

KIT FOR INSTRUCTORS

1. OVERVIEW

This document summarises the key information you need when working with the Parliamentary Counsel Office (PCO) to translate policy decisions into rules of law. Part 2 sets out the points worth committing to memory. Part 3 describes the ingredients of good instructions. Part 4 discusses the elements of a good template for preparing instructions. Part 5 lists relevant online resources.

More detail on many of these points is set out in the *Guide to Working with the PCO*.

2. POINTS

Translating policy decisions into rules of law requires adequate preparation and sufficient time. Understanding the process is essential, particularly the following points.

A. Project planning

Include enough time for drafting and quality assurance processes (design, agency comment, editorial review, peer review, BORA vet, and consultation); rough guide: 90 days for 50 clause Bill and 45 days for 50 clause Legislative Instrument.

B. Complete instructions

Instructions should contain the following ingredients: introduction (purpose of legislation, authorisation for it), current legal position, reasons for change, changes required, and any required technical provisions (commencement, consequential amendments, transitionals, and savings).

C. Approved policy

Instructions should be issued under Cabinet authorisation and reflect approved policy (see Cabinet Manual paragraph 7.53).

<https://dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual/7-executive-legislation-6#7.53>

D. Legal analysis

Instructions should be vetted by lawyers before being submitted to the PCO.

E. Legislative priorities

The PCO uses the priorities set out in the legislative programme to deploy its resources, as should all instructors. A large number of top priorities entails deciding which among equals must be drafted first.

3. INGREDIENTS

Good instructions for legislation contain all of the information that parliamentary counsel need to produce a legally effective and readable draft. They set out the policy to be implemented, the legal arena for the proposed legislation, and an analysis of the legal changes that are required. Their style matters far less than their coverage. Good instructions provide the following:

- an introduction that specifies the purpose of the proposed legislation and the relevant Cabinet authorisation
- a statement of the current legal position
- an explanation of why the law needs to be changed
- a description of all the legislative changes required, including any required technical provisions (commencement, consequential amendments, transitionals, and savings).

A. Introduction

Good instructions begin with an introduction that:

- summarises the purpose of the proposed legislative changes and the reason for the changes
- specifies the authorisation for the instructions (Cabinet or ministerial decision)
- identifies any accompanying documentation (for example, Cabinet minutes or consultation papers)
- specifies, in the case of Legislative Instruments, the relevant empowering provision.

B. Current legal position

Good instructions set out the existing law and how it operates in practice. This context helps parliamentary counsel to assess whether the instructions have identified all of the changes that are required and whether the

proposed approach will give effect to the approved policy in a way that is consistent with the established standards for legislation.

C. Reasons for change

Good instructions state why changing the law is necessary. For example, if the instructions concern amendments to an existing Act, the instructions should explain how the existing law prevents achieving what is desired. If the instructions concern the making of a Legislative Instrument under a recently enacted Act to implement the Act, the instructions should say so.

D. Changes required

Good instructions describe the legislative changes that are required in narrative form. The descriptions should be detailed and specific. For example, if the instructions concern amendments to an existing Act or Legislative Instrument, they should identify each provision that requires amendment, and the nature of the change required. Good instructions should also highlight any legal issues that arise (for example, any inconsistencies with the LDAC's *Legislation Guidelines* (2018 edition)).

Particular wording may be suggested if precedents exist or if it helps to convey what is desired. However, if this is done, the instructions must also set out what is desired in narrative form. This enables parliamentary counsel to assess whether the suggested wording achieves the desired result and is the best way of achieving it. Another way to illustrate what is desired is to specify the cases where the new law is to apply and the desired result in each case.

Good instructions also describe the technical provisions that are required. Technical provisions include commencement provisions, consequential amendments and repeals, and transitional and saving provisions. They are typically complex and time-consuming to draft and are usually among the first provisions to take effect when the new law is brought into force. Transitional and saving provisions are especially important when the desired outcome requires shifting from an existing system or set of procedures to a new system or set of procedures.

E. Other matters

Good instructions also cover other relevant matters, including timing issues, consultation requirements, practical concerns, and matters of interest to the Minister.

4. TEMPLATE

Using a template that covers the ingredients of good instructions ensures that they are complete. It also ensures that all instructors in an agency take a consistent approach. Completeness and consistency are factors that tend to reduce the amount of time needed to produce a draft. A good template includes the following elements.

