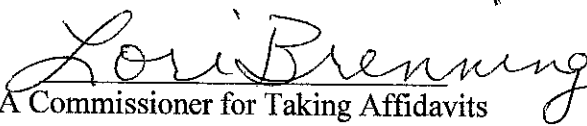


This is Exhibit "1" referred to  
in the affidavit of John Mark Keyes  
sworn before me, this 28<sup>th</sup> day  
of May, 2015

  
A Commissioner for Taking Affidavits

Lori Ann Brenning, a Commissioner, etc.,  
Province of Ontario, for the Government of Canada,  
Department of Justice.  
Expires December 3, 2016.



Government of Canada  
Privy Council Office

Gouvernement du Canada  
Bureau du Conseil privé

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# ***Guide to Making Federal Acts and Regulations***

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***2nd edition***

Canada

# Guide to Making Federal Acts and Regulations

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## Preface

In early 1998, the Government of Canada took a close look at the law-making process and at ways to improve the quality of draft legislation. One finding was that people involved in the law-making process did not always have enough information on the process or their role in it. Another finding was that there is a wealth of information on the law-making process, but relatively few people know about it. Two examples of this are the directive entitled *The Preparation of Legislation*, approved by the Cabinet in 1981, and the *Guide to the Making of Federal Acts and Regulations*, published by the Department of Justice in 1995.

On March 23, 1999, the Cabinet took an important step towards addressing these deficiencies. It approved an updated directive on the law-making process for federal Acts and regulations. The directive sets out the expectations of Ministers in relation to this process and generally orients the activities of Government officials in this regard. It also envisages the issuance of supplementary documents to provide detailed guidance to ensure that the Cabinet's objectives and expectations are met.

I am issuing this second edition of the *Guide to Making Federal Acts and Regulations* to promote awareness of the 1999 *Cabinet Directive on Law-making* and to provide complementary detailed guidance on these matters. We plan to continue to improve and update the material and invite you to give us your comments. A current version of the Guide will be available on the Privy Council Office Web site at <http://www.pco-bcp.gc.ca>

Alexander Himelfarb

Clerk of the Privy Council and Secretary to the Cabinet

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## Introduction

### Objectives

The Guide describes the steps to be followed to transform policy into Federal Acts and regulations, which are forms of written law generally referred to as “legislation.” It also outlines the roles of the participants in this process. If the process is carefully planned and competently carried out, the resulting legislation will achieve the Government’s goals while adhering strictly to the principles and policies underlying our legal system.

The Guide also serves as a reference for those already involved in law-making and as a training tool for those who are becoming involved for the first time.

### Audience

The main audience for this Guide consists of officials in the Government of Canada who are involved in the law-making process and who have responsibility for one or more of the following activities:

- developing policy to be implemented by legislation,
- supporting a Minister in obtaining Cabinet approval to draft legislation,
- participating in the drafting of legislation,
- managing legislative projects.

### Contents

The Guide covers a broad range of activities ranging from policy development to regulation-making. It begins with the **Cabinet Directive on Law-making**, which sets out the framework for the Government’s law-making activity and the principles that govern it. The Directive is the foundation for this Guide, providing the authority for the Clerk of the Privy Council to issue it.

The rest of the Guide is divided into three parts.

**Part 1** provides a framework for making laws. Chapter 1.1 deals with choosing the most effective tools for achieving policy objectives. It provides a series of questions that should be answered to make sure that a law is needed and to explore other tools. Chapter 1.2 assumes that a decision has been made to make a law and outlines the legal framework for doing so, including the Constitution and other basic laws that must be considered when preparing legislation.



**Part 2** discusses in detail the making of Acts. It begins with legislative planning and management and concludes with post-enactment review. It is organized under a series of titles to help you navigate each step in the process and includes checklists and templates, as well as detailed information about particular phases of each step.

**Part 3** deals with the making of regulations in a summary fashion. This process is currently under review. Readers looking for detailed guidance on it should consult:

- *Regulatory Policy* and the Policy and Process Guides of the Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office <http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications>.
- *Federal Regulations Manual*, Regulations Section of the Department of Justice.

The Guide concludes with an **Appendix** listing reference material that may be useful to anyone participating in the law-making process.

### Navigating the Law-making Process

The captain of a ship knows that to get from Point A to Point B successfully you need a plan, a map, a crew, a time frame, landmarks along the way, a good communications system and a bit of luck. A captain cannot operate alone or in isolation. Similarly, the law-making process works best when:

- one person has responsibility for coordinating efforts;
- expected “products” are clearly defined;
- a schedule is in place and revised as necessary;
- systems for sharing information and for reporting on progress are developed and used;
- there are clearly defined roles and responsibilities for the crew.

Whatever your role—be it subject matter expert, program official, legal adviser, drafter or manager—whatever size department you work in and whatever experience you may or may not have, *you cannot do this by yourself*.

Taking a policy and crafting it into a bill or draft regulation and then into enforceable law requires the co-ordinated efforts of dozens, if not hundreds, of people. Law-making is a complex process. It is also a crucial activity in our democracy.

Law-making is a team effort that requires planning and good management.

# Cabinet Directive on Law-making

## Overview

The *Cabinet Directive on Law-making* is the foundation document for the Guide. It sets out the expectations of Ministers in relation to the process for making federal Acts and regulations and generally orients the activities of Government officials in this process.

## Audience

All Government officials involved in the law-making process.

## Key Messages

Officials involved in law-making activities must understand the fundamentals that underlie our system of government and laws. They must also appreciate the steps involved in these activities as well as the need to plan them.

## 1. Introduction

The making of law is arguably the most important activity of government. This Directive describes the framework for this activity and the principles that govern it. It is of the utmost importance that departments embarking on law-making initiatives plan and manage them in accordance with this Directive and the supporting documents issued by the Clerk of the Privy Council.

This Directive replaces the directive entitled *The Preparation of Legislation*, approved by the Cabinet on April 16, 1981. Its main objectives are to:

- ensure that the Cabinet has the information and other support it needs to make sound decisions about proposed laws;
- outline the relationship between Acts and regulations and ensure that they are viewed as products of a continuous process of making law;
- ensure that proposed laws are properly drafted in both official languages and that they respect both the common law and civil law legal systems;
- make it clear that law-making initiatives can be very complex and must be properly planned and managed; and
- ensure that Government officials who are involved in law-making activities understand their roles and have the knowledge and skills they need to perform their roles effectively.

This Directive sets out principles and general directions on how these objectives are to be met.

## 2. Fundamentals of the Government's Law-making Activity

### Constitutional Considerations

The *Constitution Act, 1867* distributes the legislative powers of Canada between the Parliament of Canada and the legislatures of the provinces (Part VI, sections 91 to 95). The legislatures of the territories exercise legislative authority through delegation from the Parliament of Canada.

Canada's system of responsible parliamentary government is based on the rule of law. This means that laws must be made in conformity with the Constitution. The Crown retains very few regulatory powers that are not subject to the legislative or law-making process. For example, regulations governing the issuance of passports or medals and honours are still made under the royal prerogative.

Parliament may delegate regulatory authority to Cabinet (the Governor in Council), a person (such as a Minister of the Crown) or a body (such as the Atomic Energy Control Board). However, this authority remains subject to the will of Parliament and regulations made under this delegated authority are referred to as subordinate legislation.

Law-making authority in Canada is subject to a number of constraints. Parliament and the provincial legislatures are limited by the constitutional distribution of powers. They are further constrained in their law-making powers by the *Canadian Charter of Rights and Freedoms*, by the existing Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and by certain other constitutional provisions, such as the language rights and obligations that apply to Quebec and Manitoba.

Parliament consists of three elements: the Crown, the Senate and the House of Commons. Parliament makes laws in the form of statutes or "Acts." All three elements must assent to a bill (draft Act) for it to become law. The assent of the Crown is always the last stage of the law-making process.

All money bills must, according to the *Constitution Act, 1867*, originate in the House of Commons:

**53.** Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Money bills are to be introduced by a Minister of the Crown. Non-money bills may originate in the Senate. The Cabinet, which consists of the Prime Minister and the other Ministers of the Crown, plays a significant role in Parliament's law-making activity, both collectively, by approving bills for introduction in Parliament, and individually, by sponsoring bills through the stages of the parliamentary process. Cabinet Ministers are in turn supported by the officials who work in government departments.

### Deciding Whether a Law is Needed

Making a new law, whether by obtaining Parliament's assent to a bill or by making regulations, is just one of several ways of achieving governmental policy objectives. Others include agreements and guidelines or, more generally, programs for providing services, benefits, or information. In addition, a law may include many different kinds of provisions, ranging from simple prohibitions through a wide variety of regulatory requirements such as licensing or compliance monitoring. Law should be used only when it is the most appropriate. When a legislative proposal is made to the Cabinet, it is up to the sponsoring Minister to show that this

principle has been met, and there are no other ways to achieve the policy objectives effectively.

The decision to address a matter through a bill or regulation is made by Cabinet on the basis of information developed by a Minister's departmental officials. The information must be accurate, timely and complete. To provide it, a department should:

- analyze the matter and its alternative solutions;
- engage in consultation with those who have an interest in the matter, including other departments that may be affected by the proposed solution;
- analyze the impact of the proposed solution; and
- analyze the resources that the proposed solution would require, including those needed to implement or enforce it.

In the case of a bill, the principal means for conveying this information is a Memorandum to Cabinet, which a minister must present to obtain Cabinet approval for the bill to be drafted by the Legislation Section of the Department of Justice.

When a legislative initiative is being considered, and where it is appropriate and consistent with legislative drafting principles, related matters should be combined in one bill, rather than being divided among several bills on similar subjects. A single bill allows parliamentarians to make the most effective and efficient use of their time for debate and study in committee.

Finally, caution should be taken when considering whether to include a “sunset” or expiration provision in a bill, or a provision for mandatory review of the Act within a particular time or by a particular committee. Alternatives to these provisions should be fully explored before proposing to include them in a bill.

### **Relationship between Acts and Regulations**

Although Acts and regulations are made separately, they are linked in several ways:

- Parliament creates Acts and through them authorizes regulations;
- a regulation must strictly conform to the limits established by the Act that authorizes it; and
- most legislative schemes depend on regulations to make them work, so an Act and the regulations should be developed together to ensure a good match.

When developing a proposal for a bill that will authorize regulations, departments should carefully consider:

- who is to have authority to make the regulations;
- which matters are to be dealt with in the bill; and
- which matters are to be dealt with in the regulations.

Ordinarily, the Governor in Council is authorized to make regulations. A rationale for departures from this practice needs to be provided in the relevant Memorandum to Cabinet. Matters of fundamental importance should be dealt with in the bill so that parliamentarians have a chance to consider and debate them. The bill should establish a framework that limits the scope of regulation-making powers to matters that are best left to subordinate law-making delegates and processes. The following principles should also be observed:

- The power to make regulations must not be drafted in unnecessarily wide terms.
- Certain regulation-making powers are not to be drafted, unless the Memorandum to the Cabinet specifically requests drafting authority for the power and contains reasons justifying the power that is sought. In particular, specific drafting authority is required for powers that:
  - substantially affect personal rights and liberties;
  - involve important matters of policy or principle;
  - amend or add to the enabling Act or other Acts;
  - exclude the ordinary jurisdiction of the Courts;
  - make regulations having a retroactive effect;
  - subdelegate regulation-making authority;
  - impose a charge on the public revenue or on the public, other than fees for services;
  - set penalties for serious offences.

Acts and regulations are interdependent and should be developed in conjunction with one another. Regulations may be drafted at the same time as the authorizing bill or after, depending on the situation. However, if regulations are an important part of a new legislative scheme, it may be helpful to begin developing draft regulations or at least a summary of the regulations at the same time as the bill to ensure consistency with the framework being established in the bill. When regulations are developed under an existing Act, care must be taken to ensure that they fall within the authority granted by that Act.

### Importance of bilingual and bijural drafting

The *Constitution Act, 1867* requires federal laws to be enacted in both official languages and makes both versions equally authentic. It is therefore of primary importance that bills and regulations be prepared in both official languages. It is not acceptable for one version to be a mere translation of the other. For this reason, sponsoring departments and agencies must ensure that they have the capability to develop policy, consult, and instruct legislative drafters in both official languages. Both versions of legislation must convey their intended meaning in clear and accurate language.

It is equally important that bills and regulations respect both the common law and civil law legal systems since both systems operate in Canada and federal laws apply throughout the country. When concepts pertaining to these legal systems are used, they must be expressed in both languages and in ways that fit into both systems.

### Planning and Managing Law-making Activity

The Government's law-making activity is to be planned and managed on three levels:

- centrally for the Government as a whole;
- departmentally; and
- on a project basis.

At the first level, there is a government-wide process to co-ordinate and set priorities among proposals for bills from different departments. The Minister responsible for the Government's legislative program is the Leader of the Government in the House of Commons, who is also a Minister of State. For the public service, the Privy Council Office supports the Leader of the Government in the House of Commons in this activity. In addition, a committee of Cabinet, called the Special Committee of Council, and then full Cabinet review issues requiring decisions by Cabinet as a whole. For example, the Leader of the Government in the House of Commons seeks delegated authority from Cabinet for the introduction of Government bills.

In the case of regulations, departments and regulation-making agencies must plan their regulatory agendas for coming years and prepare reports on planning and priorities. In the fall, they must also prepare performance reports. These reports are to be tabled in the House of Commons as part of the Estimates and referred to the appropriate committees of that House.

At the second, departmental level, each department manages the legislative proposals in its areas of responsibility. It must ensure that



it has allocated the resources necessary to carry its proposals through each stage in the law-making process, plan for such things as consultation, and ensure that it has the capacity to formulate policy and instruct legislative drafters in both official languages. Finally, it must also plan and allocate resources for the implementation of new laws.

At the third, project level, departments must plan their law-making activities as they relate to particular bills or regulations. These activities are to be managed as projects with tools for determining what resources are needed, what tasks must be performed and what time frames are appropriate.

### 3. Preparation of the Government's Legislative Program

#### Planning the Legislative Program

Planning the Government's legislative program begins up to one year before the opening of the session of Parliament in which the various legislative items are to be introduced. Experience has shown that the planning and preparation process should be spread over the whole year, as opposed to a short period immediately before a session. This stems both from the need for long-term planning of the legislative program as a whole as well as from the established procedure for the approval of individual bills. This procedure involves three separate steps:

- Cabinet approval of the policy is sought;
- if Cabinet approves, the bill is drafted, which in many cases proves to be a lengthy and difficult process in itself; and
- approval of the Minister of State and Leader of the Government in the House of Commons is sought for introduction of the bill.

As part of the Prime Minister's June 1997 changes to the Cabinet decision-making system, the Special Committee of Council was given new responsibilities as a ministerial forum at the Cabinet committee level for discussing the Government's overall legislative planning and for specific legislative issues requiring decisions by Cabinet.

The Minister of State and Leader of the Government in the House of Commons is responsible for the Government's legislative program in the House of Commons, including examining in detail all draft bills.

Accordingly, departments and agencies whose Ministers are bringing forward legislative proposals are urged to keep in close contact with the Legislation and House Planning/Counsel Secretariat of the Privy Council Office, which provides support to the Leader of the Government in the House of Commons and to the Special Committee of Council. In particular, it is important to inform them of any

significant changes in the timing of Ministers' plans to bring bills forward.

### **Request for Legislative Proposals**

Immediately after the Speech from the Throne at the opening of each session of Parliament, the Assistant Secretary to the Cabinet (Legislation and House Planning/Counsel) will write to all Deputy Ministers and some Agency heads asking them to submit a list of the legislation that their Minister plans to propose to Cabinet for introduction in the next session. Subsequently, this legislative "call letter" will be sent twice a year (June and November) in order to deal with new or changing priorities.

The response to the request for legislative proposals should be submitted to the Assistant Secretary to the Cabinet within one month after receiving the request, or by a date specified in the request.

### **Review by Cabinet**

The proposals are prioritized by the Leader of the Government in the House of Commons and a tentative outline of the legislative program for the next sitting, together with the assignment of priorities for the various proposals, are reviewed by the Special Committee of Council. The Leader of the Government in the House of Commons normally advises the Special Committee of Council and the full Cabinet of the updated legislative program twice a year.

## **4. Preparation of Government Bills**

### **Cabinet Approval of Policy**

As soon as is feasible after Cabinet has determined that a bill is to be introduced as part of its legislative program, the responsible department should arrange for the submission of a Memorandum to the Cabinet (MC) seeking policy approval and an authorization for the Legislation Section of the Department of Justice to draft the bill. The MC is to be prepared in accordance with supplementary documents issued by the Clerk of the Privy Council and is to be submitted to the appropriate policy committee of Cabinet and then to Cabinet. It should be submitted far enough in advance of the projected date for introducing the bill to allow sufficient time to draft it.

An MC should address the type of public consultation, if any, that the sponsoring Minister has held or expects to hold and should specify whether the Minister intends to consult on the basis of the

draft bill. By tradition, draft bills have been treated with strict confidence before they were introduced in Parliament. However, in keeping with the Government's commitment to openness and consultation, sponsoring Ministers may wish to consult on the basis of draft bills. This consultation is intended to ensure that bills take into account the views of those concerned and it must not pre-empt Parliament's role in passing bills. Also, there may be cases where it would not be appropriate to do so for reasons such as the risk of giving the consulted party an unfair economic advantage. So, if a draft bill is intended to be used in consultation before it is tabled in Parliament, the MC should state that intention and ask for the Cabinet's agreement. In the case of a draft bill involving changes to the machinery of government, the approval to consult should generally be sought in a letter to the Prime Minister from the sponsoring Minister.

Drafting instructions should be annexed to the MC. However, they should not be in the form of a draft bill. Their purpose is to facilitate a policy discussion of a legislative proposal and to provide a framework for drafting a bill. Except in very rare instances, drafting instructions in the form of proposed draft legislation are not helpful. Substantial time may be required to assemble the relevant material required as part of drafting instructions. The policy discussion at this stage will make it possible to develop reasonable estimates of the time likely to be required for drafting the legislation. These estimates are essential to planning and managing the Government's legislative agenda.

### Drafting Bills

It is essential that both the Legislation and House Planning/Counsel Secretariat and the Secretariat to the appropriate policy committee of Cabinet be informed by the sponsoring department as to any significant departures from the approach to the bill agreed to by Cabinet.

As stated above, both language versions of legislation are equally authentic and must respect the bijural nature of Canada's legal system. Draft legislation must be prepared in both official languages and sponsoring departments must ensure that they have the capability:

- to instruct in both languages;
- to respond to technical questioning from drafting officers in either language and relating to each legal system; and
- to critically evaluate drafts in both languages.

It is not sufficient for a drafting officer and the instructing officer to reach full agreement on the technical adequacy of one language version of a draft bill. Both versions must meet the same standard of technical adequacy in the eyes of those qualified to critically evaluate them and the legislation must be capable of operating in both legal systems. This requirement can be particularly onerous when a legislative proposal is based on a precedent from another jurisdiction where legislation and related information, often of a very technical nature, is available in one language only. In such circumstances, it may be necessary to build into the planning and drafting process a significant time factor to allow for the development, testing, and finalization of appropriate terminology for both versions.

Another important consideration relates to the drafting of preambles and purpose clauses. Preambles can often provide important background information needed for a clear understanding of the bill or explain matters that support its constitutionality. However, when a bill amends existing legislation, the preamble is normally excluded from consolidated versions of the legislation. In order to ensure public awareness of, and access to, background information for an amending bill, a purpose clause may be considered as an alternative because it can be integrated into the consolidated legislation. Both preambles and purpose clauses must be carefully reviewed by the Department of Justice for appropriate language and content.

### **Review of Bills by the Leader of the Government in the House of Commons**

Once a bill has been drafted and approved by the responsible Minister, the Legislation Section of the Department of Justice will arrange for its printing and for copies to be sent to the Legislation and House Planning/Counsel Secretariat (L&HP/C) of the Privy Council Office before the bill is reviewed by the Leader of the Government in the House of Commons.

At this stage the sponsoring department

- prepares material for use in explaining the bill to parliamentarians and members of the public or for distribution;
- prepares a draft statement to be used by the Minister when the bill is referred to Committee;
- submits a revised and updated communication plan if the original attached to the MC is no longer appropriate.

The Leader of the Government in the House of Commons reviews the bill and its consistency with relevant Cabinet decisions. The Leader reports to Cabinet on this review and seeks delegated authority to arrange for introduction of the bill in either the House of Commons or the Senate.

Following Cabinet approval, L&HP/C submits the bill in its final form to the Prime Minister or the Leader of the Government in the House of Commons for signature, together with the royal recommendation in the case of bills that require expenditure. The preparation of royal recommendations is the responsibility of L&HP/C.

