

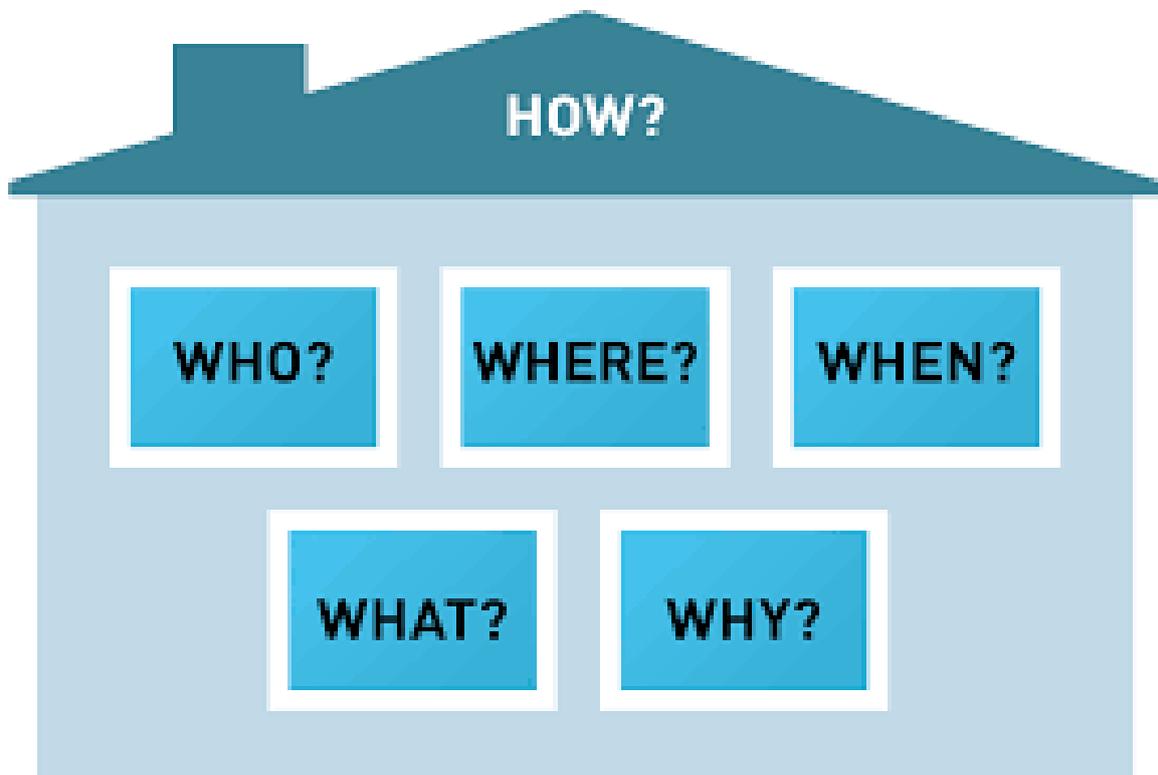


LEGISLATIVE DRAFTING OFFICE

Turning policies into Jersey law

MAKING NEW LEGISLATION

A GUIDE TO INSTRUCTING THE DRAFTER



3rd edition 2021

Making new legislation – A guide to instructing the drafter

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Chapter 1 - Introduction

- 1.1 This guide is intended to help anyone who is required to instruct the Legislative Drafting Office (“LDO”) to prepare new legislation for Jersey. It is primarily aimed at those who are engaged in larger drafting projects but we hope the general principles will assist with all drafting matters, including assisting officers of the States Greffe who might be instructing the drafter to prepare short Laws or amendments to legislation already lodged in the States. It explains the law-making process from the initial policy idea through the drafting of the legislation and its passage to becoming law, focussing on your part in the process and your relationship with the LDO. Though it tries to explain basic concepts for the beginner it should also aid more experienced instructors in understanding how Jersey’s drafters can best be assisted in producing draft legislation.
- 1.2 The guide aims to assist you with:
- The process for getting approval to draft new legislation
 - How to communicate your policy to the drafter in the best way to enable the new legislation or amendments to be produced
 - How best to work with the drafter during the drafting process
 - The steps to take to get your draft legislation ready for making.
- 1.3 There is other material available to give you detailed guidance as to procedure so the most important point for us to get across in this guide is that **you need to tell us in detail what you are trying to achieve in your own words.**
- 1.4 This guide is designed to accompany a day’s course on how to instruct the drafter, which the LDO runs. The text replaces earlier guidance. It is a living document and will be updated from time to time and we welcome any comments or suggestions for improvements.
- 1.5 The importance of the instructing officer in the drafting process should not be underestimated. The drafters in the LDO draft the legislation and are responsible for the words used and the form and legal effect of the legislation, but do not decide the policy behind the content. Legislation is simply a means by which a policy promoted by our politicians becomes law. We aim to draft legislation that is legally effective, understandable and that implements the intended policy. Legislation aims to make a change to existing law; it should not make political statements nor include material that is merely window dressing or has no legal effect. You, on behalf of the Government of Jersey, are the policy makers and it is your words to the drafter that are important if the draft is accurately to reflect your policy objective. You are responsible for initiating and refining the policy to be given effect by the proposed new legislation. Your instructions are the means by which you communicate to us what the policy is and how you want it to be implemented, so that we may construct a legislative framework that has the effect you want. The drafter has a professional obligation to ensure that the legislation achieves your objective and does not produce any unintended side-effects. He or she needs therefore to understand the intended effect of everything you propose. This guide should help you communicate what you want to do in a way that is most effective for you and for the drafter. It also explains the various steps that must be taken to turn your policy into legislation.

