GOVERNMENT OF WESTERN AUSTRALIA

Department of Justice

Legislative Drafting Services for Members of Parliament

Parliamentary Counsel's Office

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1 Introduction and summary

1.1 Introduction

This document describes the legislative drafting services available from the Parliamentary Counsel's Office (**PCO**) to non-Government groups and parties in Parliament and private members of Parliament (**MPs**), explains the process by which that legislation is drafted and enacted and sets out the roles and responsibilities of PCO and instructing MPs in that process.

1.2 Drafting services available to private MPs

The Government makes some of PCO's legislative drafting services available to MPs who are:

- members of non-Government parties
- independent MPs
- members of the Government seeking drafting services otherwise than on behalf of the Government.

The drafting services available are:

- the drafting of Bills (**PM Bills**)
- the drafting of amendments to Bills before Parliament (**PM amendments**).

1.3 Summary of guidelines and limitations

The following are the main guidelines and limitations that apply to the drafting of PM Bills and PM amendments:

- PCO drafts PM Bills and PM amendments subject to its resource capacity, given that PCO's primary role is to deliver the Government's legislative program.
- PCO endeavours to distribute its drafting resources for private MPs equitably. This may limit a party or MP from having multiple PM Bills drafted concurrently.
- Small, single-issue PM Bills are prioritised over larger or multi-issue Bills.
- Drafting can take substantial time. In general, the minimum drafting time for a PM Bill is 4 months and longer periods can be necessary in some cases. Sufficient time must also be allowed to draft a PM amendment. See section 2.2 and 2.3.
- An MP requesting drafting services will be required to prepare detailed instructions in accordance with section 4.2 and submit a request to draft in in accordance with section 4.4.
- The MP will need to work with PCO as instructor throughout the drafting process or appoint an instructing officer to do so.
- PCO will keep the PM Bill or PM amendment confidential. PCO will not disclose the title, substance or originator of the PM Bill or PM amendment to anyone outside PCO, including the Government, without the member's written consent.

2 Prioritisation and timing

2.1 Prioritisation

The Government's legislative program is PCO's first priority. Drafting services will only be provided to private MPs in a way that does not interfere with that program.

However, PCO will make every effort to ensure that drafting services are made available to private MPs, taking into account the availability of legislative drafters and other resources in PCO.

Drafting services for private MPs will usually be allocated on a "first-come, first-served" basis. However, consideration will also be given to the need for a fair distribution of drafting resources among non-Government parties and other private MPs.

In order to maintain equitable distribution of resources, non-Government parties or MPs will not generally be able to have multiple Bills drafted at the same time.

Preference will be given to small, single-issue Bills, because large or multi-issue Bills require more resources.

PCO does not draft PM Bills on an urgent basis. As far as possible, PCO will aim to draft PM Bills during non-peak periods of the year.

2.2 Time to be allowed for drafting: PM Bill

PM Bills, like Government Bills, often take substantial time to draft. The minimum time to draft a Bill, from PCO receiving complete instructions until the Bill is ready to introduce, is generally 4 months.

Before requesting drafting of a PM Bill, the instructing MP should consider their preferred timeline for the Bill. This should take into account any factors that might increase the drafting time required, including:

- the size of the Bill
- the complexity of the Bill
- the need for consultation with stakeholders
- the clarity of the instructions and their compliance with the guidelines at section 4.2
- the capacity of the MP or instructing officer to respond promptly to drafts and requests for further instructions.

An MP seeking guidance about the timeframe that would be needed to draft a PM Bill is welcome to contact the Parliamentary Counsel to discuss.

2.3 Time to be allowed for drafting: PM amendment

It is also important to allow sufficient time for the drafting of a PM amendment. The time required to draft a PM amendment will depend on the length and complexity of the proposed changes and the clarity of instructions.

For example, providing instructions during the week in which a Bill is to be debated may not allow sufficient time. For a lengthy and complex PM amendment, it will generally be necessary to provide instructions several weeks before the Bill is to be debated.

3 Confidentiality

PCO will maintain complete confidentiality in providing PM drafting services. Communications about drafting work between PCO and the MP or instructing officer are protected by legal professional privilege.

