

Causes of complex legislation and strategies to address these

Context

Complex legislation makes it difficult, expensive and time-consuming for people to understand their legal rights and obligations. This creates burdens for business and restricts access to justice.

The following general principles should be applied to improve the clarity and accessibility of laws.

Principles for clearer laws

1. Consider all implementation options—don't legislate if you don't have to.
2. When developing policy, reducing complexity should be a core consideration.
3. Laws should not be unnecessarily complex to give effect to policy.
4. Legislation should enable those affected to understand how the law applies to them.
5. Achieving clearer laws requires:
 - a. designing policy for clarity
 - b. instructing for clarity
 - c. drafting for clarity, and
 - d. assessing for clarity.

Causes of legal complexity

There are many drivers of complexity in legislation. Common examples include:

- unnecessary complexity in the underlying policy
- a tendency to respond to policy issues with legislative changes even when legislation is not necessary to address them
- pressure to prepare legislation in constrained timeframes, so that the focus becomes getting the legislation drafted rather than making it clear
- an aversion to principles-based legislation, leading to a tendency to have rules that accommodate very small variations in circumstances
- an aversion to judicial discretion, so that the courts are not left to evolve detailed rules in a common-law fashion, and
- an aversion to official discretion, so that officials are not left to evolve administrative practice.

Strategies to address causes of complexity

Issue 1: Avoiding complexity in initial policy development

In some cases it is a decision by Government that leads to a complex implementation option. In these circumstances, instructors and drafters may have limited scope to influence the way in which the decision is to be implemented into legislation.

It is the Government's prerogative to implement a policy in any way it wishes. However, it is important that agencies advise Government about the complexity that may result so that the decision is a conscious one. This includes advising about non-legislative solutions.

Strategies

- At the beginning of the process, careful attention should be given to identifying what the problem is and what policy options could be used to address the problem.
- When developing policy options, simplicity should be given a high priority and the Government advised if a particular policy option would result in more complex legislation.

Issue 2: Consult drafters early in the policy development process

Agencies often do not approach legislative drafters until they have obtained policy approval and prepared drafting instructions. This means that, when the drafter advises that the policy itself is likely to lead to overly complex legislation, the instructor has limited scope to act on this advice.

Strategies

- Drafters should be consulted early in the policy development process as appropriate. Drafters have the benefit of a cross Government perspective on different methods of policy implementation, and can provide views on those that should promote clarity in the final outcome.
- When assessing the need for legislation under the Cabinet 'due diligence' requirement, an agency's assessment should be informed by discussions with drafters before policy options are finalised.

Issue 3: Allow enough time for developing legislation

Legislation often has to be prepared in very short timeframes. This might be because there is an urgent problem to be addressed (eg a terrorist threat), or due to political imperatives. This is unlikely to be avoidable in some instances, but there may be some legislation where advice from an agency on the impact that a contracted timeframe will have on the quality of the outcome may be persuasive. The timing of a decision to introduce legislation can make it difficult to properly assess and 'road test' the legislation, which may be a persuasive factor.

Strategies

- Clear policy and legislation may take longer to develop and draft, therefore instructing agencies should advise the relevant Minister about realistic timeframes and resources required.
- Drafters can provide advice to assist in formulating recommendations regarding an appropriate level of time and resources required for legislative projects.

Issue 4: Make sure legislation is comprehensible

Many Bills are introduced in Parliament without any outside assessment of readability and useability. This means that it is difficult to ensure the end user will be able to understand the impact of the Bill on their rights and interests. Consultation can happen through the Parliamentary Committee process, but it is often difficult to make changes to things like the structure of the Bill at that stage.

Strategies

- The needs and interests of the reader must be assessed when legislation is being developed. This can be done, for example, by releasing an exposure draft for public comment or using focus groups to test how easy the legislation is to understand. This will usually facilitate passage and will improve the final outcome.
- Experience and authority need to be employed during the consultation process to ensure that consultation does not cause further complexity. For example, stakeholders may wish to see every scenario covered in the legislation, whereas the explanatory material can make it clear that some scenarios are intended to be covered by a broad provision in the legislation.

Issue 5: Experienced officers must be involved in instructing on legislation

Responsibility for instructing on legislation sometimes falls to more junior officers in an agency, who may not have the necessary authority or intricate knowledge of the subject matter to make decisions during the drafting process. This may mean, for example, that officers adopt a risk averse approach and wish to include every scenario on the face of the legislation, when some issues could be covered in the explanatory material supporting the legislation.

Instructing on legislation is a skill that improves with experience. Ideally, officers should have the opportunity to work with a more senior officer before they are responsible for giving drafting instructions.

Strategies

- Only appropriately experienced officers should instruct drafters and an SES officer should be actively involved.
- Instructing teams should usually have a mix of skills, including operational, policy and legal skills. This has been found to produce the best outcomes.

Issue 6: Make sure instructing officers have access to the necessary training and guidance materials

Instructing officers may not have enough training to carry out their functions effectively. For example, they may not be aware of the Legislation Handbook produced by the Department of the Prime Minister and Cabinet (which outlines all the steps in the legislation process). This can result in important steps in the process being overlooked.

Strategies

- Instructing agencies must recognise that instructing on legislation is an important skill and commit to training and developing staff on giving instructions and the importance of clear legislation.
- Officers should be required to undertake a course run by OPC (Legislation Process Course) or OLDP (Drafting and Making Legislative Instruments Course) before being responsible for instructing on legislation.
- The clearer laws principles are easy to understand and should be made widely available within agencies. The principles should be used by senior managers to improve the quality of their agency's legislation.
- Instructing officers working on primary legislation should be familiar with the content of the [Legislation Handbook](#).

Issue 7: Increase the use of common provisions across the statute book

There are a number of provisions that are regularly repeated across the statute book. These provisions can add to the volume of an Act.

Strategies

- The Attorney-General's Department, in consultation with OPC and relevant agencies, will expand the areas covered by Acts of general application to reduce the volume, and increase the consistency and coherence of the statute book. For example, the Acts Interpretation Act 1901 sets out general rules which then do not have to be repeated across the statute book.

Issue 8: Review of entire legislation

Amending legislation often makes patchwork amendments to existing legislation (eg fitting the new provisions in without a review of existing provisions, or the legislation as a whole). In some cases more than one area of the same Department may be working on several items of legislation that amend the same principal legislation, without coordination or consideration of what the end result will be for the useability of that legislation.

Strategies

- Legislation should be regularly reviewed for readability, useability, ease of administration and policy desirability. This could be done as a stand-alone process or when existing legislation is being amended. Whenever legislation is amended, overall clarity of the legislation should be reconsidered. This may require reassessing the underlying policy.
- This should include testing the legislation for continuing relevance, consistent with the Government's focus on reducing red tape.
- Agencies can identify legislation projects to pilot new strategies to improve clarity, which could then operate as a template for future legislative drafting projects within the agency and across Government.