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- 1.6 The better the drafting instructions we receive from you, the more quickly a final draft will be produced and more importantly, the better that legislation will be. We will work as a team with you to produce the legislation but we each have our distinct roles within that team. We hope that this guide will help both you and us by considering our respective roles in the drafting process and providing practical information about what we need from you.
- 1.7 This guide assumes that it has been decided that legislation is needed to achieve your policy aim. But please remember that many policies can be implemented without legislation and if there is any doubt you should check whether you can proceed without legislation or use existing statutory powers to achieve your goal. Our colleagues in the Law Officers' Department ("LOD") may be able to advise you if you are unsure.
- 1.8 The LOD Advice Team are often engaged to facilitate the process of progressing Jersey legislation (both primary and secondary legislation). LOD's role is separate from that of the Legislative Drafting Office, but the two work closely together. Some further information about LOD's role is provided later in this guide, but in summary the role of an LOD legal adviser in a legislation project might include:
- 1) giving legal advice and assistance to the instructing Department with regard to the preparation and content of drafting instructions for proposed legislation;
 - 2) giving legal advice to the instructing Department and the LDO during the drafting process (e.g. on customary law, human rights and other legal issues that may arise);
 - 3) carrying out a penalty review for the Attorney General and preparing a human rights memorandum of advice so that the Minister can give a compatibility statement under Article 16 of the Human Rights (Jersey) Law 2000;
 - 4) briefing and supporting the Law Officers who will be advising the Minister and Assembly members on legal issues during any debate on the legislation;
 - 5) preparing a comprehensive Royal Assent memorandum and liaising with the Ministry of Justice in order to obtain Royal Assent for a draft Law.

Chapter 2 - Authority to draft and types of legislation

Government Legislative Programme

- 2.1 The drafting of any legislation for the Government of Jersey cannot commence unless there is political endorsement. A new process to enable the Council of Ministers (“COM”) to maintain regular oversight of the policy and legislative priorities that underpin the Government Plan was approved in 2019 and was revised in 2021. Known as the Government Legislative Programme (or “GLP”) it is facilitated by the Strategic Policy, Planning and Performance Department (known as “SPPP” or “SP3”) in close coordination with the LDO. The Government Plan sets out a detailed action and resourcing plan for the forthcoming year and an outline plan for the following 3 years. The GLP a single shared plan of legislative priorities (including those falling outside of SPPP) needed for the Government Plan, to meet international obligations or as a result of a proposition agreed by the States Assembly. COM will review and update the GLP annually as part of its review of the Government Plan for the following year, with 6-monthly consideration of urgent and unforeseen matters that may need to be added.
- 2.2 The GLP covers those policy projects that will require legislation other than those classified as “minor and routine” which are not expected to take up more than a day or so’s drafting time. Using the Perform platform the GLP enables the LDO (and others) to see the relative priorities of forthcoming as well as existing legislation projects. It also provides a visual representation of the full demand which Government can then seek to match to its collective capacity. Where demand exceeds capacity, it will take the form of bottlenecks in the process, for example within an individual policy team, in the capacity of the LDO, the agenda of COM or Assembly debate time. SPPP will seek to identify those potential bottlenecks in advance and provide COM with the usual 3 options for any project:
- 1) add more resources - by moving staff, adding consultancy support or fixed term appointments; and/or
 - 2) change the quality – amending the intent so that less legislative drafting time is required; and/or
 - 3) delaying other projects – in order to free up capacity to meet a higher priority demand. This would always be a political decision.
- 2.3 Once instructions are received the LDO will be able to assess the size and complexity of legislation projects and give guidance as to what is a reasonable time frame for their completion. The GLP needs to be reviewed frequently to record progress and adjust timetables for each project. Urgent and unforeseen matters can be added when and where necessary once they are approved by COM.
- 2.4 All legislation projects will still require a Ministerial Decision (“MD”) from the relevant Minister, whether the project is a programme item (i.e. on the GLP) or a minor and routine matter. Minor and routine matters are accommodated by the LDO alongside the programme items. If more drafting resources are required than can be accommodated in about a day the Principal Legislative Drafter (“PLD”) will inform SPPP so that the project can be incorporated into the 6-monthly review process described above, or on an exceptional basis if urgent. It is thus important that before

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you approach us with instructions your project is on the GLP unless it is a minor and routine item.

Prioritisation of legislation: practical points

- 2.5 The order in which legislation is allocated for drafting will largely be determined by its place on the GLP. However, if there are undue delays in progressing legislation, less urgent matters may overtake more urgent ones. The drafters all have a number of drafting projects on the go at any one time and will use the periods when higher prioritised legislation is out of their hands to work on lower priority matters. In practice, therefore, the best way to keep your legislation at or near the top of the list is to respond quickly to drafts and queries from the LDO.

Preliminaries to writing drafting instructions

- 2.6 Before writing your drafting instructions you may find it useful to have a preliminary discussion with the PLD to clarify drafting matters that may impact on policy issues and to work through possible legislative or other means of implementing the proposals. It is also useful as a means of identifying at an early stage issues that may be contentious or complex and of resolving legal difficulties. If you wish for general legal advice, including advice as to compliance with the European Convention on Human Rights, you should consult a lawyer in the Advice Team of the Law Officers' Department. You may also wish to seek an indication from the PLD as to the likely timescale for the drafting of the legislation from the point of view of availability of a drafter. However, please note that until the drafting instructions have been received it will be very difficult to give a realistic estimate of when drafting can start and you can be given only a snapshot of the current state of play and known future workload. Pressure of work fluctuates, and we won't know what other work may come in ahead of your matter, never mind being able to give a realistic estimate of how long the drafting will take before we receive the instructions. If the legislative proposal is subject to an implementation date dependent on external factors or has been agreed by COM or a Minister then you and the drafter need to agree from the outset a timetable working backwards from that date, allowing for all the stages in the process outlined in this guide. Please note that if instructions are delivered later than as provided for in this timetable or for whatever reason drafts cannot be delivered by agreed dates, it is likely that the project cannot be delivered on time so we advise you to allow for slippage. **You cannot reduce the time agreed to be allowed for drafting and expect the end delivery date not to change accordingly.** Appendix 1 sets out the steps in the preparation of legislation up to the time of finalising the draft. For any particular project it is useful to work backwards from the bottom adding timings for each stage seeking advice from the drafter. You may be surprised by how long the process takes. In a draft of any substantial size you are likely to need a number of months just for the drafting stage.
- 2.7 Once you have prepared your drafting instructions they should be sent to the PLD. They will then be allocated to a drafter as soon as he or she has spare capacity to take on another matter. It is important, as soon as you have spent the time you need on the work, to get the instructions and any subsequent comments on a draft to us as soon as possible, as this will make it less likely that the allocated drafter has turned to other work in the meantime.

