

Appendix C

Drafting Instructions

1. General matters relating to drafting instructions

On receiving Cabinet approval, the responsible Ministry should work out the details of the scheme in order to prepare drafting instructions. In practice this should be done by a lawyer in that Ministry or a senior official. Instructions should provide legislative counsel with the following:

- sufficient background information to enable appreciation of the facts and problems the Bill is to tackle
- the objectives of the Bill
- the manner in which it is intended that the policy is to be implemented (e.g. prohibitions, licences, penalties, exceptions)
- summaries and results of any consultations that have taken place inside or outside Government (especially with law enforcement authorities)
- reference to any relevant court decisions
- reference to any committee or commission reports considering the matter
- the administrative provisions needed to implement the Bill and the manner in which it is to be enforced
- the extent to which existing laws need to be considered, or amended or repealed
- transitional provisions that may have to be drafted to get smoothly from the existing situation to the proposed one
- whether the commencement of the legislation needs to be delayed, or conversely whether it needs to be given retrospective effect (this aspect of legislation is considered in Chapter 17)
- reference to statute law of other jurisdictions that may have a bearing.

The last point does not mean use of such law as a basis for instructions to draft (see the cautions set out in paragraphs 6–11 of Appendix E). Before

instructions are sent to legislative counsel, a careful check needs to be made to ensure that there is as far as possible a clear explanation of:

- the problems needing to be resolved and the solutions proposed (including suggested maximum penalties for breaches of provisions)
- the effect the new Bill will have on existing legislation.

2. Points that may need to be raised by counsel

If major issues of policy are involved, the client Ministry may need to be asked which policy choice is to be adopted. In addition, legislative counsel should raise any of the following issues, if relevant, as they are essentially of legal significance:

- possible conflict with fundamental rights and freedoms in the Constitution
- any other provision of the Constitution that may have a bearing (e.g. separation of powers)
- any relevant provisions of the Interpretation Act or equivalent, and whether it is necessary or desirable to modify them
- safeguards for persons already engaged in a trade or profession to be regulated by statute, particularly on the first occasion that it is to be so regulated
- proposals affecting specific personal rights (e.g. pensions)
- the need for, and extent of, delegation of powers to be given under a Bill
- retrospective or retroactive effect of any provisions
- any proposed extra-territorial effect to be given in a Bill
- whether the Government is to be bound
- the need for special provisions, for example on evidence or onus of proof.

For a detailed checklist of the matters an **instructing Ministry** needs to consider, reference is recommended to *Guidelines for Instructions to Draft and Process Legislation* by Segametsi Mothibatsela, Legal Adviser in the Rule of Law Division of the Commonwealth Secretariat.