



**CROWN LAW OFFICE**  
*Te Akinanga o te Ture*

# **Guide to Preparing Instructions for the Drafting of Legislation**

**(To be read together with the Solicitor-  
General's Legislative Drafting Directives  
for the Cook Islands)**

As at 1 June 2012

## ***Introduction***

The purpose of this guide is to help government departments and agencies to prepare instructions for the drafting of legislation. Together, instructors and legislative drafters translate the policy decisions of the Government into effective, principled, and clear legislation. The quality of legislation directly reflects the quality of instructions.

It is essential that legislation is well thought out, accurate, and correct because—

- legislation uniquely impacts upon the rights and freedoms of people and society; and
- a mistake in legislation can only be corrected by another piece of legislation that must go through the entire parliamentary process.

## ***Before preparing drafting instructions***

### **Things to think about when formulating policy that may lead to the drafting of legislation**

When formulating policy that may lead to the drafting of legislation, ask yourself the following questions—

- what is the policy problem that you are trying to solve?
- do you actually need legislation to solve that problem, or are there alternatives to legislation?
- if you do need legislation, do you need a new enactment, or do you need to amend an existing enactment? What other enactments will need to be consequentially amended? Will regulations be required?
- what roles are to be played by which people or agencies?
- do you really need to set up a new agency, or can the functions and powers of an existing agency be expanded?
- if there is to be a new agency, who will work for it? Are there people available with the necessary skills, experience, qualifications, and knowledge?
- has the Government budgeted for the costs of establishing a new agency and implementing and enforcing the legislation?
- in reality, can the law be complied with and can it be enforced? Legislation should not be enacted for ideals that cannot be complied with or enforced.
- what is the punishment if someone breaks the law? If you are mandating something, then there must be a consequence if it is not done.
- will there be affected stakeholders and, if so, should you consult with them in order to obtain their views?

If you are not a legal adviser, you should involve your departmental legal advisers or the Crown Law Office throughout the development of your legislative proposal. Early legal input can—

- clarify the legal issues; and
- establish whether the options being considered conflict with legal principle; and
- identify which parts of the policy may not need to be enacted in legislation.

## **Constitution of the Cook Islands**

All Cook Islands legislation must comply with the Constitution of the Cook Islands. The Constitution is very broad and affects many different areas of the law. You must ensure that the legislation that you are proposing will comply with the Constitution.

## **Cabinet procedures**

Do you have Cabinet approval for this policy? You must have Cabinet approval **before** you start preparing drafting instructions.

In order to obtain Cabinet approval, input is required from the Solicitor-General and other relevant government departments and agencies.

### **Solicitor-General's Legislative Drafting Directives for the Cook Islands**

Every enactment drafted for the Cook Islands must comply with the Solicitor-General's Legislative Drafting Directives for the Cook Islands. Read them, as you need to be familiar with them. In particular, note that—

- all drafting instructions must be approved, and sent to the nominated drafter, by the Crown Law Office; and
- every government department and agency that intends to have legislation drafted must provide the Crown Law Office with a timetable as set out on page 2 of the Directives; and
- there are restrictions on who can draft legislation for the Cook Islands.

### ***Preparing drafting instructions***

#### **The instructor's role**

Instructions are your way of telling a legislative drafter what the Government's policy objectives are and how the law needs to be changed to achieve them.

As instructor, you will be the legislative drafter's primary point of contact. You need to be able to answer most of the questions that come up during drafting, and to have a clear understanding of the proposed legislation.

The role of the instructor requires a thorough understanding of—

- what the policy problem is and how the proposed legislation will resolve that problem; and
- the current legal position, and how the proposed legislation will change it; and
- the processes by which legislation is made (as set out in the Constitution, the Cabinet Manual, the Solicitor-General's Legislative Drafting Directives for the Cook Islands, and the Standing Orders of Parliament).

#### **Don't blindly copy legislation from overseas**

It is appropriate to look at other legislation to get ideas, and for overseas legislation to form the basis of legislation for the Cook Islands. But the legislation of other countries is drafted to reflect the specific needs of those countries. The fact that legislation works in another country does not mean that it will work in the Cook Islands. Don't just copy it. Legislation that is drafted for the Cook Islands must be tailored to meet the specific needs and circumstances of the Cook Islands.

