

A Guide to
Legislation and Legislative Process
in British Columbia

PART 3

**GUIDE TO PREPARING
DRAFTING INSTRUCTIONS**

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PART 3 – GUIDE TO PREPARING DRAFTING INSTRUCTIONS

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PART 3

GUIDE TO PREPARING DRAFTING INSTRUCTIONS

About this guide

Legislative counsel are responsible for drafting government Bills. Directions to legislative counsel are given by means of the drafting instructions that are submitted to Cabinet with a Request for Legislation (“RFL”). These initial instructions are often supplemented by further instructions provided during the course of drafting.

Drafting instructions are a process of communication. The proposed policy must be effectively communicated to Cabinet so that it can be properly considered for approval, and it must be effectively communicated to the drafter so that it can be placed into legislative form.

This guide is intended to provide ministry officials with information about preparing drafting instructions at both the RFL and drafting stages. The guide does this by

- ◆ first, providing some very general information about the purpose, form and content of drafting instructions,
- ◆ then, in the form of a checklist, setting out key matters that need to be considered.

We hope you find it useful.

Initial drafting instructions

Purposes of drafting instructions

The drafting instructions accompanying an RFL form the basis on which a Government Bill is prepared. They describe *and* limit what the draft Bill is to contain.

Drafting instructions serve several purposes:

- ◆ they provide Cabinet with a more detailed view of how the policy for which Cabinet approval is being sought will be reflected in the legislation;
- ◆ they allow the sponsoring ministry to think through its proposal in detail;

- ◆ they provide other ministries and agencies an opportunity to consider how the proposal may affect their responsibilities and interests;
- ◆ they guide the legislative counsel who drafts the Bill;
- ◆ they serve as a benchmark for determining whether the draft Bill does what Cabinet authorized in approving the RFL.

What drafting instructions need to cover

For very simple changes, the Three Column Document (policy review document) that is submitted with the RFL can also serve as drafting instructions. Such simple changes would include amendments such as changing a date, increasing the number of members on a board or decreasing a tax rate.

For anything more complex, the drafting instructions need to cover the following information:

- ◆ **Background** – What is the problem being addressed?
- ◆ **Objective** – What is the proposed legislation expected to do about the problem?
- ◆ **Rationale** – Why is this particular solution chosen (that is, how do you expect that it will address the problem)?
- ◆ **The specifics of the proposal** – How is the proposed legislation intended to work (the details of how you intend to accomplish the objective)?

What form drafting instructions should take

Drafting instructions should be written in clear, straightforward language, keeping in mind the purposes and providing the information described above.

- ◆ **Point form or prose** – Instructions may be provided in point form or as a plain prose account. Topic headings are often helpful.
- ◆ **Flow charts, diagrams, tables** – It can be very helpful to include these with your instructions: they help to illustrate a proposed process or to indicate the intended relationship between concepts.
- ◆ **Draft legislation** – Instructions in the form of draft legislation are not encouraged, but they are also not prohibited. Sometimes using a legislative form can be helpful to a ministry in thinking out its policy and administrative details in a coherent way.

However, if instructions are provided in the form of draft legislation

- ◇ each provision of the draft must be fully annotated to provide the background, objective and rationale described above, and
- ◇ the ministry should understand that legislative counsel are responsible for the final legislation and are not bound to follow

the organization or language proposed in the drafting instructions.

In all cases, substance is more important than form.

How much detail should be included?

The checklist included at the end of this part covers a wide range of matters and prompts you to think about the details that will be needed to draft the legislation. Most of these details do not need to be specifically included in the written drafting instructions, but they will need to be developed for legislative counsel to complete drafting. Details are included so that you can begin thinking about them as early as possible, so that drafting can proceed expeditiously when approval has been received.

The instructions provided with the RFL should find a middle ground between too much and too little detail:

- ◆ on the one hand, they should be general enough to provide flexibility for minor policy questions to be worked out in the drafting process;
- ◆ on the other hand, they should not be so general as to provide only minimal indication of how policy objectives are to be achieved.

For example, if the proposed legislation will include an appeal process, the RFL drafting instructions should indicate who is to be the appeal tribunal, who will be entitled to appeal and the proposed bases for appeal. Details that will be required during the drafting process include the time and method for starting an appeal, whether an appeal acts as a stay of the original decision, who is to get notice of the appeal, who can appear before the appeal tribunal, the nature of the decision on an appeal and any special procedural rules.

The drafting process and further instructions

Initial contact

After an RFL has been approved by Cabinet, Chief Legislative Counsel will assign the file to a drafter. (Often this will be the legislative counsel who provided advice on the RFL.)

The legislative counsel assigned to the file will contact the person identified in the RFL as responsible for the project to discuss the following:

- ◆ how soon drafting can start;
- ◆ who will be on the drafting team (that is, participating directly in the drafting process);
- ◆ whether there will be consultations with other people during the drafting process.

Starting to draft

Whether drafting can begin immediately will depend on government priorities and the other drafting projects being carried by the legislative counsel. The drafting process itself will depend on the legislation, the drafter and the time frame.

- ◆ For simple amendments, legislative counsel may be able to prepare a full draft based on the initial instructions provided with the RFL. Any comments or queries will be highlighted on the draft. The legislation can then be finalized through a few exchanges of response and clarification, often without requiring a direct meeting between the instructing official and the drafter.
- ◆ In some cases, legislative counsel will prepare a sketch draft based on the RFL instructions, identifying issues that need to be addressed and asking for directions. Direct meetings between the drafter and the instructing official may be the speediest way of moving to a draft that reflects the ministry's intentions. The framework of the initial sketch may well change significantly through the course of this development.
- ◆ In other cases (particularly for major Bills), legislative counsel will want to meet with the instructing official before beginning to draft. This meeting may cover planning and process issues, and involve discussing substantive legal issues related to the proposal. After this, drafts will be prepared, sent for review, discussed and revised through a process that may take many months.

Development of further drafts

All but the most minor legislative amendments will usually go through a number of drafts before they are ready for Cabinet committee review or introduction. Drafting is a process of refinement.

The first draft produced by legislative counsel will have a number of questions and comments. These may, for example, do the following:

- ◆ ask for instructions on the further detail needed to complete the legislative scheme;
- ◆ explain how a legislative provision, as prepared in accordance with the initial instructions, will operate in its legal or practical effect and ask for confirmation that this is the intended result;
- ◆ note that the instructions result in a variation from similar legislative schemes in other Acts and ask whether this variation is necessary.

The issues raised may be new ones for the instructing official, requiring further research, a request to the ministry solicitor for a legal opinion, or outside consultation. The responses back to legislative counsel may lead to

new issues for the drafter. As the detail is filled in and the issues are resolved, the questions and comments will disappear from the draft.

Drafting meetings

Drafting meetings are an opportunity for the drafting team to

- ◆ discuss issues raised by or in the previous draft, and
- ◆ provide legislative counsel with instructions for the next draft.

Depending on the legislation being developed and the personal working style of the drafter, they may also involve direct drafting. In direct drafting, the instructing officials come into the drafter's office, sit in front of a separate computer monitor and provide the drafter with instructions directly in conjunction with the drafting. (If you are an instructing official in a direct drafting meeting, it is important that you keep a record of the policy issues that arise and the decisions that were made during the meeting.)

