avoid tedious repetition by shortening a reference to a concept used in a number of places in legislation
- improve flow for readers
- enhance clarity by bringing out the logic and key features of substantive provisions, and allowing the most important elements to be understood more clearly.

PCO's guide [ACT Legislation—Reading Legislation](#)²¹ includes information about the different kinds of definitions and where you can find them.

²⁰ <http://www.pco.act.gov.au/pages/draftpubstand/spelling.htm>

²¹ <http://www.pco.act.gov.au/pages/aboutactleg/readingleg.htm>

NAMING LEGISLATION

LONG TITLE

All Acts have a long title.

The long title briefly describes what the Act is about. This is located on page 1 and usually begins ‘An Act about ...’. As well as providing useful information to the reader, it may be used as an aid to the interpretation of an Act and plays an important role in the debate of a bill (see SO 169).

When the bill is read for the first time, it is the long title only that is read (see SO 168 (b)). Subsequent debate of the bill is confined to what is covered by the long title. For example, the debate of a bill with the long title ‘An Act about the supply of liquor’ could not extend to the production of liquor.

Regulations do not have a long title.

NAME OF LAW

All Acts and regulations have a naming section, which is always the first section of the law. The name of legislation used to be called its ‘citation’ or ‘short title’.

Each Act and regulation is given a unique identifying name and number.

NAMING CONVENTIONS—ACTS

PCO has an established system of naming bills, ensuring that the name does each of the following:

- reflect its subject matter
- reflect the year it was made
- provide a convenient way of referring to the legislation.

Neutral language should be used to reflect a bill’s subject matter, not language that may be considered emotive or subjective.

For amending bills, a number of other conventions apply:

- the name of an amending bill will include ‘Amendment’
- if the main purpose of the legislation is to amend 2 or more laws (Acts or regulations) in relation to a particular subject matter, the name will reflect the general nature of the subject matter and include ‘Legislation Amendment’
- if the bill would otherwise have a name the same as another bill, the name will include a description of the scope of the legislation (in brackets) or be numbered (eg (No 2)).

NAMING CONVENTIONS—REGULATIONS

The name of a regulation (or other subordinate law) follows the name of the Act under which it is made, unless there are special circumstances that justify a different approach.

If 2 or more regulations are made under one Act, the name of each regulation will reflect the subject matter of the regulation as well as follow, as far as practicable, the name of the Act.

Table 7 *Examples of names of laws*

Kind of law	Example of name
Principal Act	<i>Legislation Act 2001</i> An Act about legislation
Amending Act	<i>Legislation Amendment Act 2001</i> or <i>Legislation (Penalty Units) Amendment Act 2001</i> An Act to amend the Legislation Act in relation to penalty units
Principal regulation	<i>Legislation Regulation 2003</i>
Amending regulation	<i>Legislation Amendment Regulation 2004</i>
More than 1 principal regulation under single Act	<i>Road Transport (General) Regulation 2000</i> <i>Road Transport (Offences) Regulation 2003</i> Regulations made under the <i>Road Transport (General) Act 1999</i>

COMMENCEMENT OF LEGISLATION

When developing your legislative proposal, you will need to consider when the proposed legislation should commence. There are a number of different ways legislation can commence, and what kind of commencement your law needs will depend on the particular circumstances of the proposal.

STANDARD COMMENCEMENT

If there is no need for your proposed law to commence at a particular time or on a particular day, or there is no need to delay commencement, the standard commencement provision will usually be suitable.

The standard commencement provision is that the law commences on the day after it is notified on the Legislation Register (its notification day). This is the default commencement that applies (see LA, s 73), although we will state this in the law for clarity and consistency.

DELAYED COMMENCEMENT—FIXED COMMENCEMENT

If you would like to delay commencement of the proposed law to a particular day, we will state the commencement day in the law.

