

THE ROLE OF THE LEGISLATIVE DRAFTING DEPARTMENT

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1. THE FIRST LEGISLATIVE COUNSEL AND THE LEGISLATIVE DRAFTING DEPARTMENT

1.1. Staff

The First Legislative Counsel is responsible to the Attorney General, and through him to the Governor, for the provision of an efficient legislative drafting service including related legislative advice for the Government of the Cayman Islands. The Legislative Drafting Department enables the First Legislative Counsel to fulfil these functions. The Department consists of First Legislative Counsel, Senior Legislative Counsel and Legislative Counsel, who are all qualified lawyers experienced in legislative drafting. They are supported by an Administrative Secretary. The Department is an integral part of the public service of the Cayman Islands; however, it is separate from the Legal Department which provides litigation and related legal services to the Government.

1.2. The activities of the Legislative Drafting Department

The Legislative Drafting Department has the following main categories of work -

- (a) drafting primary legislation - Laws;
- (b) drafting subordinate legislation - Regulations, Orders, Directions, Rules, etc.; and
- (c) advising on proposals for legislation and statutory interpretation.

1.3. Dormant legislative proposals

Every year the First Legislative Counsel submits to the Attorney General a legislative drafting programme for approval by Cabinet. It is important for the First Legislative Counsel to know when proposals have been abandoned and, therefore, where proposed legislation is no longer being pursued, the relevant Portfolio or Ministry must inform the First Legislative Counsel so that these proposals can be removed from the programme.

2. CONTACTING THE LEGISLATIVE DRAFTING DEPARTMENT

2.1. Consultation

The Legislative Drafting Department is always available for consultation and welcomes the opportunity to discuss any problems where members of the Cabinet or other Government officials think that this is required. The Department should always be consulted whenever any proposal for legislation arises, or whenever the possibility of any proposal for legislation is envisaged.

2.2. Circumstances in which the Legislative Drafting Department must be contacted

The Legislative Drafting Department must be contacted -

- (a) whenever a paper is being prepared for presentation to Cabinet in relation to proposals for legislation;
- (b) whenever consideration is being given to a new Ministerial or Departmental policy that has legislative implications;
- (c) whenever there is a proposal to create or amend legislation that arises otherwise than in the circumstances referred to in (a) or (b) above; and
- (d) whenever it is proposed to issue a draft of, or amend the drafting of, a form, licence or other legislative document that affects the rights of residents or visitors to the Cayman Islands.

2.3. How to contact the Legislative Drafting Department

The lawyers in the Legislative Drafting Department are able to give the best drafting and related services if they are fully informed regarding the details of legislative proposals. Officials may give the First Legislative Counsel a telephone call, or make an appointment for a short initial meeting, as the quickest way of contacting the Department about a matter referred to in 2.2.(a) to (d) above. The

First Legislative Counsel can then say whether additional information and documents are needed to consider the matter.

2.4. Any communication in writing to the Legislative Drafting Department should be self-contained, with supporting documentation attached. The communication should give a short summary of the facts and state clearly the point about which advice is sought or the reason why the proposed legislation is required.

2.5. Officials who are giving instructions may well be more familiar with the relevant legislation than the Legislative Counsel. It is always essential, when providing information about a new problem, to give the Legislative Drafting Department all known details about the matter - for example, full references to Laws, regulations, etc., and all available information about Ministry and departmental policy and practice in relation to the relevant matter. The official who sends a written communication to the Legislative Drafting Department should be of the rank of Assistant Secretary (or equivalent) or above. The Head of the official's Department and the relevant Chief Officer must be informed of the contact being made with the Legislative Drafting Department.

2.6. It should not be assumed that simply sending written instructions to the Legislative Drafting Department will ensure that the Department will approve all the details of the instructions. Legislative Counsel will read documents that are sent to the Department and may draw attention to any difficulty that they envisage, but they are not obliged to do so unless full instructions are given as prescribed in this document.

2.7. First Legislative Counsel is obliged, under standing instructions from the Attorney General, to keep the Attorney General informed of major legal questions likely to become the subject of legislative or constitutional difficulty. In accordance with these standing instructions, the First Legislative Counsel (or, in his absence, the relevant Senior Legislative Counsel) will inform the Attorney General of any matter relating to legislation or a proposal for

legislation which is or may be legally or constitutionally improper. In such a case, if, despite legal advice, it is still intended to pursue the particular course of action or proposal for legislation, the Attorney General is, by virtue of his office, obliged to refer the matter to the Governor.