Finalizing the draft

As a final step, the draft legislation is reviewed by legislative editors in the Office of Legislative Counsel. The editors consider such matters as format, grammar, style, cross-references and consequential amendments, and identify any provisions that may require further clarification.

When legislative counsel considers that a draft is at the final or close-to-final stage, a Certificate of Readiness is sent to the sponsoring ministry. When signed and returned to legislative counsel, the certificate indicates that the draft is ready to proceed through the final approval processes.

Planning your timelines for draft legislation

Plan by all means, but appreciate that several factors need to be considered when you are developing timelines:

- ◆ **Cabinet sets the priorities for drafting projects** – This means that, no matter how important a project is from the sponsoring ministry's perspective and no matter how prepared the ministry is for providing drafting instructions, a project may not get the drafting time it needs until other ones have been completed.
- ◆ **Legislative counsel often have a substantial number of drafting projects underway at the same time** – If there is too much time between drafts on a complex project, the drafter will need to get back up to speed on the issues involved before starting the next draft. Best practices from the sponsoring ministry's perspective will have the instructing official reviewing a new draft promptly after it is received, and providing the needed instructions on the next draft as quickly as possible.

- ◆ **Unforeseen issues arise, and ones that have been foreseen may turn out to be more complex than anticipated** – It is not uncommon for issues to come up during the drafting process that require additional legal opinions, outside consultation or review of new cost implications.
- ◆ **Complex law benefits from reflection** – Implications of your legislation may not be immediately apparent. You will almost certainly have better legislation if you can allow time to think these through.
- ◆ **Editing takes time** – The legislative editors check grammar and numbering. They do a substantive review of the text for logic, clarity and readability. In addition, they will do database searches to confirm cross-references and to ensure that necessary consequential amendments have been prepared. This takes time, and the editors are also subject to Cabinet directions on priority. The result is that editing a large Bill may take a number of days, and require a couple of further drafts back and forth between legislative counsel and the instructing official to deal with the issues raised by the editors.
- ◆ **A legislation review committee needs the draft in advance** – Materials need to be sent to this committee up to a week in advance of the meeting at which the draft legislation is to be reviewed. This means that the draft must be settled sufficiently ahead of that date for the necessary section notes and other accompanying documents to be prepared.

For these reasons, legislative counsel recommend you *avoid promising other people that drafts will be ready by a certain date*. And, if you have a target date for completion of a draft (to use for outside consultation, as an example), let your legislative counsel know as early as possible.

For the checklist on the following pages, the Office of Legislative Counsel gratefully acknowledges the helpful guide prepared by David Elliot (a legislative drafter in private practice) and a comparable checklist that was under preparation by the federal Office of Parliamentary Counsel.

Checklist for Drafting Instructions

GETTING STARTED	
Checklist item	Issues for consideration
<p>❖ The drafting team</p>	<p><i>Who should be assigned as the instructing official, responsible for providing drafting instructions to legislative counsel?</i></p> <ul style="list-style-type: none"> ◆ The Bill will be drafted by the assigned legislative counsel working closely with the ministry official or officials assigned to provide instructions to legislative counsel. ◆ Experience has shown that the drafting process works best if the instructing official <ul style="list-style-type: none"> ◇ is a senior level official in the ministry and has ready access to the deputy minister and minister, ◇ has the authority to make decisions or obtain decisions quickly, ◇ was directly involved in the policy development that led to the legislative proposal and has a good general knowledge of the subject matter of the proposal, ◇ is readily available to the drafter on an ongoing basis, and ◇ is able to provide the necessary support to the drafter and ensure that the draft accurately reflects the approved policy. (For this, the instructing official should have a feel for reading drafts, be able to see the ramifications of a proposed provision, be able to spot deficiencies in the draft and provide the drafter with the critical commentary needed to ensure that the draft legislation fulfills its intended purpose.) ◆ If the proposal is a major drafting project, the instructing official should be assigned full time and should have some project-management skills. ◆ Because there are many legal issues that arise during the drafting process, the drafting team must include the ministry solicitor for the sponsoring ministry. The ministry solicitor should be given an opportunity to review the drafting instructions before they are finalized.
<p>❖ Preparing the drafting instructions</p>	<p><i>A significant amount of time is required to prepare proper drafting instructions, including time for the following:</i></p> <ul style="list-style-type: none"> ◆ A discussion with the advising ministry solicitor regarding the problem or goal the legislation is to address; ◆ consultation with other ministries that may be affected

GETTING STARTED

Checklist item	Issues for consideration
	<p>by the proposal and a resolution of any conflicts that may become apparent;</p> <ul style="list-style-type: none"> ◆ an analysis of who may be affected by the proposal and how to deal with people who will not comply with it; ◆ an analysis of what legislation, in addition to the target legislation, may be affected and how it should be amended; ◆ a consideration of whether transitional provisions will be needed; ◆ an analysis of the regulations that will be required so appropriate authorizing language can be prepared. <p>The drafting instructions that are attached to the RFL should reflect all of the above items along with a clear articulation of the problem to be addressed or the goal to be achieved, and an explanation of the policy direction created for that purpose.</p>
<p>❖ Commitments and consultations</p>	<p><i>Have public commitments been made that will affect the content of the proposed legislation?</i></p> <ul style="list-style-type: none"> ◆ The government or the minister may have made a specific commitment about how the proposed policy would be structured. This commitment should be clearly indicated in the drafting instructions as it may significantly restrict the options available for framing the legislation. ◆ Even if a formal commitment has not been made, has the proposal been publicly discussed in specific terms that may affect how the legislation is framed? For example, by referring to a new regulatory proposal as a “licensing scheme”. <p><i>Are there requirements or commitments for consultation that will affect the time required to prepare the legislation?</i></p> <ul style="list-style-type: none"> ◆ The RFL should clearly indicate what consultations are proposed. ◆ Commitments are often made regarding stakeholder consultations. These may have been specific to the legislative proposal or (as is the case for the Protocol of Recognition between the provincial government and local governments as represented by Union of British Columbia Municipalities) a general commitment to consult. ◆ In some cases, consultation is required such as in the following examples: <ul style="list-style-type: none"> ◇ section 276 of the <i>Community Charter</i> requires

GETTING STARTED

Checklist item	Issues for consideration
	<p>consultation with the Union of British Columbia Municipalities for any amendment of that Act, the <i>Local Government Act</i> and other specified legislation;</p> <ul style="list-style-type: none"> ◇ amendments to the British Columbia <i>Income Tax Act</i> that will be administered federally must be reviewed by the federal government before they are finalized; ◇ under both treaty and common law, legislation that will affect the interests of First Nations will trigger a duty to consult; ◇ certain interprovincial trade and labour mobility agreements include express requirements for consultation; ◇ a Memorandum of Understanding between the Attorney General and Chief Justice requires consultation on proposed legislation that may affect judicial administration. <p>◆ Consultations during the drafting process can significantly extend the time required to prepare draft legislation. <i>Caution:</i> if the purpose of the consultations is to reach a negotiated agreement on the wording that is to be reflected in the legislation, legislative counsel must be consulted before that wording is finalized.</p> <p><i>Will other ministries be involved in the drafting process?</i></p> <ul style="list-style-type: none"> ◆ Often one ministry's proposal will affect the legislation or activities of other ministries, and consultation between them will be required during the drafting process. Again, this can extend the time required to prepare draft legislation.
<p>❖ Time needed to draft</p>	<p><i>Have you consulted with legislative counsel on an estimated time for drafting?</i></p> <ul style="list-style-type: none"> ◆ Keep in mind that policy details will need to be addressed during the drafting process. Sometimes these apparently minor issues can be very complex, even when the final legislative statement is very short. The time required to prepare the draft legislation may be much greater than the ministry expects.