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Types of legislation

2.8 This guide tends to refer to legislation generally but there are 3 main types of legislation you may find yourself instructing us to produce:

- **Laws:** Also referred to as “primary legislation”, Laws are the most important type of legislation and must be passed by the States and sanctioned by the Queen in Council. Draft Laws have to be lodged *au Greffe* (published and circulated to States Members) for a minimum of 6 weeks before they can be debated by the States, unless (which happens only rarely) the States waive this Standing Order requirement. Once adopted by the States they are sent to the Ministry of Justice in London with a report from the Law Officers’ Department advising that they are considered not to conflict with the UK’s international obligations, including the European Convention on Human Rights (“ECHR”). Once a Law has received Royal Assent at a meeting of the Privy Council it must be registered in the Royal Court. It will come into force usually either a given number of days after registration or commenced by an Act of the States (what used to be called an “Appointed Day Act”), or occasionally by commencement Order. A commencement Act is required to be lodged *au Greffe* for a minimum of 4 weeks but otherwise is dealt with in the States in a manner similar to Regulations. Laws are subject to little constraint on what they may contain, provided that they do not breach fundamental legal or constitutional principles (e.g. human rights) or international obligations extended to Jersey.
- **Regulations:** The most formal type of secondary legislation, Regulations are made by the States and are required to be lodged and debated in the same way as Laws. Once made they usually come into force as stated in the Regulations themselves.
- **Orders:** the most common type of secondary legislation and are made by a Minister, who will be cited in the words of enactment. Orders are currently made by the Minister’s signing the Order and attaching a seal. Once made, they are laid before the States and any Member may bring a proposition within 3 sittings to annul the Order, whether or not it is already in force. There is no power for the States to amend an Order.

There are also less common types of instrument such as Rules or Bye-Laws. In some circumstances UK legislation has been extended to Jersey, usually by Order in Council, which is also part of the body of Jersey law though it is made in Westminster.

2.9 Appendix 2 sets out the procedure for making the 3 main types of legislation. Secondary legislation, whether Regulations, Orders, or any other type, derive their powers from the primary legislation, also known in this context as the “parent Law”. Secondary legislation must not extend beyond the powers given by that Law. If it does so it is said to be “*ultra vires*” and its legality may be challenged in the courts.

2.10 It may be that you can achieve what you need to achieve by using powers set out in an existing Law, so you should look at that and if appropriate seek advice on the extent of the legal powers. The powers in the Law will state whether they may be exercised by Order or Regulations and set out any other procedural requirements such as who may need to be consulted. Any major new innovation or scheme is likely to require a new Law. The drafter will decide on the scheme of the legislation, including what should go in the Law and what should go in Regulations or Orders, though you may

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express your views. Generally Regulations contain the more important matters of secondary legislation, including where power is given to amend a Law (sometimes referred to as a “Henry VIII” clause because an early example of such a power was conferred on King Henry VIII by the Statute of Proclamations 1539). More routine and less controversial matters, as well as things that need amending frequently like fees, are usually contained in Orders because they can be made by a Minister without the need for a lodging period. As you will see from the next chapter it is important to explain the totality of your policy so that the best legislative vehicle for each aspect of your policy can be determined, and not to forget that if secondary legislation is needed, the project is not complete until that is in force too.

Provisions in legislation

- 2.11 Legislation tends to follow a set structure or order of provisions which makes it easier for people to find their way round. Accompanying any legislation going to the States is a Report written by you and added at the end of the drafting process (see paragraph 7.8) and all draft legislation will have an Explanatory Note. This is completed by the drafter once the text of the draft is virtually settled, summarising only the legal effect of the changes to be made by the draft legislation. In any substantial piece of legislation there will follow a table of contents before we reach the actual text. You will then find the title of the legislation (known as the short title in the case of a Law) and (in the case of a Law only) below it the long title setting out in a full sentence what the Law does. In the case of secondary legislation, this part of the draft contains instead reference to the powers under which the legislation is made are cited.
- 2.12 Laws and Orders are divided into a number of Articles (with numbered headings in bold – in Regulations the term is not “Articles” but “Regulations”). The first Article is usually headed “Interpretation” and provides a glossary of terms used in the legislation which are chosen by the drafter (it is not your responsibility to define words for legislation though you will need to explain what words you use in the instructions mean). You will then find the more important provisions of the legislation, and towards the end of the draft provisions covering enforcement, including offences and penalties, transitional and saving provisions designed to ensure a smooth transition from the old position to that under the new legislation, repeals, consequential amendments to existing legislation and, lastly, the citation and commencement provision, giving the name by which the legislation may be referred to (citation or short title) and when it comes into force. A large piece of legislation may be divided into a number of Parts and, following the citation and commencement provision, one or more Schedules containing matters of detail that are best covered separately. A sample of a fictitious Law pointing out some of these points is included as Appendix 3.

Chapter 3 - Writing drafting instructions

Starting off

- 3.1 Before you start writing drafting instructions you must have a clear policy in mind. Your Department must have a clear mandate to follow a certain course of action that requires legislation. Without that, you cannot produce effective drafting instructions. One way of looking at the matter is to think of yourself as the architect whose job it is to design a building for the drafters to build in the form of the legislation. Without knowing what sort of building is required - what it is to be used for, how big it is to be, some idea of what it is to look like - you cannot possibly draw up the plans in terms of drafting instructions. Make sure the policy is clear; if you are stuck, the chances are it is not, and someone needs to develop it further.
- 3.2 When developing policy, if that is your job as well as working up the drafting instructions, don't hesitate to seek help from all sources. Other parts of government may assist. Chapter 6 on consultation tells you who needs to be consulted but it may help you to have some dialogue with the consultees in advance. You may also find it useful to approach outside bodies for inspiration. One useful source of information may be the UK Government Department responsible for the policy area concerned. It may also be worth your looking at how the problem you are trying to solve has been dealt with in Guernsey or the Isle of Man or one of the overseas territories that has a similar structure to your particular area. The Internet will inform you of what is happening in your area across the world and you may readily glean inspiration from papers produced by many other Governments.
- 3.3 If this is the first time you have been asked to write drafting instructions, you may feel daunted by the task but take heart. You do not need to be a lawyer to do this task effectively. You do not need to write in some special legal language. You need only to express yourself as simply and as clearly as possible. Do not expect the drafter to know anything about the subject matter. You should avoid jargon, acronyms or terminology that is peculiar to your speciality, but if you have to use these terms you must explain what they mean, if necessary, by including a glossary of terms. The best instructions will simply describe your policy objectives and how they are to be achieved. But you will need to work out in considerable detail what you want. You should start from the current state of the law and then particularise all the changes that are needed.
- 3.4 A common mistake is to be too brief in writing instructions, which should almost always be longer than the resulting legislation. In the case of a small matter, we might expect to see 5 pages of instructions for every page of legislation produced from it, though the larger the matter the smaller will be this ratio. This is because you will need to explain what you are trying to do before you particularise each aspect of your instructions. It is important to try and cover all aspects of your policy if you can. We do understand that sometimes it is only when you see a draft that you see the holes and that sometimes new matters crop up. But what may seem like a small addition to you, and would have been a small matter for us to include in the first draft, may require a huge amount of redrafting if we have to include it later on when it may even undermine the chosen structure of the legislation. **Please do not anticipate future**