The options for doing that include the following:

- **Commencement at a particular time or on a particular day:** For example, a tax-related law may need to commence at the beginning of a financial year, or you may want a new legislative scheme to commence at the beginning of a calendar year.
- **Commencement after a stated period of time:** You may have a particular reason to delay commencement for a set period of time because, for example, you want to inform people about the proposed law or you need to make preparations before the law can be administered.

If your proposed legislation amends numerous different laws, we may seek a delayed commencement to allow us time to prepare republications of the laws amended by the proposed legislation. This is common for portfolio bills (such as Justice and Community Safety legislation amendment bills) and the time required is usually 7 or 14 days after its notification day. If we seek a delayed commencement for this reason, we will discuss this with you early in the drafting process.

- **Commencement on an event occurring:** A common example of this is when the proposed legislation is dependent on the commencement of another law. In that instance, commencement will be tied to the commencement of that other law.

DELAYED COMMENCEMENT—COMMENCEMENT NOTICE

Sometimes you may want to delay the commencement of a law, but it is not necessary for the law to start on a particular day or you may not yet know the day it needs to commence. There are a number of reasons why you may want to delay commencement:

- you may want time to inform people about the new law before it commences
- you may want to give people who will be affected by the law time to comply with the requirements (for example, if you are introducing a licensing scheme)
- you may need to make preparations for administering the law
- the commencement may be dependent on another event happening.

In this circumstance, the law may commence on a day fixed by the Minister by written notice. That is, the law will commence on a day stated in a commencement notice signed by the Minister and notified on the Legislation Register.

DELAYED COMMENCEMENT—AUTOMATIC COMMENCEMENT

A law that has had its commencement delayed commences automatically after 6 months (see LA, s 79). This is important to protect against the will of the Legislative Assembly being delayed indefinitely by the Executive, as well as providing the public with certainty about what the law is.

While a law can be delayed for a period longer than 6 months (by disapplying the Legislation Act), this is not common and should only be used when it can be justified. In that case, another default commencement provision will be needed.

RETROSPECTIVE COMMENCEMENT

Legislation usually commences after its notification day. However, sometimes you may need to commence a law before its notification day, that is, commence it retrospectively.

It is not common for laws to commence retrospectively. In considering whether it is needed or appropriate, you should bear in mind the desirability of the public having certainty about what the law is. It is particularly important to consider the appropriateness of a retrospective commencement when the law affects the rights of people. This will also give rise to human rights considerations that will need to be addressed in the explanatory statement for the bill.

If a regulation would adversely affect a person's rights or impose a liability on someone, it must not commence retrospectively without authority under an Act (see LA, s 76).

If a law is to commence retrospectively, this must be clearly expressed. If a law expressed to commence on a stated future day or event (eg 'This regulation commences on 1 January 2017') has not been passed by that day or event, the commencement will need to be amended to make it clear it is to commence retrospectively (eg 'This regulation is taken to have commenced on 1 January 2017').

SPLIT COMMENCEMENT

Sometimes you may need different provisions of a law to commence at different times. For example, proposed legislation that implements a new scheme may require a staged implementation. Or, the proposed law may amend a number of different laws that have different requirements for commencement.

This can be accommodated through a split commencement—that is, the commencement provision sets out different commencements (which may be different kinds of commencement) for different provisions of the law. For example, the commencement may provide for the law, other than part 2, to commence on the day after its notification day, and provide for part 2 to commence on a day fixed by the Minister by written notice.

REFERRING TO THE TERRITORY ETC

THE TERRITORY AND THE ACT

In ACT legislation, we use ‘the Territory’ in the same way other jurisdictions use ‘the Crown’—to refer to the Sovereign. As the Territory is a creature of statute, that term refers to the body politic established by the Self-Government Act, section 7.

The term ‘the Territory’ may also be used in a geographical sense. However, for clarity, ‘the ACT’ is preferred.

(see LA, dict, pt 1 for defs *ACT*, *Australian Capital Territory* and the *Territory*).

DIRECTORS-GENERAL AND DIRECTORATES

There may be times when you wish to refer in legislation to the director-general of a particular directorate. Directorate names are not used in legislation, avoiding the need to make consequential changes in legislation when the name of a directorate changes.