GENERAL MATTERS

Checklist item	Issues for consideration
❖ Principal objectives	<p><i>What are the principal objectives of the proposed legislation?</i></p> <ul style="list-style-type: none">◆ It is essential that the RFL clearly articulates the precise purpose of the proposed legislation, so that Cabinet and the drafter can clearly understand what the legislation is supposed to achieve.◆ It is often helpful if the problem that is being addressed and the proposed solution are separately identified.◆ If an Amending Bill has a number of different objectives, the instructions should explain these separately in relation to the provisions to be amended.
❖ Choices for implementing objectives	<p><i>How will the policy objectives be implemented?</i></p> <ul style="list-style-type: none">◆ Many legal mechanisms exist for implementing policy objectives, including the following:<ul style="list-style-type: none">◇ creating administrative/public bodies (e.g., establishing a Crown corporation);◇ conferring powers and duties on public officials (e.g., authorizing an official to make recommendations on policy or legislative changes in relation to a particular issue);◇ establishing rules that regulate, prohibit, require or authorize particular activities (e.g., establishing a licensing scheme);◇ providing sanctions for non-compliance with the rules (e.g., prosecutions, administrative penalties, loss of authority to undertake activities).◆ As far as possible, the drafting instructions should provide a description of how the legislation will actually work, including the type of legal mechanism proposed, the related powers and duties and how compliance with the legislation is to be monitored and enforced.◆ In some cases there may be more than one option for implementation, and the RFL may wish to identify these.
❖ Legal context	<p><i>What is the legal context for the proposal?</i></p> <p>Law related to the proposal must be assessed to ensure that the legislation resulting from the proposal will operate effectively in its legal context.</p> <p>Issues to be considered include the following:</p> <ul style="list-style-type: none">◆ Does the Legislature have constitutional authority to enact

GENERAL MATTERS

Checklist item	Issues for consideration
	<p>the proposed legislation?</p> <ul style="list-style-type: none"> ◆ Is the proposal consistent with the Canadian Charter of Rights and Freedoms? ◆ Is the proposal consistent with the <i>Human Rights Code</i>? ◆ Is the proposal consistent with important Acts of general application, such as the <i>Freedom of Information and Protection of Privacy Act</i> and the <i>Financial Administration Act</i>? ◆ Are there implications relating to NAFTA or other international trade matters? ◆ Are any of the proposed provisions unnecessary repetitions of provisions in Acts of general application, such as the <i>Interpretation Act</i> or the <i>Offence Act</i>? ◆ If proposed provisions vary from provisions in an Act of general application, is there a good reason for the difference? <ul style="list-style-type: none"> ◇ Conflicting legislation needs to be specifically identified. It should not be dealt with by a general statement of “despite any other Act”. ◆ Does the proposed legislation deal with matters that are also dealt with by another Bill that is being prepared or has been introduced in the Legislative Assembly? <ul style="list-style-type: none"> ◇ If so, the ministry responsible for the other Bill should be consulted about the overlap. ◆ Is the proposal intended to respond to a specific court decision or legal opinion? <ul style="list-style-type: none"> ◇ If so, a copy of the decision or opinion should be included with the initial drafting instructions.

LEGISLATIVE ELEMENTS

Checklist item	Issues for consideration
<ul style="list-style-type: none"> ❖ A basic list of questions “WHIB” 	<p><i>What elements go into a legislative provision?</i></p> <p>In developing instructions for a specific provision, one should consider the following basic components:</p> <ul style="list-style-type: none"> ◆ Who? – who is subject to the rule? ◆ What? – what is the basic rule? That is, what is it that the subject <ul style="list-style-type: none"> “may” do (empowering/permissive), “must” do (obligation),

LEGISLATIVE ELEMENTS

Checklist item	Issues for consideration
	<p>“may not” do (limiting power), or “must not” do (prohibition)?</p> <ul style="list-style-type: none"> ◆ <i>Where?</i> – is there a place component to the rule? ◆ <i>When?</i> – is there a time component to the rule? ◆ <i>Why?</i> – what is the purpose of the rule? ◆ <i>How?</i> – is there a means/method aspect to the rule? ◆ <i>How much?</i> – is there a cost/charge aspect to the rule? ◆ <i>If?</i> – are there limits to when the rule will apply? ◆ <i>If not?</i> – are there sanctions (fines, administrative penalties, something else) if the rule is not followed? ◆ <i>But?</i> – are there exceptions to the rule?

LEGISLATIVE STRUCTURE

Checklist item	Issues for consideration
<p>❖ Options for structuring the proposed scheme</p>	<p><i>How is the scheme to be implemented, as between the Act itself, the regulations under the Act and administrative instruments?</i></p> <ul style="list-style-type: none"> ◆ Many instruments are available to express and implement policy. They fall into three categories: <ul style="list-style-type: none"> ◇ Acts; ◇ Regulations; ◇ Administrative instruments (e.g., internal directives, guidelines, bulletins, decision documents). ◆ Processes are different for each instrument: <ul style="list-style-type: none"> ◇ <i>Acts</i> – are laws made through the parliamentary process of the Legislature. ◇ <i>Regulations</i> – are laws made under an express delegation in an Act. The Act will determine who may make the regulations and what the regulations can do. The process for giving effect to regulations is governed by the <i>Regulations Act</i>. ◇ <i>Administrative instruments</i> – do not involve legislative processes, but may be subject to particular legal requirements such as those relating to natural justice in public decision making. ◆ The provisions of the Act, the regulations under the Act and any related administrative instruments must fit together in a coherent scheme that accords with the

LEGISLATIVE STRUCTURE

Checklist item	Issues for consideration
	framework established by the Act.
<p>❖ Things that should be in the Act</p>	<p><i>What is to be included in the Act?</i></p> <ul style="list-style-type: none"> ◆ Generally speaking, the Act contains the fundamental framework of the legislative scheme. The underlying principles expressed by that framework (either directly or by implication) will govern how the Act is interpreted by the courts and, thus, how it may legally be implemented. ◆ In addition to these fundamentals, the following matters are usually dealt with in the Act: <ul style="list-style-type: none"> ◇ controversial matters that should be addressed by the Legislature (including the matters identified in the <i>Extraordinary provisions proposed for an Act</i> section of these guidelines as being matters for special consideration by Cabinet); ◇ provisions establishing the structure of public bodies or providing for senior appointments; ◇ provisions that substantially affect personal rights (e.g., search and seizure powers, penalties for serious offences, expropriation); ◇ provisions that establish a tax (including fees that raise revenues substantially above the cost of the services provided); ◇ transitional provisions required for implementing the new legislation; ◇ consequential amendments to other Acts.
<p>❖ Things that should or could be in regulations</p>	<p><i>What is to be covered by the regulations?</i></p> <ul style="list-style-type: none"> ◆ Regulations should deal with matters of a legislative nature that are subordinate to the main principles of the Act. ◆ Regulations are appropriate to deal with the following matters: <ul style="list-style-type: none"> ◇ procedural matters (e.g., how to apply for a licence); ◇ matters that need frequent adjustment (e.g., establishing interest rates or licence fees); ◇ technical matters that involve scientific or other expertise (e.g., prescribing classes of organic pollutants); ◇ matters that cannot be finalized until there is some experience in working with the new legislation