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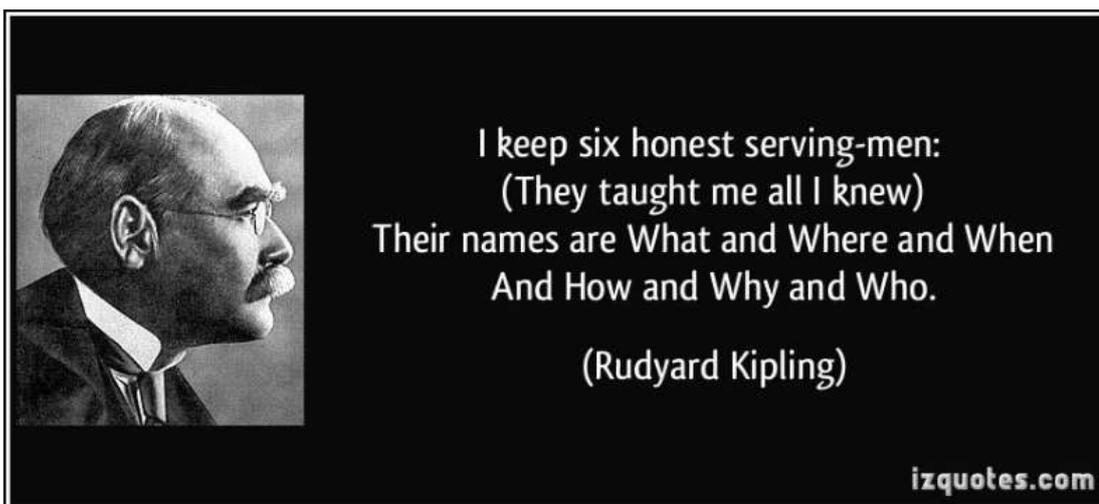
legislative changes. It is for the later Law to make consequential amendments to earlier legislation.

3.5 Let us give you an example of how you might approach the task of writing instructions. Suppose you want to regulate a certain commercial activity. You've decided that nobody should do this activity without a licence granted by a Minister. That all sounds very simple until you think it through. You should find yourself asking:

- 1) Who exactly do I want to regulate? Everyone who does this activity or only those who do so on a commercial basis? How do I define those whom I wish the new legislation to cover? What exemptions should there be, if any, from the licensing requirement?
- 2) Who qualifies to apply for a licence? How do people apply for a licence? Who grants the licence? How long does it last? Is there a licence fee? What criteria determine whether or not the licence is granted? What representations can applicants make? Can other people object to a licence being granted? How do they do this? What time limits are there? Does the licence have to be displayed? What happens if it is lost or destroyed?
- 3) What happens when a licence is refused? What reasons must be given? What about appeals against the refusal of a licence? Who hears the appeals? Within what time limit? What happens while an appeal is pending: can the person continue to operate? Is there to be a system of third-party appeals? Is there a further appeal to a court or tribunal? Which one? Is this a new body? If so, how is it constituted? Who are the members? Who appoints them? What are their qualifications for appointment? Their terms of service? Remuneration?
- 4) What happens if someone carries on the activity without a licence? Is this to be a criminal offence? What court has jurisdiction? What is the maximum penalty for the offence? Is there an offence of making a false representation in order to obtain a licence? Or one of displaying a false licence?
- 5) What about people lawfully carrying on the activity before the legislation is passed? Can they carry on without a licence? For how long?
- 6) What consequences are there for the existing law? Do I know of other legislation that might need amending in consequence of the new proposals?
- 7) What powers do I need the drafter to include to enable the details of some of these matters to go in Regulations or Orders? Which is more appropriate: Regulations or Orders?
- 8) Are the proposals based on an existing licensing system elsewhere or should I look and see what happens in the UK? In Guernsey? Elsewhere? What legislation is in existence elsewhere that might assist me with the policy or the drafter in producing the legislation?
- 9) When do I want my new legislation to come into force? (Please see paragraph 2.5 on timetabling). As soon as possible or are there things that need to be done first (e.g. Regulations may need to be drafted under a Law, administrative procedures changed, new people appointed, training given)? Do I want a facility to bring the Law into operation at a later date when all the necessary things have been done? Do I want to be able to bring some provisions of the Law in earlier than others?

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- 3.6 This is a brief list of the sort of matters that are likely to require consideration in any new licensing scheme. There will be many others, some of which are unique to your particular project. The important thing is to work out what you want as fully as possible. You won't think of everything; that is quite normal. Expect the drafter to come back to you asking, "what about...?" But if you try and cover as much as you can yourself in advance you will be saving your time and ours. Instructions that say little more than "please provide for a new licensing system for producers of X" will be rejected and more detail requested. It is not for the drafters to fill in the detail for you and substitute their solution for yours.
- 3.7 Another source of inspiration may be the Common Legislative Solutions which some drafters in the UK have produced. You will find on the websites of the Scottish and Welsh Governments at: <https://www.gov.scot/publications/guidance-instructing-counsel-common-legislative-solutions/> and <https://gov.wales/common-legislative-solutions-a-guide-to-tackling-recurring-policy-issues-in-legislation>. They are provided to direct policy makers to the ways commonly occurring matters have been dealt with in existing legislation in the UK. Use them to inform and guide your thinking where they happen to cover a matter relevant to your policy.