## 5. Parliamentary Processes and Amendments

### Introduction and Readings

Government bills are usually introduced by the sponsoring Minister. They proceed through three readings in both the Senate and the House of Commons and are studied by committees of each House. Detailed information on these proceedings can be found by consulting publications such as the *Précis of Procedure*, published by the House of Commons, and *The Senate Today* and *Rules of the Senate of Canada*, published by the Senate.

The timing and place of introduction are decided either by the Cabinet on the recommendation of the Leader of the Government in the House of Commons or by the Leader of the Government in the House of Commons under authority delegated by Cabinet.

Notice of introduction in the House of Commons is given to the Clerk of that House by the Assistant Secretary to the Cabinet (Legislation and House Planning/Counsel) only when instructed to do so by the Leader of the Government in the House of Commons. When introduction is in the Senate, the timing of introduction is decided by the Leader of the Government in the House of Commons in consultation with the Leader of the Government in the Senate. In both cases, the Assistant Secretary informs the sponsoring Minister of the timing of introduction.

Timing of the Second Reading debate, Report Stage, and Third Reading in the House of Commons is the responsibility of the Leader of the Government in the House of Commons. The timing of the stages of debate in the Senate is the responsibility of the Leader of the Government in the Senate.

During a committee's consideration of a bill, whether in the House of Commons or the Senate, the sponsoring Minister or the Parliamentary Secretary attends the committee meetings to assist the deliberations by ensuring that the Government's position is expressed. This is of particular importance in situations where amendments to the bill may be proposed.

## Amendments

If the sponsoring Minister wishes to move or accept an amendment after introducing a bill, the following procedure should be followed before the amendment is moved:

- amendments that are merely technical may be agreed to by the sponsoring Minister with no need for Cabinet approval;
- amendments that have an impact on the policy approved by Cabinet or that raise policy considerations not previously considered by Cabinet are subject to the same procedure as the initial proposal, namely, the submission of an MC for consideration by the original policy committee of Cabinet and approval by the Cabinet;
- urgent major amendments need not follow the full procedure referred to above, but may be approved by the Prime Minister and the Chair of the relevant policy committee of Cabinet together with other interested Ministers.

All amendments moved or accepted by the Government must be drafted or reviewed by the Legislation Section of the Department of Justice.

## Royal Assent

The final stage in the enactment of a bill by Parliament is Royal Assent. The timing of Royal Assent ceremonies is arranged by the Leader of the Government in the House of Commons in consultation with the Leader of the Government in the Senate.

## 6. Coming into Force

An Act has the force of law upon Royal Assent, unless it provides otherwise. Quite frequently, an Act provides that it, or any of its provisions, comes into force on a day or days to be fixed by order of the Governor in Council. These orders are prepared by officials in the department that administers the Act and are submitted to the Special Committee of Council by the responsible Minister. If approved, they are sent to the Governor General for signature and published in the *Canada Gazette*. Draft orders should be submitted for approval well in advance of the day or days that they propose for provisions to come into force.

## 7. Regulation-making

The main elements of the regulation-making process are established by the *Statutory Instruments Act*. They include requirements that:

- draft regulations be examined by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice;
- regulations be transmitted to the Clerk of the Privy Council to be registered and published in the Canada Gazette;
- regulations be referred to the Standing Joint Committee of the Senate and the House of Commons for the Scrutiny of Regulations (Committee).

With respect to the last requirement, the Committee regularly communicates with departments in carrying out its mandate. For that purpose:

- Each department is to have one or more designated person(s) to whom the Committee may address its inquiries.
- All inquiries are to be coordinated by a departmental tracking office (e.g., departmental parliamentary relations office, departmental correspondence unit, legislative and regulatory affairs unit). This office is to establish a tracking system to facilitate timely responses to all correspondence from the Committee.
- Each department is to establish appropriate timelines for responding to inquiries, depending upon the complexity of the issue. If a timeline cannot be met in any particular case, the Committee is to be advised of the need for an extension.
- If an inquiry involves a legal issue, the department's Legal Services Unit is to be consulted.
- Each Deputy Minister is to receive a status report from their departmental tracking office on a regular basis. A copy of the status report is to be provided to the Minister's office.

These elements of the regulation-making process are supplemented by the analytical and procedural requirements of the Regulatory Policy:

<http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications>.

## 8. Conclusion

This Directive sets out the objectives and expectations of the Cabinet in relation to law-making activities of the Government. Departmental officials involved in these activities are expected to be aware of the Directive and to follow the instructions it contains. They are also expected to use the supplementary documents that the Clerk of the Privy Council may issue to provide detailed guidance on planning and managing the development of legislation to ensure that the Cabinet's objectives and expectations are met.

# Part 1

## Law-making Framework



## Chapter 1.1

### Choosing the Right Tools to Accomplish Policy Objectives

#### Overview

This chapter supplements section 2 of the *Cabinet Directive on Law-making* which says:

Law should be used only when it is the most appropriate. When a legislative proposal is made to the Cabinet, it is up to the sponsoring Minister to show that this principle has been met, and there are no other ways to achieve the policy objectives effectively.

This chapter provides guidance on meeting this requirement by providing an analytical framework that covers:

- the range of instruments (techniques) available for accomplishing policy objectives;
- how to determine which ones are the most appropriate; and
- how to decide whether an Act or regulation is required.

Officials are encouraged to adopt a comprehensive approach to developing proposals to accomplish policy objectives. They should focus on achieving a desired outcome, rather than assuming that a particular instrument, particularly an Act or regulation, will be effective. This chapter is also a good place to begin thinking about what should go into an Act or regulation if one is required. This question is explored in more detail in the “Checklist for Preparing Bill-drafting Instructions for a Memorandum to Cabinet” in Chapter 2.2.

#### Audience

Departmental program officials and their legal advisers.

#### Key messages

- Instrument-choice should be considered early in the policy development process.
- The Government cannot deal with every situation. Its involvement must be assessed in light of its responsibilities, its resources and the likely effectiveness of its involvement relative to the involvement of other governments or the private sector.
- The range of possible instruments available to accomplish policy objectives is very broad, allowing the Government to choose the type and degree of its intervention, if any.

- An Act or regulation should only be chosen after assessing the full range of possible instruments.
- Instrument-choice has wide-ranging effects and is an important element of many governmental activities.
- Consultation on instrument-choice, both within and outside the Government, is essential to making good choices.

## Introduction

When a situation may require the Government's attention, it should be assessed to determine what, if anything, the Government should do to address it. This involves determining the objectives in addressing it and how these objectives can best be accomplished. This determination should be done as early as possible in the policy development process. The following questions may help you to do this:

- What is the situation?
- What are the objectives in addressing the situation and what particular results are desired?
- Is there a role for the Government of Canada?
- What instruments are available to accomplish the desired results?
- What is involved in putting the instruments in place?
- What effect would the instruments have?
- How will their success be measured?
- Which (if any) instrument(s) should be chosen?

The assessment process does not necessarily follow the order of these questions. Answers reached at one point in the process may have to be re-evaluated in light of other answers.

In order to obtain sound answers, it is also important to conduct appropriate consultations with those affected.

## What is the situation?

This step involves defining the key features of a situation that may require the Government's attention. A situation may present itself in the form of a problem, in which case you should try to get to its source and not define it in terms of its symptoms.

The situation may also be an opportunity for the Government to do something creative or positive, for example celebrating a national or global event, as opposed to responding to a problem.

A description of the situation is often framed in terms of how people are behaving or how they may behave in future. Their behaviour may be active (doing something) or passive (not doing something). A behavioural approach involves identifying the following elements:

- the behaviour that is, or may be, creating or contributing to the situation;
- who is engaging in the behaviour;

- who is affected by the behaviour and what these effects are;
- whether some behaviour, or behaviour by some persons, is more serious than others;
- what external factors are influencing the behaviour;
- what behavioural changes are desired to address the situation.

## What are the objectives and desired results?

This question is intended to help you define the objectives as concretely as possible in terms of particular results to be achieved. Objectives and the desired results go hand in hand, but they are not quite the same.

For example, an objective might be to make a particular activity safer, while the desired result might be a 30 percent reduction in the rate of injury.

Another example is an objective of increasing Canada's capacity in information technology. The desired result would be to increase the number of people who immigrate to Canada with expertise in this field by 500 in the next two years.

## Is there a role for the Government of Canada?

Consider whether the Government of Canada can or should do something. The Constitution constrains the authority of the Government through:

- the distribution of legislative powers between Parliament and the provincial legislatures (although this distribution is qualified by powers such as the spending power and the power to declare works for the general advantage of Canada);
- limits on the exercise of legislative powers, for example the *Canadian Charter of Rights and Freedoms*;
- obligations relating to such things as the provision of services in both official languages.

Policy considerations should also be weighed, including consistency with the political platform of the Government and its approach to federal-provincial relations.

Practical considerations should be addressed as well. The Government has limited resources and it can't deal with every situation: perhaps others are better placed to achieve a desired outcome.

Finally, if the Government does become involved, what role should it play? Possible roles include taking the lead, acting in partnership with others or stimulating or facilitating action.

## What instruments are available to accomplish the desired results?

This question looks at the full range of available policy instruments, which can be grouped into five categories:

- *information;*
- *capacity building;*
- *economic instruments, including taxes, fees and public expenditure;*
- *rules;*
- *organizational structure.*

### Information

Information can be a powerful tool. People act on the basis of the information available to them. By giving them specific information, it may be possible to influence their behaviour. Some examples are:

- consumer information about the quality or safety of products;
- occupational health and safety information;
- anti-drinking and driving advertising and education campaigns;
- “buy-Canadian” promotional campaigns;
- environmental awareness programs;
- information about how programs are operated or about administrative practices;
- symbolic gestures.

### Capacity Building

Capacity-building increases the ability of people or organizations to do things that advance policy objectives. It goes beyond providing information to include transferring to them the means for developing their ability. Some examples are:

- employment skills training programs;
- programs to support scientific research and public education about the results of the research;
- information gathering through consultation or monitoring;
- working with industries to help them develop voluntary codes governing their practices.

### Economic Instruments

Many instruments have a mainly economic focus. They affect how people behave in the marketplace or in other economic transactions.

These instruments include taxes, fees and public expenditure, which are considered separately below. They also include the creation of exclusive or limited rights, such as marketable permits, licences or marketing quotas that acquire value because they can be bought and sold. Insurance requirements are another example of economic instruments because they can, for example, force businesses to assess and reduce risks and ensure that their products are priced to cover the costs of insurance or preventive measures.

### *Taxes and Fees*

The basic purpose of taxes and fees is to raise revenue. However, they are also capable of influencing how people make choices about the activities to which the taxes or fees apply. In this sense, they can be powerful tools for accomplishing policy objectives. Examples include:

- taxes on income, property or sales;
- customs duties;
- fees or charges for licences or services;
- tax exemptions, reductions, credits or remissions.

Further information on user fees and charges is available from the Treasury Board Secretariat:

- Cost Recovery and Charging Policy available at [http://www.tbs-sct.gc.ca/Pubs\\_pol/oepubs/TB\\_H/CRP\\_e.html](http://www.tbs-sct.gc.ca/Pubs_pol/oepubs/TB_H/CRP_e.html).
- Information on External User Charges at [http://www.tbs-sct.gc.ca/Pubs\\_pol/oepubs/TB\\_H/FeeInfoe.html](http://www.tbs-sct.gc.ca/Pubs_pol/oepubs/TB_H/FeeInfoe.html)

### *Public Expenditure*

The Government can act by transferring or spending money in a particular area in order to accomplish policy objectives involving those who receive the money. This makes it a potentially effective instrument for encouraging particular activities that support the policy objectives. Some examples of public expenditure are:

- monetary benefits, grants or subsidies;
- loans or loan guarantees;
- vouchers redeemable for goods or services;
- transfers to the provinces and territories for education or health programs.

## Rules

Rules, in the broadest sense, guide behaviour by telling people how things are to be done. However, there are many different types of rules. For example, they differ in terms of how they influence behaviour:

- Acts, regulations or directives tend to apply to groups of people and have legal force in that they can be enforced by the courts;
- contracts or agreements also have legal force, but they generally apply only to those who are parties to them;
- guidelines, voluntary codes or standards and self-imposed rules usually apply to groups of people, but they do not have legal force, relying instead on their persuasive or moral value.

Rules having legal force are generally cast in terms of requirements, prohibitions or rights. A combination of these elements can be seen in rules that create:

- rights that entitle people to do things on an equal footing, such as obtaining goods, services or employment, and corresponding requirements to provide these things to those entitled to them;
- prohibitions against doing something without a licence that confers a right to do it, for example, exclusive or limited rights, such as marketable permits, licences or marketing quotas that acquire value because they can be bought and sold.

Rules may also be formulated in different levels of detail, for example:

- as precise requirements that tell people exactly what to do; or
- as performance standards that set objectives that people are responsible for meeting.

Finally, it is worth noting the drafting technique of incorporation by reference. Rules of one type (for example, Acts or regulations) can sometimes be drafted so that they incorporate rules of the same or another type (for example, other Acts or regulations as well as industry codes or standards) simply by referring to them, rather than restating them. This avoids duplication of the incorporated rules and can be a way of harmonizing the laws of several jurisdictions if they each incorporate the same set of rules. However, this technique, particularly in the context of regulations, is subject to a number of legal considerations, such as requirements governing the publication of laws in both official languages and the general accessibility of the law.

Additional information on choosing the right type of rules can be found in the publications listed at the end of this chapter as well as

in the “Checklist for Preparing Bill-drafting Instructions for a Memorandum to Cabinet” in Chapter 2.2.

### Organizational Structure

Organizational structure is often critical in accomplishing policy objectives. It generally supports the use of other instruments by providing for their administration. Examples of organizational instruments include:

- departmental or agency structures to deliver programs;
- framework agreements and partnerships with other governments or organizations;
- privatization or commercialization of government services;
- public investment in private enterprises.

Additional information on organizational structure can be found in the Alternative Program Delivery Policies and Publications, available from the Treasury Board Secretariat at [http://www.tbs-sct.gc.ca/Pubs\\_pol/oepubs/TB\\_B4/siglist\\_e.html](http://www.tbs-sct.gc.ca/Pubs_pol/oepubs/TB_B4/siglist_e.html) or through the Alternative Service Delivery Division Home Page at [http://www.tbs-sct.gc.ca/si-si/asd-dmps/index\\_e.htm](http://www.tbs-sct.gc.ca/si-si/asd-dmps/index_e.htm).

### Combination and Timing of Instruments

These instruments are not necessarily stand-alone alternatives to one another. In fact, many of them are mutually supportive or otherwise interrelated. For example, information enables organizations to work effectively and organizations are often needed to administer legal rules, such as Acts or regulations, which may, in turn, be needed to support the creation of organizations.

Another important dimension of the range of available instruments is timing. Some instruments are better used in the initial stages of policy implementation while others may only be needed later if circumstances warrant. For example, information campaigns often precede the imposition of legal rules and, if they are effective enough, they may avoid the need for such rules.

### What is involved in putting the instruments in place?

This question involves the legal, procedural and organizational implications of using each instrument as well as the process requirements for making them operational. It also involves considering in greater detail the role that the Government of Canada may play, whether acting alone or as a partner with other levels of government or the private sector.



You should assess:

- whether the use of the instrument is within the general mandate or authority of the Government;
- whether some specific legal authority is needed, for example, authority to impose taxes or penal sanctions, and, if so,
  - whether it requires new laws (Acts or regulations) to be made,
  - whether there is legal authority to make the new laws federally, and
  - whether the new laws would be consistent with Canada's international obligations.

It is particularly important to consult departmental legal advisers when considering this legal aspect of the question.

- What the short- and long-term operational requirements, both organizational and financial, of the instruments are, including:
  - organizations and personnel needed to administer the instruments, for example, officials needed to assess benefit claims or conduct inspections,
  - additional costs for the courts because their workload has increased as well as the effect such an increase may have on their general efficiency;
- who should be consulted before the instruments are put in place (other departments, other governments, stakeholders);
- what processes are required to put the instruments in place, including processes required for any new laws (as described in this Guide);
- what, if any, monitoring or enforcement measures will be needed, such as penalties, inspections and court action (this is closely connected to the next question of what effect the instruments would have).

### What effect would the instruments have?

This question involves assessing how the instruments would work, including:

- whether the instruments will bring about the desired results, including whether people will voluntarily do what the instruments encourage or require, or whether some are likely to try to avoid compliance or find loopholes;
- whether the instruments will cause any unintended results or impose costs or additional constraints on those affected by them;

- what the scope and nature of any likely environmental effects will be, particularly any adverse environmental effects and how they can be reduced or eliminated;
- what effect the instruments may have on federal-provincial relations or international relations, particularly in light of the Government's obligations under interprovincial or international agreements;
- how the general public will react to the instruments and, in particular, whether the instruments will be perceived as being enough to deal with the situation.

When deciding whether to choose legal rules, you should also keep in mind their strengths and weaknesses. They can often be used to overcome resistance in achieving the desired results because they are binding and enforceable in the courts. However, they may also give rise to confrontational, rights-based attitudes or stifle innovative approaches to accomplishing the policy objectives. You should also not assume that a legal prohibition or requirement will, by itself, stop people from doing something or make them do it.

### How will the success of the instruments be measured?

It is not enough to choose various instruments and use them. Clear and measurable objectives must also be established as well as a means for monitoring and assessing whether they are being achieved. This assessment should be ongoing and include looking at how other governments are addressing the same situation. This is necessary both for determining whether the chosen instruments should continue to be used as well as for providing a better basis on which to make instrument-choice decisions in future.

### Which instruments should be chosen?

The final step is to choose the instruments that would be most effective in achieving the policy objective. It is important to realize that a single instrument is seldom enough. Usually a combination of instruments is required, often in stages with different combinations at each stage. They should be chosen through a comparative analysis of their costs and benefits, taking into account the answers to the preceding questions.

This is also a good time to consider again whether there is a role for the Government of Canada. It may be that none of the instruments should be chosen if:

- the situation does not justify the Government's attention, for example, because there is no problem or the situation is beyond the Government's jurisdiction or is not a priority for it;

- the situation will take care of itself or will be addressed by others;
- the Government does not have the resources to address the situation;
- the Government becoming involved in the situation would lead to unmanageable demands to become involved in similar situations.

### Additional information

Additional information on how to implement policy objectives can be found in the following publications and through Web sites:

- Alternative Program Delivery Policies and Publications, Treasury Board Secretariat: [http://www.tbs-sct.gc.ca/Pubs\\_pol/oepubs/TB\\_B4/siglist\\_e.html](http://www.tbs-sct.gc.ca/Pubs_pol/oepubs/TB_B4/siglist_e.html)
- Alternative Service Delivery Division Home Page, Treasury Board Secretariat: [http://www.tbs-sct.gc.ca/si-si/asd-dmps/index\\_e.htm](http://www.tbs-sct.gc.ca/si-si/asd-dmps/index_e.htm)
- *Assessing Regulatory Alternatives*, Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office: <http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications>
- Cost Recovery and Charging Policy, Treasury Board Secretariat: [http://www.tbs-sct.gc.ca/Pubs\\_pol/oepubs/TB\\_H/CRP\\_e.html](http://www.tbs-sct.gc.ca/Pubs_pol/oepubs/TB_H/CRP_e.html)
- *Designing Regulatory Laws that Work*, Constitutional and Administrative Law Section of the Department of Justice
- *1999 Cabinet Directive on Environmental Assessment of Policy, Plan and Program Proposals*, Canadian Environmental Assessment Agency: [http://www.ceaa-acee.gc.ca/0012/0006/sea\\_e.htm](http://www.ceaa-acee.gc.ca/0012/0006/sea_e.htm)
- Information on External User Charges, Treasury Board Secretariat: [http://www.tbs-sct.gc.ca/Pubs\\_pol/oepubs/TB\\_H/FeeInfoe.html](http://www.tbs-sct.gc.ca/Pubs_pol/oepubs/TB_H/FeeInfoe.html)
- *Standards Systems: A Guide for Canadian Regulators*, Regulatory Affairs and Standards Policy Directorate of Industry Canada: <http://strategis.ic.gc.ca/stdsguide>
- *Voluntary Codes: A Guide for Their Development and Use*, Regulatory Affairs and Standards Policy Directorate of Industry Canada: <http://strategis.ic.gc.ca/volcodes>

## Chapter 1.2

### Legal Considerations

#### Overview

This chapter supplements section 2 of the *Cabinet Directive on Law-making*.

Federal Acts and regulations, and indeed federal law generally, form a single system. If a legislative proposal is to be implemented effectively, it must be expressed in legislation that takes the federal legal system into account and fits into it. A good understanding of this system is essential. This Chapter provides an introduction to its major elements, which consist of 4 groups of laws:

- the Constitution
- quasi-constitutional Acts
- Acts of general application
- rules of law that are of general application.