Usually, it will be sufficient to refer to ‘the director-general’, as this will be a reference to the director-general of the directorate that has responsibility for administering the particular provision (see LA, s 163).

If you need to refer to a director-general of another directorate, we will generally refer to a relevant Act administered by the particular directorate.

The term ‘directorate’ is not defined as a commonly-used term in the Legislation Act, dictionary, part 1. If it is necessary to refer to a directorate, the term ‘administrative unit’ is used instead.

COMMONLY-USED TERMS FOR TERRITORY AND ITS ENTITIES

There are numerous terms used for the Territory and its various entities. Some are defined to apply generally to legislation, while others are relevant only in relation to particular legislation. Table 8 identifies many of those terms and where the definitions can be found.

Table 8 Terminology relating to the Territory and its entities

Term	Definition	Where
ACT	the Australian Capital Territory	LA, dict, pt 1
administrative unit	an administrative unit for the time being established under the PSMA, s 13 (1)	LA, dict, pt 1
director-general	<ul style="list-style-type: none"> • a reference in a law to a director-general is a person engaged as a director-general under the PSMA • a reference in a law to the director-general is: <ul style="list-style-type: none"> ○ the director-general of the administrative unit responsible for administering the particular provision in relation to the relevant matter <p>or</p> <ul style="list-style-type: none"> ○ if 2 or more administrative units are responsible for administering the provision in relation to the relevant matter—the director-general of any of the units 	LA, s 163
Executive	the Australian Capital Territory Executive established under the Self-Government Act, s 36	LA, dict, pt 1
Executive , when exercising a function	<ul style="list-style-type: none"> • a function given to the Executive under an Act may be exercised by any 2 Ministers acting in concert • A subordinate law or disallowable instrument is taken to be made by the Executive if it is signed by 2 Ministers, 1 of whom is the responsible Minister 	<ul style="list-style-type: none"> • LA, s 253 • LA, s 41
Legislative Assembly	the Legislative Assembly for the Australian Capital Territory established by the Self-Government Act, s 8 (1)	LA, dict, pt 1
Minister	<ul style="list-style-type: none"> • a reference in a law to a Minister is the Chief Minister or a Minister appointed under the Self-Government Act • a reference in a law to the Minister is: <ul style="list-style-type: none"> ○ the Minister administering the particular provision in relation to the relevant matter <p>or</p> <ul style="list-style-type: none"> • if 2 or more Ministers administer the provision in relation to the relevant matter—any of the Ministers 	<ul style="list-style-type: none"> • LA, s 162
Term	Definition	Where

public employee	<ul style="list-style-type: none"> • a public servant • a public sector member • a person employed by a territory instrumentality 	LA, dict, pt 1
public sector	<ul style="list-style-type: none"> • the Australian Capital Territory Public Service (constituted under the PSMA, s 12) • entities in which public sector members (statutory office-holders and their staff) are employed that are owned or operated by the Territory or a territory instrumentality 	PSMA, dict
public sector body	<ul style="list-style-type: none"> • a body made up of public sector members • includes a body made up of 1 statutory office-holder 	LA, dict, pt 1
public sector member	<ul style="list-style-type: none"> • a statutory office-holder • a person employed by a statutory office-holder • if a statutory office-holder enters into an arrangement with the head of service for the use of a public servant—the public servant <p>but not</p> <ul style="list-style-type: none"> • the Chief Justice, a judge or associate judge • the Chief Magistrate, a magistrate or any office that must be occupied by a magistrate • a statutory office-holder or an employee or public servant of the statutory office-holder to the extent that they exercise a judicial function 	PSMA, s 150
public servant	a person employed in the public service	LA, dict, pt 1
public service	the Australian Capital Territory Public Service (constituted under the PSMA, s 12)	LA, dict, pt 1
statutory office-holder	a person occupying a position under an Act or statutory instrument (other than a position in the public service)	LA, dict, pt 1
territory authority	a body established for a public purpose under an Act, but does not include a body declared by regulation not to be a territory authority	LA, dict, pt 1