How to structure drafting instructions

- 3.8 It is usually best if you start out with a general statement of your aims and then go into detail further on. Your general statement will be an introduction to the policy, explaining the background to it and providing an overview. You might wish to cover the answers to the following questions:
- Why is legislation needed?
 - What effect is the legislation to have?
 - How will it achieve that effect?
 - How will it affect existing law and practice?

If you know of any legal or practical difficulties that might affect the proposals, mention them here. For example, existing provisions may have been the subject of an unexpected judicial decision or adverse comment in court.

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- 3.9 The detailed instructions should provide a complete narrative of the matters to be included in the legislation. It is best to work through each stage in logical order, considering each aspect in detail. Points 1) to 9) above may provide you with some inspiration and indicate the sort of level of detail you should go into.

Documents in support

- 3.10 You should include with your instructions any background papers of relevance, or a hyperlink to them, for example:

- 1) Policy papers relating to the Ministerial decision to proceed with the legislation;
- 2) Any consultation documents on the topic;
- 3) any papers that have been lodged or debated in the States on the matter;
- 4) Any decision of the courts that has given rise to it;
- 5) Any legal advice (there is no difficulty in sharing LOD advice with the LDOs);
- 6) Any EU or international documents that the legislation is to implement.

- 3.11 However, please do not use background material as a substitute for your own analysis. It is of no help to us unless you explain its relevance. There is no need to provide copies of any legislation from the UK to which you refer but it may save us some time if you provide a copy or a link to any other legislation. It also helps if you cite the legislation or any sections of it clearly and fully, preferably including the chapter or SI number or equivalent if possible. Please remember that importing provisions of legislation from elsewhere will not necessarily produce the same result locally. Moreover, it may not be appropriate in its current form if it is designed for a much larger jurisdiction with multi-tiers of government. For example, a Secretary of State may want regulation-making powers to be able to direct the action of all local authorities in England and Wales, but a Minister in Jersey does not normally need a power to make an Order telling himself or herself what to do. It is quite common in Jersey to follow UK legislation with adaptations where there are valid reasons for mirroring UK law. But taking legislation from elsewhere and indicating what adaptations you wish to include is highly risky, particularly if you are not a lawyer yourself. It is always better to state what you want in narrative form.

Why are instructions in the form of draft legislation such a bad thing?

- 3.12 Many people believe that trying to draft the legislation themselves will save the drafter time and make his or her task easier, thus speeding up the process. In fact the converse is true, whether the draft is prepared by you or copied from other legislation.
- 3.13 When we read a ready prepared draft we can only discover the effect of the words you have written, not what you intended or what is needed. If you send us a draft instead of a narrative brief you will be diverting your own valuable time away from your task of working up the policy, which is your expertise, in order to express yourself in the language of the resulting legislation, which is the drafter's expertise. When he or she receives a draft, the drafter cannot know whether it correctly expresses your policy. The drafter has to start by converting it back into narrative and then asking

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you if that is what you meant, which wastes more of your time and the drafter's time. This may bring to light that the draft does not achieve your policy, but it may not, especially if the policy is complex. You vastly increase the risk of the draft not being what was needed if you have drafted it yourself.

- 3.14 It is often said it is like sending someone a completed crossword and their then having to work out what the clues were; they may get a different result from that of the compiler. Another analogy is that of a patient who goes to the doctor and requests a particular treatment rather than describing his symptoms. He may do that because his friend had similar symptoms and was prescribed a particular drug, but just because a particular provision is right for the UK it does not mean it is right for Jersey; as explained above, you cannot assume that the state of the law is the same in both places because it frequently isn't and the structure of Government is undoubtedly different, which often means a far simpler structure will suffice. The drafter can better work out what you need from a simple exposition of the problem rather than your presenting him or her with what you think is the legal solution.
- 3.15 In summary, drafting instructions should ideally:
- 1) be in narrative form, broken up into easily readable numbered paragraphs and paginated and dated;
 - 2) contain a general statement of the aims of the proposed legislation and the means by which it is suggested they be achieved;
 - 3) give specific instructions as to all matters to be dealt with by the proposed legislation;
 - 4) identify any difficulties of a legal, administrative or other nature that appear to be involved;
 - 5) refer to other similar or existing legislation that may be affected or require modification;
 - 6) identify any relevant legislation from other jurisdictions;
 - 7) be accompanied by any relevant case law, opinions from in-house lawyers or outside lawyers, or reports of committees or working parties, that are relevant to the legislation; and
 - 8) provide express instructions about the commencement, transitional provisions and extent of regulation-making powers required (this is very important to avoid misunderstandings and difficulties at a later stage, and assists with timetabling).
- 3.16 Drafting instructions should not:
- 1) raise or refer to matters of principle or policy not covered within the ambit of the specific approval of COM or the summary of proposed content accompanying the MD or submission for inclusion in the Government Legislative Programme;
 - 2) merely paraphrase those submissions; they will normally cover general principles whereas the instructions should contain all relevant matters of detail; or
 - 3) take the form of draft legislation: reference to provisions of other legislation or model Bills may be made, but this should not be used as a substitute for detailed narrative instructions explaining the proposals.

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3.17 10 points to remember when writing instructions:

- 1) You are the expert in your field: assume the drafter knows nothing about the subject and tell him or her the story as you would to any other person who does not know the subject.
- 2) Try to work out the policy in full before you start writing.
- 3) Be consistent in your use of language. If you refer to one term to mean one thing and then use another term later on the drafter will think you mean something different. But don't feel you need to limit yourself to text – sometimes tables, flowcharts and diagrams will help you spot gaps or clarify your analysis.
- 4) Check that the policy proposals expressed in your instructions are consistent with each other.
- 5) Check that any procedures requested in your instructions are complete and do not lead to any dead ends. Use a flow chart if it would help.
- 6) Ask yourself in relation to each element of the policy: Who? How? Where? When?, etc. It may be helpful for you to bear in mind Kipling's honest serving men or the **WHIB** checklist. In the context of a regulatory Law the sorts of questions to be answered and points to be spelt out in the instructions are —

What is to be regulated?