The significance of these laws varies. The Constitution is the most fundamental law. If another law is inconsistent with the Constitution, it has no force. The second group of laws are called quasi-constitutional because they too express fundamental values and they generally override other inconsistent laws. However, they are not subject to the rules for amending the Constitution since they can be amended by another Act of Parliament. The third and fourth groups include Acts and other rules of law that generally apply, unless another Act clearly says otherwise.

#### In this chapter

- The Constitution
- Quasi-constitutional Acts
- Acts of General Application
- Rules of law that are of General Application

#### Audience

All Government officials involved in the law-making process and other interested persons.

#### Key Messages

Officials involved in law-making activities must understand the legal framework for legislation and other government action.

## The Constitution

Canada is governed by a Constitution that rests on British constitutional tradition and includes numerous Acts and orders in council. The *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms* are among the most important of these.

The *Constitution Act, 1867* allows us to answer the question: “What can an Act deal with?” It establishes two levels of government in Canada: federal and provincial. Each exercises full legislative power over the matters within its jurisdiction. Constitutional law, as elaborated by court decisions, defines what these matters are, as well as their limits.

The Constitution also provides a number of rules that define the legal framework for making laws, for example, rules requiring the bilingual publication of Acts or governing the procedures of Parliament and the provincial legislative assemblies.

The *Canadian Charter of Rights and Freedoms* allows us to answer the question: “How can an Act deal with its subject matter?” It governs how legislative objectives may be achieved, rather than the matters that may be dealt with. The Charter imposes limits on government activity in relation to fundamental rights and liberties.

Because the Charter is part of the Constitution, Acts and regulations are ineffective to the extent that they are inconsistent with the Charter. It is legally possible for Parliament to override explicitly certain of the rights and freedoms guaranteed by the Charter. However, Parliament has never exercised this power and a government would obviously be extremely reluctant to propose a bill that would have that effect.

Another important part of the Constitution is Part II of the *Constitution Act, 1982*. It recognizes and affirms the existing aboriginal and treaty rights of the Aboriginal peoples of Canada.

The Minister of Justice is responsible under the *Department of Justice Act* for seeing that the administration of public affairs is in accordance with law. This responsibility includes ensuring that all government actions are consistent with the Constitution. Two specific mechanisms are in place for this purpose:

- the Cabinet Support System (See “Constitutional Issues and the Cabinet Support System” in Chapter 2.2)
- the certification of Government bills. (See “Certification of Government Bills” in Chapter 2.4)

It is also important to keep in mind that since the *Quebec Act* of 1774 Canada has had two systems of law: common law and civil law. The application of an Act may differ depending on whether it is being

applied in a part of Canada that is governed by one system or the other. The common law applies throughout Canada in matters of government law. However, private legal relationships are governed by civil law in Quebec and by common law elsewhere. This has a number of effects, particularly on the sources of law and the interpretation of an Act.

## Quasi-constitutional Acts

Besides the *Canadian Charter of Rights and Freedoms*, there are a number of “quasi-constitutional” Acts that can limit policy choices in the preparation of Acts and regulations. These Acts express values that are of fundamental importance in Canada including, in particular, the protection of minorities. Any derogation from them must be explicit.

Accordingly, these Acts apply except to the extent that other Acts expressly exclude their operation. It is legally possible to override them, but this is very rarely done and those involved in the preparation of Acts and regulations should assume that the quasi-constitutional Acts will apply.

The requirement of explicit derogation protects the values expressed in those Acts to the maximum extent possible, short of entrenching those values in the Constitution. It also ensures accountability to the public for any decision to derogate.

The most important quasi-constitutional Acts are:

- *Canadian Bill of Rights*
- *Canadian Human Rights Act*
- *Official Languages Act*

### Canadian Bill of Rights

The first of these quasi-constitutional Acts to be enacted was the *Canadian Bill of Rights*. It is a precursor of the Charter, recognizing and declaring a series of human rights and fundamental freedoms. The Minister of Justice's responsibilities in relation to the Bill are similar to those described above in relation to the Charter.

The *Canadian Bill of Rights* provides that every law of Canada is to be interpreted so as not to infringe the recognized rights or freedoms, unless it expressly says otherwise. The only explicit derogation from the *Canadian Bill of Rights* took place during the October Crisis. It was included in the *Public Order (Temporary Measures) Act, 1970*, which replaced the regulations made in 1970 under the *War Measures Act*.

### Canadian Human Rights Act

The *Canadian Human Rights Act* is an important aspect of our national human rights protection. Human rights legislation sets out many of the fundamental values of our society. The Act itself prohibits discrimination in employment, services, contracts and accommodation.

In contrast to the *Canadian Charter of Rights and Freedoms*, which protects individuals primarily against acts committed by governments, human rights legislation protects against discriminatory acts committed by the federal government, businesses and individuals in areas of federal jurisdiction. The Act applies to such areas as telecommunications, banking and interprovincial transportation and was designed to provide an informal, expeditious and inexpensive mechanism for the resolution of human rights complaints.

The courts have recognized that Acts dealing with human rights prevail over other legislation. The *Canadian Human Rights Act* therefore prevails over other federal Acts.

### Official Languages Act

The purpose of the *Official Languages Act* is to ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions. It particularly applies with respect to the use of the official languages in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions. This Act also supports the development of English and French linguistic minority communities and generally advances the equality of status and use of the English and French languages within Canadian society.

Section 82 of the *Official Languages Act* says that Parts I to V prevail over all other Acts, except the *Canadian Human Rights Act*.



## Acts of general application

Besides the Constitution and quasi-constitutional Acts, a number of other Acts can limit policy choices in the preparation of bills. These other laws apply except when some other law excludes their operation. They differ from quasi-constitutional Acts in that they do not express values that are as fundamental and so it may be easier to exclude them. These Acts affect the preparation of bills in two ways.

First, because courts presume that they apply except when some other Act says otherwise, provisions excluding their operation must be drafted explicitly.

Secondly, drafters presume that there has been no political decision to exclude one of these Acts if no such decision is mentioned in the Cabinet Record of Decision. Instructing officers who wish to override this presumption bear the burden of persuading their minister that a recommendation to that effect should be included in the ministerial recommendations section of the Memorandum to Cabinet (MC). Ministers who are persuaded to do so will have to justify their decision to Parliament and the public.

Like the Constitution and the quasi-constitutional Acts, these presumptively applicable Acts support values found in Canadian society. Policy makers can rely on the solutions that these Acts provide instead of having to develop their own solutions. Departmental legal advisers and drafters in the Legislation Section of the Department of Justice can provide assistance in this regard.

The requirement to explicitly exclude these Acts in other Acts or regulations and in Cabinet Records of Decision:

- protects those values;
- ensures that ministers and, ultimately, parliamentarians decide whether other values are more important in the circumstances under consideration; and
- helps to ensure that public servants do not inadvertently create political controversy.

Those involved in the preparation of bills will take into account the requirement of explicitness so as to ensure that any political decision to exclude the operation of a presumptively applicable law is legally effective.

Finally, it is often undesirable in Acts and regulations to provide specifically for the application of a rule that already applies generally. Such a provision may cast doubt on the application of the rule in other Acts or regulations. Alternatively, it may tempt the courts and

others to assign some other unintended meaning to the particular provision, since the courts assume that every provision has some legal effect and is intended to do something rather than nothing.

The most important Acts of general application are:

- *Access to Information Act*
- *Criminal Code*
- *Financial Administration Act*
- *Interpretation Act*
- *Privacy Act*
- *Statutory Instruments Act*.

### **Access to Information Act**

The *Access to Information Act* provides a right of access to information in records under the control of federal government institutions. The right is provided “notwithstanding any other Act”, but it is subject to certain exemptions, including those for:

- information obtained in confidence from another government;
- personal information;
- trade secrets and other confidential information supplied by a third party; and
- information whose disclosure is restricted by certain Acts of Parliament, such as the *Income Tax Act*.

Refusals of access may be reviewed by the Information Commissioner, who can make recommendations to a head of a federal government institution and report to Parliament. Also, the Information Commissioner or a person who requests access to information can apply to the Federal Court for a review of the matter.

The *Access to Information Act* provides specific solutions to problems of reconciling a right of access to government information with the need to keep some information confidential or secret.

Unjustified proposals to circumvent the Act can not only cause difficulty for sponsoring departments in having Acts enacted by Parliament, but can also lead to anomalies in the law and the eventual ineffectiveness of the *Access to Information Act*. Any proposal to exempt information from the operation of that Act should be brought to the attention of the Information Law and Privacy Section of the Department of Justice.

### **Criminal Code**

The *Criminal Code* not only creates criminal offences, it also deals with the investigation and prosecution of offences. For example, it authorizes the issuance of search warrants and states the rules of procedure for laying charges and conducting trials. In addition, Part I of the Code states many fundamental rules of criminal law dealing with such things as the presumption of innocence (section 6), excuses, justifications and defences to charges (section 8) and liability for attempting to commit an offence or participating in its commission. Part XXIII sets out principles and procedures governing the imposition of sentences for offences.

Subsection 34(2) of the *Interpretation Act* provides that the Code applies to all offences created by a federal Act or regulation (unless it otherwise provides).

The following are examples of provisions in the Code whose duplication in particular cases may turn out to have unintended consequences:

- rules that extend liability for the commission of offences to persons who attempt to commit them or participate in their commission;
- the power to obtain a search warrant from a justice of the peace where there are reasonable grounds to believe that an offence has been committed; and
- the power to obtain a “telewarrant” from a justice of the peace where it is not practical to appear personally before the justice.

### **Financial Administration Act**

The *Financial Administration Act* provides the legal basis for the Government’s financial management accountability. For this purpose, it contains:

- provisions governing public money, including public spending and keeping the accounts of the Consolidated Revenue Fund;
- the legal framework for the maintenance and control of public property by public servants;
- the legal framework for managing the public debt;
- general provisions that apply to Crown corporations.

The Act also establishes two departments: the Department of Finance and the Treasury Board. The Treasury Board is given wide powers to administer the federal public service, including powers relating to the management of human resources.

Because this Act is a basic law that supplements other laws, those involved in legislative projects should understand it well in order to avoid needlessly duplicating its provisions. For example, new legislation should not duplicate the provisions of the Act that authorize fees to be prescribed for government services or facilities (section 19ff.). Similarly, provisions for the payment of interest on debts to the Government need not be included because they are also covered (section 155.1).

### Interpretation Act

Interpretation Acts were originally enacted to avoid the repetition of rules that are commonly included in individual Acts. Rather than repeat the rules each time a new Act is drafted, they were collected into a single Act that says they apply generally, except when another Act or regulation provides that the rule does not apply.

The rules contained in the *Interpretation Act* cover;

- how legislation operates in terms of when it comes into force (section 6) and where it applies (section 8);
- definitions of commonly used terms such as “corporation” or “year” (sections 35 to 37);
- other interpretational rules, for example, that references to nouns in the singular include the plural (subsection 33(2)) and transitional rules that apply when legislation is amended or repealed (sections 42 to 45));
- administrative rules, for example, about the issuance of proclamations (section 18), the administration of oaths (section 19), appointments (section 23), and the exercise of powers, including the delegation of powers (section 24).

The following are examples of *Interpretation Act* rules whose duplication in particular cases may turn out to have unintended consequences:

- the power of departmental officials to exercise, on behalf of the minister presiding over that department, powers conferred by law on that minister;
- the power of regulation-making authorities to amend or repeal regulations;
- the power of appointing authorities to terminate appointments and to remove, suspend, re-appoint and reinstate public officers; and
- the survival of rights that vested under an earlier Act or regulation and other rules respecting the temporal operation of Acts and regulations.

### Privacy Act

The *Privacy Act* protects the privacy of individuals with respect to personal information about themselves held by federal government institutions, and provides individuals with a right of access to that information. Refusals of access may be reviewed by the Privacy Commissioner, who can make recommendations to a head of a federal government institution and report to Parliament. Also, the Privacy Commissioner or a person who requests access to information can apply to the Federal Court for a review of the matter.

Unjustified proposals to circumvent the Privacy Act present the same concerns as proposals to circumvent the *Access to Information Act* and should be brought to the attention of the Information and Privacy Law Section of the Department of Justice.

### Statutory Instruments Act

The *Statutory Instruments Act* provides for the examination, registration, publication and parliamentary scrutiny of regulations. A fundamental principle of Canadian law is that everyone is presumed to know the law. This principle cannot be accepted or be effective unless it is supported by a system that enables those affected by a law to have reasonable access to it. The *Statutory Instruments Act* provides a means of making regulations public by requiring them to be registered with the Clerk of the Privy Council and published in the *Canada Gazette* Part II. (See “Making Regulations” in part 3).

Bills containing powers that are to have effect as law are usually drafted so that the exercise of those powers will result in a “regulation” for the purposes of the *Statutory Instruments Act*.

The publication requirements of the *Statutory Instruments Act* are not always appropriate. However, drafters will take issue with proposals to get around the Act if there is clearly no effective system in place under a law to make it known in both official languages to those affected by it. The justification for any derogation from the Act must therefore provide alternative solutions to the problems that the Act resolves. For example, the MC should explain what steps will be taken to:

- publicize a document that is to have effect as law if it will not be registered or published under the Act;
- ensure that the document is legally effective;
- make the document available to Parliament.

## Legal principles of general application

In addition to rules stated in Acts of general application, there are also a number of important principles that form part of the legal system. They operate in much the same way and must also be taken into account in developing legislative proposals. The following are examples of these principles:

- the rules of natural justice and procedural fairness, which require that a person whose rights or interests are affected by an administrative decision be given a reasonable notice of the proposed decision and an opportunity to be heard by an unbiased decision maker;
- respect for the ordinary jurisdiction of the courts, including the jurisdiction of the Federal Court of Canada under the *Federal Court Act* to hear and determine an application for judicial review in which relief is sought against a federal board, commission or other tribunal;
- the prospective operation of Acts of Parliament and regulations, which limits retroactive interference with rights;
- the principle that Acts of Parliament and regulations generally have effect throughout Canada, including the internal waters and the territorial sea, but not outside Canada;
- respect for and compliance with Canada's treaty obligations and Canada's other obligations under international law;
- the principle that property should not be expropriated without compensation;
- the requirement that one must have a guilty mind in order to be guilty of an offence; and
- the need to be very clear when providing that a person is to be penalized for contravening an Act or regulation since the courts give them the benefit of the doubt when penal provisions are ambiguous.

Despite the applicability of a general principle, it is sometimes not good legislative policy to silently rely on it. For example, the requirement of notice is an important element of the rules of natural justice. If the Act is silent, the courts may have to determine which persons have a sufficient interest in a proposed decision to be entitled to notice of it and how much notice those persons are entitled to. It is often preferable for an Act to answer these questions specifically.

Another example relates to the requirement that one must have a guilty mind in order to be guilty of an offence. The law distinguishes

between true crimes, where the required mental element of the offence is knowledge or intention, and strict liability offences, where the offence has no mental element as such, although there is a defence of due diligence. (A third class of “absolute liability” offences, where there is no defence of due diligence, is not relevant here.)

If the Act is silent, the courts may have to determine whether an offence is a true crime or a strict liability offence. It is sometimes preferable for an Act to answer this question, especially where the same Act contains both true crimes and strict liability offences. A common instance of this occurs when a regulatory Act contains mainly strict liability offences but also offences of obstructing enforcement officers and providing false or misleading information. These offences should be specified as true crimes through the use of words such as “willfully” or “knowingly” because they are akin to *Criminal Code* offences prohibiting similar conduct.

In answering these kinds of questions specifically, policy making is guided and structured, rather than limited, by presumptively applicable principles.

There is a difference between specifying what would otherwise be uncertain and merely duplicating a rule of law that is applicable in any event. If the rule of general application does not need to be expressed, then expressing it is not only useless, but possibly dangerous, because it may cast doubt on the application of the rule in other Acts.

# Part 2

## Making Acts



## Chapter 2.1 Getting Started

### Overview

This chapter provides background information to help get started on the law-making process for Acts. It begins by considering what Acts are, including the different kinds of Acts, and who is involved in making them.

The focus then shifts to legislative planning and management, which is addressed in section 2 of *the Cabinet Directive on Law-making*, and the preparation of the Government's legislative program, which is addressed in section 3 of the Directive. It deals with these topics from two perspectives. The first is the Government-wide process that is administered by the Privy Council Office and hinges on the legislative call letter that it sends to the departments. The second is the perspective from within departments that are developing legislative proposals. The objective of this material is to help departments to participate effectively in the Government-wide process and to manage their legislative activities internally.

### In this chapter

- What are Acts and Who is involved in Making Them?
- Preparation of the Government's Legislative Program
- Departmental Planning and Management
- Strategic Considerations for Legislative Planning and Management
- Project Planning Templates
- Schematic Map of the Federal Law-making Process and Associated Support Activities (Acts)

### Audience

- Managers who are responsible for coordinating law-making projects.
- Officials responsible for advising the Privy Council Office about law-making projects in their departments.

### Key Messages

- The legislative call letter is a key planning tool for the Government that requires timely and accurate information about law-making projects.

- Law-making is a complex management exercise that requires careful planning. Approach law-making as a project and follow good project management practices.

## What are Acts and Who is Involved in Making Them?

### What is an Act?

An Act is the most formal expression of the will of the State. It is a form of written law that is made by Parliament through a process often referred to as *enactment*. Parliament consists of three parts: the Crown, the Senate and the House of Commons. Acts originate as *bills*, which are introduced in either the Senate or the House of Commons. Each of Parliament's three parts must approve a bill before it becomes law. In this Guide, the parliamentary approval process is referred to as *enactment*.

The purposes of an Act may either be of a general, public nature (*public Acts*) or private, conferring powers or special rights or exemptions on particular individuals or groups (*private Acts*). Almost all Government bills result in the enactment of *public Acts*.

Bills are classified either as *Government bills*, which are submitted to Parliament by members of the Cabinet, or *private members' bills*, which are submitted by members of the Senate or the House of Commons who are not in the Cabinet.

The Guide deals exclusively with the enactment of Government bills resulting in public Acts.

### New and Amending Acts

A bill may provide for the enactment of a new Act or it may amend (change) one or more existing Acts. If a bill to enact a new Act or amend an existing Act makes it necessary to amend other Acts, the bill will contain "consequential" or "related" amendments to those Acts.

### Miscellaneous Statute Law Amendments

The Miscellaneous Statute Law Amendment Program is a periodic legislative exercise to correct anomalies, inconsistencies, outdated terminology or errors that have crept into the statutes. It allows minor amendments of a non-controversial nature to be made to a number of federal statutes without having to wait for particular statutes to be opened up for amendments of a more substantial nature. *Miscellaneous Statute Law Amendment Acts* are subject to an accelerated enactment process involving committee study of legislative proposals before they are introduced as a bill.

The Program was established in 1975 and is administered by the Legislation Section of the Department of Justice.

Anyone may suggest amendments, but most come from Government departments or agencies. To qualify for inclusion in the proposals, an amendment must *not*

- be controversial;
- involve the spending of public funds;
- prejudicially affect the rights of persons; or
- create a new offence or subject a new class of persons to an existing offence.

The Legislation Section is responsible for requesting and reviewing proposals. It then prepares them in the form of a document entitled

Proposals to correct certain anomalies, inconsistencies and errors in the Statutes of Canada, to deal with other matters of a non-controversial and uncomplicated nature in those Statutes and to repeal certain provisions of those Statutes that have expired, lapsed or otherwise ceased to have effect.

The proposals are tabled in the House of Commons by the Minister of Justice, and are then referred to the Standing Committee on Justice and Human Rights. The proposals are also tabled in the Senate and referred to its Standing Committee on Legal and Constitutional Affairs.

Consideration of the proposals by the Standing Committees has always been thorough and non-partisan. Since these committees are masters of their own procedure, they can always accept or reject requests to withdraw proposals or to add new ones. The latter must, of course, meet the criteria mentioned above. Perhaps the most important feature of the entire program is the fact that if, at either of the committees, a proposal is considered to be controversial, it is dropped.

The Legislation Section then prepares a Miscellaneous Statute Law Amendment Bill based on the reports of the two committees and containing only proposals approved by both of them. The bill is then subject to the ordinary enactment procedures. An example of one of these Acts is the *Miscellaneous Statute Law Amendment Act, 1999*, SC 1999, c. 31, which can be found at:

[http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/government/C-84/C-84\\_4/C-84\\_cover-E.html](http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/government/C-84/C-84_4/C-84_cover-E.html).