Term	Definition	Where
territory instrumentality	<p>a corporation established under an Act or statutory instrument, or under the Corporations Act, that is comprised of people, or has a governing body comprised of people, a majority of whom are appointed by 1 of the following:</p> <ul style="list-style-type: none"> • a Minister • the head of service • a director-general • a statutory office-holder • a corporation established under an Act or statutory instrument, or under the Corporations Act, that is subject to control or direction by a Minister <p>but not</p> <ul style="list-style-type: none"> • an administrative unit or a part of an administrative unit • a prescribed body 	PSMA, dict
territory-owned corporation	a Territory-owned corporation under the <i>Territory-owned Corporations Act 1990</i> (currently only Icon Water Limited)	LA, dict, pt 1
the Territory	<ul style="list-style-type: none"> • when used in a geographical sense—the Australian Capital Territory • in any other case—the body politic established by the Self-Government Act, section 7 	LA, dict, pt 1

HOW DOES ACT LEGISLATION APPLY?

ACT LAWS BIND EVERYONE

An ACT law binds everyone, including people who are not citizens and all governments (including the Territory, the Commonwealth, a State, another Territory or New Zealand) (see LA, 121 (1). Although the Commonwealth is bound, this is limited (see Self-Government Act, s 27)).

This removes any doubt there might otherwise be that laws bind the Territory, as well as any need to expressly state in a particular law that the Territory is bound by the law.

If any aspect of your legislative proposal is not intended to bind the Territory, please let us know so we can expressly address this in the law.

LAWS REQUIRING PAYMENT DO NOT BIND TERRITORY

If a law requires payment of money that will form part of the Territory's public money, the general rule is that the Territory is not required to make the payment (see LA, s 121 (2)).

This is the general rule, but there are exceptions. See, for example, the *Taxation Administration Act 1999*, section 5 (Act binds Territory).

This exception only relates to the Territory—other governments are not excepted from making those payments.

GOVERNMENTS NOT LIABLE FOR OFFENCES

Although ACT laws bind all governments, the general rule is that a government is not liable to be prosecuted for an offence against an ACT law (see LA, s 121 (3)).

This is the general rule, but there are exceptions. See, for example, the *Environment Protection Act 1997*, section 10 (Criminal Liability of the Territory).

GOVERNMENT ENTITIES ALSO IMMUNE

To the extent that an ACT law does not bind a government, it also does not bind a government entity (which includes an instrumentality, officer or employee of the government, as well as a contractor or anyone else who exercises a function on behalf of the government).

However, that immunity only applies to an authorised act or omission of the entity, which essentially requires the act or omission to be within the scope of the functions of the entity.

(See LA, s 121 (4) and s 121 (6), defs **government entity** and **authorise**).

ACT LAWS CONNECTED WITH TERRITORY

ACT laws usually deal with people and situations connected with the ACT. In general, a reference to a person or situation is a reference to that person or situation in connection with the Territory (see LA, s 122).

As such, it is not necessary for a law to state that it applies only if there is a geographical connection with the ACT. In general terms, the ACT has no jurisdiction to legislate for matters not connected to the ACT.

However, there may be limited circumstances where this is appropriate, and in that case it will need to be expressly stated. For example, the *Births, Deaths and Marriages Registration Act 1997*, s 7 allows for the registration of the birth of a child born in an aircraft on its way to an ACT airport.

ENSURING COMPLIANCE WITH LEGISLATION

GENERAL

When you require someone to do (or not do) something under legislation, you will generally want to put in place an appropriate consequence for failing to comply with this requirement, in order to support the requirement.

Creating an offence is a common response. However, criminalising behaviour has significant implications, including human rights implications, and should not be undertaken lightly. Before creating an offence, you should consider the range of options available to work out the most effective and appropriate approach in the circumstances.