A. Identification

Good instructions are identified as instructions for a particular Bill or Legislative Instrument and cite the authorisation for them (Cabinet or ministerial decision). They are addressed to the appropriate drafting team manager and they are dated (date sent).

B. Background

Good instructions set out the relevant background. In the case of Cabinet authorisation, the executive summary of the relevant Cabinet paper is usually a helpful source. In the case of ministerial authorisation, the relevant briefing paper is usually a helpful source.

C. Form of legislation

Good instructions indicate the form of legislation that is needed. Legislation generally takes one of the following forms: a new Bill, an amending Bill, a new Legislative Instrument, an amending Legislative Instrument, or an omnibus Bill. Omnibus Bills amend or replace several existing Acts or create several new Acts or both. They are used when the implementation of a given policy decision requires changes to a range of Acts.

D. Timing

Good instructions state the relevant timing considerations. They also provide a suggested timeline and indicate when the proposed legislation should come into force. In the case of Bills, they also indicate the proposed Bill's priority in the current legislative programme. Subsequent changes should be communicated promptly.

E. Administration

Good instructions specify the agency or agencies that will administer the resulting Act or Legislative Instrument.

F. Further instructions

Good instructions indicate whether further instructions are likely. In the case of Bills, this includes an indication of whether Legislative Instruments will be needed and an estimate of the magnitude and timing of this work. In the rare cases where instructions are provided in tranches, this includes an indication of when the next tranche or tranches of instructions will be sent to the PCO.

G. Narrative form

Good instructions are in narrative form. They state the issue to be resolved and the proposed solution. In doing so, they:

- describe the proposal's purposes (the proposed legislation will do A)
- spell out the reasons for the proposed legislation (it will solve problem B; the present law falls short because of C)
- identify the people and activities involved (the proposed legislation will affect, or is related to, D and E)
- describe what should be in the proposed legislation (do A by changing provision F in G way)
- explain how the proposed legislation will fit into existing law (Act H already covers I; the proposed Act will cover J)
- specify the consequential changes that need to be made to related legislation (Act L must be amended, M penalties need to be adjusted)
- explain what is needed to make the transition from the existing law to the law as it will be (old Act N applies until O, P has Q years to conform with the new Act R)
- provide specific references to the relevant Cabinet or ministerial decisions.

Good instructions focus on the intended objective rather than on the words that may be used. Set phrases or forms of words can become a liability, holding parliamentary counsel back from finding better alternatives.

H. Questions to answer

Good instructions also indicate:

- how the proposed legislation relates to other relevant legislation

- whether any unresolved issues remain to be solved
- whether the proposed legislation is inconsistent with any of the current Cabinet requirements for legislation, particularly:
 - a) the principles of the Treaty of Waitangi
 - b) the rights and freedoms of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993
 - c) the principles in the Privacy Act 1993
 - d) the relevant international obligations
 - e) the guidance contained in the *Legislation Guidelines* (2018 edition)
- whether those affected by the legislative proposal have been consulted and whether they are of the view that the proposed legislation will work as intended in all likely situations
- whether the proposed legislation, in the case of Legislative Instruments, is within the limits of the relevant empowering provision.

I. Supporting documents

Good instructions provide and identify any relevant supporting documentation. This documentation generally includes:

- the relevant Cabinet papers and papers sent to the Minister
- the relevant precedents, cases, legal opinions, and reports
- notes of any relevant court or other proceedings in contemplation
- official copies of any relevant international agreements or obligations
- a description of any consultation, including the names of the organisations and individuals involved, and a summary of their views
- any other relevant background material.

J. Consultation

Good instructions often provide a list of agencies with an interest in the proposed legislation, especially if the instructing agency intends to expose the draft to consultation before finalising the draft.

K. Contact details

Good instructions provide the contact details of the instructor and the instructor's backup.

5. RESOURCES

Resources relevant to producing good instructions can be found online.

A. Policy to Parliament diagram

Knowing the policy formation and drafting processes is helpful, especially when formulating timelines. The diagram sets out the steps and time required to transform policy into a Bill for introduction.

<http://www.pco.govt.nz/policy-to-parliament/>

B. Submitting bids for the legislative programme

Knowing how to submit a bid to place a Bill on the legislative programme is essential. It is a vital first step in policy to legislation process.

<http://www.dpmc.govt.nz/cabinet/circulars/co16/5>

C. Contact details for PCO drafting teams

Knowing which of the drafting teams to contact for assistance is also helpful, especially when seeking advice regarding drafting instructions or the legislative process.