3. PREPARING INSTRUCTIONS FOR LEGISLATIVE PROPOSALS

3.1. Cabinet approval of drafting instructions

As a general rule, the Cabinet should give instructions for drafting legislative amendments that are technical in nature. Proposals for legislative amendments requiring policy decisions must be submitted to Cabinet, before drafting commences, by means of a Cabinet Paper outlining the policy objectives for consideration by Cabinet. Drafting instructions may only be issued to the Attorney General following Cabinet's approval in principle of the proposed legislation, and no drafting will commence before the First Legislative Counsel has received a copy of the Cabinet Extract.

3.2. Coordination of instructions

The formal giving of instructions, or further instructions, on draft legislation must come through, and be coordinated by, the relevant Portfolio or Ministry. The Portfolio or Ministry must synthesize the comments rather than merely pass on various sets of comments to First Legislative Counsel.

3.3. To ensure a smooth process, the Portfolio or Ministry must ensure that all relevant institutions are consulted and are given an opportunity to react to each other's and the Portfolio's or Ministry's comments throughout the process, right up to the finalization of a draft.

3.4 Meetings are a necessary part of the instructing process; however, as a general rule, Legislative Counsel do not attend meetings for the purpose of formulating policy.

3.5. General content of drafting instructions

Instructions for legislation must -

- (a) contain sufficient background information to enable the Legislative Drafting Department to understand the issues which the legislative proposal is intended to solve;
- (b) state clearly and fully the principal objects of the proposed legislation;
- (c) provide full information as to how the principal objects of the legislation are to be achieved;
- (d) refer to all known implications and difficulties - whether political, legal, administrative, financial or otherwise; and
- (e) not be given solely in the form of a draft of legislation.

3.6. Background information

The instructions for legislation must include all available details about the history of the proposals - for example, any earlier attempts at introducing similar legislation should be fully documented; any informal political or public consultation should be evidenced, and relevant existing legislation in other jurisdictions should be described and documented; any relevant court cases and earlier advice from the Legal Department or any other lawyer must be copied and provided; and all technicalities of subject matter particular to the issues must be fully explained.

3.7. Principal objects

The Legislative Drafting Department must be introduced to all the fundamentals of the proposals for legislation so that all of the reality of the proposal is available for scrutiny. It is vital for Legislative

Counsel to know exactly and comprehensively what the proposed legislation is intended to achieve. Without thorough and complete drafting instructions, the Legislative Drafting Department cannot draft legislation that will necessarily provide Government with the legislative solution to the matter concerned.

3.8. Full information

The instructions for legislation must provide Legislative Counsel with complete information as to how the proposed legislation will be administered, financed and operated in practice. The budgetary, administrative and operational issues and procedures envisaged, and also the powers and duties necessary for achieving and implementing those issues and procedures, must be described in detail. If a power to make regulations is envisaged as being required to give detailed effect to a proposed Law, the instructions for the Law should identify the matters with respect to which power to make regulations is proposed.

3.9. References to all known implications and difficulties

It is the responsibility of the Legislative Drafting Department to be satisfied of, and give appropriate advice about, all the foreseeable legislative implications and difficulties of a proposal for legislation, but to discharge this responsibility effectively for the benefit of the public service of the Islands, the instructions must contain full and complete references to all implications and difficulties known to the official who prepares the instructions.

3.10. Instructions for legislation must not be given solely in the form of a draft of legislation

Instructions for the preparation of legislation must not be given solely in the form of a draft of legislation. Instructions for the preparation of legislation must be given in the form of a clear account, in plain ordinary English, of all the matters prescribed in this document as being necessary. The mere copying of an existing

Law of this or any other jurisdiction, does not automatically or even necessarily transfer any relevant information to the Legislative Drafting Department. It is a fundamental obligation of the official preparing instructions for legislation to explain in plain language his understanding of the issues that may need to be dealt with in the proposed legislation.

3.11. Consultants' drafts

In dealing with a consultant's draft, it is important to remember that it is the duty of the Legislative Drafting Department to prepare legislation for the Government of the Cayman Islands. A consultant's draft is a proposal to help the Legislative Drafting Department perform its functions.