This means that information will not be provided about a PM Bill or PM amendment to the Government, a member of the Public Service outside PCO or a member of the public. This includes not disclosing the title, the substance or the originator of the PM Bill or PM amendment.

The only exception to this is where PCO is authorised, in writing, by the instructing MP to disclose the information.

The instructing MP may choose to share a PM Bill or PM amendment or information about a PM Bill or PM amendment. However, note that it is inappropriate for an MP to identify publicly which drafter is undertaking work for them.

4 Process to request drafting

4.1 Considering whether PM Bill or PM amendment is appropriate

Before requesting drafting of a PM Bill or PM amendment, the MP should consider whether a Bill or amendment is the most appropriate course of action or whether there may be other avenues to achieve the intended result.

The purpose of legislation is to provide for legal obligations, rights and powers and not simply to make a statement about a matter.

In deciding whether a PM Bill or PM amendment is appropriate, the MP should consider:

- whether a speech, substantive motion or question in the relevant House of Parliament could be equally effective
- if the purpose of the action is to raise awareness of an issue or to provoke debate or thought — whether there is a more appropriate method to achieve that result
- whether there is a definite intention to introduce the PM Bill or move the PM amendment

- in the case of a PM Bill — whether an amendment to a Bill currently before Parliament is a more appropriate option
- whether an administrative or regulatory avenue could achieve the same result and how to encourage the Government to pursue that avenue
- whether, taking into account the time required for drafting, the PM Bill or PM amendment will still be required when it is finalised.

4.2 Preparing drafting instructions

A request for drafting should be accompanied by detailed drafting instructions setting out the proposal for the PM Bill or PM amendment.

The process of preparing drafting instructions may involve:

- researching similar legislation of other jurisdictions
- consulting with relevant people or bodies
- seeking legal advice (where appropriate)
- considering financial and resource implications
- considering accountability issues
- considering whether the *Constitution Acts Amendment Act 1899* s. 46 or Standing Orders would prevent the proposed PM Bill or PM amendment from progressing in Parliament (see further section 8 below).

Not taking these steps when preparing drafting instructions may slow down the drafting process, as more queries and issues may arise during drafting.

Drafting instructions should:

- be in writing
- use numbered paragraphs for ease of reference
- specifically and comprehensively describe the policy outcomes sought to be achieved and the rationale for the changes
- use straightforward, consistent language
- explain the policy aims, rather than setting out proposed draft provisions.

Drafting instructions should also:

- identify any provisions of existing legislation to be amended to give effect to the policy
- indicate any known consequential amendments to other legislation that may be necessary
- indicate proposed commencement arrangements
- identify any transitional issues that could arise
- refer to any provisions of other jurisdictions' legislation that may be similar or provide guidance

- attach any relevant legal advices that have been obtained
- attach or link to any other relevant background material, including court decisions, policy papers and law reform commission reports.

4.3 Instructing officer

A dedicated instructing officer is needed for the PM Bill or PM amendment. This can be the MP themselves or a nominated staff member. It is important that the instructing officer fully understands the policy and is able to make decisions on issues arising in the drafting process.

4.4 Formal request to draft

When the drafting instructions are complete, the instructing MP should send them to PCO by email to pco@pco.wa.gov.au with a formal request to draft the necessary PM Bill or PM amendment.

The formal request should:

- include the name, address, telephone number and email address of the instructing MP and the instructing officer
- set out the proposed timeframe requested
- attach the drafting instructions and any advices, decisions or other documents supporting those instructions (see section 4.2 above).

5 Drafting process

5.1 Allocation of drafter

On receiving the formal request, PCO will respond to the instructing MP to confirm whether a drafter can be allocated. If a drafter is allocated, the contact details of the drafter will be supplied.

5.2 Drafting stage

Ordinarily, the allocated drafter will prepare a first draft and send it to the instructing officer for consideration. The draft may contain drafter's notes and questions requiring further instruction from the instructing officer.

In some cases, the drafter may need to seek further instructions from the instructing officer before a first draft can be prepared.