By **Whom**?

Who is to be regulated? (E.g. should there be exemption from the regime?)

When are they to be regulated?

What coercive powers is the regulator to have to obtain information, enter premises, inspect documents and so on?

How is the regulatory regime to operate?

If a licensing regime is involved **how** are those required to hold them to go about applying for a licence?

How is fitness to hold a licence assessed?

How are licence holders to prove compliance?

If they comply what happens?

If they do not comply what sanctions are to be available?

But (every regime has exceptions).

- 7) Keep testing the policy as you write: how will it work in practice?
- 8) The more information you give to the drafter the better he or she will be able to give you a draft that does what you want, and fewer queries will be raised.
- 9) Make sure you identify what you want to include in secondary legislation.
- 10) When you have finished, put the instructions away for a few days and then re-read them. This can help to reveal unclear areas, internal inconsistencies and gaps. It may be helpful to pass them to a colleague to read.

3.18 A general checklist of matters that may need to be included in drafting instructions is in Appendix 4 to this Guide. **If your instructions are to uprate fees there is an application to help you. Please ask the LDO if you cannot access it.**

Chapter 4 - Submitting your instructions

- 4.1 Your instructions should be emailed to the Principal Legislative Drafter (“PLD”) along with the MD giving authority for the drafting of the new legislation and indicating the preferred timescale or level of urgency. The PLD will have a general look at them to gauge the size of the task involved and if the matter is not to be allocated very shortly to a drafter, will indicate to you how long it will be before it is allocated. **If you do not hear from the PLD within 2 working days, you are advised to contact the PLD just in case the matter has gone astray or been overlooked.** Since 2020 the process has become semi-automated with the installation of DOMIS (which stands for Drafting Office Management Information System). The PLD enters every drafting matter into DOMIS and the process of informing you and the drafter who has been allocated is now done by an auto-generated email. DOMIS will then store all the emails relating to that matter - including the MD and instructions sent by you and the drafts sent out by the drafter. It facilitates time recording by the drafter on each matter and enables the PLD to track progress across all matters and generate reports, including progress reports for the Government Legislative Programme. If the instructions are clearly not adequate to enable drafting to commence the PLD may request that you provide further details at this stage. The allocated drafter will work with you until the project is finished and the two of you need to work as a team to deliver the project.
- 4.2 Once a matter has been allocated to him or her, the drafter will consider your instructions carefully and critically. At this stage, if the matter is complex or raises a number of issues, the drafter may need to clarify the instructions with you to ensure that he or she has a clear preliminary grasp of what you want. This could be in writing or it might be proposed that you meet. He or she will indicate whether more is needed before a first draft can be prepared. It is not the drafter’s role to comment on policy except to the extent required to clarify the intention for the purposes of drafting the legislation or to point out inconsistencies or conflicts that need to be addressed before a draft can be prepared. However, the drafter may well question your policy to test how thoroughly you have thought it out. He or she may suggest alternatives, but on the understanding that you are free to disregard them. It may be that a different approach can be taken to implement the desired policy and that legislation is not necessary, and the drafter may put this forward for your consideration. However, policy issues should, as far as is possible, be settled before drafting commences.
- 4.3 Areas on which the drafter may comment or require further information include:
- 1) the form of the instructions;
 - 2) whether or not the instructions provide sufficient information and detail for the preparation of a first draft;
 - 3) whether the proposals raise issues of law, justice, equity or fairness which may require further consultation, information, consideration or clarification;
 - 4) how the proposals fit with existing law and what that interrelationship should be (if relevant);
 - 5) whether the proposed scheme could be simplified for greater understanding and compliance;

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- 6) whether other legislation will require amendment to accommodate the new proposal;
 - 7) consideration of the commencement scheme, transitional or savings issues and whether or not new regulations will be needed or existing Regulations, etc. amended (this includes consideration of the scope of regulations that it is intended to make so that appropriate and adequate regulation-making powers can be included in the draft Law);
 - 8) whether or not other relevant departments or bodies have been consulted;
 - 9) the timetable for delivery.
- 4.4 The drafter will then plan the legislative scheme which sets out a structure for the legislation in a logical order. It is important for the integrity of the scheme that your initial instructions include all your policy proposals. The drafter will also be thinking about how your proposals will work in practice and whether there are any ambiguities or inconsistencies in the policy.

Chapter 5 - The drafting process

First draft

- 5.1 The drafter prepares a first draft of the legislation using a customised template, designed to ensure that drafts appear in a consistent format. A memo or email will accompany a draft if the drafter wants to make any particular comments or to draw any particular matters to your attention, or the drafter might choose to mark these on the draft itself. The drafter may also need to explain where it has not been possible to give effect to part of your instructions and why, which may be because he or she does not understand what you want or perhaps because there are legal reasons why it is not possible to do as you wish.

Considering the draft

- 5.2 When you receive the draft, study it carefully and let the drafter have your comments. It is a help if you can get back to the drafter as soon as you are able once you have fully analysed the draft. In the meantime, he or she will have moved to other work and if there is a long interval before the drafter returns to your matter more time will have to be spent by the drafter reading back into it. Likewise, if you haven't looked at your file for some weeks you will lose familiarity with the policy issues and will have to re-acquaint yourself with them before commenting on the draft. It is best to avoid the risk of the drafting "going cold" which may lead to the reason for an aspect of the policy or for the draft to be structured a particular way being lost along the way, though keeping a record of why decisions are reached will assist. Moreover, if you do not actively progress the work you may find you lose the drafter to other legislation that is of higher priority. If there is substantial delay this may have to be reported to COM and this may result in your matter being put to the back of the queue.
- 5.3 Do not hold back in commenting if you think something might not be right or in querying anything you do not understand. At this stage it is common for the draft to contain errors and the drafter will not be offended if you point out something which has in fact been done that way for a reason. Do not be fooled that because the draft looks like a completed piece of legislation that it is right. Also it can be easy to assume that the drafter has correctly interpreted what you want when he or she has not. As a general rule, if there is nothing to discuss and argue about, something is wrong. Neither of us can have anticipated every contingency at the outset and it is the dialogue between us that will identify the gaps and inconsistencies.
- 5.4 The drafter is responsible for the format and structure of the legislation and the language used. It is not your role to dictate to the drafter what words should be used or how the provisions should be written but of course you are free to question to ensure that we have understood your policy. However, comment from instructors as to readability of the language used and whether the draft effectively implements the desired policy is appropriate. Often the drafter has chosen to use particular words or phrases because they have been judicially considered or are consistent with the rest of the statute book, but if the wording is not clear there may well be scope for refinement. The LDO has prepared a practice manual for the use of drafters to ensure some consistency in the way we write legislation which may determine why

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certain matters are drafted in a particular way which you can find at <https://www.gov.ie/Government/NonexecLegal/StatesGrefe/pages/legislativedraftingoffice.aspx#anchor-3>.