NON-CRIMINAL OPTIONS

Options for increasing compliance with a legislative requirement include the following:

- **Community education programs:** This may accompany legislative change or be undertaken before legislative change. You may want to delay commencement of the legislation to allow for an education program to be carried out.
- **Issuing warning notices, cautions etc:** These actions would usually precede some kind of action, for example, a prosecution for an offence.
- **Licensing/permit scheme:** This kind of scheme requires a person to hold a licence or a permit to undertake a particular activity, and allows the permit or licence to be suspended or cancelled for non-compliance with its conditions. Examples include a licence to drive or to breed certain animals, or a permit to run a lottery, or occupational discipline in relation to licensed or registered occupations.
- **Infringement notice scheme:** Offences may be dealt with as infringement notice offences. Under an infringement notice scheme, a person is offered the option of paying an infringement notice penalty as an alternative to prosecution. Only particular kinds of simple offences are appropriate for infringement notice offences.
- **Civil remedies:** Legislation may create rights for citizens or other entities to take legal action against a person or entity for breach of a legislative requirement. Examples include making a complaint to the Human Rights Commission under the *Human Rights Commission Act 2005* in relation to a health service or making an application to ACAT under the *Common Boundaries Act 1981* to build a fence between parcels of land.

- **Civil penalties:** Legislation may give a court power to order an amount of money to be paid by someone as a civil penalty. This is not commonly found in ACT legislation.
- **Powers for government to stop activity:** Powers can be given to government entities to stop activities or undertake remediation and recover costs.

OFFENCES

Offence provisions may range from offences for the most serious violent and antisocial behaviour to regulatory offences to enforce compliance with legislative requirements. In the ACT, principles of criminal responsibility are dealt with under the Criminal Code. The Criminal Law Group in LPP has developed the [Guide for Framing Offences](#)²², which will provide you with information about the matters to consider in developing offences.

²² <http://www.justice.act.gov.au/publication/view/184/title/guide-for-framing-offences>

EXERCISING LEGISLATIVE FUNCTIONS

WHAT IS A FUNCTION?

Generally, any time you require or allow an official to do something under a law in an official capacity, you are giving them a function. That is, any provision of a law under which an official may or must do something gives a function to that person.

Sometimes a law will set out what the functions of a particular entity are. A provision of this nature often represents an overview of the entity's main role, but is unlikely to be the total of the functions given to it under the law.

GENERAL RULES

The term *function* is defined in the Legislation Act to include 'authority, duty and power'.

The Legislation Act, part 19.2 sets out the general rules about the exercise of functions under ACT laws, including:

- an entity given a function has the powers necessary and convenient to exercise the function (s 196)
- functions may be exercised again and again (s 197)
- the exercise of functions by bodies (s 199)
- the exercise of functions by occupants of positions (s 200).

WHO SHOULD EXERCISE A FUNCTION?

If your legislative proposal will create a function, you will need to consider who should be given the function. This will not necessarily be the person who in practice will exercise the function (as this may be delegated) but the person who should ultimately be responsible for the exercise of the function.

The usual options include:

- an existing office-holder or other entity (eg a Minister, director-general or the ACAT)
- officers authorised by an existing office-holder or other entity to perform certain functions (eg inspectors authorised by a director-general to carry out certain enforcement activities)
- a new statutory office or entity.

APPOINTMENTS

GENERAL RULES

The general rules about appointments under ACT laws are set out in the Legislation Act, part 19.3, so that they do not need to be included in each law that includes an appointment provision. That part deals with the following in relation to appointments:

- that an appointment must be in writing (s 206)
- that an appointment may name the person appointed or the occupant of a position (s 207)
- that the power to appoint includes the power to suspend (s 208)
- that the power to appoint includes the power to make an acting appointment (s 209)
- resignation (s 210)
- the effect of changes in an appointer (s 211)
- the effect of defects in an appointment (s 212) .

There are similar provisions for acting appointments (div 19.3.2).

Some ministerial appointments are disallowable instruments that require the Minister to consult with the relevant committee of the Legislative Assembly (div 19.3.3).

