

LEGISLATIVE BUILDING BLOCKS

**CANADIAN INSTITUTE FOR
ADMINISTRATIVE JUSTICE**

**Alternative Design –
Emerging Trends in Instrument
Choice - Policies, Directives and
Guidelines**

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Policies, Directives, And Guidelines – a “soft law” alternative

- * BC’s Administrative Justice Office was responsible for administrative justice reform for tribunals and other statutory decision makers within government.
- * The AJO worked closely with leg drafters and policy developers on new initiatives and and also developed a series of papers, including:
- * *“Development and Use of Policies and Guidelines in the Decision Making Process”* - a Discussion paper – has case citations and legislative examples

POLICIES, GUIDELINES AND DIRECTIVES

- * WHAT ARE THEY?

- * FORMAL - Rules, Manuals, usu. authorized by statute or regulation
- * INFORMAL - Directives, Guidelines, Fact Sheets, Memoranda, Emails for which express statutory authority is not required

POLICIES, GUIDELINES AND DIRECTIVES

WHO MAY MAKE

- * INTERNAL TO GOVERNMENT – Ministers, DM's, Directors
- * ARM'S LENGTH/QUASI-JUDICIAL - Administrative Tribunals, Commissions
- * REGULATORS, LICENSING AUTHORITIES - Who may be internal or arm's length to gov't

Difference from some other tools

- * Regulations - are more formal and clearly have force of law as legislative documents, but like legislation can be very inflexible, and difficult to change
- * Incorporation by reference – who develops them and has “ownership” – another entity or the entity who is applying. With ownership, can come greater flexibility (can control the revision process) and also greater accountability and responsibility for content (can’t simply pass off as set by another entity)

POLICIES, GUIDELINES AND DIRECTIVES

WHY USE PDG's

- * FILL IN THE DETAIL
- * PROVIDE FLEXIBILITY
- * PROVIDE CONSISTENCY
- * AS AN INFORMATION TO TOOL
- * EASE OF PROCESS TO MAKE OR REVISE

To supply greater detail

- * there is simply too much detail: legislation simply cannot address all of it – this applies particularly in commercial, industrial, or trade regulatory schemes, with licenses, permits, permissions, etc.
- * the matter is highly technical – the terminology, standards and other aspects demand a high degree of specific knowledge – for example in medical or scientific fields

To meet a need for flexibility that legislation just cannot provide

- * a high level of variation
 - * too many circumstances to consider
 - * too many possible variations in those circumstances
- * things are always changing – so to avoid “freezing” at a given point in time
- * still too many unknowns – the matter being addressed is new and evolving, and a high level of change may be anticipated.

To provide consistency, with flexibility

- * to provide a clear statement of how the SDM itself interprets it legislation and how it will apply it – valuable especially when lots of variation, numerous persons making decisions
- * to try to ensure as much as possible that like circumstances are decided alike, while ensuring individual circumstances are reflected

As an education and training tool

- * to enable an agency to proactively deal with a problem in a cohesive and comprehensive manner, rather than incrementally and reactively on a case-by-case basis
- * to assist users and members of the public to predict how an agency is likely to exercise its statutory discretion so users can arrange their affairs accordingly

EASE OF PROCESS

- * No set process required to be followed
- * May be by internal document
- * Legal language may be limited
- * Can be fast and easy to change
- * May remove or distance from political arena

POLICIES, GUIDELINES AND DIRECTIVES

VARIETY OF USES

MAY BE ABOUT

- * SUBSTANTIVE - THE WHAT
- * PROCEDURE – HOW

SOME ISSUES & DISADVANTAGES

- * “QUESTIONABLE” LEGAL STATUS
- * LACK OF TRANSPARENCY AND ACCOUNTABILITY
- * POTENTIAL GAPS OR INCONSISTENCIES BETWEEN THE LEGISLATION AND THE PDG’S
- * LACK OF PUBLIC PROCESS WHEN MAKING

LEGAL STATUS

PDG's

- * ARE “SOFT LAW”
- * ARE NOT BINDING
- * NEED TO BE CAREFUL DO NOT FETTER EXERCISE OF DISCRETION IN APPLICATION
- * BUT MAY RAISE EXPECTATIONS THAT MIGHT BE ENFORCEABLE
- * MAY BE LOOKED AT FOR GOV'T'S OWN COMPLIANCE

Potential Lack of Transparency and Accountability:

- * The lack of a formal process - PDG's may be developed and implemented without any public or stakeholder process
- * The lack of public access - may be problematic for individuals to know policies exist, and where to find them

Potential Gaps or inconsistencies between the legislation and the PDG's

- * Persons responsible for drafting instructions are not the same as the persons who develop the PDG's that implement the legislation, so can be gaps in the understanding of what was intended when the legislation was drafted
- * May not reflect what government intended, so usurp government's role
- * May be erroneously looked to as if "superior" to legislation

OTHER DISADVANTAGES

- * Can become rigid if not regularly reviewed
- * May become overly technical so inaccessible to all but the most knowledgeable
- * May become “owned” by an interest group or others who [unfairly] influence content