The aim of the drafter is to achieve a sound legislative product that satisfies the MP's objectives and is legally and technically correct. To achieve this, the drafter may query aspects of the instructions or suggest alternative ways of achieving the MP's objectives. This is an ordinary part of a rigorous drafting process.

Once a draft is received, the instructing officer should promptly:

- review it in detail to see if it accurately reflects the policy outcomes sought
- consider the drafter's notes and queries

- provide further instructions in writing addressing the drafter's queries and explaining any further changes that are required.

The further instructions should be in a separate document or email and should not take the form of a marked-up or annotated draft.

The drafter will then prepare a second draft and the process will repeat until the PM Bill or PM amendment is finalised. It may be necessary for numerous drafts to be prepared to reach a finalised product.

Substantive new policy or instructions should not be introduced once a Bill is being drafted.

A PM Bill or PM amendment is finalised when the MP has confirmed that the Bill or amendment achieves the outcomes sought and the drafter has confirmed that PCO's quality assurance processes have been completed.

In the drafting process, contact between the instructing officer and the drafter may be by email, telephone or meeting. The instructing officer is welcome to email or phone the drafter during business hours with queries or to discuss the Bill.

5.3 Quality assurance

The draft PM Bill or PM amendment will also be subjected to PCO's internal quality assurance processes. This includes review by another drafter and editorial checking. These processes require some additional time and may raise further queries for the instructing officer to consider.

5.4 Revision of timeframe

During the drafting process, the Parliamentary Counsel or the allocated drafter may set a revised timeframe for drafting based on the workload of PCO or the allocated drafter.

5.5 The draft document

An MP or instructing officer should not make changes to a draft PM Bill or draft PM amendment themselves. If changes are required, ask PCO to make them.

The MP may use a draft PM Bill or PM amendment prepared by PCO for consultation purposes. However, bear in mind that there may be limited utility to consulting on an early draft, which may not yet adequately reflect the MP's intentions.

Each draft is identified by a draft number in the footer. The most recent draft provided by the drafter should be treated as the current draft and should be the only draft used for instructing purposes.

5.6 Inform PCO of discontinued project

Please ensure that the drafter is informed as soon as possible if an MP decides to put on hold or not to proceed with a PM Bill or PM amendment.

6 Process after drafting finalised: PM Bill

6.1 Printing of PM Bill

When a Bill is finalised, the instructing MP decides if the Bill should be printed so that it can be introduced to Parliament.

To get a finalised Bill printed, the instructing MP should send PCO a written request to print the Bill. This should be sent by email to the drafter.

The request should allow sufficient time for PCO to prepare the notice of motion required to introduce the Bill and to prepare the Bill for introduction.

On receiving the request, PCO —

- arranges for the Bill to be printed
- sends the instructing MP a notice of motion to introduce the Bill to the relevant House of Parliament
- sends a copy of the notice of motion to the Clerk of the relevant House of Parliament (unless instructed otherwise by the instructing MP).

See also section 8.2 below in relation to Governor's messages.

The instructing MP should notify PCO immediately if there is any reason why printing of the Bill should be delayed.

When printed, copies of the Bill are sent, in confidence, to the Legislative Assembly Office or to the Legislative Council Procedure Office, depending on the House in which the Bill is to be introduced.

If the Bill contains amendments to an Act, PCO will also prepare a marked-up version of that Act showing how it is proposed to be amended by the Bill. Copies are made available on the Parliament website when the Bill has been introduced.

6.2 Introduction and passage through Parliament

The instructing MP is responsible for:

- preparing an explanatory memorandum for the Bill (required by each House of Parliament's Standing Orders) explaining the background to and the reasons for each clause of the Bill and, if necessary, the relationship of a clause to other clauses in the Bill
- preparing the second reading speech for the Bill and making it available to Chamber staff for printing
- giving the notice of motion to introduce the Bill to the Clerk of the House in which the Bill is to be introduced.

The drafter, if requested to do so and if PCO's resources permit, will draft any amendments to the Bill that the instructing MP may require during the Bill's passage through Parliament.