WHAT TO CONSIDER

When instructing us to draft an appointment provision, these are the kinds of things it is useful to consider:

- What functions will the appointee perform?
- What qualifications or experience should the appointee have?
- Is the appointee to be a public servant and how will the appointee be remunerated?
- What should the term of the appointment be?
- Should there be limits on reappointment?
- When and how can an appointment be ended?
- How will the conditions of appointment be determined?

It may be that you do not wish to include details about all these matters in the appointment provisions, or that these matters will be dealt with under other legislation, such as the Public Sector Management Act or the *Financial Management Act 1996* (for appointments to governing boards). For more information about appointments, boards and committees, see [Governance Principles—Appointments, Boards and Committees in the ACT](#) ²³

²³ http://www.cmd.act.gov.au/__data/assets/pdf_file/0004/1045984/Governance-Principles-2017-FINAL.pdf

DELEGATIONS

GENERAL RULES

The general rules about delegations under ACT laws are set out in the Legislation Act, part 19.4, so that they do not need to be included in each law under which functions are intended to be delegated. That part deals with the following in relation to delegations:

- that a delegation must be in writing (s 232)
- that a delegation may be made by naming the person to whom the function is delegated or the occupant of the position (s 233)
- when the instrument takes effect and in what circumstances (s 234)
- that the power to delegate cannot be subdelegated (s 236)
- the responsibilities of the appointer (s 238)
- that the delegation is not affected by appointer changes (s 241).

For delegations by a Minister, the power to delegate is in the Legislation Act, section 254A.

For delegations by the head of service or a director-general, the power to delegate is in the Public Sector Management Act, sections 18 and 20 (including a power to subdelegate).

WHAT TO CONSIDER

When giving functions to an office-holder or other entity under a law, you should consider whether the function will be delegated and if so the following kinds of things:

- Who should a delegate be? It is generally not appropriate to delegate a function to ‘any person’.
- Should a delegate have any particular qualifications, experience or knowledge?
- Should a person who has been delegated a function be able to subdelegate that function (the general rules do not allow for this)?
- Should the power to delegate be limited in some way?

STAFFING PUBLIC SECTOR ENTITIES

GENERAL

If your legislative proposal involves establishing a public sector entity, it is important to consider what assistance will be needed to allow the entity to carry out its functions and what, if any, staffing arrangements the entity will need to be effective.

STAFFING OPTIONS

The following are the usual approaches adopted in ACT laws to staff entities, and often a combination of these is appropriate:

- An office holder of the entity employs staff directly, and is given ‘head of service’ powers in relation to the staff who will be employed under the Public Sector Management Act (see PSMA, s 152).
- The entity enters into an arrangement with the head of service to use public servants and other territory resources or facilities.
- The entity has the power to engage consultants or contractors.
- The head of service delegates powers in relation to staff to the entity.
- The entity has no staff.

WHAT TO CONSIDER

In determining the best option or combination of options for staffing a public sector entity, you will need to consider the nature of the entity’s functions and how they will be carried out in practice. Examples of the considerations include the following:

- Will the entity undertake an ongoing, steady workload that would require a minimum number of people to carry out?
- Will there be peaks of work that may require access to additional staff for short periods?
- Will the entity need to engage service providers or consultants?
- Can the needs of the entity be met by the staff of a directorate (for example, a secretariat function of a board)?

CONSEQUENTIAL AMENDMENTS

OVERVIEW

When you create new legislation or amend existing legislation it may have consequences for other legislation currently in force. In order to deal with these consequences, the existing legislation may need to be amended by what are called consequential amendments.

APPROACH

A common approach to determining whether and what consequential amendments may be needed is set out below.

- **Find the impacted legislation**

You can find the legislation which is impacted by the proposed legislation by using the [advanced search function](#)²⁴ on the Legislation Register. Try searching for references to the legislation and to the provisions that you are amending or to matters that are dealt with in the proposed legislation.

