



DP1: Using PCO drafting practice documents

NSW Parliamentary Counsel's Office
Drafting practice document
1st Ed, May 2017

Introduction

1. This document is *DP1: Using PCO drafting practice documents* (NSW Parliamentary Counsel's Office, 1st Ed, May 2017). It is a drafting practice document of the NSW Parliamentary Counsel's Office (*the PCO*).
2. The purpose of this document is to explain the status of, and how to use, the drafting practice documents of the PCO published on the [NSW legislation website \(www.legislation.nsw.gov.au\)](http://www.legislation.nsw.gov.au).

What the PCO drafts

3. The PCO drafts (that is, writes) most of the legislation of NSW. In particular, it drafts:
 - all Government Bills for Acts of Parliament, and
 - almost all Non-Government Bills for Acts of Parliament, and
 - almost all amendments to Bills for Acts before Parliament (called *amendments in committee*), and
 - all regulations made under Acts of Parliament, and
 - all local environmental plans and State environmental planning policies under the [Environmental Planning and Assessment Act 1979](#), and
 - almost all of the court rules and tribunal rules of NSW.
4. The drafting of legislation is complex legal work undertaken by specialist lawyers. An office of parliamentary counsel has been in existence for NSW since the 19th century. See the [About](#) page on the [PCO website](#) for more information about the PCO's history.
5. As a result, the PCO has, over many years, developed drafting practices and precedents that it uses to ensure that legislation is drafted in a consistent and coherent way.

What drafting practice documents are

6. Drafting practice documents outline particular drafting practices of the PCO and the reasons for them.
7. Drafting practice documents are located under the heading “PCO drafting practices” on the [Legislation information](#) page of the [NSW legislation website \(www.legislation.nsw.gov.au\)](http://www.legislation.nsw.gov.au). They are in PDF (Portable Document Format) and contain hypertext links to cited cases, legislation and other material if accessible on the Internet.
8. New documents will be added over time. However, they will not deal with all aspects of the PCO's drafting practices. They will, instead, focus on important or topical areas.
9. Each drafting practice document is allocated a unique number (DP1, DP2 etc). Each document also has an edition number and publication month.

Status of drafting practice documents

10. A drafting practice document expresses the official view of the PCO concerning the drafting practice to which it relates.
11. The publication of drafting practice documents is intended to inform the legal profession and the public generally about some of the most important of these practices.
12. However, it is important to remember that a drafting practice document is merely an outline of the usual practice followed by the PCO. In some cases, a legislative drafting project may require deviation from, or the modification of, a usual drafting practice. For instance, this may be required in cases where New South Wales is following a nationally agreed legislative scheme. See, for example, the [Heavy Vehicle National Law \(NSW\)](#).
13. Although the PCO chooses the words used in legislation, it does not choose the policy that is being implemented and is not involved in how it is administered.
14. Questions about the policy contained in legislation or its administration should be raised directly with the relevant Government agency. The PCO cannot assist you with these questions.
15. As a result, a drafting practice document should not be treated as an expression of Government policy on a topic. It only reflects the usual drafting practice of the PCO, which can be used to implement a variety of different policy outcomes sought by the Government.
16. Also, to the extent that a drafting practice document states the views of the PCO on a legal question, those views should not be treated as the views of other Government legal advisers (for example, the Solicitor General or Crown Solicitor).

Use of drafting practices in interpreting legislation

17. For the following reasons, the published drafting practices of the PCO may be relevant material that can help in interpreting legislation (including ascertaining the purpose or object of particular kinds of legislative provisions).
18. In [Commissioner of Taxation v Consolidated Media Holdings Ltd \[2012\] HCA 55](#) at [39], the High Court of Australia summarised the basic approach to statutory interpretation (sometimes called *statutory construction*) as follows:

“ ‘This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text.’ So must the task of statutory construction end. The statutory text

must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.”

19. [Section 34](#) of the [Interpretation Act 1987](#) enables the courts to use any material (called *extrinsic material*) not forming part of an Act or statutory rule that is capable of assisting in ascertaining the meaning of a provision of an Act or rule:

- to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context and the purpose or object of the Act or rule), or
- to determine the meaning of the provision if it is ambiguous or obscure, or
- to determine the meaning of the provision if the ordinary meaning of its text (taking into account its context and the purpose or object of the Act or rule) leads to a result that is manifestly absurd or is unreasonable.

20. Also, [section 33](#) of the [Interpretation Act 1987](#) requires a court to interpret a provision of an Act or statutory rule in a way that would promote the purpose or object of the Act or rule (whether or not that purpose or object is expressly stated) instead of in a way that would not promote that purpose or object.

21. The term *statutory rule* (as used in sections 33 and 34 of the [Interpretation Act 1987](#)) is defined in [section 21 \(1\)](#) of that Act to mean:

- a regulation, by-law, rule or ordinance made by the Governor, or
- a regulation, by-law, rule or ordinance made by another person or body that must be approved or confirmed by the Governor, or
- a rule of court (which is a rule made by the person or body having power to make rules regulating the practice and procedure of a court or tribunal).

22. See also [section 5 \(6\)](#) of the [Interpretation Act 1987](#) in relation to environmental planning instruments.

23. When interpreting legislation, courts and tribunals have taken into account whether it has (or has not) been drafted by parliamentary counsel. A greater degree of precision is expected of parliamentary counsel (as expert legislative drafters) than drafters who are not parliamentary counsel. See, for example, [Day v Harness Racing New South Wales \[2014\] NSWCA 423](#) at [79] (Leeming JA); [Hunter Support Services Pty Ltd v The Children's Guardian \[2005\] NSWSC 616](#) at [16] (Palmer J); [Evans v State of New South Wales \[2008\] FCAFC 130](#) at [70].

24. Less common is the use by courts and tribunals of published drafting practices in interpreting legislation, although this has occurred on occasion. See, for example, the use of the drafting directions of the [Commonwealth Office of Parliamentary Counsel](#) in [Eckett & Eckett \[2010\] FamCAFC 39](#) at [73] and [Seoud and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs \[2011\] AATA 640](#) at [13]. It may be that the reason why courts and tribunals have not often used drafting practices to interpret legislation is because of the difficulty in locating official versions of that material.

25. Instructors of the PCO rely on the expert legislative drafting services of the PCO (including its drafting practices) to produce consistent and coherent legislation. Acts are enacted by the Parliament and other legislation is made by its makers on this understanding.

26. Given this context, the PCO's view is that its published drafting practices can be relevant extrinsic material when interpreting legislation, particularly in areas involving highly technical drafting practices. See, for example, the drafting practices outlined in [DP4: Drafting savings and transitional provisions](#) on the

[Legislation information](#) page of the [NSW legislation website \(www.legislation.nsw.gov.au\)](http://www.legislation.nsw.gov.au) under the heading "PCO drafting practices".

Key points

27. The following is a summary of the key points of this document:

- The PCO drafts most of the legislation of NSW and has long established drafting practices.
- Drafting practice documents are official documents of the PCO that outline particular drafting practices and the reasons for them.
- Drafting practice documents only express the PCO's views and do not express the policy views of the Government or the legal views of other Government legal advisers.
- As drafting practice documents are outlines of particular drafting practices, it is important to remember that the PCO may be required to depart from or modify those practices for certain drafting projects (for example, when implementing nationally agreed legislative schemes).
- The published drafting practices of the PCO may be relevant extrinsic material when interpreting legislation, particularly in areas involving highly technical drafting practices.