### Who is involved in Making Acts?

#### *Sources of Legislative Proposals*

Although the passage of an Act involves decisions of the Government and enactment by Parliament, the policy underlying an Act does not

necessarily originate within the Government. There are basically five sources of legislative policy:

- the general public;
- Cabinet ministers;
- the Public Service of Canada;
- Parliamentarians (senators and members of the House of Commons);
- Courts and administrative agencies.

The Speech from the Throne is one of the primary means for the Government to announce its legislative program. It is delivered at the beginning of each session of Parliament by the Queen or, most often, by her representative, the Governor General. The legislative program announced in the Speech from the Throne is often taken from the electoral platform of the governing party, particularly when a new Parliament is formed. However, during the course of the Government's mandate, the legislative program will be taken from the priorities established and approved by the Cabinet. The budget speech each year is another important source of legislative policy.

Acts frequently represent the outcome of important political initiatives or decisions of the Government. They may also result from recommendations in a report of a working group or royal commission of inquiry. Finally, Acts may be intended to implement treaties, conventions or accords; to provide for administrative action, such as licensing; or to deal with particular problems or emergency situations.

Events may affect the Government's legislative program. You should be aware that the Government also publicizes its ideas in the form of position papers and press releases.

### *Who are the main participants?*

Exactly who is involved in making a particular Act depends on a variety of factors, including the type of Act and who sponsors it.

The following are the main participants in the preparation of Government bills:

- the Cabinet;
- the Minister who introduces the bill (the “sponsoring minister”);
- officials in the sponsoring Minister’s department, including officials responsible for
  - policies and programs,
  - communications,

- cabinet affairs,
- parliamentary relations;
- departmental legal advisers;
- the Privy Council Office;
- the Legislative Services Branch of the Department of Justice.

These participants are also involved in the parliamentary phase of the enactment process where the key participants are Senators, members of the House of Commons and parliamentary staff.

## Preparation of the Government's Legislative Program

### Who prepares the program?

The Leader of the Government in the House of Commons is responsible for the Government's legislative program in the House of Commons. The Special Committee of Council (SCC) is a ministerial forum at the Cabinet committee level for discussing the Government's overall legislative planning and for specific legislative issues requiring decisions by the Cabinet. The Leader of the Government in the House of Commons and Leader of the Government in the Senate are members of this Cabinet committee. The Legislation and House Planning/Counsel Secretariat of the Privy Council Office supports these ministerial and Cabinet committee responsibilities.

### Legislative Call Letter

#### *Timing*

Following the Speech from the Throne at the opening of each Session of Parliament, the Assistant Secretary to the Cabinet (Legislation and House Planning/Counsel) writes to all Deputy Ministers and some agency heads asking them to submit a list of the legislation their Ministers plan to propose to Cabinet for introduction in the next session. The list is to be submitted within the time specified in this legislative "call letter", usually one month. The letter is subsequently sent twice a year, normally in June and November, in order to deal with changing priorities.

#### *Responses*

Each proposal should contain the following information where possible:

- a summary of its principal features;
- whether there is policy approval for the legislation from Cabinet and expenditure approval, where appropriate;
- an assessment of the proposal from a broader, horizontal perspective in terms of both the sponsoring minister's portfolio and other government priorities and initiatives;
- whether it will constitute
  - new legislation,
  - a repeal of existing legislation,

- a major revision of existing legislation,
- an amendment to existing legislation that is simple in drafting terms but would be controversial or would effect a major change, or
- technical and administrative amendments (“housekeeping”);
- if new legislation is proposed, why the legislation is necessary;
- its relationship, if any, to the Government’s priorities, as enunciated in various policy statements;
- federal-provincial relations implications;
- whether any new Governor in Council positions will be created and their terms and conditions of appointment;
- the scope of the regulatory component of the proposal, if any;
- the target date for passage, together with a tentative assessment of its priority, based on the following categories
  - URGENT (measures subject to statutory time constraints or deadlines announced by the Government),
  - ESSENTIAL,
  - OTHER.

A Minister’s legislative list should refer to any existing statutes that require amendments in order to remain current.

### *Cabinet Review*

The proposals are prioritized by the Leader of the Government in the House of Commons. The Special Committee of Council (SCC) reviews a tentative outline of the legislative program for the next sitting, together with the assignment of priorities for the various proposals.

Each week while Parliament is in session, the Leader provides regular updates on the status of the program to the SCC, which reviews the progress of bills through Parliament and the status of bills nearing readiness for introduction. The legislative program is adjusted to accommodate such circumstances as changing priorities or the parliamentary workload.

The Leader normally advises the SCC and the full Cabinet of the updated legislative program twice each year.



## Departmental Planning and Management

Each department manages the legislative proposals in its areas of responsibility. It must:

- plan each stage of the law-making process, including such things as consultation and the development of any regulations that may be needed;
- ensure that it has allocated the resources necessary to carry its proposals through each stage;
- ensure that it has the capacity to formulate policy and instruct legislative drafters in both official languages; and
- plan and allocate resources for the implementation of new laws.

Departments must also plan their law-making activities as they relate to particular bills or regulations. These activities are to be managed as projects with tools for determining what resources are needed, what tasks must be performed and what time frames are appropriate.

### Project Planning and Management Principles

Principles of project planning and management must be applied to the process for preparing and enacting bills. They bring a discipline that allows for better direction from senior management and more transparency in the process. They also provide a way to achieve the desired outcome in a timely manner. This part of the chapter briefly summarizes the main elements of project planning and management. You should also consult the Treasury Board Project Management Policy, which is available on the Treasury Board Secretariat website at [http://www.tbs-sct.gc.ca/Pubs\\_pol/dcgpubs/TBM\\_122/CHAPT2-2\\_e.html](http://www.tbs-sct.gc.ca/Pubs_pol/dcgpubs/TBM_122/CHAPT2-2_e.html).

The Government devotes significant resources to the development of legislation. There is a general consensus that the current practice used in most departments needs to be more efficient and effective. In recent years some federal organizations have experimented successfully by using independent teams—such as task forces and working groups—reporting directly to the executive level as a means of improving the process for developing legislation.

The process is very complex and time consuming. If managed like other operational activities, it competes with the dozens of other operational priorities and urgent matters on the executive agenda. When managed outside routine operations, a legislative project can take on a higher profile at the executive level.

The ways of understanding project management are probably as numerous as the authors who have written about it. However, this section focuses on three main elements: **planning**, **scheduling** and **controlling** the activities needed to reach the project objectives.

### *Planning*

Planning allows those involved or interested in a project to have a common understanding of its objectives and what will be needed to achieve them. As will become clear, it is also a powerful tool for managing the project and its progress.

#### Establish a project plan

A project plan includes an outline of the scope and objectives of the project as well as a list of what has to be accomplished at each of its main stages.

The scope of a legislative project usually consists of implementing the government policies.

The definition of the objectives is more complex and provides a better understanding of the project. This is because the objectives must be clearly and precisely described and must mirror the needs that the project must meet. They must also be attainable and measurable; otherwise it will be impossible to determine whether they have been achieved.

A useful technique to help understand the policy context is to hold seminars in order to engage in open discussion of the concepts and intent of the proposed legislation. Such discussions enhance the understanding of the policy issues and support team building as well as professional development. They also help to clarify the broader policy dimensions related to government accountability, the long-term impact on society, human resource implications, inter-departmental relationships, future legislative revisions and federal-provincial relations.

Once the scope and objectives of a project have been established and are well understood by the participants, it becomes possible—indeed necessary—to divide the project into separate steps. In turn, each step should be broken into specific tasks to be accomplished. This breakdown continues until the tasks are indivisible (or the planning-time exceeds task performance-time). One way of distinguishing project objectives from the tasks needed to achieve them is to think of objectives as nouns and tasks as verbs. To allow the team members to understand the organization of tasks—and the milestones that will be discussed a little later—project managers often use charts or maps known as *organigrams* or *work breakdown structures* (WBS).

Like the project objectives, tasks must be clearly defined, attainable and measurable in order to allow the manager to control the project and achieve the desired results.

#### Other steps

Planning a project also involves the following steps:

- *Establish a project team:* One of the most important elements in the completion of a project is establishing a team capable of completing the project. The members of the team should be as unfettered as possible by ongoing operational responsibilities.
- *Determine what financial resources are needed:* Depending on the project manager's other responsibilities, he or she may have to determine what other resources are needed to complete the project. These might, for example, include consultation costs, particularly travel expenses, as well as fees for outside consultants.
- *Obtain senior management approval of the plan:* The project manager must obtain the approval of senior management before going ahead. This approval extends to the plan itself as well as to any subsequent changes to it.
- *Define any risks associated with the project:* It is important to consult the team members as early as possible to determine what, if any, risks may be associated with the project. This is not a matter of being pessimistic, but instead involves finding solutions to problems that may arise. If something can be done about the problems, it should be reflected in establishing the plan. If a risk cannot be eliminated, its adverse effects can perhaps be minimized. Finally, it is not necessary to identify all possible risks, just the more likely ones.

#### Scheduling

Scheduling involves determining in what order and when the tasks are to be done as well as who will do them. It is determined within the overall time frame for the project, the skills required for it and basic logic. For each task (as defined in the work breakdown structure), a person responsible and deadlines (start-date, time required and finish-date) are established.

#### Deadlines

Project management requires a clear understanding of deadlines that must be met at each stage of the process. Final deadlines may be imposed externally, for example, through a government commitment or as a result of a pressing public policy concern. Other deadlines

may be less urgent, but no less important, from a project management perspective.

The statement of key milestone dates for each point in the project management process is essential to monitor progress. Failure to achieve key milestone dates is a “wake-up call” that requires immediate attention in order to address any issues that could affect the quality or time frame of the project. A useful source of information in setting achievable target dates can often be found by examining milestone dates set for other legislative projects. Unrealistic target dates are not conducive to good project management.

#### Critical path

Scheduling also involves establishing a critical path and a system for tracking project milestones.

A critical path is a series of activities used to establish the minimum time frame within which the project can be completed. It is “critical” in the sense that delay in achieving any of the activities will delay completion of the project as a whole. The critical path is established by arranging the different tasks in a logical sequence. Usually, this is done through a *critical path method diagram*. It shows each step in the project and the particular tasks that they involve, together with beginning and end dates for each one with some margin of flexibility.

The milestones consist of as many markers as will allow the project manager and the rest of the team to evaluate their progress through each step and to draw the appropriate conclusions.

#### Human resources

It is up to the project manager to determine what skills and knowledge are essential to the success of the project. With this information, the manager can obtain the right people for the project.

The clarity of assigned tasks, team member acceptance of their tasks and ongoing consultation with team members and others involved in the project will develop a shared commitment to its completion. It is also important to clearly define reporting relationships and responsibilities among the team members.

#### Controlling

Controlling the project is the most demanding aspect of managing a project in terms of both the time and effort it requires. It is the basic reason for planning and scheduling the project. A good road map is needed to make sure that the project is going in the right direction.

Controlling the project involves gathering and analysing information about the progress of the project and taking steps to adjust its direction, as needed.

A way of monitoring the work assignments and time frames is required. This may be as simple as weekly meetings or regular progress reports.

New information often requires adjustments to the content of the project and the plan for completing it. Project management involves sharing information openly, cooperatively and when it is needed. It has to be shared not only with the team members, but also with senior managers and, through them, the Minister's office, whose general overview of the project is essential for its success.

A process of continuous improvement should be built into the project. At the various milestones, as well as at the end of the process, team members should acknowledge successfully completing the milestones and be prepared to critically evaluate their performance. Managers should also assess their own performance, along with the team's, in terms of meeting the basic project planning and implementation criteria. Such a review can reveal how to improve the process and to convey this information to other legislative project managers as a way of contributing generally to the public policy process.

## Strategic Considerations for Legislative Planning and Management

This table highlights important questions and issues for consideration in planning and managing legislative projects.

QUESTIONS AND ISSUES	TAKEN INTO ACCOUNT	
	YES	NO
<b>Legislative project team</b> <ul style="list-style-type: none"> <li>• Are team members fully bilingual and able to evaluate drafts critically in both official languages?</li> <li>• Does the team include members who fully understand the Cabinet approval process and parliamentary procedure?</li> <li>• Are the team members able to network at all levels within the Government, with Minister's staff and with staff of the House of Commons and Senate?</li> <li>• Does the team include a legal adviser from the Departmental Legal Services Unit to deal with the many legal questions that necessarily arise in a legislative project?</li> <li>• Do the team members have the appropriate technical skills? (for example, word processing, e-mail, Internet, etc.)</li> <li>• Does the team include administrative support staff?</li> </ul>		
<b>Development of Legislative Strategy</b> <ul style="list-style-type: none"> <li>• What is the priority of the proposed legislative project relative to other bills?               <ul style="list-style-type: none"> <li>– how does it relate to other Government priorities?</li> <li>– was it part of the Speech from the Throne?</li> <li>– was it part of the Budget?</li> <li>– is there a technical reason for the bill (for example, the implementation of an international agreement)?</li> </ul> </li> <li>• Which Parliamentary process should be proposed?               <ul style="list-style-type: none"> <li>– normal legislative route</li> <li>– committee study of a bill before Second Reading</li> <li>– Senate consideration of bill before the House of Commons</li> <li>– committee study of policy proposal before a bill is introduced</li> <li>– committee study of a draft bill.</li> </ul> </li> <li>• What are the target dates for the Parliamentary phase (taking into account other events)?               <ul style="list-style-type: none"> <li>– introduction in the House of Commons</li> <li>– passage by the House of Commons</li> <li>– introduction in the Senate</li> <li>– passage by the Senate</li> <li>– Royal Assent.</li> </ul> </li> </ul>		

QUESTIONS AND ISSUES	TAKEN INTO ACCOUNT	
	Yes	No
<b>Communications Strategy</b> <ul style="list-style-type: none"><li>• What are the public, interest groups and the media saying about the bill?</li><li>• What is the atmosphere in Parliament and what external events may affect the debate on your bill?</li><li>• What is the appropriate focus of public communications (for example, why is this a good initiative)?</li><li>• What media activities could support the strategy?</li></ul>		

## Project Planning Templates

The two templates in this chapter are to assist managers, team leaders and working level officials to plan each step in the law making process. For each template, an outline is provided with an example showing how the template might be used.

### Product Development Template

This template is very useful during the early stages of legislative development. The key step or activity is listed first (for example, Introduction), along with the anticipated timing (for example, the week of March 12th). Once that is established, the product associated with that step is identified (for example, briefing books and information kits) along with the start and finish dates, the person(s) responsible for drafting and the status of development.

#### Template

KEY STEP OR ACTIVITY	ANTICIPATED TIMING				
PRODUCT	START ON	FINISH BY	RESPONSIBILITY	COMMENTS	STATUS

#### Example

KEY STEP OR ACTIVITY	ANTICIPATED TIMING				
Introduction and first reading	Week of March 12th				
PRODUCT	START ON	FINISH BY	RESPONSIBILITY	COMMENTS	STATUS
Briefing books and information kits	January 5	March 5	P. Smith	Senior management to review the advance copy	First draft now being reviewed by legislative project team



### Project Time Line Template

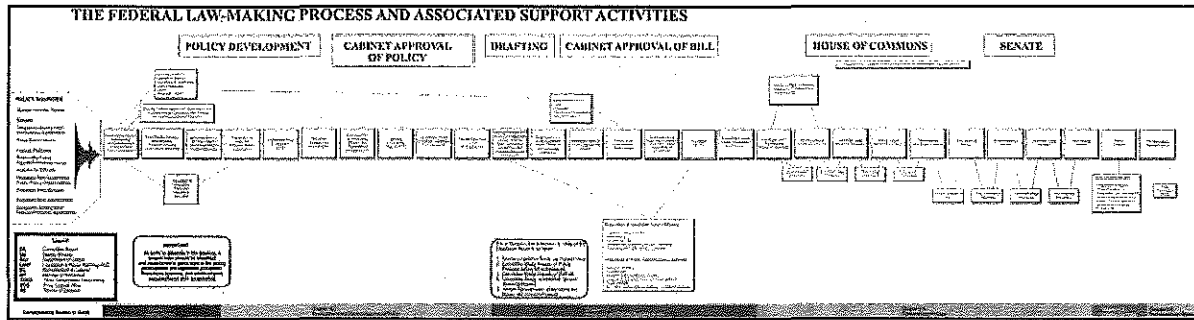
This template can be used at any stage of the law-making process. It is designed to assist officials at every level in the process to generate a basic project plan. Itemize the task, activity, or product to be developed, then fill in the anticipated or earliest start and latest finish dates.

#### *Template*

TASK OR STEP	EARLIEST START	LATEST FINISH

#### *Example*

TASK OR STEP	EARLIEST START	LATEST FINISH
Prepare Ministerial briefing books	January 5	February 5
Prepare and assemble bill kits	January 19	February 20
Prepare news releases and information packages	February 5	February 28
Draft speeches	February 5	February 28



## Schematic Map of the Federal Law-making Process and Associated Support Activities (Acts)

Versions (click on a version to open)

Note to users: Given the scope and complexity of the data, this schematic map exceeds standard paper and/or screen dimensions. For printing purposes, the map has been formatted to fit within 5 separate 8.5" x 11" pages. Print each page separately and assemble side by side for a complete image.

- [JPG](#)
- [PDF - 8.5" x 14"](#)
- [PDF- Five 8.5" x 11"](#)

## Chapter 2.2

### Development and Cabinet Approval of Policy

#### Overview

This Chapter supplements section 3 of the *Cabinet Directive on Law-making* by providing information on the various steps involved in policy development and Cabinet approval. It sets out the Good Governance Guidelines and goes on to describe how to prepare a Memorandum to Cabinet (MC), which is a Minister's vehicle for proposing and explaining a legislative measure to the Cabinet and for obtaining its approval. The MC provides context for the drafting instructions that must be developed as part of the MC.

#### In this chapter

- Summary of the Cabinet Policy Approval Process
- Good Governance Guidelines
- Preparing a Memorandum to Cabinet
- Preparing Bill-drafting Instructions for a Memorandum to Cabinet
- Particular Legal and Policy Considerations
- Activities and Products for Policy Development and Approval
- MC Preparation Planning Calendar

You should also consult

- *Memoranda to Cabinet: A Drafter's Guide*, published by the Privy Council Office ([http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=publications&Sub=mc&Doc=mc\\_e.htm](http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=publications&Sub=mc&Doc=mc_e.htm)).

#### Audience

- Officials involved in developing legislative policy and seeking Cabinet approval, particularly those involved in writing or reviewing an MC.

#### Key Messages

- Before seeking Cabinet approval, thoroughly consider the complex and wide-ranging issues involved in the preparation of legislation.
- Ensure that the bill-drafting instructions in the MC are detailed enough to give Cabinet a clear understanding of what the proposed law is to do and how it is to do it.

- Carefully consider the drafting instructions in order to identify and resolve potential legislative and administrative difficulties.
- Identify sources of funds to cover resulting financial implications for the Government of Canada arising from the implementation of the legislation

## Summary of the Cabinet Policy Approval Process

### Memorandum to Cabinet and drafting instructions

After a proposed bill is included in the Government's legislative program, the next step is to prepare a submission to Cabinet to seek policy approval and authority to draft the bill. This is done by way of a Memorandum to Cabinet (MC), prepared in accordance with the guidance documents issued by the Privy Council Office. MC drafters should refer to *Memoranda to Cabinet: A Drafter's Guide*

(<http://www.pco->

[bcp.gc.ca/default.asp?Language=E&Page=publications&Sub=mc&Doc=mc\\_e.htm](http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=publications&Sub=mc&Doc=mc_e.htm)), the *Good Governance Guidelines* and the *MC*

*Preparation Planning Calendar*. When a bill is being proposed, the MC includes an annex of drafting instructions, which provides the framework for drafting the bill. This is a critical component of the MC that demands much care and attention (see also *Preparing Bill-drafting Instructions* for a Memorandum to Cabinet in this chapter).

### Main Steps in Cabinet Approval Process

The main steps in preparing an MC are:

- The sponsoring department writes the MC, including the drafting instructions, in cooperation with departmental legal advisers. The Privy Council Office (PCO) should be consulted as early as possible in the process. As set out in the MC Preparation Planning Calendar, the sponsoring department must alert PCO to the draft MC at least 6 weeks before the Cabinet Committee meeting at which it is to be presented. Other departments and central agencies should be consulted as issues arise during the preparation of the MC.
- The sponsoring department hosts a substantive interdepartmental meeting at least 3 weeks before the Cabinet committee meeting to discuss the policy implications of the MC. The meeting includes PCO and the other central agencies as well as all departments whose ministers sit on the Cabinet policy committee that will consider the MC, and other interested departments. The sponsoring department then revises the MC taking into account comments from departments and ensures that it has the support of central agencies and other departments.
- As the central agency that serves as the secretariat to the Cabinet and its committees, PCO performs a challenge function on matters of process, most notably on what consultations are appropriate and on how public interest is determined. It also looks at issues of horizontality and the appropriate level of government

intervention, particularly in terms of efficiency, affordability, federalism and partnerships.

