

# Turning Policy Into Law

Good Policy  
+ Good Process  
Good Law

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July 2016



[www.nt.gov.au/justice](http://www.nt.gov.au/justice)



The law is the last result of human wisdom  
acting upon human experience  
for the benefit of the public.

*Samuel Johnson*



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# The Goal

It is not enough to attain to a degree of precision  
which a person reading in good faith  
can understand;  
but it is necessary to attain if possible to a degree of precision  
which a person reading in bad faith  
cannot misunderstand.

*In re Castioni* [1891] 1 Q.B. 149



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# What is legislation?

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## Legislation

**Law + Writing = Legislation**

**More conventionally:**

- a formal expression by a body of elected representatives
- identifying actions that are permitted, required, or prohibited
- expressing the consequences of doing what is prohibited or not doing what is required

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## Legislation

**Primary Legislation**

- Bills/Act passed by Legislative Assembly and assented to by the Head of State or representative (in NT, the Administrator)

**Delegated (subordinate) legislation**

- regulations, rules, by-laws
- matters of detail, implementation

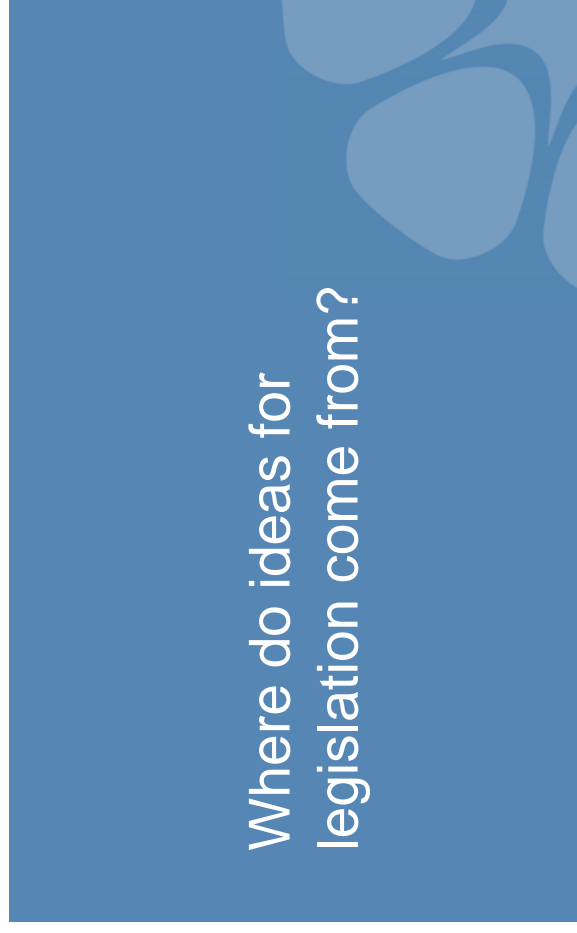
**Process of drafting is generally the same**

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# Where do ideas for legislation come from?

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## Ideas



- Election commitments
- Ministers
- Government Departments
- Intergovernmental / international agreements
- Australian / international trends
- Court decisions
- Interest Groups
- General Public

# Translating ideas into drafting instructions

## Government Bills

### Preliminary Questions

1. What is the **issue** (mischief)?
2. Is a **law** required?
3. What **combination** of primary legislation, subordinate legislation, policy and other elements will best achieve the purpose? (**instrument choice**)
4. Is there **sufficient power** to make the laws?
5. Is there a **“natural home”** (new law or amend old)?

## Government Bills

1. Department prepares draft drafting instructions
2. Consultation with OPC
  - a. Policy objectives
  - b. Legislative authority
  - c. Drafting schedule
3. Department seeks advice from Treasury Finance on regulatory impact (red-tape reduction)
4. Department seeks approval for project and drafting instructions from Minister and then Cabinet
5. Cabinet approves (if not, repeat from Step 1)
6. Instructions and approved timetable sent to OPC

## Opposition / Independent Bills

1. Member prepares preliminary instructions
2. Contacts Chief Parliamentary Counsel to discuss
  - objective of the proposed law
  - legislative authority
  - problems of inspiration from other jurisdictions

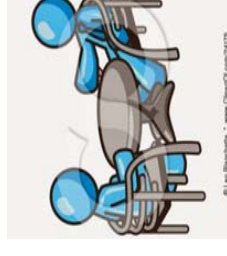
## Translating drafting instructions into Bills

## Drafting Instructions

- All requirements necessary to give effect to proposal (including whether other laws may already apply)
- Existing legislation to be considered / amended
- Consequential amendments
- Transitional arrangements (if applicable)
- Cases / legal opinions

## Drafting Team

- Instructing officer
- Office of the Parliamentary Counsel drafter (specialist lawyers, trained in **legislative** drafting)
- Office of the Parliamentary Counsel support/liaison with the Legislative Assembly



## Threshold Questions

- Is there **sufficient power** to make the proposed law?
- Does the proposed law **breach any fundamental legal principles**?
- Does the proposed law **conflict** with any existing laws?
- Will the proposed law **be enforceable and achieve the policy** objectives?

## The “Final Draft”

Parliamentary Counsel, in drafting the legislation and presenting the draft to the government agency, is in effect advising that the draft legislation is in accordance with the instructions given and gives legal effect to those instructions. The draft itself is not the legal advice, but the communication in providing the draft legislation contains implicitly the advice of Parliamentary Counsel endorsing the draft legislation as being effective and valid.



State of New South Wales v Betfair Pty Ltd [2009] FCAFC 160 [22]

## Drafting Shuttle



File is assigned to a drafter -- “drafting shuttle” begins

- First draft (may contain questions/seek clarification)
- Comment on draft
- Further drafts
- Until the Agency (MLA) and OPC are satisfied that the draft is “fit for purpose”/ meets approved instructions

## Then what?

### Government Bill

- Formal approval to introduce (Cabinet procedure as for approval to draft)
- Final sign off
- (Administrative) providing copies to Minister/Members

### Private Member’s Bill

- Approval of draft
- (Administrative) providing copies to Members

# Parliamentary process

## Parliamentary Process

NT is a Westminster model unicameral legislature



- Notice of Introduction
- First Reading (Introduction)
- Second Reading
- One month passes
- Consideration in Detail (if applicable) or referral to a committee – Amendments can be proposed at this stage
- Third Reading (Bill passed to become a proposed law)
- Assent (advice that within NT powers)
- Commencement

Questions?

Comments?



Photo credit Rick Edmonds

Thank you