- 5.5 The draft may lead you to think of new matters or change your policy slightly. Do not be afraid to do this as it is quite normal not to get all the details right first time. It is fine if you would rather discuss the matter face to face rather than send written comments, though depending on the context the drafter may request that you put something in writing first. You may wish to refer the draft to a technical adviser or other colleagues who may have comments of their own for you to relay to the drafter. If you need to bring anyone else from your Department to a meeting, that is fine too.
- 5.6 Note, however, that the drafter does not, except in rare cases, attend meetings relating to development of policy nor does he or she usually meet people outside the circle of those responsible for the policy. A drafter cannot take instructions directly from an outside source, but if the instructions have been prepared by a consultant engaged by an arm of Government, he or she becomes the instructing officer and is not an outside source. The instructing officer is the source of the drafter's instructions, and dealings with people other than the instructor should always be through the instructor.
- 5.7 Just as is the case with original instructions, further instructions should be in writing and in narrative form. **They should not take the form of a marked-up draft or provisions re-drafted by the instructor or someone else.** The drafter needs to know the nature of the problem to be solved. This is easier to do if an explanation is given rather than the drafter having to interpret words rewritten by someone else when the rewriting may not solve the problem that the instructor wants to address.
- 5.8 At a meeting to consider a draft, the drafter may request that oral instructions given by you during the meeting are confirmed in writing. If a meeting results in proposed changes to a draft, it is important that there is a written record of any new instructions (except for mere technical amendments such as grammatical errors, spelling mistakes, redrafting for clarity, etc.). If you need to follow up in writing you should do so as soon as possible.
- 5.9 After receiving your comments the drafter will produce a second draft and the process of commenting and redrafting will then continue over several more drafts if the project is of any substantial size. You can expect this to happen over several weeks or even months. We will probably get to know each other quite well.
- 5.10 During this process it is important that you study each draft as critically as you can. Consider what effect the draft has and then check it against the effect that you wanted. Then tell us about anything that occurs to you. Meanwhile the drafter will also be analysing each draft and seeking issues that need further thought.
- 5.11 As drafting progresses and the draft is close to being finalised, it may be sufficient for instructions or comments to be provided orally if they are minor matters. However, any matters of significance must be confirmed in writing.

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Adding new matters

- 5.12 There is a difference between giving further instructions to clarify what is needed by way of alteration of the draft to give effect to your policy and adding new matters, though the dividing line may be blurred. Paragraph 3.4 above urges you to be as comprehensive as possible in your initial instructions. If you find you need to add to the scope of the legislation we will usually be happy to accommodate matters that don't take too long or radically alter the structure or scope of the legislation. But what we can't usually accommodate is a radical new scheme or the drip-feeding of more and more provisions so we never reach a cut-off point. If you have COM authority for the legislation to cover certain matters, you will need further approval from them for any substantial changes from what was approved. In stressing this, however, we don't want you not to tell us about other matters you need. If we could have accommodated a matter it is wasteful for it to have to go in a separate piece of legislation. If you have additional instructions please always send to the PLD, though if you expect them to be assigned to a drafter who is already engaged in the same topic, do copy in that drafter.

Chapter 6 - Consultation

Within Government

- 6.1 Despite the advent of the 'One-Gov' you will still need to ensure that all parts of Government affected by the policy change/new legislation are aware of it. You should be live to the need to consult any person or body particularly affected by the legislation.
- 6.2 In addition, be careful to check with External Relations in the event of there being any non-domestic consequences of the legislation, with the Treasury if it is to result in new expenditures, with the Courts if any court procedures are affected and with the Law Officers' Department if any legal issues are raised. If you create any new public appointments, you should inform the Public Appointments Commission and be careful to avoid a term of appointment or appointments that total more than 9 years.
- 6.3 Another person you may very need to consult is the Children's Commissioner. Putting children first is the primary policy of Government and you should consider whether your legislation may have a role to play in relation to Government's role in relation to children in care as their corporate parent. At the time of writing legislation is being drafted to require Government to have due regard to the United Nations Convention on the Rights of the Child (UNCR).
- 6.4 In addition, you should remember the role of Scrutiny in relation to draft legislation. It is a requirement for any draft Law or Regulations considered by the States, for the Chairman of the relevant Scrutiny Panel to be invited to review the legislation. In practice, if your draft legislation is something that is likely to attract the attention of Scrutiny you would probably want to consult them at a much earlier stage. Scrutiny is an important part of the legislative process and early consultation will help to reduce delay. If you need advice about how Scrutiny operates you should contact our Scrutiny colleagues in the States Greffe.

Outside consultation

- 6.5 When going to outside consultation the following points may be worth bearing in mind:
 - 1) Consult widely throughout the process, allowing several weeks for at least one written consultation during the development of the legislation or policy.
 - 2) Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
 - 3) Ensure your consultation is clear, concise and widely accessible.
 - 4) Give feedback regarding the responses received and how the consultation process influenced your policy.
 - 5) Ensure your consultation follows best practice.
- 6.6 Though consultation is a matter for you, your drafter will be happy to advise if you are unsure about whom you might or need to consult (sometimes it is a legislative requirement), or you are unsure about timing. Please note that it is usually more

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effective to consult on your policy proposals rather than on the draft. If you do so then any changes in policy you wish to make following the consultation can be incorporated into your instructions and made part of the draft from the beginning. This is better than the drafter having to adapt the draft at a later stage. But often people like to see the actual legislation, even though changes are much more difficult when the draft legislation has been framed. If and when you intend to send any legislation out for consultation, please tell the drafter in advance to be sure he or she is happy for it to go out. **You should never send draft legislation outside of Government without obtaining the drafter’s agreement.** Please also let the drafter know when the consultation period starts and ends. As a matter of practice legislation may be sent to COM for approval to go out to consultation.