LEGISLATIVE STRUCTURE

Checklist item	Issues for consideration
	<p>(e.g., establishing the time limits for when certain steps must be taken).</p> <p>[See also the <i>Regulation-making authority</i> section.]</p>
<p>❖ Things that should be in administrative instruments</p>	<p><i>What should be dealt with through administrative instruments?</i></p> <ul style="list-style-type: none"> ◆ Often many of the elements of a proposal (particularly a regulatory scheme) should in fact be dealt with by administrative instruments. ◆ Examples of administrative instruments include permits, licences, contracts, guidelines and directives. ◆ The following are examples of when it is appropriate to use administrative instruments: <ul style="list-style-type: none"> ◇ legal requirements that are to be imposed individually on a case-by-case basis; ◇ non-binding guidelines for eligibility; ◇ internal directives on administrative matters.

POWERS AND DUTIES

Checklist item	Issues for consideration
<p>❖ Assignment of powers and duties</p>	<p><i>Who should powers and duties be given to?</i></p> <ul style="list-style-type: none"> ◆ The nature of the power or duty usually determines who is best to exercise it. ◆ Regulation-making powers – <ul style="list-style-type: none"> ◇ Most regulation-making powers are exercised by the Lieutenant Governor in Council. ◇ Ministers may be authorized to make regulations in relation to matters that are not of concern across government generally. For example, the minister responsible for the <i>Homeowner Protection Act</i> establishes the content of reports to be made by builders, contractors and renovators under that Act. ◇ In some cases, a specialized tribunal may be authorized to make regulations in its area of expertise. For example, the Workers Compensation Board has the authority to make most occupational health and safety regulations. ◇ If regulation-making authority is given to an outside

POWERS AND DUTIES

Checklist item	Issues for consideration
	<p>individual or body, approval of the Lieutenant Governor in Council may be required. For example, certain bylaws under the <i>Veterinarians Act</i> do not come into force until approved by the Lieutenant Governor in Council.</p> <ul style="list-style-type: none"> ◆ Judicial and quasi-judicial powers – <ul style="list-style-type: none"> ◇ Judicial and quasi-judicial powers must be exercised with impartiality. ◇ The people who exercise these powers should have the qualifications and security of tenure to ensure this impartiality. ◆ Administrative powers – <ul style="list-style-type: none"> ◇ Most administrative powers are given to ministers who, in turn, have implied authority to authorize officials in their ministries to exercise the powers. (Caution: there are limits on this implied authority to delegate. See the following <i>Delegation of statutory authority</i> section.) ◇ Except for very senior appointments or publicly sensitive matters, administrative powers should not be given to the Lieutenant Governor in Council. ◇ Inspection and enforcement powers are usually given to classes of officials created to exercise these powers.
<p>❖ Delegation of statutory authority</p>	<p><i>Are powers or duties under the legislation to be delegated?</i></p> <ul style="list-style-type: none"> ◆ As a starting point, if an Act establishes the powers or duties of a specified person or body, this person or body is considered to be acting as a delegate of the Legislature. Further delegation to another person or body is known as subdelegation. The general common law rule is that statutory powers cannot be subdelegated unless subdelegation is expressly authorized by statute. ◆ One important exception to the common law rule is the subdelegation authority of ministers. Ministers are considered to have an implied authority to subdelegate – except in relation to quasi-judicial functions. (Broadly speaking, these are functions related to decisions that directly affect the rights of specific people on a case-by-case basis.) <p>In relation to people other than ministers, the rule is strictly applied by the courts—even when it causes administrative inconvenience—unless the context implies an authority to</p>

POWERS AND DUTIES

Checklist item	Issues for consideration
	<p>subdelegate. A court will often find subdelegation authority if the function is purely administrative (for example, a duty to publish a notice). For other functions, the court will be reluctant to find an implied authority.</p> <p>For example, there is no implied authority to subdelegate if the power</p> <ul style="list-style-type: none"> ◇ is legislative (e.g., making regulations), ◇ is quasi-judicial (e.g., making a determination of responsibility on the basis of evidence), or ◇ indicates that trust is being placed in the person's individual judgment or discretion (e.g., if particular expertise is required). <p>If there is to be any subdelegation of duties or powers beyond the purely administrative, the proposed legislation should include an express authorization.</p> <p>For example, if subdelegation is to be authorized in relation to a specific power, the statute will</p> <ul style="list-style-type: none"> ◇ confer the power on a specified person or body, ◇ authorize the specified person or body to delegate those powers to another person, and ◇ most often, directly provide that this delegated authority is subject to any restrictions or conditions established in the delegation. <p>◆ As a final point, it is worth noting that section 23 of the <i>Interpretation Act</i> provides some limited authority for statutory powers and duties to be exercised by other people without a delegation:</p> <ul style="list-style-type: none"> ◇ in the case of a minister, the deputy minister or associate deputy minister may act for the minister (subject to the limit that these officials may not make regulations); ◇ in the case of a specified public officer, a person appointed to act in the office or the deputy of the public officer may act for the public officer.

EXTRAORDINARY PROVISIONS

Checklist item	Issues for consideration
<p>❖ Extraordinary provisions proposed for an Act</p>	<p><i>Does the proposal include extraordinary provisions that will require specific Cabinet approval through the RFL process?</i></p> <ul style="list-style-type: none"> ◆ Certain types of provisions should be specifically identified in the RFL (usually because they are an extraordinary exercise of legislative authority). Cabinet must be made aware of them so that a proper assessment can be made of whether they should be included in the legislation. ◆ The following are examples of these provisions: <ul style="list-style-type: none"> ◇ provisions that affect rights or freedoms protected by the <i>Canadian Charter of Rights and Freedoms</i> or that significantly affect other personal rights or freedoms; ◇ retroactive provisions; ◇ validation of provisions that have been struck down by a court; ◇ power to expropriate property; ◇ power to subdelegate regulation-making powers; ◇ power to grant exemptions from the legislation; ◇ provisions that exclude the jurisdiction of the courts; ◇ power to amend the Act or another Act by regulation (known as a “Henry the Eighth clause”); ◇ regulation-making powers for matters that are usually dealt with in Acts. (See “the Things that should be in the Act”); ◇ provisions that are to operate – “despite the <i>Freedom of Information and Protection of Privacy Act</i>”, “despite the <i>Financial Administration Act</i>”, or “despite the <i>Canadian Charter of Rights and Freedoms</i>”. (Note that this would be a unique exclusion in British Columbia laws and extraordinary constitutional rules apply.)
<p>❖ Extraordinary provisions proposed for regulations under the Act</p>	<p><i>Is it anticipated that the regulations to be made under the Act will include extraordinary provisions that should be identified in the RFL?</i></p> <ul style="list-style-type: none"> ◆ As with the Act itself, if it is expected that the regulations will involve the extraordinary use of legislative authority, the RFL should specifically request this authority and state why it is needed.