- **Identify any overlaps or inconsistencies**

Once you have found the relevant legislation, look for any overlaps or inconsistencies between the proposed legislation and the existing legislation. For example, does the legislation:

- regulate the same area
- define matters inconsistently
- make reference to outdated provisions.

- **Decide your policy**

It is important that you decide what to do with the impacted legislation. Do you want to keep the status quo? Do you want to have the impacted legislation apply, not apply or apply in a modified way? What needs to happen to bring this about?

²⁴ <http://www.legislation.act.gov.au/query/advsearch.asp>

TRANSITIONAL PROVISIONS

OVERVIEW

Transitional provisions are used when an existing legislative scheme is repealed and a new legislative scheme begins. Transitional provisions preserve existing rights and explain how they fit into the new scheme. The better approach is generally for a new legislative scheme to take over completely from an old scheme. However, it is not uncommon for an old legislative scheme, although repealed, to be taken to apply to certain proceedings or other things that happened before the commencement of the new scheme.

SAVING OPERATION OF REPEALED LAW—LA, S 84

The Legislation Act, section 84 saves the operation of a repealed law so that things done under the repealed law continue to be valid after the repeal takes effect. The repeal of a law does not:

- revive anything not in force when the repeal happened, such as a law previously repealed
- affect the previous operation of the law, or anything done, begun or suffered under the law
- affect an existing right, privilege or liability acquired, accrued or incurred under the law.

Also, a right to start an investigation or proceeding is saved in relation to an existing right, privilege or liability.

WHEN ARE TRANSITIONAL PROVISIONS USED?

Although the Legislation Act, section 84 saves a repealed law, transitional provisions are often included to confirm the continuing effect of the repealed law if that makes the continuing operation of the repealed law clearer or more certain for the people to whom the law applies.

As an example, a repealed law provides for the conduct of an investigation that may lead to criminal proceedings. It will be clearer, and provide more certainty, for the parties and the court in a prosecution, if the court can rely on a transitional provision that confirms the continuing validity of the investigator's powers and the investigation instead of having to establish that section 84 applies to the investigation.

If you do not want the general rules for saving the operation of repealed and amended laws to apply, you will need transitional provisions to reflect that.

Examples of scenarios when transitional provisions may be needed include the following:

- **Save instruments:** If there are instruments made under the law to be repealed, those instruments will be repealed also. If you want to save the instruments you will need transitional provisions (usually to provide that the instruments under the repealed law are taken to be equivalent instruments under the new law).
- **Deal with incomplete applications etc:** Transitional provisions may be needed to set out how to deal with something that has been started under a law, but not completed before the law was changed. For example, if an application for a licence has been made but not decided before the law changes, transitional provisions can clarify if the application is to be decided under the law that is to be repealed or if it is taken to be an application under the new law.
- **Deal with investigations, proceedings or remedies under repealed law:** The standard position is that an investigation, proceeding or remedy under a repealed law may be started, continued or completed as if the repeal had not happened. Transitional provisions can confirm this or displace it.

TRANSITIONAL REGULATION-MAKING POWERS

It is not always possible to identify the full range of issues that may arise in transitioning from one legislative scheme to another. When unforeseen issues arise, it is often important to deal with them quickly.

A transitional regulation-making power in a new law will allow the Executive to make a regulation to deal quickly with unforeseen issues, and may be particularly appropriate for complex transitions. It is a limited power to make regulations about transitional matters only and needs to be exercised with care.

EXPIRY AND ONGOING OPERATION OF TRANSITIONALS

Because transitional provisions will generally only be relevant for a limited period of time, a provision is usually included to expire them after a stated period of time. Once they have expired, the law will be republished without the transitional provisions. This is one way in which PCO maintains an up-to-date, relevant statute book.

Even though a transitional provision will be removed from a law, its effect will continue (unless the provision specifically states that it won't) (see LA, s 88). The amendment history of the law (endnote 4) will give you the legislative history of an expired transitional provision, and you can find the expired transitional provision itself in the relevant historical version of the law.



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