- Once finalized, the sponsoring minister signs the MC and it is sent to PCO. PCO is responsible for distributing the MC to deputy ministers and ministers, for scheduling the item on the agenda of the appropriate Cabinet policy committee and for briefing the committee chair.
- The Cabinet policy committee considers the MC.
- If approved, PCO issues a Cabinet Committee Report (CR), which is then considered by the full Cabinet.
- If there are financial implications, a source of funds must be identified before full Cabinet considers the CR. If the CR is ratified, PCO issues a Record of Decision (RD). Both the CR and the RD are based on the recommendations and drafting instructions contained in the original MC.
- The policy committee or full Cabinet may require changes to the proposal. In such cases, the sponsoring minister may be asked to return with a revised MC, depending on the nature and scope of the changes. A revised CR and RD may also be issued to reflect the changes.
- Once the RD is issued, PCO sends copies to all ministers and deputy ministers (in practice usually to the departments' cabinet affairs units) and to the Legislation Section of the Department of Justice.
- At this stage, drafting may begin.

In exceptional circumstances, where it is necessary to meet the priorities of the Government, drafting may begin before the Cabinet authorization has been formally obtained if the Leader of the Government in the House of Commons so authorizes. This authorization is granted on the advice of the Director of the Legislation Section and the Assistant Secretary to the Cabinet (Legislation and House Planning/Counsel) in consultation with the relevant PCO policy secretariat.

### Who does what in the Cabinet Approval Process?

The Cabinet makes policy decisions, including decisions about how policies will be implemented in legislation. These decisions are communicated through the Cabinet's approval of drafting instructions in a memorandum to Cabinet.

Most departments have units responsible for developing policies — including legislative policies — relating to matters for which they are responsible. The officials who work in these units are responsible for

linking the various parts of the department in order to develop policies that respond to public concerns and can be effectively implemented.

Because each department is organized differently, it is possible here to describe only two groups of departmental officials: instructing officers and departmental legal advisers. They are responsible for explaining the objectives of the proposed legislative measure in an MC.

Officials in the Operations Secretariat of the Privy Council Office must be involved from the earliest stages.

Others who may assist in one way or another are legislative drafters in the Legislation Section of the Department of Justice.

### *Instructing Officers*

An instructing officer's role is to co-ordinate the efforts of their department. The efforts include analysing and recommending the alternatives available to achieve the policy objectives, as well as communicating to the Cabinet the potential substance of the bill for which authorization is being sought, once the Minister has made a decision. This substance is expressed in the detailed instructions for drafting the bill.

The instructing officers' responsibilities include preparing the bill-drafting instructions for the MC and usually extend to many other aspects of the project, including the communication of detailed instructions to the drafters at the drafting stage.

This stage requires a considerable amount of work. The instructing officers must ensure that the approach adopted has been thoroughly examined. Clear and coherent drafting instructions can be formulated only with a thorough analysis of the issues that may arise. "Preparing Bill-drafting Instructions for a Memorandum to Cabinet" illustrates what elements of the proposed legislative measure must be brought to the attention of Cabinet.

Those who prepare the MC drafting instructions should also provide instructions at the bill-drafting stage. This will provide continuity and ensure that the drafters have the background information they need to draft the bill. The team of instructing officers must:

- be knowledgeable about the subject matter of the proposal;
- be able to formulate the instructions and answer questions about them in both official languages and ensure that each version is well-written and says the same thing;
- be able to make policy decisions as drafting proceeds, or have access to decision makers.

### *Departmental Legal Adviser*

The legal adviser's role is essentially to check the legal aspects of the proposed legislative measure and advise the instructing officer.

First, the legal adviser verifies that the proposed measure is needed to achieve the department's objectives.

Second, if it is needed, the legal adviser checks the legal aspects of the drafting instructions in the MC to ensure that the instructions are consistent in all respects with the applicable legal rules. To assist in this task, he or she may seek the services of the specialized legal counsel at the Department of Justice. If the proposed instructions are legally defective, the legal adviser must propose alternative solutions.

Third, the legal adviser provides information on what is involved in submitting the MC in terms of time constraints, procedure, essential elements of the proposed legislative measure to be brought to the attention of Cabinet and the consequences of Cabinet approval.

Fourth, the legal adviser advises on general principles and policies that may affect the proposed legislative measure, such as policies relating to gender equality, bijuralism and access to government information.

The legal adviser may also act as the instructing officer.

### *Privy Council Office*

The involvement of PCO, beginning at the earliest stages of the development of an MC, is crucial. As the central agency that serves as secretariat to the Cabinet and its policy committees, PCO, and in particular the Operations Branch, is responsible for reviewing policy proposals and providing a foundation to enable consensus on recommendations to Cabinet. It also ensures that policy proposals can be considered strategically by ministers.

Officials in the Operations Branch of PCO perform four functions:

- advising the departmental officials on policy questions and the Cabinet System to ensure coherence with the Government's broad agenda priorities and policy framework;
- ensuring that Departments follow through on the Government's commitments so that they are addressed;
- ensuring that the sponsoring department has followed all steps in the process, including consultation with appropriate departments and agencies;
- posing questions about the proposed legislative measure, including questions about whether it is needed at all;



- ensuring that other interested central agencies are aware of the proposed legislative measure so that it can be thoroughly studied before Cabinet sees it.

### *Legislative Drafters*

Legislative drafters do not systematically participate in preparing the MC. Their main function is to draft legislation once Cabinet has approved the MC. However, departments are increasingly seeking their help—particularly with respect to the formulation of the drafting instructions—to avoid problems at the drafting stage.

Legislative drafters have both a sense of how the legislative process works as well as an overview of federal legislation as a whole. They can assist instructing officers on the following points:

- the policy rationale for the proposed legislative measure,
- determining the legal form the measure may take,
- fitting the measure into the body of federal legislation,
- determining the content of the drafting instructions,
- inserting certain types of provisions into the measure,
- selecting a comprehensive or specific solution to resolve a particular problem,
- determining the time required for drafting and printing the bill.

The advice of legislative drafters may save the instructing officer time and trouble. For example, it may avoid having to go back to Cabinet to obtain authorization to include essential provisions.

Legislative drafters may also advise on general principles and policies that may affect the proposal, particularly on generally accepted drafting principles, such as those expressed in the Legislative Drafting Conventions of the Uniform Law Conference of Canada, available on the Internet at

[www.law.ualberta.ca/alri/ulc/acts/edraft.htm](http://www.law.ualberta.ca/alri/ulc/acts/edraft.htm).

## Good Governance Guidelines

The Good Governance Guidelines are a set of analytical criteria for use by departments and Ministers in the assessment and development of policy. They were developed as part of a broader exercise designed to improve policy-making in the federal government and facilitate high quality policy discussions in Cabinet Committees.

<b>POL</b> icy Basics Test	<p><b>Has the problem been adequately identified and are the goals and objectives clearly defined?</b></p> <p>Are there <b>horizontal considerations</b> and <b>interdependencies</b> with other priorities or issues (e.g. environment, rural, science, trade, etc.)?</p> <p>Are they in <b>citizen-focussed</b> terms?</p> <p>Does this initiative build on and fill <b>gaps</b> in existing policy and programs (federal, provincial)?</p> <p>Does the proposal <b>replace or overlap</b> any existing program?</p> <p>Will this initiative be sustainable (social, economic, environmental) in the longer term?</p> <p>Have a range of options for the achievement of goals/objectives been considered? The full range and choice of instruments (e.g. legislative, regulatory, expenditures)?</p> <p>Has a feedback mechanism been incorporated into policy and program design to allow for evaluation, fine-tuning, and updating?</p> <p>Is the policy based on sound science advice?</p>
<b>Public Interest</b> Test	<p><b>How would the proposal meet the needs of Canadians?</b></p> <p>How do the overall <b>societal benefits</b> compare to its <b>costs</b>? Have the full range of <b>risks</b> been assessed?</p> <p>Does the proposal respect the <b>rights of Canadians</b> and take into account their <b>diverse needs</b> (e.g. cultural, linguistic, etc.)?</p> <p>Have Canadians been given an opportunity for <b>meaningful input</b>?</p>
<b>Government Themes</b> Test	<p><b>How would the proposal contribute to the Government's priorities as set out in the Speech from the Throne, the Budget, etc.?</b></p> <p>Is it <b>consistent with current legislative</b> (e.g. Official Languages Act, Privacy Act, etc.) and <b>government policy and program guidelines or directives</b> (e.g. Social Union Framework, Expenditure Management System, Environmental Assessment, F/P/T or international agreements such as WTO and/or NAFTA)?</p> <p>Have other departments been involved in the development of this initiative? Have <b>opportunities for synergies</b> (across issues and departments) been identified?</p> <p>What is the plan for <b>connecting this initiative with Canadians</b>?</p>

<b>Federal Involvement Test</b>	<p><b>What is the rationale for federal involvement in this area (e.g. constitutional, legal, scope of issue)?</b></p> <p>Have the particular <b>federal interests</b> been adequately identified?</p> <p>How does the initiative balance the need for <b>coordinated Canada-wide action with the need for flexibility</b> to reflect the diverse needs and circumstances of provinces and regions?</p>
<b>Question of Accountability Test</b>	<p><b>Has an adequate accountability framework been developed? (in particular for multi-stakeholder arrangements)</b></p> <p>Have mechanisms been established for ongoing <b>monitoring , measuring, and reporting to Canadians</b> on outcomes and performance?</p> <p>Have <b>eligibility criteria and public service commitments</b> been made publicly available?</p>
<b>Urging Partnerships</b>	<p><b>Can this initiative benefit from joint planning and collaboration?</b></p> <p>Has it been designed in a way that <b>complements existing provincial programming and services</b>?</p> <p>Are measures in place to ensure <b>equitable treatment of provinces/regions</b> - in consideration of their diverse needs and circumstances? [Has consideration been given to the unique character of Quebec in policy and program design?]</p> <p>If a substantial change in funding or design is being considered, have partners, particularly provinces and territories, been <b>consulted or given advance notice</b>?</p> <p>Are the <b>relative roles and contributions</b> of partners clear? How will they be publicly recognized?</p> <p>Have <b>opportunities for partnerships</b> with communities, voluntary sector and private sector been considered?</p> <p>Have mechanisms been established to <b>consult with Aboriginal peoples</b>?</p>
<b>Efficiency and Affordability Test</b>	<p><b>Will the proposed option be cost-effective?</b></p> <p>Does the proposal assess <b>non-spending options</b>?</p> <p>Does it consider reallocation options?</p> <p>Would a <b>joint F/P/T or partnership based effort</b> result in a more efficient or effective program or service?</p> <p>What are the <b>longer term funding issues</b> associated with this proposal – for the federal government, and for its partners?</p> <p>Are there <b>program integrity</b> issues related to this initiative (e.g. non-discretionary/legal commitments, risks, strategic investments)?</p> <p>Has the initiative considered <b>downstream litigation risks</b> (e.g. potential for trade disputes, Aboriginal claims, etc.)</p>

## Preparing a Memorandum to Cabinet

### Form and Content

A Memorandum to Cabinet (MC) is a Minister's vehicle for submitting and explaining a proposal to the Cabinet and for obtaining its approval.

An MC conforms to a predetermined structure and style. This makes it easier for Ministers and their advisers to locate the information that interests them so that they can express an opinion on the proposal.

An MC is written in the two official languages and presented in a bilingual format. Both versions must be of equally high quality. This is because an MC is the cornerstone of the drafting process. An inadequately translated version that does not use appropriate terminology may create confusion and waste valuable time.

Ministers should be able to expect a carefully written text, regardless of which language they use. Detailed guidance on the form and content of MCs is provided in *Memoranda to Cabinet: A Drafter's Guide*, published by the Privy Council Office ([http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=publications&Sub=mc&Doc=mc\\_e.htm](http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=publications&Sub=mc&Doc=mc_e.htm)).

An MC is composed of two main parts: the Ministerial Recommendation and the Analysis. Drafting instructions for the bill are included in an annex.

### Ministerial Recommendation

The Ministerial Recommendation describes the current situation (the problem) and the solution (legislative measure) being proposed. The financial aspect of the solution is also addressed. This is the only place in the memorandum where the Minister expresses his or her opinions and observations.

The Ministerial Recommendation also includes a communications overview which sets out the main elements of the proposed legislative measure in respect of which communications come into play. The format is provided by the PCO.

A communications plan is contained in an annex to the MC and is prepared by officials responsible for the department's public relations in close collaboration with the Minister's office. The plan anticipates possible public and media reaction to the proposed legislative measure and shows how the Minister intends to present and explain the proposal to the public, in both the short and long term.

The Ministerial Recommendation concludes with the Minister's main recommendation:

It is recommended that: ... the Legislation Section of the Department of Justice be authorized to draft [title of the bill] in consultation with [the responsible department(s) or bodies] and in accordance with the drafting instructions set out in annex [...]

### **Analysis**

The Analysis describes various options that have been considered, the advantages and disadvantages of each one and their financial implications. It does not express an opinion; it is, instead, a detailed and objective explanation of the context and solutions.

### **Bill-drafting Instructions**

The annex of drafting instructions serves two essential purposes.

- It provides the members of Cabinet with enough information to understand the substance of the proposed legislative measure and make an informed decision, specifically by bringing the main questions to their attention.
- It establishes the framework within which the people most directly involved in the drafting process (legislative drafters, instructing officers and departmental legal advisers) will have to work.

Detailed guidance on preparing drafting instructions follows.

## Preparing Bill-drafting Instructions for a Memorandum to Cabinet

### Introduction

This section of the Guide provides departmental officials with information about preparing bill-drafting instructions to be included in a Memorandum to Cabinet (MC). Its aim is to provide them with a process that reflects the thinking involved in transforming policy into legislation. This process is presented in the form of a checklist that outlines a series of principal matters to be considered. Each matter is supplemented by detailed questions and comments. By responding to them, officials should be able to prepare drafting instructions that provide a clear, succinct picture of how the approved policy is to be reflected in legislation.

Most of the matters addressed at the MC stage will have to be addressed in more detail when the bill is drafted. But it is a good idea for departmental officials to begin thinking about them as early as possible so that they are well-prepared for the bill-drafting stage. It is particularly important to be ready to provide detailed drafting instructions in both languages so that each language version of the bill can be properly drafted.

### Purposes of Drafting Instructions

The drafting instructions in an MC are the basis on which a Government bill is drafted and approved for introduction in Parliament. They both determine and limit what the draft bill is to contain. Drafting instructions serve a number of related purposes:

- act as a key mechanism for the Cabinet's control over the legislative process by giving Ministers a more detailed view of how the policy they are approving will be reflected in legislation;
- provide an opportunity for the sponsoring department to think through its proposals;
- provide an opportunity for other departments to appreciate how, if at all, the proposals will affect them;
- guide the legislative drafters who eventually have to draft the bill;
- serve as a benchmark for assessing whether the draft bill does what Cabinet authorized, or whether additional authority must be sought for particular provisions of the bill.

## **Format and Style**

Drafting instructions should be written in clear, straightforward language. They should not be in “legal” language or attempt to dictate the wording of the bill. They should be prepared keeping in mind the purposes outlined above.

The checklist that follows covers a wide range of matters and prompts instructing officers to think about the details needed to draft legislation. However, many of these details do not have to be specifically expressed in the MC drafting instructions, and indeed they should not be.

The drafting instructions should steer a course between the extremes of too much detail and too little. On the one hand, the drafting instructions should be general enough to allow flexibility for minor policy questions to be worked out in the drafting process. On the other hand, they should not provide carte blanche authority to draft legislation for vaguely defined policy objectives, without any indication of how the objectives are to be achieved.

It is important to find a balance between high-quality information that provides an understanding of the most important issues and a degree of flexibility that allows for unforeseen questions to be addressed.

## **Checklist for Preparing Bill-drafting Instructions for a Memorandum to Cabinet**

This checklist covers the following elements:

### **Getting Started**

- Main objectives of the proposal
- Time needed to prepare drafting instructions
- Public commitments

### **General Legal and Policy Matters**

- Legal context
- Policy context
- Resources
- Legal instruments for accomplishing policy objectives

### **Legal Structure of the Proposal**

- Combining matters in a single bill
- Types of legal instruments

- Provisions that should be in the Act
- Provisions that should be in regulations
- Incorporation by reference
- Administrative instruments
- Recipients of powers

#### Particular provisions

- Titles
- Preambles and purpose clauses
- General application provisions
- Application to the Crown
- Public bodies and offices
- Senior appointments
- Financial provisions
- Information provisions
- Monitoring compliance
- Sanctions for noncompliance
- Enforcement powers
- Appeals and review mechanisms
- Dispute resolution mechanisms
- Extraordinary provisions

#### Technical legislative matters

- Sunset and review provisions
- Repeals
- Consequential and conditional amendments
- Transitional provisions
- Coming into force

#### Finishing touches

- Internal consultation
- External consultation
- Time needed for drafting the bill and implementing the Act
- Outstanding matters



*Getting Started*

MATTERS	QUESTIONS AND COMMENTS
Main objectives of the proposal	<p><b>What are the main objectives of the proposal?</b></p> <p>It is essential for the sponsoring department to clearly articulate the precise purpose of proposed legislation, so that Cabinet and the drafters properly understand what the legislation is supposed to achieve.</p> <p>For amending bills that are intended to accomplish a number of different purposes, the instructions should explain these purposes separately in relation to the provisions that are to be amended. They should also include a general instruction to make consequential amendments to other provisions.</p>
Time needed to prepare drafting instructions	<p><b>Is there enough time to prepare the drafting instructions?</b></p> <p>Thinking through the detail of drafting instructions will raise policy issues that were not identified when ideas were expressed in general terms in the policy development stage. Time will be needed to address and resolve these issues. The sponsoring department must be prepared to spend the time necessary to produce a coherent set of provisions to implement their proposals. Unresolved issues haunt a legislative project until they are resolved and it is wiser and more efficient in the long run to resolve as much as possible at the Memorandum to Cabinet stage, before the actual drafting begins.</p> <p>The time spent in thinking through drafting instructions is well worth it. Good drafting instructions will avoid:</p> <ul style="list-style-type: none"> <li>• Delays in drafting the bill because of unresolved policy questions;</li> <li>• Having to go back to Cabinet to clarify policy issues that were not adequately resolved in the original Memorandum to Cabinet;</li> <li>• Having to propose amendments in Parliament because the policy was still in flux after the bill was introduced or because the two language versions were not consistent;</li> <li>• Being left without the necessary legal authority after the Bill is passed to draft the regulations required to complete the legislative scheme.</li> </ul> <p>Departments should not rely on time frames that have been established before the legislative drafter has been consulted. The time needed to prepare the draft may be much greater than the department expects.</p>
Public commitments	<p><b>Has the Government or the Minister made any public commitments, either generally or about the specific legislative proposal, that will affect its contents or timing?</b></p> <p>Often when legislative policy is being developed, the Government or a Minister makes commitments about it, such as promising to consult with stakeholders or guaranteeing that the legislation would be framed in a certain way. They may also make general commitments, such as those in the Federal Gender Equality Action Plan approved by the Cabinet in 1995. These public commitments could affect the timing of the legislation or require it to be framed in a certain way.</p> <p>Stakeholders or provincial governments are sometimes consulted on the draft proposals. When the aim of consultations is a negotiated agreement on wording that is to be proposed in the legislation, drafters should be consulted before specific wording is agreed on.</p>