EXTRAORDINARY PROVISIONS

Checklist item	Issues for consideration
	<ul style="list-style-type: none">◆ Examples are regulations that would do any of the following:<ul style="list-style-type: none">◇ affect rights or freedoms protected by the <i>Canadian Charter of Rights and Freedoms</i> or that would significantly affect other personal rights and freedoms;◇ determine important matters of policy or principle;◇ operate retroactively;◇ exclude the ordinary jurisdiction of the courts;◇ impose a tax (including fees that raise revenues substantially above the cost of the services provided);◇ set penalties that are higher than those established by the <i>Offence Act</i>;◇ allow regulation-making authority to be subdelegated;◇ provide an exemption from the general process established by the <i>Regulations Act</i>;◇ amend the enabling Act or other Acts.

SPECIFIC ISSUES

Checklist item	Issues for consideration
❖ Title	<p><i>What is the proposed title of the Bill?</i></p> <ul style="list-style-type: none">◆ In British Columbia, Bills are given one title. (In other jurisdictions there may be both a long and a short title.)◆ A proposed title should reflect the content of the Bill in a neutral form. The title of an Act is used by courts in interpreting its provisions, so care is needed.◆ The first word of the title determines an Act's placement in the statute books. Avoid beginning a title with general words such as "British Columbia", "BC", "Provincial" or "Government".◆ You may consult the Office of Legislative Counsel when choosing a working title.◆ For amending Bills, the basic form of title is established by convention. So, for example, the first 2012 Bill to amend the <i>Motor Vehicle Act</i> would be titled <i>Motor Vehicle Amendment Act, 2012</i>. If there were a second Bill that year amending the same Act, its title would be <i>Motor Vehicle Amendment Act (No. 2), 2012</i>.

SPECIFIC ISSUES

Checklist item	Issues for consideration
<p>❖ Preambles, purpose and principles clauses</p>	<p><i>Is a preamble or purpose clause being considered?</i></p> <ul style="list-style-type: none"> ◆ Generally legislation can speak for itself and these are not needed. Indeed, because preambles and purpose clauses are used by courts in interpreting the legislation, they may have unintended effects unless they are carefully developed. ◆ There is general direction from Cabinet that these should not be used in government Bills. <p><i>Preambles and purpose clauses perform slightly different functions:</i></p> <ul style="list-style-type: none"> ◆ Preambles – <ul style="list-style-type: none"> ◇ provide background information about the circumstances giving rise to the legislation (for example, a preamble might describe the problem addressed by the legislation or identify the Commission report it is intended to implement); ◇ may assist in supporting the constitutionality of the legislation; ◇ should be drafted sparingly to avoid creating confusion about the meaning of the legislation; ◇ are placed at the beginning of a Bill, as a beginning to the enacting clause. ◆ Purpose clauses – <ul style="list-style-type: none"> ◇ indicate the intended results of the legislation; ◇ should highlight only the principal purposes; ◇ are included in the body of the legislation. <p><i>Is a guiding principles clause being considered?</i></p> <ul style="list-style-type: none"> ◆ Guiding principles clauses – <ul style="list-style-type: none"> ◇ These clauses provide direction as to how an Act is to be administered. See, for example, section 2 of the <i>Child, Family and Community Service Act</i>. ◇ Again, caution is required as these clauses may be used by the courts to establish powers or obligations beyond those initially contemplated by the legislation.
<p>❖ Application provisions</p>	<p><i>Should the application of the legislation be expanded or confined in any way?</i></p> <ul style="list-style-type: none"> ◆ It may be necessary to expand or confine the application of

SPECIFIC ISSUES

Checklist item	Issues for consideration
	<p>legislation in a number of ways:</p> <ul style="list-style-type: none"> ◇ geographically (e.g., to certain parts of the province); ◇ temporally (e.g., to certain periods of time); ◇ by subject matter (e.g., by excluding matters that are regulated under another Act). <p>◆ Application provisions, however, often raise complex legal questions that must be more fully explored before the proposed application provision can be included in the legislation.</p>
<p>❖ Regulation-making authority</p>	<p><i>What regulations are anticipated for implementing the scheme?</i></p> <ul style="list-style-type: none"> ◆ Regulations are often a key component of the legislative scheme. Because they are a form of delegated law (someone other than the Legislature is making law), regulations must be authorized by an Act of the Legislature. ◆ A court will declare regulations invalid if they are beyond the authority granted by their governing Act. The formal legal description of this is that they are <i>ultra vires</i> the Act. ◆ If a provision provides general authority for regulations, that authority will include the powers to make regulations referred to in section 41 of the <i>Interpretation Act</i>. These include regulations <ul style="list-style-type: none"> ◇ providing for administrative and procedural matters, ◇ prescribing the amount of a fee authorized by the Act, and ◇ in the case of regulations made by the Lieutenant Governor in Council, establishing offences for contravention and consequential penalties (up to the <i>Offence Act</i> maximum). ◆ For a legislative proposal that will have a substantial part of its scheme implemented by regulations, a solid idea of their anticipated content is needed when the Act itself is drafted; otherwise, there is a risk that the Act will not provide the required regulation-making authority. ◆ While there may be a preference for having regulation-making provisions stated in broad terms, courts may take a narrow view of this broad delegation. This is particularly so if the regulations create penalties or interfere with

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Checklist item	Issues for consideration
	<p>property or civil rights. In these cases, the courts require the regulations to be authorized by “clear and unambiguous language”.</p> <ul style="list-style-type: none"> ◆ Examples of provisions that require express authority include the following: <ul style="list-style-type: none"> ◇ automatic forfeiture of security deposits; ◇ disqualification for licence eligibility; ◇ authorization for property to be held for investigative purposes. ◆ As well, there must be clear authority if regulations are to discriminate (for example, by establishing different rules for different classes of people). <p><i>Are there any special procedural requirements?</i></p> <ul style="list-style-type: none"> ◆ Generally, regulations are subject to the procedures established by the <i>Regulations Act</i>. Exceptions are very rare and should be specifically identified in the RFL. ◆ In some cases, additional procedural requirements are wanted. For example, the authorizing section of the Act might <ul style="list-style-type: none"> ◇ require that the regulation be made only on the recommendation of a specified minister, ◇ require that the minister consult with a specified body before any recommendation is made, or ◇ provide that a regulation cannot come into force until some specified time after it has first been published in the British Columbia Gazette.
<p>❖ Senior appointments</p>	<p><i>Will the Act authorize the Lieutenant Governor in Council to make appointments to a board, tribunal or other senior position?</i></p> <ul style="list-style-type: none"> ◆ If so, the appointment process will be conducted through the Board Resourcing and Development Office of the Ministry of Finance. This Office should be consulted when preparing the drafting instructions.
<p>❖ Creation of a public body</p>	<p><i>How is the public body to be structured?</i></p> <ul style="list-style-type: none"> ◆ The nature and structure of public bodies vary widely, depending on the functions the bodies are to perform. The following are some of the questions to consider when creating a public body: <ul style="list-style-type: none"> ◇ What name will it have?

