

The Wavering Line between Policy Development and Legislative Drafting

Elizabeth Grant¹



Abstract:

This paper looks, from the perspective of a legislative drafter, at policy and legal advice, including their purposes and how they are distinguished. It considers a legislative drafter's role in various situations: where good instructions or (as often occurs) poor instructions are received; on being invited to step into the policy whirlpool; and in unusually hard cases. It recognises that legislative drafters give legal advice, and advice about what the law ought to be. Generally, though, the role of policy adviser is not part of the legislative drafter's role. If a person is required to fulfil a policy role in addition to the role of a legislative drafter, it is important to retain an awareness of the nature of the distinct functions involved in each role. What is policy, and what is its purpose?

Introduction

According to the Oxford English Dictionary, the most basic definition of policy is that it is "(t)he art, study, or practice of government or administration".²

For our purposes, we can leave aside the study of government or administration, and maybe also policy as an art. It is essentially policy as the practice of government or administration that a legislative drafter encounters from day to day, both from the drafter's vantage point as an observer of governments and administrators, and, more immediately,

¹ Parliamentary Counsel Office, New Zealand.

² *Oxford English Dictionary*, 3rd edition, July 2010; taken from the online version of November 2010.

as a drafter of legislation that will give effect to the policies developed by the government of the day.

Policy development encompasses many areas that legislative drafters do not see much of on a daily basis. For example, policies are developed by governments and administrators to determine the structure of work resources within departments. Policies may also be developed to determine priorities in spending in relation to such matters as public health or the achievement of the nation's educational goals. Policy development helps to form attitudes to, and eventually to decide the allocation of resources among, the many possible objects of the attentions of a government and its administrators.

For legislative drafters, it can be easy to forget that a huge part of policy development has almost nothing to do with our work as legislative drafters. That is because the kind of policy development that legislative drafters encounter on a regular basis is the specific kind of policy development that results in changes to the laws of the land, either by the creation of entirely new laws or, more often, by the amendment of existing laws.

When a legislative drafter receives instructions from a department to draft a bill, in New Zealand at least, it is because Cabinet has agreed to a policy or set of policies and has agreed that drafting instructions should be issued to Parliamentary Counsel to give effect to the decisions that Cabinet has made. The Cabinet Minute on the topic and the Cabinet papers that the Minute summarises are always the outcome of policy work by the instructing department, even if the original impetus for proposing the legislative change came from the Minister rather than from the department itself.

Regulations are a little different. They are the result of prior decisions of Parliament itself, which has envisaged that certain kinds of enactments will be acceptable to it, and do not need to be brought before Parliament again in the same way as a new bill must be. Regulations must meet whatever criteria Parliament has decided upon in the legislation that empowers the making of the regulations. In New Zealand, the regulations will be looked over by one of the committees of Cabinet before the regulations are finally made, and then again by a committee of Parliament after they are made. Thus the specific policies that result in regulations are constrained by the empowering legislation and to a large extent have already been developed long before any drafting instructions for them are written. But still there is always in the immediate background further recent policy work that has been done before any drafting instructions are issued in relation to regulations.

Both bills and regulations make changes to the law as it exists. Policy expresses what the government has decided that the law ought to be.

In summary, for legislative drafters, policy is the expression of the practices of government or administration, in the form of instructions that we receive and that, once drafted and enacted, will give effect to the actions that the government has decided upon as those it wishes to carry out.

What is legal advice, and from whom does it come?

To develop sound policy, policy advisers call upon legal advisers to assist in the process. Legal advisers may not be as skilled as policy advisers in weighing various public interests in the balance, but they bring invaluable skills. For example, legal advisers are able to say with some authority what the law is now, not just in terms of what is in statutory law at present, but also the meaning of the statute as elucidated in any relevant judicial decisions.

Legal advisers can also draw attention to any overlying or underlying legal principles that may pertain to the particular matter. In New Zealand, we have an expert Legislation Advisory Committee that offers its views on proposed legislation, usually after a bill is introduced to the House. It publishes guidelines on the process and content of legislation,³ and these contain useful checklists for departments to consider when they are developing proposals for legislation. For example, the guidelines suggest giving thought to whether the *Interpretation Act 1999* has been considered, whether the common law has been considered, and whether there are any international obligations and standards relevant to the legislation.