*General Legal and Policy Matters*

MATTERS	QUESTIONS AND COMMENTS
Legal context	<p><b>What legal considerations affect the proposal?</b></p> <p>This portion of the drafting instructions should be completed by the departmental legal adviser. It involves an assessment of the law related to the proposal in order to ensure that the resulting legislation will operate effectively. Some areas of particular concern are:</p> <ul style="list-style-type: none"> <li>• Does Parliament have constitutional authority to enact the legislation?</li> <li>• Will it affect matters within provincial jurisdiction?</li> <li>• Is it consistent with the Canadian Charter of Rights and Freedoms, the Canadian Bill of Rights and the International Covenant on Human Rights? <ul style="list-style-type: none"> <li>– Note that the Cabinet Support System instituted in 1991 requires the Analysis section of the MC to address the legal implications of the proposal, particularly those relating to the Charter and the constitutional division of powers. (see also “Constitutional Issues and the Cabinet Support System” in this chapter).</li> </ul> </li> <li>• Does the proposal raise any gender or other equality issues? <ul style="list-style-type: none"> <li>– Consult the handbook entitled “Diversity and Justice: Perspectives on Gender Equality”, the gender equality specialists in the various sections of the Department of Justice or the Office of the Senior Advisor on Gender Equality and Diversity in that Department.</li> </ul> </li> <li>• Is it consistent with important Acts of general application, such as the <i>Access to Information Act</i>, the <i>Privacy Act</i>, the <i>Official Languages Act</i> and the <i>Financial Administration Act</i>?</li> <li>• Do any of the proposed provisions unnecessarily duplicate provisions in the <i>Interpretation Act</i>, the <i>Criminal Code</i>, or any other Acts of general application? If they are not quite the same, is there a good reason for the difference?</li> <li>• Do any elements of the proposal conflict with other legislation? <ul style="list-style-type: none"> <li>– Any conflicting legislation should be specifically identified and the conflict should not be resolved by a general “notwithstanding” provision.</li> </ul> </li> <li>• Does the proposal deal with matters that are also dealt with by another bill that is being prepared or has been introduced in Parliament? If so, are the officials responsible for that bill aware of the overlap?</li> <li>• Does the proposal respond effectively to any court decisions or legal opinions that gave rise to the legislation or any of its elements?</li> <li>• Are there any international agreements to which Canada is a signatory that have a bearing on the proposal?</li> <li>• Does the proposal rely on provincial private law (for example, contracts or property) to supplement it? If so, have both legal systems (civil law in Quebec and common law elsewhere) been considered? <ul style="list-style-type: none"> <li>– You can consult the Civil Code Section of the Department of Justice about legal concepts and institutions of the civil law of Quebec.</li> </ul> </li> </ul>
Policy context	<p><b>Do any Government policies affect the proposal?</b></p> <p>There are a number of policies approved by the Cabinet that may have a bearing on the proposal. They must be considered to ensure that the proposal is consistent with them. These policies include:</p>

MATTERS	QUESTIONS AND COMMENTS
	<ul style="list-style-type: none"> <li>• <i>1999 Cabinet Directive on Environmental Assessment of Policy, Plan and Program Proposals</i>, Canadian Environmental Assessment Agency <a href="http://www.ceaa-acee.gc.ca/0012/0006/sea_e.htm">http://www.ceaa-acee.gc.ca/0012/0006/sea_e.htm</a>;</li> <li>• <i>Regulatory Policy</i>, approved by the Treasury Board in <a href="http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&amp;Page=Publications">http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&amp;Page=Publications</a>;</li> <li>• Federal Gender Equality Action Plan, approved by the Cabinet in 1995;</li> <li>• <i>Cabinet Directive on Law-making</i>, approved by the Cabinet in 1999 (set out at the beginning of this Guide);</li> <li>• <i>Federal Identity Program</i>: <a href="http://www.tbs-sct.gc.ca/pubs_pol/sipubs/tb_fip/siglist_e.html">http://www.tbs-sct.gc.ca/pubs_pol/sipubs/tb_fip/siglist_e.html</a>.</li> </ul> <p>One of the best ways to ensure consistency with government policies is by consulting the officials who are likely to know about them.</p>
Resources	<p><b>Who will incur costs as a result of the legislation?</b></p> <p>If non-federal bodies will incur costs as a result of the legislation, a strategy must be identified for managing their reaction or obtaining their support.</p> <p>If there are new federal costs associated with implementing or complying with the proposed legislation, a source of funding will be needed before Cabinet approval.</p>
Legal instruments for accomplishing policy objectives	<p><b>How will the policy objectives of the proposal be accomplished?</b></p> <p>As discussed above in Chapter 1.1 “Choosing the Right Tools to Accomplish Policy Objectives”, there are many legal mechanisms available for implementing policy objectives. These include:</p> <ul style="list-style-type: none"> <li>• The creation of public bodies and offices;</li> <li>• The conferral of powers and duties on public officials;</li> <li>• Rules that regulate, prohibit, require or authorize particular activities;</li> <li>• The creation of sanctions for non-compliance with the rules.</li> </ul> <p>Some particular mechanisms that are often adopted include:</p> <ul style="list-style-type: none"> <li>• Licensing schemes directed toward controlling particular activities;</li> <li>• Monitoring and enforcement provisions.</li> </ul> <p>For further information on these mechanisms, consult <i>Designing Regulatory Laws that Work</i> published by the Constitutional and Administrative Law Section of the Department of Justice. See also “Enforcement Powers” in this chapter.</p> <p>As far as possible, the instructions should provide a picture of how the legislation will actually work, describing the type of machinery envisaged and the necessary powers and duties, including how the legislation will be enforced.</p>

*Legal Structure of the Proposal*

MATTERS	QUESTIONS AND COMMENTS
Combining matters in a single bill	<p><b>What should be included in a single bill?</b></p> <p>Related matters should be combined in one bill, rather than being divided among several bills on similar subjects. A single bill allows parliamentarians to make the most effective and efficient use of their time for debate and study in committee. However, matters should only be combined if it is appropriate and consistent with legislative drafting principles. Titles to Acts are among the most important tools people use to find the law. If very different matters are combined in one Act, it becomes more difficult for people to find the law relating to the matters that concern them.</p>
Types of legal instruments	<p><b>What types of legal instruments should be used?</b></p> <p>There are many legal instruments and other related documents available to implement policy. They fall into three categories:</p> <ul style="list-style-type: none"> <li>• Acts</li> <li>• Regulations</li> <li>• Administrative documents (for example, contracts, internal directives, bulletins, decision documents).</li> </ul> <p>Both Acts and regulations are forms of law, with the same legal effect. Administrative documents do not necessarily have legal effect.</p> <p>Additional differences among these categories involve the procedures used to make them. Statutes involve the parliamentary process while regulations are governed by the requirements of the <i>Statutory Instruments Act</i>. There are no general statutory requirements for other subordinate documents, although they are sometimes subject to particular requirements such as those relating to natural justice.</p> <p>The provisions of an Act must fit together in a coherent scheme with the regulations and administrative documents that it authorizes. This means that the authority to make regulations and administrative documents must be established by the Act, either expressly or impliedly.</p>
Provisions that should be in the Act	<p><b>What should be in the Act?</b></p> <p>Generally speaking, the Act contains the fundamental policy or underlying principles of legislation that are unlikely to change. The following additional matters are usually dealt with in the Act:</p> <ul style="list-style-type: none"> <li>• Provisions that might substantially affect personal rights (search and seizure powers, penalties for serious offences, expropriation);</li> <li>• Provisions establishing the structure of public bodies or providing for senior appointments;</li> <li>• Controversial matters that should be addressed in Parliament;</li> <li>• Amendments to Acts, including the definition of terms used in Acts.</li> </ul>

MATTERS	QUESTIONS AND COMMENTS
Provisions that should be in regulations	<p><b>What should be in regulations?</b></p> <p>Regulations should deal with matters of a legislative (as opposed to administrative) nature that are subordinate to the main principles enunciated in the Act. This includes:</p> <ul style="list-style-type: none"> <li>• Procedural matters, for example, how to apply for a licence;</li> <li>• Matters that are likely to need adjusting often, for example, prescribing interest rates, setting annual fishing quotas;</li> <li>• Technical matters involving scientific or other expertise;</li> <li>• Rules that can only be made after the department gains some experience in administering the new Act, for example, prescribing the time within which certain steps should be taken;</li> <li>• Fees applicable to a broad sector of the public.</li> </ul> <p>Some regulation-making powers require specific Cabinet approval. The drafting instructions must specifically provide authority to do any of the following things and the MC must provide reasons for requesting this authority:</p> <ul style="list-style-type: none"> <li>• Substantially affect personal rights and liberties;</li> <li>• Determine important matters of policy or principle;</li> <li>• Amend or add to the enabling Act or other Acts;</li> <li>• Exclude the ordinary jurisdiction of the Courts;</li> <li>• Apply retroactively;</li> <li>• Sub-delegate regulation-making authority;</li> <li>• Impose a charge on public revenue or a tax on the public;</li> <li>• Set the penalties for offences (other than administrative monetary penalties).</li> </ul> <p>Finally, consider what, if any, procedural requirements should apply to making the regulations, for example, are the requirements of the <i>Statutory Instruments Act</i> and the <i>Regulatory Policy</i> appropriate (see Summary of the "Regulatory Process" in part 3).</p> <ul style="list-style-type: none"> <li>• Note, however, that if an instrument of a legislative nature is to be expressly exempted from the requirements of the <i>Statutory Instruments Act</i> and the <i>Regulatory Policy</i>, the drafting instructions must specifically provide authority for the exemption and the MC must provide reasons for requesting this authority.</li> </ul>
Incorporation by reference	<p><b>Should some matters be dealt with through documents or laws incorporated by reference?</b></p> <p>Legislation does not have to spell out all the details of what it requires or provides. It can instead refer to other laws or documents and incorporate their contents without reproducing them. If this is to be done in regulations, consideration should be given to whether particular authorizing provisions are needed. Incorporation by reference is also subject to constitutional requirements governing the publication of laws in both official languages as well as requirements relating to the accessibility and intelligibility of incorporated documents. Departmental Legal Advisers can provide guidance on these questions on the basis of the Legal Policy Statement on Incorporation by Reference issued by the Deputy Minister of Justice.</p>

MATTERS	QUESTIONS AND COMMENTS
Administrative instruments	<p><b>What should be dealt with through administrative instruments?</b></p> <p>Many of the elements of a regulatory scheme should be dealt with in administrative instruments, such as permits, licences, directives or contracts. These include</p> <ul style="list-style-type: none"> <li>• legal requirements that are to be imposed individually on a case-by-case basis;</li> <li>• fees imposed in accordance with procedures such as those in sections 21-23 of the <i>Department of Industry Act</i>;</li> <li>• non-binding guidelines;</li> <li>• internal directives on administrative matters.</li> </ul>
Recipients of powers	<p><b>Who should powers be given to?</b></p> <p>Regulation-making powers</p> <ul style="list-style-type: none"> <li>• Ordinarily, the Governor in Council is authorized to make regulations. A rationale for departures from this practice needs to be provided in the MC.</li> <li>• In some cases, independent regulatory tribunals, such as the National Energy Board, are given regulation-making powers, but their regulations are often subject to the approval of the Governor in Council.</li> </ul> <p>Judicial and quasi-judicial powers</p> <ul style="list-style-type: none"> <li>• Judicial and quasi-judicial powers must be exercised with impartiality and the delegates who exercise them should have the qualifications and security of tenure to ensure their impartiality.</li> </ul> <p>Administrative powers</p> <ul style="list-style-type: none"> <li>• Most administrative powers are given to Ministers who, in turn, have implied authority to authorize officials in their departments to exercise them.</li> <li>• These powers should not be given to the Governor in Council, except powers to make very senior appointments or power relating to international obligations or publicly sensitive matters.</li> <li>• Inspection and enforcement powers are usually given to classes of officials created to exercise these powers.</li> </ul>

### Particular Provisions

MATTERS	QUESTIONS AND COMMENTS
Titles	<p><b>What will be the title of the bill?</b></p> <p>Each bill has a long title, which sets out the scope of the bill and gives a brief description of its purpose. The wording of this title should be left to the bill-drafting stage.</p> <p>A bill to enact a new Act also has a short title, which is used to identify the Act when discussing it or referring to it in other legislation. A short title is also sometimes included in an amending Act that is likely to be referred to in other Acts. A short title should succinctly indicate the Act's subject matter. The following are examples of the long and short titles of an Act:</p> <ul style="list-style-type: none"> <li>• An Act to provide for the financial administration of the Government of Canada, the establishment and maintenance of the accounts of Canada and the control of Crown corporations;</li> <li>• <i>Financial Administration Act</i>.</li> </ul>

MATTERS	QUESTIONS AND COMMENTS
	<p>Finalizing the short title should also be left to the bill-drafting stage. However, a working title is needed from an early stage and care should be taken to establish an appropriate title since it often becomes more difficult to change as the proposal moves forward.</p> <p>Short titles must be consistent with the <i>Federal Identity Program</i> <a href="http://www.tbs-sct.gc.ca/Pubs_pol/sipubs/TB_fip/siglist_e.html">http://www.tbs-sct.gc.ca/Pubs_pol/sipubs/TB_fip/siglist_e.html</a>. It is also important to ensure that both language versions of the title are equivalent and idiomatic. You should beware of using a word in one language just because it is like a word in the other.</p> <p>In the English version, the first word in the short title determines the Act's indexed place in the statute book. Try to avoid words such as "Canadian," "National," "Federal" and "Government" because they make it harder to find the Act by its subject matter in a table of statutes.</p> <p>You may consult the Legislation Section when choosing a title. You must also consult the Machinery of Government Secretariat of PCO about the name of any new public body, which also usually appears in the title (see below "Public bodies and offices").</p>
Preambles and purpose clauses	<p><b>Should there be a preamble or purpose clause?</b></p> <p>Preambles and purpose clauses should not be included in a bill without carefully thinking about what they would add to the bill and what they would contain. They should not be used to make political statements. They can have a significant impact on how the legislation is interpreted by the courts.</p> <p>Preambles and purpose clauses perform different, but overlapping functions.</p> <p>Preambles:</p> <ul style="list-style-type: none"> <li>• can often provide important background information needed for a clear understanding of the bill, or to explain matters that support its constitutionality;</li> <li>• are placed at the front of the bill;</li> <li>• should be drafted sparingly to avoid creating confusion about the meaning of the legislation.</li> </ul> <p>Purpose clauses:</p> <ul style="list-style-type: none"> <li>• indicate what the intended results of the legislation are;</li> <li>• should highlight only the principal purposes;</li> <li>• are included in the body of the legislation;</li> <li>• generally have a greater effect on the interpretation of legislation than preambles.</li> </ul> <p>When a bill amends an existing Act, only the amendments themselves are added to the text of the Act when it is reprinted in a consolidated form. The preamble is not included. In order to ensure public awareness of, and access to, background information for an amending bill, a purpose clause may be considered as an alternative because it can be integrated into the consolidated legislation. Both preambles and purpose clauses must be carefully reviewed by the Department of Justice for appropriate language and content.</p>
General application provisions	<p><b>Should the application of the Act be confined or expanded in any way?</b></p> <p>It is possible to confine or expand the application of the Act in a number of ways:</p> <ul style="list-style-type: none"> <li>• geographically (for example, in particular provinces or territories);</li> </ul>

MATTERS	QUESTIONS AND COMMENTS
	<ul style="list-style-type: none"> <li>temporally (for example, to particular periods of time);</li> <li>jurisdictionally (for example, to the extent that particular matters are within the constitutional authority of Parliament);</li> <li>in terms of the subject matter governed by other Acts (for example, to the extent that particular matters are not regulated under other Acts).</li> </ul> <p>However, application provisions often raise complex legal questions that must be fully explored before they are included. For example, applying an Act outside raises many international law questions, some of which are addressed in the <i>Oceans Act</i>.</p>
Application to the Crown	<p><b>Should the Act be binding on the Crown?</b></p> <p>Legislation does not bind the Crown unless the legislation expressly or impliedly provides that it does. You should consider whether the Act should do so, taking into account the following:</p> <ul style="list-style-type: none"> <li>binding the Crown may entail additional legal liability for government activities;</li> <li>not binding the Crown may render the legislation less effective if it governs an activity that the Crown carries on to a significant degree;</li> <li>agents of the Crown (for example, Crown corporations) generally benefit from Crown immunity, which may give them an advantage over private sector competitors;</li> <li>the Crown has not only a federal aspect, but also provincial and international (Commonwealth) aspects, any or all of which may be bound.</li> </ul> <p>Other governments and departments affected by the legislation should be fully consulted before a provision to bind the Crown is included.</p>
Public bodies and offices	<p><b>What public bodies or offices will be needed?</b></p> <p>The creation of public bodies and offices are matters falling within the prerogatives of the Prime Minister. Proposals for their creation must be discussed with the Machinery of Government Secretariat and the Management Priorities and Senior Personnel Secretariat of the Privy Council Office.</p> <p>The nature and structure of public bodies and offices vary widely, depending on the functions they are to perform. The following are some of the important aspects to consider when creating a public body:</p> <ul style="list-style-type: none"> <li>what name will it have?</li> <li>where will its headquarters be located?</li> <li>will it be a corporation? <ul style="list-style-type: none"> <li>if so, section 90 of the <i>Financial Administration Act</i> requires parliamentary approval for the incorporation of a corporation or the acquisition of shares on behalf of the Crown.</li> </ul> </li> <li>will it have the capacity of a natural person or will its powers be set out in detail?</li> <li>will it be able to enter into contracts, either in its own name or on behalf of the Crown?</li> <li>will it be able to acquire and dispose of property (note the Department of Public Works and Government Services Act and Federal Real Property Act)?</li> <li>will the Auditor General be its auditor (note the <i>Auditor General Act</i>)?</li> <li>will it be subject to the <i>Canadian Environmental Assessment Act</i> or review by the Commissioner for Sustainable Development under the Auditor General Act?</li> <li>will it be an agent of the Crown (and benefit from the non-application of</li> </ul>



MATTERS	QUESTIONS AND COMMENTS
	<p>legislation to the Crown)?</p> <ul style="list-style-type: none"> <li>• which minister will be responsible for it?</li> <li>• will it report to Parliament?</li> <li>• how many members will it have?</li> <li>• will there be executive officers (chairperson, secretary, etc.)?</li> <li>• how will the members and executive officers be appointed? (see the next box)</li> <li>• will the body, or any of its members or staff, be part of the public service and subject to general public service legislation such as: <ul style="list-style-type: none"> <li>– <i>Financial Administration Act</i></li> <li>– <i>Public Service Staff Relations Act</i></li> <li>– <i>Public Service Employment Act</i></li> <li>– <i>Employment Equity Act</i></li> <li>– <i>Public Service Superannuation Act</i></li> <li>– <i>Access to Information Act</i></li> <li>– <i>Privacy Act</i></li> <li>– <i>Official Languages Act</i></li> </ul> </li> </ul> <p>The Alternative Service Delivery Office of the Treasury Board Secretariat and the Constitutional and Administrative Law Section of the Department of Justice should also be consulted on these matters. Further information can be found in <i>A Manual for Designing Administrative Tribunals</i> published by the Constitutional and Administrative Law Section of the Department of Justice.</p>
Senior appointments	<p><b>Will the Act authorize the appointment of members of boards and tribunals and other senior officials?</b></p> <p>Mechanisms for appointing these officials fall within the prerogatives of the Prime Minister. Proposals for legislation dealing with these appointments must be referred to the Machinery of Government Secretariat and the Management Priorities and Senior Personnel Secretariat of the Privy Council Office, including legislation dealing with:</p> <ul style="list-style-type: none"> <li>• how these officials are to be appointed;</li> <li>• what their tenure of office will be;</li> <li>• what their status or rank will be (for example, as a deputy head);</li> <li>• what public service legislation will apply to them (see previous box).</li> </ul> <p>If the terms and conditions of employment of an official to be appointed by the Governor in Council are not described expressly in the legislation, they will be established by the Management Priorities and Senior Personnel Branch of the Privy Council Office within the parameters of sections 23 and 24 of the <i>Interpretation Act</i>.</p> <p>These appointments are usually made by the Governor in Council.</p>
Financial provisions	<p><b>Will there be provisions involving the collection or disposition of public money?</b></p> <p>The <i>Financial Administration Act</i> is the main Act governing the collection and disposition of public money. It will apply unless there is an express provision to the contrary. Particular attention should be paid to that Act when creating a public body or office.</p> <p>The Department of Finance must be consulted about any proposal to:</p>