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Checklist item	Issues for consideration
	<ul style="list-style-type: none">◇ What are its purposes?◇ What is its membership? (how many, who, how appointed, term of office)◇ Will it have executive officers (such as a chair and vice chair) and how are they to be appointed?◇ Will it be a corporation?◇ Will it be an agent of the government?◇ Will it be able to enter into contracts, either in its own name or in the name of the government?◇ Will it be able to acquire and dispose of land or interests in land—that is, override the limitation established by section 17 (1) (d) of the <i>Interpretation Act</i>?◇ What is its financial structure? (will the Minister of Finance have authority over its accounting; who will be the auditor; what borrowing and investment powers will it have)◇ To whom will it report? (the minister, the Attorney General, the Legislative Assembly)◇ Where will its headquarters be located?◇ Which minister is to be responsible?◇ Will it have the authority to appoint its chief executive officer or will that authority rest elsewhere?◇ Will its members and staff be part of the public service and subject to general public service legislation, such as the <i>Public Service Act</i>, the <i>Public Service Labour Relations Act</i>, and the <i>Public Sector Pension Plans Act</i> (consultation with Public Sector Employers' Council is required)?◇ Who is to have dismissal authority for staff? (note section 22 of the <i>Public Service Act</i>)◇ Will it be subject to Acts that are generally applicable to government bodies, such as the <i>Financial Administration Act</i>, the <i>Financial Information Act</i>, and the <i>Freedom of Information and Protection of Privacy Act</i>?

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Checklist item	Issues for consideration
	<ul style="list-style-type: none"> ◆ Proposals for creating public bodies often require specific approval outside the RFL process. This should be discussed with Cabinet Operations.
<ul style="list-style-type: none"> ❖ Financial arrangements 	<p><i>Will the legislation include specific provisions regarding the collection or disposition of public money?</i></p> <ul style="list-style-type: none"> ◆ Generally, the handling of public funds is dealt with under the <i>Financial Administration Act</i>. That Act will apply unless there is an express provision otherwise. ◆ Particular attention should be paid to the <i>Financial Administration Act</i> when creating a public body or office. ◆ The Ministry of Finance and its advising ministry solicitor should be consulted about a proposal to do any of the following: <ul style="list-style-type: none"> ◇ create a special account in the consolidated revenue fund; ◇ create a trust fund that would be held outside the consolidated revenue fund; ◇ create an ongoing statutory appropriation; ◇ authorize borrowing, guarantees or indemnities. ◆ As well, the Ministry of Finance should be consulted if the legislation will authorize the collection of money by the government or an agency of the government (by way of tax, levy, assessment, fee, etc.) for anything other than recovery of costs incurred for providing services to the people charged.
<ul style="list-style-type: none"> ❖ Information and privacy issues 	<p><i>Will there be any special rules in relation to information?</i></p> <ul style="list-style-type: none"> ◆ Access to information held by government and public bodies, and the collection, use, disclosure and storage of personal information by government and public bodies, is governed by the <i>Freedom of Information and Protection of Privacy Act</i>. ◆ The collection, use, disclosure and storage of personal information held by private bodies is governed by the <i>Personal Information Protection Act</i>. ◆ In addition, common law principles of confidentiality and privilege should be considered. ◆ The Ministry responsible for the <i>Freedom of Information and Protection of Privacy Act</i> should be consulted in advance for policy advice regarding any provisions that would

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	<ul style="list-style-type: none"> ◇ restrict access under the <i>Freedom of Information and Protection of Privacy Act</i>, ◇ affect the collection, use, disclosure or storage of personal information otherwise protected by that Act or the <i>Personal Information Protection Act</i>, or ◇ authorize information-sharing agreements between organizations. <ul style="list-style-type: none"> ◆ This consultation should be initiated through your ministry’s privacy officer. ◆ The Legal Services Branch solicitor who advises in respect of information and privacy issues should also be contacted to determine if there are any legal issues.
<ul style="list-style-type: none"> ❖ Sanctions for non-compliance 	<p><i>Will penalties or other sanctions be needed to ensure compliance with the legislation?</i></p> <ul style="list-style-type: none"> ◆ Most legislation is enforced by the imposition of sanctions for non-compliance. The three basic methods of imposing sanctions are as follows: <ul style="list-style-type: none"> ◇ prosecution of offences in the courts (using the procedures of the <i>Offence Act</i>); ◇ offence ticketing schemes (e.g., by regulation under the <i>Offence Act</i>); ◇ imposition of administrative penalties (such as monetary penalties, licence suspensions or disqualifications). ◆ If sanctions are to be included, the rule of law requires that the legislation <ul style="list-style-type: none"> ◇ be capable of being enforced in practice, and ◇ not be written in the expectation that it will be enforced only in limited circumstances not described in the legislation (that is, as a matter of discretion). ◆ Section 5 of the <i>Offence Act</i> creates a general offence for contravention of an Act or a regulation. For new legislation, legislative counsel encourage a statement that excludes the application of this section, and recommends that the proposed offences be specifically identified in the Act. <p>Penal sanctions –</p> <ul style="list-style-type: none"> ◆ Section 4 of the <i>Offence Act</i> provides a standard penalty of \$2 000 or 6 months in jail, or both. Any other penalty must be specifically identified in the legislation.

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Checklist item	Issues for consideration
	<ul style="list-style-type: none"> ◆ Provisions establishing penal sanctions should be reviewed to ensure <ul style="list-style-type: none"> ◇ they will be effective in obtaining compliance, ◇ they are supported by effective enforcement mechanisms (such as inspection and search powers), ◇ the sanctions are appropriate to the seriousness of the non-compliance, and ◇ the sanctions have sufficient flexibility to allow fair treatment of accused people depending on the circumstances of the non-compliance. ◆ In many cases, the Criminal Justice Branch will need to be consulted to ensure that Crown Counsel can effectively present the evidence required to prove the offence. (Consider, for example, the complex scheme of certificates required to allow photo radar to be enforced.) <p>Ticketing schemes to enforce penal sanctions –</p> <ul style="list-style-type: none"> ◆ An offence provision may be enforced through the violation ticket process under the <i>Offence Act</i>. In order to use this process, the provision must be designated in the <i>Violation Ticket Administration and Fines Regulation</i> under the <i>Offence Act</i>. ◆ If the proposed legislation is to be enforced by means of this process, consultation with the Criminal Justice Branch will be required. <p>Administrative sanctions –</p> <ul style="list-style-type: none"> ◆ Administrative sanctions may require a significant legislative framework. For example, <ul style="list-style-type: none"> ◇ a scheme that allows suspension or cancellation of licences will need to deal with matters such as notice, opportunity to make presentations and appeals, and ◇ a scheme that applies monetary penalties for contraventions will need to address a number of administrative law issues.
<ul style="list-style-type: none"> ❖ Statutory reviews and appeals 	<p><i>If the legislation will authorize decisions affecting people's rights, will it also authorize a review process in relation to those decisions?</i></p> <ul style="list-style-type: none"> ◆ It is common (in some matters, expected) that an Act that authorizes significant decisions respecting specific individuals or organizations provide for some form of review for those decisions.