3.12. If a consultant is engaged to prepare draft legislation, it is important to put him in touch with the First Legislative Counsel before he begins to draft the legislation. The First Legislative Counsel will advise him as to Departmental practice and procedure.

3.13. Once the consultant has prepared the draft, the Portfolio or Ministry must examine the draft carefully to ensure that it meets with Government policy on the matter. When the draft is conveyed to the First Legislative Counsel, it must be accompanied by full instructions prepared in the same manner as in cases where there is no accompanying draft. It is desirable that the consultant be available when Legislative Counsel is working on the draft. This process can be lengthy and a drafter may ask many questions and make drastic changes to the draft. It must not be assumed that because there is a draft prepared by a consultant, the draft will be finalized quickly by the Legislative Drafting Department.

3.14. The consultative process sometimes requires that a draft be made available for public comment after stakeholders have been consulted, but the consultant's draft should not be made available for public comment before the Legislative Drafting Department has prepared a draft based on the consultant's draft.

4. SUBMISSION OF LEGISLATION TO CABINET

Once agreement has been reached in respect of a draft, the draft will be proofread by one or more other members of the Department before it is submitted for Cabinet consideration. Legislative Counsel will notify the relevant Portfolio or Ministry when a draft is ready for submission to Cabinet. Draft legislation must not be submitted to Cabinet until such notification has been received. Draft legislation that is sent to a Portfolio or Ministry for discussion will contain words on the face of the draft indicating that it is a Discussion Draft and that it is not to be submitted to Cabinet.

5. SPEAKING NOTES

The relevant Legislative Counsel may be consulted, if necessary, to clarify any particular points arising in relation to Speaking Notes prepared by a Portfolio or Ministry.

6. EXPECTATIONS

6.1. The Legislative Drafting Department expects from Portfolios and Ministries the following:

- (a) that the instructions are conceptually sound and well-thought-out. Contacting First Legislative Counsel with a broad legislative proposal in the hope that the Legislative Counsel will flesh it out will delay the assignment as detailed instructions will still be required by Legislative Counsel;
- (b) that the Portfolio or Ministry will be ready and willing to discuss, explain, clarify, re-consider and, if necessary, revise the instructions, in the light of the observations of Legislative Counsel;
- (c) that the Portfolio or Ministry will allocate enough human resources, time and attention to the proposed legislation commensurate with its urgency and importance. It is important that once the first draft has been prepared, comments be received as soon as

practicable. The same goes for subsequent revisions of the first draft;

- (d) that the instructing official is sufficiently senior to make most decisions as and when they arise in the instructing process without having to postpone a response or refer it to a higher authority;
- (e) that the Portfolio or Ministry will maintain sufficient communication with the Legislative Drafting Department. In particular, the First Legislative Counsel must be informed of any changes in the target dates for the legislation and plans to defer legislation or abandon it must be communicated to the First Legislative Counsel as soon as possible; and
- (f) that the Portfolio or Ministry will allow Legislative Counsel to determine the wording and other matters relating to the form of the legislation.

6.2. A Portfolio or Ministry can expect the following from the Legislative Drafting Department:

- (a) that once written instructions are received by the First Legislative Counsel, they will be acknowledged;
- (b) that the First Legislative Counsel will assign matters to a Legislative Counsel, who will give them priority in accordance with the legislative drafting programme approved by Cabinet. Legislative Counsel will bring to the attention of First Legislative Counsel any problems affecting these priorities, with a view to resolution;
- (c) that the Legislative Counsel, if requested, will explain why provisions are drafted in a certain way. The Legislative Counsel may chose to do so without being requested if he thinks that the particular issue justifies it;
- (d) that as soon as reasonably practicable the Legislative Counsel will draw the attention of the Portfolio or Ministry to anything that he is required to include in

- the legislation but which does not have policy authority; and
- (e) that the Legislative Counsel will update the Portfolio or Ministry on the progress of the assignment.

7. GETTING THE BEST OUT OF THE LEGISLATIVE DRAFTING DEPARTMENT

The Legislative Drafting Department exists for the benefit, protection and implementation of Government policy. The First Legislative Counsel, Senior Legislative Counsel, Legislative Counsel and Administrative Secretary of the Department are pleased to provide an efficient legislative drafting and related advisory service to the Government of the Cayman Islands. With cooperation, the Department can continue to effectively provide the highest possible standard of service.