MATTERS	QUESTIONS AND COMMENTS
	<ul style="list-style-type: none"> <li>• create a special account in the Consolidated Revenue Fund;</li> <li>• authorize a public body to deal with money without going through the Consolidated Revenue Fund;</li> <li>• provide guarantees or indemnification;</li> <li>• create an ongoing statutory appropriation;</li> <li>• authorize the borrowing of money.</li> </ul> <p>For additional information on financial provisions, see Department of Justice <i>Financial Administration Act Commentary</i> published by the Legal Operations Sector of the Department of Justice.</p>
Information provisions	<p><b>Will the legislation restrict or require the disclosure of information?</b></p> <p>The disclosure of information is governed by the <i>Access to Information Act</i> and the <i>Privacy Act</i>. It is also affected by legal concepts of confidentiality and privilege. Provisions affecting the disclosure of information should be reviewed in light of these requirements and discussed with the Information Law and Privacy Section of the Department of Justice.</p> <p>Proposals to authorize the use of Social Insurance Numbers require specific Cabinet approval.</p>
Monitoring compliance	<p><b>Should there be provisions for monitoring compliance with the legislation?</b></p> <p>Provisions for monitoring compliance should be considered to ensure that the legislation is effective. These provisions authorize or require inspections or analyses to be conducted on a routine basis (as opposed to when there is suspicion of wrongdoing: see below "Enforcement powers"). You should consider who will conduct the monitoring activities and the circumstances in which they may be conducted.</p>
Sanctions for non-compliance	<p><b>Will penalties or other sanctions be needed to ensure compliance with the legislation?</b></p> <p>Most legislation is enforced by the imposition of sanctions for non-compliance. They range from penal sanctions, such as fines and imprisonment, to administrative sanctions, such as licence suspensions or disqualifications.</p> <p>There are three basic methods of imposing sanctions:</p> <ul style="list-style-type: none"> <li>• through the prosecution of offences in the courts;</li> <li>• through offence ticketing schemes, such as the <i>Contraventions Act</i>;</li> <li>• through the imposition of administrative monetary penalties or other administrative sanctions.</li> </ul> <p>Provisions for the imposition of penal sanctions should reflect the principles set out in sections 718 to 718.2 of the <i>Criminal Code</i>. They should be reviewed to ensure that:</p> <ul style="list-style-type: none"> <li>• they will be effective in obtaining compliance;</li> <li>• there will be effective enforcement mechanisms, such as powers to conduct inspections or searches;</li> <li>• the sanctions are appropriate for the seriousness of the noncompliant behaviour;</li> <li>• the sanctions are variable enough to reflect the circumstances of the accused person in order to ensure that they receive equal treatment under the law.</li> </ul> <p>If administrative sanctions are to be imposed, a mechanism will be needed for their</p>

MATTERS	QUESTIONS AND COMMENTS
	<p>imposition. The creation of this mechanism raises many legal and policy choices to be considered, including choices about</p> <ul style="list-style-type: none"> <li>• Strict or absolute liability;</li> <li>• The processes by which liability for and the amount of a sanction will be determined;</li> <li>• The relationship of the administrative sanctions to criminal prosecution;</li> <li>• The institutional structure of required impartial review.</li> </ul> <p>See also “Proportionality of Sentences for Offences” in this chapter and <i>Designing Regulatory Laws that Work</i> published by the Constitutional and Administrative Law Section of the Department of Justice.</p>
Enforcement powers	<p><b>Should the Act authorize searches, seizures and other action to support the prosecution of offences?</b></p> <p>The <i>Criminal Code</i> provides a basic set of powers for the enforcement of federal legislation, including powers to make arrests, conduct searches and seize things (see “Acts of general application, Criminal Code” in Chapter 1.2). However, these powers may not be sufficient or they may have to be supplemented. Alternative or supplementary enforcement powers should be developed in accordance with:</p> <ul style="list-style-type: none"> <li>• Guidelines for Granting Enforcement Powers under Federal Legislation,</li> <li>• Principles for the Attribution of Federal Enforcement Powers</li> </ul> <p>(See “Particular Legal and Policy Considerations” in this chapter)</p>
Appeals and review mechanisms	<p><b>Should there be procedures for appealing or reviewing decisions of administrative bodies created or authorized to make decisions under the Act?</b></p> <p>Judicial Review</p> <p>The <i>Federal Court Act</i> provides that the Federal Court may review the decisions of any “federal board, commission or tribunal.” This review concerns the legality of the decisions, as opposed to their merits. In most cases, applications for review are heard by the Trial Division of the Court. However, section 28 of that Act specifies bodies whose decisions are reviewed by the Court of Appeal.</p> <p>Appeals</p> <p>Appeals generally concern the merits as well as the legality of decisions. A right of appeal exists only if it is granted expressly by the Act. Appeals may be taken to the courts (usually the Federal Court) or to an administrative tribunal created by the Act (see also “Creation of public bodies and offices” in this checklist).</p> <p>A decision is not generally subject to judicial review if it is subject to appeal.</p> <p>Review</p> <p>It may also be appropriate to create other review mechanisms (in addition to judicial review and appeal). A decision-making body may be authorized to review its own decisions. Another body (Review Committee, Revision Office, Council, etc.) may be created to review the decision or an existing body (for example, the Cabinet) may be authorized to review them.</p> <p>Unlike appeals, which are limited to particular grounds of appeal, reviews may concern all aspects of the original decision, as if a new decision were being made.</p>
Dispute	<p><b>Should there be mechanisms for the resolution of disputes arising under the</b></p>

MATTERS	QUESTIONS AND COMMENTS
resolution mechanisms	<p><b>legislation?</b></p> <p>Consideration should be given to including provisions for the resolution of disputes instead of relying on the courts, whose procedures are usually costly and involved. Some examples of dispute resolution mechanisms are negotiation, mediation and neutral evaluation.</p> <p>The Dispute Resolution Services of the Department of Justice provides advice on dispute resolution mechanisms. Further guidance can be found in two documents published by the Department of Justice. The first is <i>Dispute Resolution Reference Guide</i> prepared by the Dispute Resolution Services. The second is <i>Designing Regulatory Laws that Work</i> prepared by the Constitutional and Administrative Law Section.</p>
Extraordinary provisions	<p><b>Does the proposal include any extraordinary provisions requiring specific Cabinet approval?</b></p> <p>Certain types of provisions should be specifically identified because they may be controversial. Ministers must be made aware of them so that they can properly assess whether they should be included in the legislation. These sorts of provisions involve:</p> <ul style="list-style-type: none"> <li>• the retroactive application of legislation;</li> <li>• broad powers to grant exemptions from the legislation;</li> <li>• power to subdelegate regulation-making powers;</li> <li>• excluding the jurisdiction of the courts;</li> <li>• expropriation of property;</li> <li>• emergency powers;</li> <li>• substantial restrictions on fundamental rights or freedoms;</li> <li>• regulation-making powers dealing with matters that are usually provided for in Acts (see above "What should be in the Act").</li> </ul>

*Technical Legislative Matters*

MATTERS	QUESTIONS AND COMMENTS
Sunset and review provisions	<p><b>Should provisions be included for the expiry or review of the Act?</b></p> <p>Caution should be taken when considering whether to include a “sunset” or expiration provision in a bill, since these provisions may result in a gap of legal authority if the new legislative regime cannot be brought into force in time.</p> <p>Similarly, caution should be taken when considering inclusion of a provision for mandatory review of the Act within a particular time or by a particular committee given that this limits Parliament’s flexibility.</p> <p>Alternatives to these provisions should be fully explored before proposing to include them.</p>
Repeal	<p><b>Are there any Acts or regulations that have to be repealed as a result of the legislation?</b></p> <p>If a new Act is proposed to replace an existing Act, the existing Act will have to be repealed. It may also be necessary to repeal particular provisions of related Acts as well as regulations. If these provisions or regulations are administered by other departments, these departments must be consulted.</p>
Consequential and coordinating amendments	<p><b>Are there any Acts or regulations that will have to be amended as the result of the legislation?</b></p> <p>New legislation often affects provisions in other Acts. One of the most common examples of this occurs when the name of an Act is changed. References to the Act in other legislation must be amended to reflect the change.</p> <p>You should also determine whether any other legislation amends the same provisions. If so, amendments will be needed to co-ordinate the amendments so that one does not undo the other.</p>
Transitional provisions	<p><b>Will any transitional provisions be needed to deal with matters arising before the Act comes into force?</b></p> <p>Whenever changes are made to the law, consideration should be given to matters that arose under the previous law, but which are still ongoing after the new law comes into force. These matters include:</p> <ul style="list-style-type: none"> <li>• regulations made under the previous law;</li> <li>• rights or benefits granted under the previous law;</li> <li>• appointments to offices;</li> <li>• offences committed under the previous law;</li> <li>• judicial or administrative proceedings involving the application of the previous law.</li> </ul> <p>Many of these matters are governed by the general transitional provisions in sections 43 and 44 of the <i>Interpretation Act</i>. However, these provisions may not provide the result intended in all cases. It may also be unclear how they apply in particular cases. Special transitional provisions are often needed, particularly when:</p> <ul style="list-style-type: none"> <li>• an administrative body is abolished and another created to take its place;</li> <li>• money appropriated for the purposes of the repealed Act is to be used for the purposes of a new Act.</li> </ul>

MATTERS	QUESTIONS AND COMMENTS
	Finally, regulations made under existing legislation should be reviewed to determine which of them should continue in force under the new legislation and to ensure that they are compatible with it. Regulations should be expressly repealed if they are not intended to continue in force. This will avoid doubts about their status.
Coming into force	<p><b>When should the Act come into force?</b></p> <p>When an Act comes into force, it begins to operate as law. An Act comes into force on the day it receives Royal Assent, unless it says otherwise. There are a number of options. It may come into force</p> <ul style="list-style-type: none"> <li>• on a specified day;</li> <li>• on a day dependent on a specific event (for example, the coming-into-force of another Act);</li> <li>• on a day to be fixed by order of the Governor in Council.</li> </ul> <p>An Act may also provide that different provisions may come into force on different days.</p> <p>If a provision for an Act to come into force retroactively is to be included, it must be clearly authorized by the drafting instructions.</p>

### *Finishing Touches*

MATTERS	QUESTIONS AND COMMENTS
Internal consultation	<p><b>Will any other affected Ministers, departments or agencies of the federal government have to be consulted on drafting the bill?</b></p> <p>Ministers, departments or agencies who are consulted on the policy proposals should also be given the opportunity to comment on the drafting instructions. This is particularly so when consequential amendments are proposed to legislation administered by those departments. Consider the following questions:</p> <ul style="list-style-type: none"> <li>• Have the affected departments or agencies had an opportunity to review the drafting instructions?</li> <li>• Are there any outstanding issues that need to be addressed before final drafting instructions can be given?</li> <li>• Are there other bills or Acts administered by other departments or agencies that will be affected by the legislation?</li> <li>• Are there other Ministers who will have legal responsibilities or powers under the proposed legislation?</li> <li>• Is there an agreement in place about the extent of those responsibilities or powers?</li> </ul> <p>You should also consider whether consultation may result in changes to the policy and whether Cabinet approval will be needed for the changes.</p>
External consultation	<p><b>Will any consultation with other governments, non-governmental bodies or the public be needed on the draft bill?</b></p> <p>Consultation on draft legislation may be carried out with persons outside the federal government if the MC states that intention and asks for the Cabinet's agreement.</p>

MATTERS	QUESTIONS AND COMMENTS
	<p>You should also consider whether consultation may result in changes to the policy and whether Cabinet approval will be needed for the changes.</p>
<p>Time needed for drafting the bill and implementing the Act</p>	<p><b>How should drafting and implementation time frames be established?</b></p> <p>Ministers usually want to know how long it will take to draft the required bill. These time frames are rarely expressed in the MC or the resulting Cabinet decision, but are established on a less formal basis. They should be determined in consultation with the Legislation and House Planning/Counsel Secretariat of the Privy Council Office and the Legislative Services Branch of Justice, taking into account:</p> <ul style="list-style-type: none"> <li>• the complexity of the bill;</li> <li>• the degree to which the underlying policy is developed or developing;</li> <li>• the drafting resources available.</li> </ul> <p>Implementation dates are also sometimes considered at this stage, although it is impossible to predict how long it will take Parliament to deal with the bill. Additional factors should also be taken into account in establishing implementation dates, including:</p> <ul style="list-style-type: none"> <li>• the work required to draft any necessary regulations (including any amendments to existing regulations);</li> <li>• administrative, staffing and training arrangements needed.</li> </ul>
<p>Outstanding matters</p>	<p><b>Are there any matters that still have to be resolved?</b></p> <p>It is sometimes not possible to resolve all policy issues without unduly delaying the preparation of the bill. In these cases, the MC may identify these matters and provide that they are to be resolved through a supplementary MC or by some other means.</p>

## Particular Legal and Policy Considerations

When preparing legislative proposals, consideration should be given to the legal framework (See Chapter 1.2, “Legal Considerations”) as well as Government policies, such as:

- *1999 Cabinet Directive on Environmental Assessment of Policy, Plan and Program Proposals*, Canadian Environmental Assessment Agency [http://www.ceaa-acee.gc.ca/0012/0006/sea\\_e.htm](http://www.ceaa-acee.gc.ca/0012/0006/sea_e.htm);
- *Regulatory Policy*, approved by the Treasury Board in 1995: <http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications>,
- *Federal Gender Equality Action Plan*, approved by the Cabinet in 1995,
- *Cabinet Directive on Law-making*, approved by the Cabinet in 1999;
- *Federal Identity Program*. [http://www.tbs-sct.gc.ca/Pubs\\_pol/sipubs/TB\\_fip/siglist\\_e.html](http://www.tbs-sct.gc.ca/Pubs_pol/sipubs/TB_fip/siglist_e.html)

This legal and policy framework raises a number of particular considerations, which are described below. They are grouped under three headings:

- Constitutional Issues and the Cabinet Support System;
- Proportionality of Sentences for Offences;
- Enforcement Powers.



### Constitutional Issues and the Cabinet Support System

To ensure that constitutional issues (including the *Canadian Charter of Rights and Freedoms*) are properly taken into account in proposals for new programs or Acts, the Clerk of the Privy Council instituted the Cabinet Support System, with the support of the Department of Justice. The System requires all Memoranda to Cabinet (MCs) to include an analysis of the Charter and other constitutional implications of any policy or program proposal. The Clerk of the Privy Council wrote to all deputy ministers on June 21, 1991, for the purpose of implementing the System.

One of the reasons for the System is that successful Charter challenges in court can result in legislative provisions being struck down or program benefits being extended with significant financial costs to the Government. Another reason for the System is to avoid difficulties in federal-provincial relations. Also, experience has shown that litigation and other legal costs are frequently overlooked when officials estimate the costs of proposals.

The System requires that the Analysis section of each MC address:

- whether the proposal is likely to be subject to serious challenge on constitutional (including Charter) grounds and, if so,
  - the risk of successful challenge,
  - the impact of an adverse decision, and
  - the possible costs of litigation, to the extent that they can be estimated;
- whether the proposal raises division of powers issues that are likely to be sensitive in the current federal-provincial context; and
- whether the proposal would have a significant impact on other federal legislation, and if so, which ones.

If the constitutional implications will be minimal, a simple statement in the MC to the effect that they have been considered and been found to be insignificant would suffice.

If the legal implications are significant, a summary of the analysis should be included in the MC in the same way that analysis of any other significant factor is addressed. These significant implications should then be taken into account in formulating the recommendations to ministers.

If acceptance of a proposal would result in increased demands for legal services and require additional personnel or funding, this should also be included in the MC as a specifically identified part of the overall resource implications of the proposal.

Departmental legal advisers have primary responsibility for assisting their clients with the legal analysis. They are supported in their role by the Public Law and Central Agencies Portfolio of the Department of Justice, which has special expertise in constitutional issues and provides detailed assessments of these issues.

Although the Cabinet Support System is specifically concerned with MCs, its objectives apply throughout the policy-development process. Assessment of Charter implications for policy proposals neither begins nor ends with the MC process. Charter issues can be identified and risks mitigated well before an MC is drafted. Also, MCs are generally written at a high level of generality and principle. Drafting the fine details, such as administrative or regulatory arrangements, can result in new Charter issues being identified after an MC has been approved. Thus, assessment of constitutional and Charter risks must take place throughout the policy-development process.

### Proportionality of sentences for offences

The principle of proportionality of sentences for offences requires the severity of punishments to reflect the relative seriousness of offences. No two offences of comparable seriousness should be punishable by maximum punishments of substantially different severity. Likewise, offences of manifestly disparate seriousness should not attract the same maximum punishment. An Act should provide for different punishments for breaches of different provisions, unless all breaches are of comparable seriousness.

Departments contemplating the enactment of new offences should consult with the Department of Justice, initially through their departmental legal advisers, as early as possible in the policy making process to ensure that the penalty provisions applicable to the offences are consistent with those governing similar conduct in other Acts.

In determining the maximum punishment appropriate for an offence, the Department of Justice considers the following criteria, which were approved by the Cabinet Committee on Human Resources, Social and Legal Affairs in 1991.

#### *Harm:*

- Does the offence involve risk of harm or actual harm?
- If so, is the harm to human life, health or safety? To property? To the environment?
- Is the harm short-term or long-term?
- Is it easily reparable?

The greater the harm or potential harm, the greater the need to deter the conduct giving rise to it and, therefore, the greater should be the punishment imposed on conviction.

#### *Likelihood of detection:*

- Is the misconduct difficult to detect?
- Is it detectable on routine inspection?

Since detection itself often acts as a deterrent to misconduct, an offence that is unlikely to be detected should be subject to greater punishment.

*Profit motive:*

- Does the misconduct result in cost savings or profits for the defendant?

Misconduct that has economic value for the defendant will be more difficult to deter than other types of conduct. If the punishment is to deter non-compliance, it must exceed the savings or profit that may be realized by non-compliance.

*Aggravating factors:*

In addition to these general criteria, consideration is given to aggravating factors that may increase the appropriate punishment in a given case. These are characteristics of the offence that cannot be known in advance; they will vary from case to case. However, the maximum punishment for a given offence should be assigned after considering the worst case in order to ensure that the sanction can have a deterrent effect on the violator and others. Mitigating factors can be taken into account by the sentencing court.

Aggravating factors are:

- previous convictions;
- failure to co-operate in the investigation or to abide by previous orders or warnings;
- harm caused to particularly vulnerable victims;
- duration of non-compliance;
- intention, knowledge or recklessness regarding non-compliance and its consequences;
- involvement of high-level management;
- actual costs saved or profit realized; and
- actual risk created or actual harm caused.

## Enforcement Powers

When considering the enactment of new enforcement powers, consideration should be given to:

- *Guidelines for Granting Enforcement Powers under Federal Legislation;*
- *Principles for the Attribution of Federal Enforcement Powers.*

These guidelines and principles are reproduced below.

Consideration should also be given to developing a compliance and enforcement policy for the purpose of implementing any enforcement powers that may be granted.

Sponsoring departments should also consult with the Department of Justice, initially through their departmental legal services units, as early as possible in the policy making process to ensure that the enforcement powers are consistent with those governing similar conduct in other Acts.

### *Guidelines for Granting Enforcement Powers under Federal Legislation*

The following guidelines for granting enforcement powers under federal legislation were approved by the former Interdepartmental Committee of Deputy Ministers Responsible for Federal Law Enforcement.

#### **1. Every federal statute should provide for and clearly define the powers required to ensure compliance with it.**

An analysis of existing enforcement powers indicates that the number and nature of such powers are often inappropriate in terms of the defined mandate and required activities. In some instances the powers were conferred by a generalized reference to another statute, for example, "have for the purposes of this Act the powers of a police constable." Presumably the link is to the *Criminal Code* where the definition of peace officer includes a "police constable" with the status that definition implies.

To the greatest extent possible, powers should be contained in the statute concerned. However, the attribution of powers by reference to another statute may be deemed appropriate for reasons such as avoiding duplication of voluminous material on a multiple basis (and the inherent problems in its subsequent amendment). To be clearly defined, attribution by reference must avoid wide—sweeping generalities and be done with a precise reference to the statute concerned, for example, "have for the purposes of this Act the power to issue an appearance notice in accordance with section 496 of the *Criminal Code*." Powers will not be attributed in

regulations; however, the activities derived from an attributed power may be set out in regulations.

The powers granted to enforcement officers should be sufficient to allow for the proper enforcement of the legislation for which the department has a mandate. Departmental officers and legal advisers must ensure that these powers are not excessive for the mandated task and do not arbitrarily or unreasonably interfere with individual rights and freedoms. These powers should be based on conditions or scenarios which have a reasonable probability of occurrence.

- 2. Enforcement powers, including the terms and conditions on which they may be granted and exercised, must be compatible with the *Canadian Charter of Rights and Freedoms*. In the granting of enforcement powers and the activities which flow from those powers, there must be an overriding consideration and recognition of the degree to which the Charter restricts Government's right to impose limits on individual freedoms.**
- 3. Peace officer status or a similar approach to providing a general category of powers should be granted only to officials whose statutory duties include the enforcement of the *Criminal Code*, the *Controlled Drugs and Substances Act* and the *Food and Drugs Act*.**

The intent of having an appointment such as “peace officer” is to provide the powers required for the maintenance of the public peace or local harmony. Originally, English criminal laws were intended to preserve the peace, and gave peace officers powers of arrest, detention and appearance.

The use of the term “peace officer” in legislation to describe either the status or powers of enforcement officers can cause confusion among officers concerning the extent of their powers and differing conceptions about the reach of their authority. This use of general powers could result in unwarranted and undesirable mandate expansion and overlap into areas in which another agency may have a more clearly established mandate and jurisdiction.