<http://www.pco.govt.nz/working-with-the-pco#guide6.4>

D. Guide to Working with the PCO

Knowing how to work with the PCO is helpful. More detail can be found in the *Guide to Working with the PCO*.

<http://www.pco.govt.nz/working-with-the-pco/>

E. Principles of clear drafting

Being aware of the principles of clear drafting can enhance the production of instructions and the evaluation of drafts.

<http://www.pco.govt.nz/clear-drafting/>

F. Cabinet Manual

The Cabinet Manual is an authoritative guide to central government decision making for Ministers, their offices, and those working within government. It also provides information on existing constitutional arrangements, including those relevant to the policy formation and legislative processes.

<https://dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual>

G. CabGuide

The CabGuide sets out the role of Cabinet and its committees. It also explains how to use CabNet and provides general guidance on a range of matters relevant to the policy formation and legislative processes.

<http://cabguide.cabinetoffice.govt.nz/role-cabinet-cabinet-committees>

H. Cabinet Office Circulars

From time to time, the Cabinet Office issues circulars on matters of general interest to Ministers and agencies. They provide detailed guidance on central government processes. They supplement the Cabinet Manual and the CabGuide.

<http://www.dpmc.govt.nz/cabinet/circulars/index.html>

I. Cabinet standards for legislation

Cabinet expects legislation, particularly Bills, to conform to a range of standards. Understanding these standards is essential to producing good instructions (see Cabinet Manual paragraphs 7.65–7.66).

<https://dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual/7-executive-legislation-6#7.65>

J. Legislation Guidelines

The *Legislation Guidelines* (2018 edition) are designed to be a first port of call for those involved in the development of legislation. Compliance with the *Legislation Guidelines* is one of the Cabinet standards for legislation.

<http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/>

K. Regulatory impact assessments

Awareness of the requirements for regulatory impact assessments for Bills is helpful. These assessments entail a fair amount of time and expertise to produce.

<https://dpmc.govt.nz/publications/impact-analysis-and-impact-statements>

<https://treasury.govt.nz/publications/legislation/regulatory-impact-assessments>

<https://www.dpmc.govt.nz/publications/co-17-3-impact-analysis-requirements>

L. Disclosure statements

Awareness of the requirements for disclosure statements for Bills is also helpful. These statements also entail a fair amount of time and expertise to produce.

<http://disclosure.legislation.govt.nz/>

<http://www.pco.govt.nz/disclosure-statements/>

<https://treasury.govt.nz/publications/guide/disclosure-statements-government-legislation-technical-guide-departments-html>

M. Production of forms and graphics in legislation

Understanding the basic technical requirements of forms and graphics to be published in legislation can save time.

<http://www.pco.govt.nz/forms-and-graphics/>

N. Standing Orders of the House of Representatives

The Standing Orders of the House of Representatives are the rules of procedure for the House of Representatives and its committees. Awareness of these rules is useful to those responsible for shepherding legislation through the House.

<https://www.parliament.nz/en/pb/parliamentary-rules/standing-orders/>

O. Parliamentary Practice

For an in depth discussion of parliamentary practice, see D McGee, *Parliamentary Practice in New Zealand*.

<https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/>

P. Notifying Legislative Instruments

Knowing the steps to take for giving notice of Legislative Instruments in the *Gazette* helps to ensure that applicable notification requirements are met.

<http://www.pco.govt.nz/notifying-legislative-instruments/>

Q. Checklists

Using the PCO checklists for drafting instructions, the introduction of Bills, and transitional and savings provisions, can help ensure the PCO has the information it needs to produce Bills for introduction.

<http://www.pco.govt.nz/checklists/>

6. CONCLUDING REMARKS

The production of legislation is a lengthy process. It begins with policy development and approval, continues through instruction and drafting, and concludes with the enactment of Acts or the making of Legislative Instruments. Agencies work with the PCO during the instructing, drafting, and enacting (or making) stages. Producing legislation that does what it is intended to do is a function of collaboration between parliamentary counsel and their instructors. This collaboration is an iterative process that involves the production of a number of drafts and the incorporation of feedback from instructors, the PCO's quality assurance systems, submissions, consultation, and policy refinements. It begins with instructions, and generally proceeds smoothly when the instructions conform to the advice set out in this paper, particularly the points in Part 2.

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