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Checklist item	Issues for consideration
	<ul style="list-style-type: none"> ◆ To assist in deciding whether a review process is appropriate in relation to your proposed legislation, and what form it should take, you should review the document <i>A Guide for Consideration of a Process for Review of Administrative Decision-making</i>, available at: http://www.ag.gov.bc.ca/dro/publications/guides/guide_to_designing_a_review_process.pdf. ◆ To give you a sense of the issues that are involved, the legislation may do the following: <ul style="list-style-type: none"> ◇ authorize the original decision makers to reconsider their decision; ◇ authorize a superior of the original decision maker to review the decision; ◇ establish an administrative tribunal to conduct reviews; ◇ assign new review responsibilities to an existing tribunal; ◇ provide for an appeal to court. ◆ If a review process is to be established, many details will need to be considered in providing drafting instructions, including the following: <ul style="list-style-type: none"> ◇ what decisions are reviewable? ◇ who may ask for the review? ◇ on what basis may they be reviewed? ◇ what is the time limit for requesting a review? ◇ how is the process started? ◇ who must be given notice? ◇ who is entitled to participate in the process? ◇ what is the nature of the review – is it a completely new hearing, a review on the documented record or something in between? ◇ what powers does the review authority have in making its decision? ◇ how are the costs of the process to be covered?
<p>❖ Judicial review</p>	<p><i>Are any special considerations needed in relation to judicial review (either of an initial statutory decision or a review decision)?</i></p> <ul style="list-style-type: none"> ◆ The British Columbia Supreme Court has inherent authority to review statutory decisions that affect legal rights, duties or eligibility for benefits. Any restriction on

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	<p>this must be done expressly by legislation.</p> <ul style="list-style-type: none">◆ Judicial reviews are limited to the legality of the decisions (e.g., jurisdiction, procedural fairness) and are not reconsiderations of the merits of the individual case.◆ Restricting access to judicial review is extraordinary, and the legislative privative clauses required to do so are read narrowly by the courts.◆ The process for judicial review is governed by the <i>Judicial Review Procedure Act</i>.
❖ Dispute resolution mechanisms	<p><i>Should mechanisms be established for resolving disputes arising under the legislation?</i></p> <ul style="list-style-type: none">◆ If the legislation will likely involve disputes between parties with different interests (e.g., a scheme that grants exclusive area rights to licence holders), consideration should be given to including provisions for resolving these disputes without going to the courts.◆ Examples of dispute resolution mechanisms are negotiation, mediation, neutral evaluation and arbitration.◆ The Dispute Resolution Office in the Ministry of Justice is available to provide advice.

ANCILLARY MATTERS

Checklist item	Issues for consideration
❖ Repeals	<p><i>Do any Acts need to be repealed as a result of the new legislation?</i></p> <ul style="list-style-type: none">◆ If a new Act is proposed to replace an existing Act, the existing Act will need to be repealed.
❖ Consequential amendments	<p><i>Are any consequential amendments required?</i></p> <ul style="list-style-type: none">◆ New legislation often affects existing legislation, requiring consequential amendments to other Acts.◆ If the required changes are limited to housekeeping matters (such as changing section cross-references), these can be left to the drafting stage.◆ If, however, consequential amendments for substantive changes are required, these should be identified in the RFL.◆ For legislation that is administered by other ministries, consultation with these ministries will be required.

ANCILLARY MATTERS

Checklist item	Issues for consideration
	<ul style="list-style-type: none"> ◆ Note that consequential amendments may be required <ul style="list-style-type: none"> ◇ for legislation that is not yet in force, or ◇ for other Bills that are currently before the Legislative Assembly.
<ul style="list-style-type: none"> ❖ Transitional provisions 	<p><i>Will any transitional provisions be needed to deal with matters arising before the new legislation comes into force?</i></p> <ul style="list-style-type: none"> ◆ Transitional provisions may be needed for <ul style="list-style-type: none"> ◇ matters that arose under legislation that is being repealed or amended by the new legislation, or ◇ matters that need to be dealt with before the new legislation can be effectively implemented. ◆ Many of these matters are governed by the general provisions of sections 35 and 36 of the <i>Interpretation Act</i>. These provisions, however, may not be appropriate in all cases and may not cover all transitional issues that need to be dealt with. ◆ Examples of matters requiring consideration include the following: <ul style="list-style-type: none"> ◇ regulations made under the previous law; ◇ rights or benefits granted under the previous law; ◇ offences committed under the previous law; ◇ transfers of assets and liabilities; ◇ the creation of a replacement administrative body for one existing before the new legislation comes into force; ◇ appeals, reviews or other administrative proceedings under the previous law that have not been finalized at the time the new legislation comes into force; ◇ judicial proceedings involving the application of previous law. ◆ Regulations made under existing legislation should be reviewed to determine if they are authorized to continue under the new legislation: <ul style="list-style-type: none"> ◇ If the entire Act is being repealed and replaced, it is best to likewise repeal and replace the previous regulations. ◇ In all cases, existing regulations should be repealed if they are not intended to continue under the new legislation. This will avoid doubts as to their status.

ANCILLARY MATTERS

Checklist item	Issues for consideration
❖ Commencement	<p><i>When should the legislation come into force?</i></p> <ul style="list-style-type: none">◆ An Act begins to operate as law when it comes into force. Under the <i>Interpretation Act</i>, legislation is considered to have come into force at the very start (immediately after midnight) of the day on which it comes into force. There are a number of options for when legislation may come into force.◆ If an Act is silent, its provisions will come into force on the date of Royal Assent.◆ If one or more provisions are to come into force on another date, the commencement section of the Act will provide for this by establishing that they are to come into force on one or a combination of the following:<ul style="list-style-type: none">◇ a specified date after Royal Assent (e.g., January 1, 2015);◇ <i>the date on which specified circumstances occur</i> (e.g., the date on which another Act comes into force);◇ <i>a date set by regulation</i> (appropriate, for example, if regulations must be enacted in order for the legislation to be implemented);◇ <i>retroactively to a specified date</i> (in which case, the legislation actually comes into force on another date determined in accordance with the above options but, once it is in force, is deemed in law to have come into force at an earlier time).◆ Different provisions of an Act may come into force on different dates.<ul style="list-style-type: none">◇ As well, if an Act provides that it comes into force “by regulation of the Lieutenant Governor in Council”, different provisions may be brought into force on different dates and by different regulations.