In the framing of the guideline, the original proposal was to limit the status of peace officer to those whose statutory duties relate to the enforcement of the “criminal law.” The broad interpretation of that term would seem to take it beyond the tasks expected to be performed by a peace officer. For example, certain aspects of income tax, competition and consumer legislation may be viewed as criminal law.

Notwithstanding that statutes such as these may be regarded as “criminal law” and in many instances their violation has serious economic consequences for the nation, they are not directly

related to the daily continuum of peace, good order and the expectation of quiet enjoyment. The enforcement of those matters can be effected by a law enforcement officer who has the necessary background of experience or professional qualification to identify, investigate and document a violation and ensure appropriate measures are undertaken. Peace officer status is not required to enforce those laws effectively. Enforcement officers may at their discretion seek support of a peace officer to minimize the potential for violations of the public peace during activities associated with the application of their own powers.

This guideline provides peace officer status only to those whose duty involves responsibility to enforce the *Criminal Code*, the *Controlled Drugs and Substances Act* and the *Food and Drugs Act*. These are considered to relate primarily to the public peace as described above.

In the granting of status as a peace officer or assigning peace officer powers, it will also be necessary to establish whether that status or those powers can be limited by the conditions for which they are required, for example, territorially, functionally or by class of person. Officers specifically appointed as peace officers in certain circumstances must exercise their powers within the limits mentioned in the legislation.

Reference is made to the judgment of the Supreme Court of British Columbia:

There are several categories of persons defined by s. 2 [of the *Criminal Code*] as peace officers ... Customs and excise officers are police officers (this means that they have the powers of a peace officer) when performing their duties under the Customs Act or the *Excise Act*. Their powers as police officers are not limited territorially, but are restrained functionally to the exercise of such powers as may be necessary in the performance of duties in administering those Acts. The same applies to fishery officers under the Fisheries Act, and to the pilot in command of an aircraft. None of these is empowered by the definition section or otherwise to act as a police officer for the purposes of the *Criminal Code* except in relation to specified duties. Outside of those duties they are civilians. (See *R. v. Smith* (1982), 67 C.C.C. (2d) 418, 427, appeal dismissed (1983), 2 C.C.C. (3d) 250, B.C.C.A.)

All decisions which reflect that the status of peace officer is merited shall be further assessed to determine if they should be limited by functional conditions, class-of-persons conditions or territorial conditions.

**4. Every statute that provides for the granting of enforcement powers should set out appropriate review and redress procedures for persons affected by the exercise of the power provided in that statute.**

Review and control procedures are imperative in the exercise of enforcement powers for the benefit of both those affected by the exercise of the powers in the statute as well as the officers required to undertake the activities and decisions associated with its enforcement. When powers are granted which affect the rights and freedoms of an individual in any way, ranging from arrest, entry to their premises, limiting their right to engage in either licensed or unlicensed activity or as a result of a decision not to act or sustain a complaint, the statute concerned must contain provisions to allow for a review or redress of the particular action which has been taken or is perceived to have been taken. This process of review or redress should be based on clearly established, well-understood accountability procedures related to internal supervisory control of enforcement actions of all officers as well as to third party review and investigation of the conduct of officers holding peace officer status or exercising peace officer powers in the enforcement of the statute. These procedures should as a minimum meet the FLEUR Guidelines Respecting Accountability Systems and Controls approved by the Committee of Deputy Ministers Responsible for Federal Law Enforcement dated May 1991.

**5. Every statute that provides enforcement powers should provide and clearly define the protection(s) that officers require to fulfil their enforcement responsibilities.**

In recent reviews it has been noted that some departments and agencies seek peace officer status for their officers solely in the belief that this is the only means whereby the officers may have the required protection in the execution of their duties.

Protections should not be conferred by a generalized reference to another statute in statements such as “have for the purposes of this Act the protections enjoyed by a peace officer.”

To the greatest extent possible, protections should be contained in the statute concerned; however, where reference is deemed appropriate for reasons such as avoiding duplication of voluminous material on a multiple basis (and the inherent problems in its subsequent amendment), the granting of protection by reference is acceptable. It must, however, avoid wide sweeping generalities and be done with a precise reference to the statute concerned. Protection must be confined to that which is fully justifiable in terms of what is necessary and useful in the



protection of the enforcement officer in the performance of the enforcement activity.

### *Principles for the Attribution of Federal Enforcement Powers*

The following principles for the attribution of federal enforcement powers have been approved by the Interdepartmental Committee of Senior Enforcement Officials and must be respected in relation to the attribution and exercise of federal enforcement powers.

#### The legal framework of power

1. Provisions of the law which grant enforcement powers must be clear and unambiguous.
2. Before any person is permitted to exercise enforcement powers, organizations must ensure they are fully aware of the legal responsibilities inherent in their appointment. The justification to utilize such power must be based on a statutory or common law authority.
3. The nature and degree of any enforcement powers conferred shall be no more than is necessary to achieve the mandated task and shall be based upon conditions and scenarios which have a reasonable probability of occurrence. The overall powers of a peace officer do not accrue as an automatic entitlement and are limited to the particular mandate. The attribution of powers shall comply with the Guidelines for the Granting of Enforcement Powers under Federal Legislation.

#### The vesting of power

4. The basis for the appointment of an officer shall be set out by a clear and precise statement in legislation. This shall be supplemented by the necessary policy statements, which indicate who has been or may be appointed in accordance with that statement. This may be by individual person, a readily identifiable class or a category of person employed on a particular task.
5. Appointments shall be made by way of an appointment document or credentials that clearly state the power granted and any limitations upon that power.
6. The public has a reasonable expectation of being able to readily determine the identity and powers of the appointed officers and the standards of service that they have a right to expect from them.

### Training Requirements

7. The vesting of power will be contingent upon officers meeting minimum performance standards related to particular training objectives. This training will be based on the course training standards issued by the Interdepartmental Committee of Deputy Ministers Responsible for Regulatory Reform. The minimum training standards may be supplemented by additional training deemed appropriate by the organization concerned.
8. A minimum threshold of training must be established before status enforcement power/status is granted.
9. To maintain the required standard, each organization will conduct refresher training and ensure a continuing program based on the evolving issues related to the enforcement duties concerned.

### Operational Considerations and Practices

10. The enforcement of the criminal law (as defined for the purposes of the Guidelines for the Granting of Enforcement Powers Under Federal Legislation) in the federal sphere is the responsibility of the RCMP except where otherwise specified.
11. Limitations on powers shall be consistent with the minimum requirement to achieve the mandate concerned. Presence in a particular territorial area or association with a particular function is not a sufficient reason for organizations that have limited powers to broaden their enforcement activities.
12. Enforcement activity beyond the applicable statutory limitations shall be confined to dealing with endorsed warrants, cases of special jurisdiction and “fresh pursuit” within Canada. In the case of the latter, the case must be turned over to the police of local jurisdiction at the earliest moment.
13. The investigation of international and organized crime is the prime jurisdiction of the RCMP. Interdepartmental cooperation, agreement or other assistance in the pursuit of such matters may be developed on a case-by-case basis or through the continuation of an existing agreement or on the basis of a new or revised agreement as the circumstances may dictate.

### Intergovernmental agreements: extension or delegation of power

14. The acquisition of power from other levels of government must be based upon a reasonable requirement. That power must be required to achieve the mandate of the applicable federal statute. Such powers must be set out in an agreement that explicitly indicates that the responsibility for oversight mechanisms and

complaint resolution will remain with the federal organization to which the delegated officer belongs.

15. Delegation of any power to another level of government shall be by agreement that establishes the basic purpose for entering into the agreement. It must include the authority for such delegation and provisions for accountability and liability. The responsibility for oversight mechanisms and complaint resolution shall normally remain with the organization to which the delegated officer belongs.
16. Such agreements shall be managed in a manner that ensures standardization and coordination and facilitates the ready identification of persons granted such additional powers.

#### Review and redress

17. A review and redress process shall be established in all organizations whose officers possess enforcement powers. The process will be based on clearly established, well understood accountability procedures.

#### *Developing Compliance and Enforcement Policies*

In February 1992, Treasury Board amended the Government's *Regulatory Policy* <http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications> to place a new emphasis on regulatory enforcement. The reasons for this change in policy included the need:

- to ensure more effective management of scarce resources;
- to emphasize that compliance, not punishment, is the primary objective of enforcement activity under regulatory Acts; and
- to minimize the Government's increased exposure to damages for negligent enforcement under recent case law.

Departments administering regulatory Acts are now generally required to have formal compliance and enforcement policies. In addition, they must ensure that adequate resources are available to discharge their enforcement responsibilities and to ensure compliance, where the Act binds the Government. Compliance issues should form an integral part of the policy development process for any new Acts or regulations. If those issues are left to the drafting stage, or later, there may be no opportunity to incorporate modern compliance and enforcement measures, for example, to make formal provision for negotiated solutions to non-compliance or for administrative monetary penalties.

Published compliance and enforcement policies are usually preceded by the development of an (unpublished) compliance strategy that addresses anticipated compliance problems. The final, published compliance policy typically includes the following elements:

- an overview of the policy purpose of the Act or regulation;
- the orientation of the program;
- a formulation of the major rules under which compliance is sought;
- an outline of the range of techniques to be employed for encouraging voluntary compliance, for monitoring compliance and for dealing with non-compliance (possibly including a range of alternatives to prosecution); and
- the factors that enforcement officials take into account in exercising their statutory powers.

A guide entitled *A Strategic Approach to Developing Compliance and Enforcement Policies* <http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications> was prepared by the former Regulatory Compliance Project of the Department of Justice and published by Treasury Board to help departments meet this new responsibility.

The Administrative Law Section of the Department of Justice provides advice and assistance on compliance and enforcement issues arising throughout the legislative process.

## Activities and Products for Policy Development and Approval

The following table identifies key steps of the process of policy development and approval and describes the associated activities and products. This table should be used with the MC Preparation Planning Calendar, which follows it and provides guidance on the timeframes that should be built into the process.

STEP	ACTIVITIES AND PRODUCTS
Contact Privy Council Office (Operations Branch) policy analyst responsible for your department	Consult early to define the proposal and discuss timing.
Contact your departmental Cabinet affairs unit	<p>The departmental Cabinet affairs unit provides:</p> <ul style="list-style-type: none"> <li>• guidance on procedures and requirements within your department;</li> <li>• information on the requirements of the Privy Council Office;</li> <li>• a copy of <i>Memoranda to Cabinet: A Drafter's Guide</i> (<a href="http://www.pco-bcp.gc.ca/default.asp?Language=E&amp;Page=publications&amp;Sub=mc&amp;Doc=mc_e.htm">http://www.pco-bcp.gc.ca/default.asp?Language=E&amp;Page=publications&amp;Sub=mc&amp;Doc=mc_e.htm</a>);</li> <li>• assistance in the policy development process.</li> </ul> <p>See also <i>Memoranda to Cabinet: A Drafter's Guide</i>, section E, the Good Governance Guidelines and the MC Preparation Planning Calendar.</p>
Contact your departmental official responsible for parliamentary relations	Advise them that you are starting proposals for a memorandum to Cabinet that includes a proposal for a bill.
Contact Treasury Board Secretariat and Department of Finance policy analysts responsible for your department	<p>Consult early to determine whether the proposal:</p> <ul style="list-style-type: none"> <li>• requires adjustment to existing expenditures;</li> <li>• requires new expenditures;</li> <li>• impacts on government contingent liabilities;</li> <li>• requires significant adjustments to existing programs;</li> <li>• impacts on Crown corporations;</li> <li>• has implications for official languages matters or labour-management relations.</li> </ul>
Review the Good Governance Guidelines and the Preparing Bill-drafting Instructions for a Memorandum to Cabinet	Highlight matters to be considered as early as possible in the policy development process.
Draft Memorandum to Cabinet	For detailed advice, consult your Cabinet affairs unit and refer to <i>Memoranda to Cabinet: A Drafter's Guide</i> .

STEP	ACTIVITIES AND PRODUCTS
Prepare the drafting instructions	Prepared by a team of knowledgeable officials that includes a member of the departmental legal services unit (DLSU). This team will also provide detailed instructions at the bill-drafting stage. For detailed information, see the "Checklist for Preparing Bill-drafting Instructions for a Memorandum to Cabinet".
Seek departmental approvals (including Minister's approval) in accordance with departmental process	This step usually requires the preparation of briefing materials.
Have the draft MC translated in accordance with the departmental process	Give the translators the time and information they need to prepare an accurate translation. Have the translation reviewed by policy officials.
Organize interdepartmental meeting and circulate the draft MC to all departments concerned	Circulate to all departments whose Ministers sit on the policy committee that will consider the MC as well as to other departments involved in the proposal. Also include the PCO, TBS and Department of Finance analysts responsible for your department. Send out the draft MC in advance to allow departments sufficient time to digest the draft MC before interdepartmental meetings are held. See also <i>Memoranda to Cabinet: A Drafter's Guide</i> , section E.
Interdepartmental meetings chaired by senior departmental officials	Brief other departments on the details of the proposal and determine their positions. Include their positions in the MC, and resolve any issues.
Finalize the MC, including the translation, and send to Minister in accordance with departmental procedures	Provide Minister with appropriate briefing materials, including the results of interdepartmental consultations. Check that the MC conforms to PCO content and formatting requirements as specified in <i>Memoranda to Cabinet: A Drafter's Guide</i> .
Send two copies of the signed MC and electronic copies on diskette to the PCO Cabinet Papers Office	
Prepare presentation material for the Minister to use at Cabinet and Cabinet committee meetings	Presentation materials may be a slide deck, talking points, additional briefing material outlining anticipated positions of other ministers and Qs and As.
PCO Cabinet Papers Office distributes the MC to the other departments	
PCO analyst prepares briefing materials and briefs the Committee Chair	Briefing material is distributed only to the Committee Chair and PCO Ministers (the Prime Minister, the Deputy Prime Minister, the Leader of the Government in the House of Commons, the Leader of the Government in the Senate and the Minister of Intergovernmental Affairs).
Cabinet Policy Committee considers the MC and Drafting Instructions. PCO Cabinet Papers Office issues the Committee Report (CR)	Once the Cabinet Committee has decided on the proposal, a Committee Report is drafted by the Policy Committee Secretariat and issued by the Cabinet Papers Office. It is based on decisions made by the Committee in relation to the Ministerial Recommendations (MR) portion of the MC as well as any annexes to the MC (such as the drafting instructions).

STEP	ACTIVITIES AND PRODUCTS
	The Secretariat that drafts the CR may consult with the originating department and other interested departments to ensure that the wording of the CR accurately reflects the decisions of Ministers. See also <i>Memoranda to Cabinet: A Drafter's Guide</i> , section A.
Cabinet Approval of CR and drafting Instructions, followed by issuance of Record of Decision (RD) by PCO Cabinet Papers Office	The full Cabinet considers the CR and accompanying drafting instructions. The CR and the MC are the basic documents for Cabinet discussion. If the Cabinet confirms the CR, an RD is issued. See also <i>Memoranda to Cabinet: A Drafter's Guide</i> .

## MC Preparation Planning Calendar

WEEKS BEFORE CABINET COMMITTEE (CC) MEETING	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
Six Week Minimum: Notification by Sponsoring Department(s)	Sponsoring Dept(s) alerts PCO that MC draft is forthcoming next week. Review of timelines and identification of horizontal linkages and Key Departments to be involved in MC preparation.				
Five Weeks: At least 72 hours to review MC prior to Key Departments' Meeting	First draft of MC distributed to Key Depts (to be shared informally for initial feedback).			Meeting with Key Depts to review first draft of MC.	
Four Weeks: At least 72 hours to review MC prior to Interdepart- mental				MC second draft distributed to Interdepart- mental community for review.	
Three Weeks: Interdepart- mental		Interdepart- mental meeting (minimum 21 days before CC meeting)			
Two Weeks: Final Drafting Stages	MC third draft to Interdepartmental Community for review.			If required, Key or Full Interdepart- mental meeting.	
One Week: French and English submission of MC to PCO					



## Chapter 2.3

### Preparation and Cabinet Approval of Bills

#### Overview

This section supplements section 4 of the *Cabinet Directive on Law-making*. It provides information on the various steps related to the drafting of policy proposals into the legislative form of a bill and the Cabinet's approval of the bill for introduction in Parliament. It contains a description of the activities and products involved in this process.

#### In this chapter

- Summary of the Bill Preparation and Cabinet Approval Process
- Legislative Drafting Conventions
- Bill Preparation Process in Detail
- Activities and Products for Bill Preparation and Approval

#### Audience

- Officials involved in preparing a bill and seeking Cabinet approval for it.

#### Key messages

- Preparing a bill is a complex and critical step in the process and you should not underestimate the time and effort it requires.
- Bills are to be drafted in accordance with established conventions for legislative drafting.
- Program officials must be prepared to respond to the critical analysis of the draft bill by the Leader of the Government in the House of Commons.
- This stage of the process should also be used to prepare for the Parliamentary stage.

## Summary of the Bill Preparation and Cabinet Approval Process

### Preparation of bills

The bill preparation process begins with a Cabinet decision authorizing the drafting of a bill in accordance with written instructions approved by Cabinet.

The Legislation Section of the Department of Justice is responsible for drafting all Government bills. The Section is part of the Legislative Services Branch and consists of legislative drafters who work with other members of the Branch, including jurilinguists, legislative revisors, editors and computer services staff. It also includes drafters who work exclusively on fiscal bills for the Department of Finance.

Bills are co-drafted by pairs of drafters in the Legislation Section working simultaneously on English and French versions of the bill. Neither version is subordinated to the other. Co-drafting also reflects bijuralism, with each drafter usually having been trained in either common or civil law. One drafter has primary responsibility for communicating with instructing officers and managing administrative tasks. The sponsoring department may also ask other government departments to review and advise on the draft bill.

The process of preparing bills also involves officials in the departments from which the policy for the bills originate as well as legal counsel from the Department of Justice who work in the departmental legal services units. (see “Who does what in the Preparation of Government Bills” in this chapter). These officials and legal counsel are generally referred to as instructing officers. Their role is to supplement the drafting instructions approved by Cabinet by providing more detailed instructions to the drafters. Usually, many drafts of a bill are prepared, reviewed and discussed before a final draft is achieved.

Draft bills have traditionally been treated as Cabinet confidences. However, the *Cabinet Directive on Law-making* allows ministers to seek the agreement of Cabinet to consult on draft bills.

Consideration should be given to whether the bill has financial implications that will require a royal recommendation (for spending measures) or a ways and means motion (for taxation measures). These questions significantly affect legislative planning, for example, whether bills can be introduced first in the Senate. They should be considered as early as possible in the drafting process so that the drafters may advise the Legislation and House Planning/Counsel Secretariat (L&HP/C) of PCO. The Department of Finance must also be contacted for advice on the need for a ways and means motion.

As the bill is being drafted, the sponsoring department prepares the necessary briefing materials that will be needed both at the next step when the Leader of the Government in the House of Commons reviews the bill as well as later during the legislative process. These include:

- briefing books (also known as clause-by-clause books) for use by the minister or parliamentary secretary and by the members of the parliamentary committees that review the bill;
- draft statements for the minister, parliamentary secretary and government members during debate at the various stages of the parliamentary process;
- a succinct background paper that describes the bill;
- communications material.

In the final stages of drafting, the bill is printed by St-Joseph Print Group in preparation for the Cabinet approval process.

### **Cabinet approval of bills**

Once a bill has been drafted in both official languages to the satisfaction of the sponsoring department, the sponsoring Minister, the Director of the Legislation Section and the Privy Council Office, it must be approved by Cabinet before being introduced in Parliament.

The Cabinet approval process has several stages:

- L&HP/C staff contact the sponsoring minister's Legislative Assistant to co-ordinate when the bill is to be introduced in Parliament.
- Once the bill printing process begins, copies of each print are sent directly to L&HP/C and to the sponsoring department.
- L&HP/C reviews the bill and consults the relevant PCO Policy Committee Secretariat to ensure that the bill respects the objectives approved by Cabinet.
- L&HP/C prepares a note for the Leader of the Government in the House of Commons.
- L&HP/C provides the bill and briefing note to the Leader of the Government in the House of Commons, who then conducts a line-by-line review of the bill and makes recommendations to Cabinet on whether it should be introduced in Parliament.
- If the bill is to be introduced, the Leader of the Government in the House of Commons goes to Cabinet to seek delegated authority to approve its introduction.

- After the Cabinet meeting, and before the introduction of the bill in Parliament, L&HP/C prepares and circulates a “Memorandum to Cabinet—Bill” (MC—Bill), along with the bill itself.
- After Cabinet approval, L&HP/C submits the bill in its final form to the Prime Minister or the Leader of the Government in the House of Commons for signature, along with the royal recommendation if the bill requires expenditure. The preparation of royal recommendations is the responsibility of L&HP/C.