6.3 Assent, publication and commencement

If both Houses of Parliament pass the Bill:

- copies of the Bill, incorporating any amendments made in Parliament, are prepared by the Clerk of the Parliaments and forwarded through PCO to the Governor for Royal Assent
- on assent, the Bill becomes an Act of Parliament and is published on the WA legislation website
- the Act comes into operation in accordance with its commencement provision.

Commencement by proclamation is generally not suitable for PM Bills, as private MPs are not in a position to have a proclamation made by the Governor.

7 Process after drafting finalised: PM amendment

When the drafting of a PM amendment is finalised, the drafter will send the instructing officer a PDF of the finalised amendments.

The finalised amendments should be printed out, signed by the instructing MP and given to the Clerk of the Legislative Assembly or Legislative Council, as appropriate.

PCO will provide a Microsoft Word version to the relevant Clerk when requested to do so. The amendments will then be published by the Clerk of the relevant House.

8 Constitutional and parliamentary procedural issues

8.1 Rules affecting content of Bills and amendments

There are a number of constitutional rules and parliamentary Standing Orders that affect what can be included in PM Bills and PM amendments. A PM Bill or PM amendment that contravenes any of these rules may be ruled out of order or otherwise unable to proceed. A brief description of some of these issues is set out below.

PCO can assist in determining whether a PM Bill or PM amendment would contravene constitutional or procedural rules and advise on possible drafting options. In some cases, advice from the Clerk of the Legislative Council or Legislative Assembly is sought by the MP (or by the drafter with the MP's consent).

8.2 *Constitution Acts Amendment Act 1899* s. 46

The *Constitution Acts Amendment Act 1899* s. 46 provides for the powers of the Houses of Parliament in respect of legislation.

A Bill introduced into the Legislative Council that appropriates funds or imposes taxation is susceptible to being ruled out of order in both the Legislative Council and Legislative Assembly.

The Legislative Council cannot amend:

- a Loan Bill, Budget Bill or Bill imposing taxation
- any Bill in a way that would increase a proposed charge or burden on the people.

The Legislative Council can request the Legislative Assembly to make amendments that cannot be made in the Council, so long as the requested amendment does not increase a proposed charge or burden on the people.

A Bill that clearly appropriates funds must be introduced in the Legislative Assembly and cannot be read a second time unless it is recommended by a message from the Governor. Only the Government can request that the Governor provide a message. Therefore, a PM Bill that requires a message generally cannot be passed unless the instructing MP is able to persuade the Government to request a message.

Members should consult the Clerk of their House for advice on the application of Standing Orders relating to the powers of the two Houses under the *Constitution Acts Amendment Act 1899*.

8.3 Standing Orders

Bill must deal with a single topic:

Under Legislative Council Standing Order 122(2), matters included in a Bill must have a proper relationship to each other. This means that a single Bill cannot deal with unrelated topics.

Permissible amendments to Bills:

Under Legislative Council Standing Order 134, an amendment to a Bill must fall within the subject matter of the Bill. It is not enough for an amendment to amend the same Act as the Bill, it must also be related to the provisions of the Bill.

Under Legislative Assembly Standing Order 177(1), an amendment moved during consideration in detail must fall within the subject matter of the Bill. Rulings have held that an amendment not relevant to the subject matter of the Bill is out of order, so it is not enough that the amendment would amend the same Act as the Bill. An amendment outside the subject matter can be moved only if the Assembly first agrees to a motion, of which notice has been given, extending the scope of the Bill. Because notice is required, any such motion must be planned before consideration in detail begins.

Under Legislative Council Standing Order 122(1) and Legislative Assembly Standing Order 163, no clause can be included in a Bill that does not come within its title. If an amendment agreed to does not come within the title of the Bill, the title must then be amended (see Legislative Council Standing Order 134(2) and Legislative Assembly Standing Orders 163 and 177)(2)).

9 Contact details

Inquiries can be directed to PCO at the contact details below.

Parliamentary Counsel's Office

Email: pco@pco.wa.gov.au

Website: Parliamentary Counsel's Office

WA legislation: www.legislation.wa.gov.au

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