The guidelines also require people involved in the preparation of legislation to consider whether the policy objective has been clearly defined, and whether consideration has been given to achieving the policy objective other than by legislation. So the guidelines are of use to policy advisers as well as to the legal advisers involved with the proposed legislation. But many of the questions posed by the checklists in the guidelines are more easily answered by legal advisers than by policy advisers.

Legal advice is often advice about what the law is; but, like policy, legal advice is also concerned with what the law ought, and ought not, to be. And this is so whether the legal adviser is a departmental one, helping to develop policy and eventually drafting the instructions that go to the legislative drafter, or whether the legal adviser is the legislative drafter, looking at the law that he or she is drafting and considering how, for example, it is to fit with the rest of the law. Any conscientious legal adviser cares very much about what the law ought to be.

A legislative drafter's role

On receiving good or (ordinarily) poor instructions

The legislative drafter is required to give effect to the government's policy decisions by drafting the instrument that will turn the current law from what it is now into what it has been decided that it ought to be. It follows, therefore, that in no way is it part of the legislative drafter's brief to decide what the law ought to be. That is where the line is drawn, and yet it wavers.

³ See <http://www.justice.govt.nz/lac/index.html> for the latest version of the guidelines.

With any luck (from the point of view of the legislative drafter), it is a legal adviser working in the department that administers the relevant law who writes the drafting instructions for a bill. Ideally, the legal adviser has considered, before writing the drafting instructions, all the legal aspects of the policy and any legal questions that may be raised by the instructions, and in turn has already gone back to the policy advisers with any queries that arise during that process to clarify just what the policy seeks to deliver.

Even with good instructions that set out to address all the legal questions a drafter may have, and that are otherwise clear and helpful, there are often gaps. There may be outstanding issues that were not spotted by the departmental legal advisers, or unintended ambiguities. Identifying the gaps often happens just as a result of the new perspective brought to the proposal by the legislative drafter; working out of the details also occurs during drafting, so that a legislative drafter returns time and again to the instructor.

A good instructor is generally the determining factor in whether or not a drafting job is going to go well for the legislative drafter, or not so well. Even if the job is complicated, or has to be carried out under great time pressure, or the policy has not been well developed, a collaborative and courteous instructor will usually make all the difference necessary to enable the result to be achieved smoothly and with relatively little stress for the legislative drafter and perhaps the instructor too. And this is especially apparent given the iterative process of drafting with its frequent exchanges between drafter and instructor.

A good instructor can convert initially poor instructions into perfectly adequate ones with a little prompting. Part of the process of doing so is the dialogue between the instructor and the legislative drafter. A good working relationship helps both instructor and drafter, and that is so even if the instructor is a departmental policy adviser rather than a legal adviser.

A policy adviser who provides drafting instructions commented to me that she had found the following to be the case: if there is a good working relationship between instructor and drafter, the line between advising on policy and legal issues can become a little blurred. A legislative drafter may express opinions on policy issues and those who develop policy may have views about how to achieve the desired legal outcome, even though that is normally the preserve of the legislative drafter. This flexibility has advantages: if the line can be stepped over, problems can be headed off before they happen, in the experience of that instructor. However, policy and legal advisers (including drafters) must on some occasions go back to their own clear side of the line and their usual roles. If the advisers and drafters do not have a close working relationship, then they tend to stay more in their own particular roles and this can be counter-productive, in the view of my instructor colleague.

When there is the flexibility described by my instructor colleague, it seems that the legislative drafter does help to decide what the law ought to be. The objective is a law that fits well with basic legal principles and the rest of the relevant law, as well as achieving the policy objectives articulated and approved by Cabinet. There can be adjustments to the

policy along the way and it may be that the instructors return to Cabinet to obtain agreement to additional or modified policies.

In summary, with good instructions, a good instructor, or both, most drafting problems can be worked through quite readily. On occasions in the process, the line may waver or be stepped across. The roles of each participant in the process are understood and respected by all and adhered to when it counts, but the possibility of a flow of ideas and a constructive problem-solving approach is retained.

On being invited to step into the policy whirlpool

It can happen that an instructor can invite the drafter to provide policy advice. For example, instructions may require the drafting of a new offence, but be silent on the penalties required.

In that case, the drafter must return to the instructor for further instructions. But on occasion an instructor will ask the drafter what he or she thinks would be appropriate. The furthest a drafter can go is to refer the instructor to the relevant legal principles and similar offences and penalties in related legislation, whilst making it clear that the decision is one of policy and not for the drafter. The drafter may have strong views on how the law ought to be, but a drafter cannot try to fill the gap in the instructions without reference to whoever is deciding the policy, nor should a drafter be the person responsible for the final policy decision.