#### **Prescriptive or principle-based legislation?**

There are 2 basic approaches that can be taken in drafting legislation. It can be prescriptive, setting out every little thing in great detail. Alternatively, it can set out principles that must be followed. In preparing your drafting instructions, you need to be clear about which approach you wish to use.

Principle-based legislation will generally be better for the Cook Islands. However, prescriptive legislation may be required because of the subject matter being addressed.

The advantages of prescriptive legislation are that it provides certainty and it limits people's choices, rigidly requiring them to follow prescribed procedures. The disadvantages are that it is inflexible, it generally results in longer legislation, and it must be accurately followed or legal challenges will result.

The advantages of principle-based legislation are that it is flexible, it is more adaptable to differing scenarios, and it is less likely to require future amendment. The disadvantages are that it allows people to exercise greater discretion, which may result in people doing things that were not intended or envisaged.

### ***The instructions***

A format for preparing instructions for the drafting of legislation is set out in the Schedule of this guide. Instructions usually consist of a narrative with supporting documents.

It may be useful to discuss your instructions with the Crown Law Office or the legislative drafter while you are working on them. This can help you clarify what is required and work through any difficulties.

### **The narrative**

Your instructions should—

- describe the proposal's objectives (ie, this legislation will do A):
- set out the reasons for the proposal (ie, this legislation is necessary to solve problem B. The present law falls short because of C):
- identify the people and activities involved (ie, this legislation will affect, or is related to, persons/agencies/situations D and E):
- describe what should be in the legislation (ie, we intend to do A by amending Act F in the following ways):
- explain how the proposed legislation will fit into existing law (Act G already covers H, and the proposed legislation will cover I):
- explain what will need to be done to make the transition from the existing law to the law as it will be (ie, existing licences under Act J will become permits under the new legislation; people will have K years to conform to the new law):
- explain what changes will be needed to other legislation (ie, Act L must be amended):
- explain what other consequential and related matters will be required (ie, regulations will be needed in order to set fees and prescribe forms).

The focus of your instructions should be the intended objectives. Do your instructions answer the questions of what, when, where, who, why, and how?

You should also include—

- a timetable as set out on page 2 of the Solicitor-General's Legislative Drafting Directives for the Cook Islands; and
- an indication of when any further instructions will come if the initial instructions are not complete; and
- your contact details, as well as the contact details of any other person who may need to be consulted.

### **Supporting documents**

It is important that you include all relevant material with your instructions. The legislative drafter needs as complete a picture of the proposal as possible. Relevant material will include—

- all relevant Cabinet papers, and papers sent to your Minister; and
- all relevant legislation, particularly any legislation that is to be amended; and
- all relevant court cases, legal opinions, reports, and so on; and
- details of any relevant court proceedings that are contemplated; and
- all relevant international agreements or obligations; and

- documents created or obtained as part of any consultation process that you have undertaken; and
- any other relevant background material.

### ***Before submitting your instructions***

Before submitting your instructions, take a fresh look at them. Examine them from both the legal and practical perspectives. Ask yourself, “If I knew nothing about this matter, would these instructions give me a clear, accurate, and complete picture of what is wanted?”

Address as many of the problems as possible before submitting your instructions. If your instructions are incomplete, tell the legislative drafter about the unresolved issues and the process for resolving them. This will save the drafter a lot of time.

### ***Submitting your instructions***

Once complete, your drafting instructions must be approved by the Crown Law Office. The Crown Law Office will send your instructions to the relevant legislative drafter. See the Solicitor-General’s Legislative Drafting Directives for the Cook Islands for further details.

### ***Responding to drafts***

When you receive a draft,—

- read it critically; and
- check it against your instructions; and
- check that nothing is missing; and
- check for internal consistency; and
- check for readability; and
- check for any conflict with approvals that you have obtained (for example, Cabinet’s policy approval); and
- test it against practical scenarios or formulae; and
- fully and clearly answer any questions asked by the drafter.