REVIEWS AND CONSULTATIONS

Checklist item	Issues for consideration
❖ Internal reviews	<p><i>Are there issues that will require internal reviews during the drafting process?</i></p> <ul style="list-style-type: none">◆ In some cases, legislative counsel will require draft legislation to be reviewed by another office, committee or ministry. The most common circumstances in which this arises involve the following:

REVIEWS AND CONSULTATIONS

Checklist item	Issues for consideration
	<ul style="list-style-type: none"> ◇ Legislation establishing a significant offence penalty (one that is substantially greater than the <i>Offence Act</i> penalties or the penalties in comparable legislation) <i>referral to the Criminal Justice Branch (Ministry of Justice);</i> ◇ Legislation establishing a new tribunal or assigning new responsibilities to an existing tribunal <i>referral to the Justice Services Branch (Ministry of Justice);</i> ◇ Legislation placing new demands on the court system (for example, a provision requiring courts to give a decision within a specified period of time) <i>referral to the Court Services Branch (Ministry of Justice);</i> ◇ Legislation establishing an exception to the <i>Freedom of Information and Protection of Privacy Act</i> (including allowing access to personal information that would otherwise be protected by that Act) <i>referral to the Ministry responsible for the Freedom of Information and Protection Privacy Act and the Legal Services Branch (Ministry of Justice) solicitor who advises in respect of information and privacy issues;</i> ◇ Legislation providing full or partial protection from legal proceedings (statutory immunity) <i>referral to the Statutory Immunity Committee.</i> ◆ In most cases, legislative counsel will simply copy a draft to the reviewing agency for referral purposes. Legislative counsel may or may not be involved in the policy discussions between the reviewing agency and the instructing ministry. ◆ There is usually a more formal process with the Statutory Immunity Committee: a representative of the instructing ministry and the drafting legislative counsel will be invited to attend the committee meeting at which the draft is discussed.
<p>❖ Internal consultations</p>	<p><i>Will any other ministers, ministries or government agencies have to be consulted on drafting the Bill?</i></p> <ul style="list-style-type: none"> ◆ Ministers, ministries or agencies who are consulted on the policy proposals leading up to an RFL should also be given the opportunity to comment on the drafting instructions. This is particularly important when consequential

REVIEWS AND CONSULTATIONS

Checklist item	Issues for consideration
	<p>amendments are being proposed to legislation administered by another ministry.</p> <ul style="list-style-type: none"> ◆ The following should be considered in determining whether consultation is required: <ul style="list-style-type: none"> ◇ Is legislation administered by another ministry affected by the proposed legislation? ◇ Are programs provided or administered by another ministry affected by the proposed legislation? ◇ If the proposed legislation assigns duties or powers to another minister, is there agreement on the extent of these duties or powers? ◇ Have the affected ministers, ministries or agencies had an opportunity to review the drafting instructions? ◇ Do outstanding issues need to be addressed before final drafting instructions can be given? ◆ By way of example, if the legislation would allow new applications to the Provincial Court, program costs of the Ministry of Justice will be affected and the proposal should be referred to that ministry for review. <p><i>Will other ministries or government agencies be participating in the drafting process or reviewing the draft legislation as it progresses through the drafting process?</i></p> <ul style="list-style-type: none"> ◆ If so, legislative counsel should be advised at the start of the drafting process as to who will be the responsible officials for these other ministries or agencies.
<ul style="list-style-type: none"> ❖ External consultations 	<p><i>Will any consultation with other governments, non-governmental bodies or the general public be needed on drafting the legislation?</i></p> <ul style="list-style-type: none"> ◆ RFLs and draft legislation are confidential Cabinet documents and come within the Cabinet document protection of section 12 (1) of the <i>Freedom of Information and Protection of Privacy Act</i>. At the same time, consultations with people outside government may be wanted. ◆ Consultation may take 2 forms. The preferred form is consultation on policy only. Occasionally, though, it is necessary to consult on draft language (e.g., if in relation to an aboriginal treaty agreement or the bylaws of a professional college). ◆ The sponsoring ministry may undertake outside

REVIEWS AND CONSULTATIONS

Checklist item	Issues for consideration
	<p>consultations on draft language only if Cabinet has approved this in approving the RFL.</p> <ul style="list-style-type: none"> ◆ Legislative counsel should be advised if drafts are to be shared outside government, as this may affect whether legal advice is provided within the drafts themselves or separately. <ul style="list-style-type: none"> ◇ Caution: the drafts should <u>not</u> be shared in Bill form. In Bill form, issues of parliamentary privilege are added to those of Cabinet confidentiality. ◇ On request, legislative counsel will prepare an appropriate consultation draft. ◆ Drafts should not be shared outside government unless a confidentiality agreement, prepared by the ministry solicitor, is in place. ◆ If outside consultations (whether on policy or on draft language) are not intended to be public, this should be made clear to the people with whom the consultation is taking place. ◆ If it is expected that outside consultation may significantly affect policy, further Cabinet approval of the legislative project may be needed. <p><i>Is the proposed legislation a good candidate for confidential review by outside lawyers?</i></p> <ul style="list-style-type: none"> ◆ For a number of years, members of the British Columbia Branch of the Canadian Bar Association (“CBA”) have assisted legislative counsel by providing confidential reviews of draft legislation. The process is coordinated through the Legislation and Law Reform Committee, a standing committee of the British Columbia Branch with a staffed position of Legislation and Law Reform Officer. ◆ These reviews are provided without remuneration and the lawyers participating are bound by an undertaking of confidentiality that prohibits them from disclosing any aspect of their engagement, even to other members of their firm, without the government’s consent. ◆ The reviews are particularly useful in relation to <ul style="list-style-type: none"> ◇ private law legal issues such as wills and estates, where expertise within the Legal Services Branch is limited, and ◇ practice areas where there are existing CBA sections, such as Municipal Law and Administrative Law.

REVIEWS AND CONSULTATIONS

Checklist item	Issues for consideration
	<ul style="list-style-type: none"> ◆ Legislative counsel may suggest that the sponsoring ministry consider such a review.

FINAL CONSIDERATIONS

Checklist item	Issues for consideration
❖ Outstanding issues	<p><i>Are there any issues that still need to be resolved?</i></p> <ul style="list-style-type: none"> ◆ It is sometimes not possible to resolve all key policy issues that should be dealt with by Cabinet without unduly delaying the start of drafting. ◆ In these cases, the RFL must <ul style="list-style-type: none"> ◇ identify the outstanding policy issues, ◇ indicate how they are to be resolved during the drafting process, and ◇ provide a time line for this resolution.
❖ Implementation	<p><i>How should implementation deadlines be established?</i></p> <ul style="list-style-type: none"> ◆ Although it is not possible to predict how a Bill will proceed through the Legislative Assembly, proposed implementation dates are often set as part of the RFL. ◆ When determining these, consideration must be given to <ul style="list-style-type: none"> ◇ the work required to prepare any necessary regulations or amendments to regulations, and ◇ any administrative, staffing and training arrangements that will be needed. <p><i>Is legislative counsel involvement required for implementation?</i></p> <ul style="list-style-type: none"> ◆ Legislative counsel services will be required <ul style="list-style-type: none"> ◇ if the legislation is to come into force by regulation (such a regulation is not prepared automatically; it must be requested by the responsible ministry within the time frame required to bring it before the Lieutenant Governor in Council before the required implementation date), and ◇ if regulations are needed for implementation (under section 5 of the <i>Interpretation Act</i>, such regulations may be enacted in advance of the legislation coming into force).

FINAL CONSIDERATIONS

Checklist item	Issues for consideration
	<ul style="list-style-type: none">◆ After legislation has been brought into force, legislative counsel generally do not provide advice on its interpretation. Ministries should look to their advising ministry solicitor for assistance in such matters.