Select committees also are inclined on occasion to ask Parliamentary Counsel for what amounts to advice on policy matters. Again, the nature of these requests needs to be identified on the spot and this kind of request should be referred to the policy advisers present at the select committee.

So when a legislative drafter is asked to become the policy maker, it is especially important that the drafter recognises the situation and eschews any temptation to become the one who decides what the law should be. It is a time to keep firmly on the legislative drafter side of the wavering line.

In unusually hard cases

Some situations that legislative drafters may face in regard to the line between policy and drafting are unusually difficult, but fortunately rare, in New Zealand at least. These are situations where there is a policy expressed in instructions that is in conflict with basic legal principles. For example, it may propose a penalty that is clearly disproportionately harsh in relation to any penalty that already exists for very similar offences. This kind of situation can raise a moral dilemma for legislative drafters.

It is not unusual for a policy to be one that a legislative drafter disagrees with personally. That is how these things go in a democracy and no reason at all of itself to raise any objection to instructions. It is hard to imagine a drafting office functioning at all if drafters

had to agree with the policies of every government of the day. It is more unusual to receive an instruction to draft legislation that the drafter considers is in conflict with his or her own moral values, but is otherwise not legally exceptionable. If this conflict is severe, the drafter can ask for the drafting job to be reassigned to another drafter.

When a policy raises legal issues such as a basic conflict with legal principles the matter of itself is not purely one of policy. It is just as much one of legal advice. If a government seeks to disenfranchise a large part of its population, to reintroduce the death penalty or imprison people for non-criminal behaviour, legal advice must be given that these policies are legally unsound. The objective is a modification of the policy until it falls within the bounds, or not so far outside them, of currently accepted legal principles. With legislation, radical departures from current principles set poor precedents for the future.

Of course, there can be an overlap to the drafter between legal wrongness and personal morality: one may believe it is morally wrong to participate in the making of a law that conflicts to an unacceptable degree with fundamental legal principles. If the stratagems to help modify the policy fail, the drafter must decide what his or her action should be.

What do you do if you must develop policy and provide legislative drafting?

In New Zealand, there are policy development experts in each department and Ministry. We also have our separate Parliamentary Counsel Office, and those of us who are Parliamentary Counsel have a clear function: to provide legislative drafting. We draft Acts and regulations for all of New Zealand. It is well understood that we do not engage in the policy development process. And we do not need to as there are always other people ready and available to do that.

Not all other Commonwealth legislative drafters are in the same situation as we are in New Zealand. Legislative drafters in other countries may be required to carry out several different functions. This may be because there is not enough work for a legislative drafter to do whatever drafting is required as a full-time job. So a drafter may have other functions and these could include acting as a prosecutor, helping in the day-to-day running of a department or Ministry, or providing legal advice to Ministers as part of the process of the development of policy. Or there could be a great deal of drafting to be done, but still a legislative drafter may be required to undertake other types of work as well, just because there are insufficient funds to employ an ideal number of people to do all the work that is needed.

If legislative drafters are required to supply policy advice, legal advice and drafting, then they have to accept the realities of their situation. However, it is worth recalling the different nature of the functions and what is required for each. A person who is developing policy as a policy adviser is engaging in that discipline, weighing competing policy interests, considering the wider interests of the government, and carrying out the other aspects of that role, so as to arrive finally at decisions about what the law ought to be.

When a person is acting as a legal adviser engaged in policy development, the role is ancillary to the development of sound policy. When a person is acting as a legal adviser providing drafting instructions, the task is to translate policy into the form that will enable the legislative drafter to understand what needs to change in the law as it is at present and what the law needs to become. Legislative drafters provide the means to turn the law from its current version to what it ought to be, according to decided policy.

In the situation where a person who is a legislative drafter is also required to undertake roles that are additional to, and different from, the role of a legislative drafter, the line between policy development and legislative drafting will be drawn differently, or at least the person may find himself or herself on different sides of the line according to the functions he or she is performing at the time. The authority and requirement to give policy advice are distinct from the requirements of the drafting role, but maintaining an awareness of the nature of each function will enable each role to be carried out in a way that retains clarity of purpose.