It is important that you carefully read every word and think through each step set out in the draft. Ask yourself—

- does this reflect your policy intent and needs?
- does it solve the problem that you are addressing?
- realistically, can the legislation be complied with and will it work in practice?

You must tell the drafter if there is anything that—

- is not right; or
- is unclear, confusing, or difficult to understand; or
- does not make sense to you; or
- is contradictory.

Ensure that these problems are corrected. The legislation of the Cook Islands should be able to be read and understood by all people. If you don’t understand it, then other people won’t either, so it needs to be fixed.

If you find a problem, respond to the drafter by explaining what is wrong. Focus on the concepts rather than the words. Give examples of the problem. Clearly and fully explain any changes that you want made so the drafter can understand what you want the drafter to do.

As instructor, you should collect comments from other people within your department, or from other interested departments. Analyse any comments you receive and filter out those that are unhelpful or that don't accord with your policy.

The drafter will likely ask questions to clarify issues or resolve uncertainty that arose during drafting. You need to answer those questions accurately, clearly, and completely.

Present your feedback in whatever form is best in the circumstances. The easiest and clearest method is usually by putting revision-tracked comments into the draft legislation, or by hand-writing your comments on the draft.

The faster and more fully that you respond to a draft, the faster the drafter will be able to prepare the next draft for you and finalise the draft legislation.

### ***Finalising the draft legislation***

Drafting legislation is an iterative process. Many drafts may be required before the legislation is finalised.

Once you have finalised the draft legislation, you must send it to—

- first, the Crown Law Office for approval; and
- secondly, Cabinet for approval for introduction.

See the Solicitor-General's Legislative Drafting Directives for the Cook Islands for further details.

## SCHEDULE

### Format for Instructions for the Drafting of Legislation

Department: \_\_\_\_\_

These instructions are prepared by: \_\_\_\_\_

Your email, telephone, and other contact details: \_\_\_\_\_

Email, telephone, and other contact details for other relevant parties: \_\_\_\_\_

Minister responsible: \_\_\_\_\_

Details of Cabinet's approval of policy: \_\_\_\_\_

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Is the legislation considered urgent? If yes, why? \_\_\_\_\_

When does the legislation need to be introduced to Parliament? \_\_\_\_\_

When does the legislation need to come into force? \_\_\_\_\_

Are there any other time constraints? \_\_\_\_\_

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1. What is the proposed title of the legislation? \_\_\_\_\_

2. What is the legislative problem to be remedied? \_\_\_\_\_

3. What is the legislation to do? \_\_\_\_\_

4. How is the legislation to do it? \_\_\_\_\_

5. Who or what is the legislation to apply to? \_\_\_\_\_

6. How does the proposal relate to existing law? \_\_\_\_\_

7. What transitional and savings arrangements are needed? \_\_\_\_\_

8. What other consequential and related changes are required? \_\_\_\_\_

9. Details of any unresolved difficulties with the proposal: \_\_\_\_\_

10. Details of any matters that these instructions do not cover: \_\_\_\_\_

11. If the instructions are incomplete, when will complete instructions be available? \_\_\_\_\_

12. If the instructions are for a Bill, what regulations will be needed? \_\_\_\_\_
13. If the instructions are for regulations, are they within the limits of the authority of the empowering Act (ie, intra vires)? \_\_\_\_\_
14. Is the proposal consistent with the Constitution? \_\_\_\_\_
15. Who will administer and enforce the legislation? \_\_\_\_\_
16. Have you checked the proposal with your operational people? \_\_\_\_\_
17. Which government departments or agencies are affected by, or interested in, this legislation? \_\_\_\_\_
18. Are there other affected stakeholders who need to be consulted? \_\_\_\_\_
19. What consultation has been undertaken so far? \_\_\_\_\_
20. Other information that will assist the drafting process: \_\_\_\_\_

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Signed by the Instructor:

Date:

Signed by the Solicitor-General:

Date:

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**Check the following things—**

- have you got prior Cabinet approval for this policy?
- have you answered all of the questions on this form as fully as possible?
- have you attached a copy of all supporting documents?