- 6.7 In the case of secondary legislation it is fairly common for the Law under which it is made to require consultation to have been undertaken, and the words of enactment produced by the drafter will recite this (along with a reference to any other formal prerequisites that need to be undertaken). It is vitally important that you ensure that these steps are all taken before the legislation is made and it is a good idea if you refer to them in the Report (see paragraph 7.8 below).



Data Protection requirements - “high risk legislation”

- 6.8 Where any draft legislation would require, authorise or otherwise relate to the processing of personal data and, taking into account the nature, scope and purposes of the processing, is likely to result in a high risk to the rights and freedom of natural persons, Article 18 of the Data Protection (Jersey) Law 2018 comes into play. This

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imposes a requirement on the Minister or other person responsible for the lodging or making of the draft legislation, to consult the Data Protection Authority by means of a written “consultation notice”. The consultation notice must include any data protection impact assessment carried out in connection with the proposed processing of that personal data unless the assessment includes –

- (a) a systematic description of the proposed processing (including the means of processing), its purposes and the objectives of the provisions of the legislation effecting it;
- (b) an assessment of the necessity (including proportionality) of the proposed processing in relation to those objectives;
- (c) an assessment of the risks to the rights and freedoms of data subjects posed by the processing; and
- (d) the measures envisaged to address those risks, including appropriate safeguards, security measures and mechanisms to ensure the protection of personal data and demonstrate compliance with this Law, taking into account the rights and freedoms of data subjects.

You may wish to seek guidance from the Government’s data protection team or the Office of the Information Commissioner if you are unsure about these requirements. Further information is also available on the intranet here:

<https://soj/CorporateProjects/DataProtection/Pages/DataProtectionToolkit.aspx>

Chapter 7 - Matters prior to making of legislation

LOD's role

- 7.1 Before a draft Law (not secondary legislation) is finalised for lodging before the Assembly, the Advice Team in the LOD will need to review the draft. LOD's review has a number of purposes, but in essence it is important to remember that the Law Officers are the principal legal advisers to the Government and the Assembly. LOD's review ensures that the Law Officers are briefed on any novel or outstanding legal issues in respect of the draft Law before it comes to the Assembly, so that appropriate advice can be provided to the Assembly during the debate.
- 7.2 As noted earlier in this guide, the Advice Team is also responsible for preparing advice on human rights and, in the case of a draft Law, preparing both:
- a confidential human rights advice memorandum, confirming whether the Minister can make a statement under Article 16 of the Human Rights (Jersey) Law 2000 that the draft Law is compatible with human rights;
 - a human rights note for publication with the Minister's Report on the draft Law.
- 7.3 LOD is also responsible for carrying out a review of any criminal penalties proposed in a draft Law or in any subordinate legislation so that the Attorney General can advise the Department on whether these are appropriate and are consistent with the level of penalty imposed for similar offences elsewhere in statute.
- 7.4 It is important that you allow sufficient time for LOD's review and advice to be provided before a draft Law needs to be lodged. The time taken for the review and generation of advice will often depend on how familiar the legal adviser in the LOD is with the content of the draft Law through prior involvement in the drafting process. **As a rule of thumb, you should allow a minimum of 28 days for a review and advice to be provided on a draft Law.** Your drafter can usually advise you about when to approach LOD or you can contact Matthew Berry, who is the Senior Legal Adviser in the Advice Team, for further information.

Finalising the text

- 7.5 Once draft legislation has been settled between the drafter and the instructor, the drafter will arrange for various essential in-house legal checks to be done. These checks involve reading through for clarity and sense and checking that amendments work, and that the draft legislation is properly formatted in accordance with the template. The draft will first be examined by the LDO's Legislation Editor as well as being subjected to a legal check by another drafter. One of the legislation clerks will also examine the draft to ensure the formatting is correct. The editorial and legal checks are likely to spot things the drafter will miss and it is quite common for the drafter to come back to you with fresh points following these reviews. **The importance of this step cannot be stressed enough: it is a rare draft indeed that contains no points for a reviewer to comment upon.** At this stage you and the drafter will have read the draft so many times you will not spot matters that a person coming cold to the matter will think about. This step in the process is a major factor in ensuring that legislation containing errors is not made or submitted to the States.

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Depending on the length of the project as a general guide **you should aim to allow 1-3 weeks in the timetable for the editorial and legal reviews and formatting checks.**

- 7.6 It is also a good thing to have a final check at your end too, for any last minute typographical or other errors. At this stage, it is a good idea if a person other than the instructor reads the draft. In the case of an Order, once everyone is satisfied, a formal “signature copy” is produced for you to arrange to be presented to the relevant Minister for signing. In the case of other draft legislation the Minister should approve the final draft before it is submitted for lodging.
- 7.7 Please note that there is a strict system of version control (which is why it is never a good idea to write amendments on a draft). The drafter works from the last draft he or she has produced, and this is the version used for signing or lodging. **You should never attempt to substitute another version. If changes are needed, even at the last minute, they must be made on the master copy or they will not take effect.**

The Report

- 7.8 A Report outlining the general scope of the legislation must appear at the front of all draft Laws and draft Regulations that are lodged for consideration by the States. The Report is your responsibility, though the drafter will be happy to give advice. The Report differs from the Explanatory Note, (see paragraph 2.10) as it is able to explain the policy intention, i.e. the reasons for the legislation. It must outline the manpower and resource implications of the proposed legislation. If the proposed legislation will increase expenditure it must say so. You should have consulted the Treasury about this. Please note that the States Greffe no longer proofs or reformats Reports. The LDO is making available a shell document to assist with the Report along with instructions as to formatting, etc. When you have completed it, you should send the final version in Word format to be attached with the draft legislation to form the *projet*.
- 7.9 In the case of a Law the Report must also include a statement confirming whether or not the legislation is compatible with the European Convention on Human Rights as will have been advised by the Law Officers’ Department (see Appendix 5).

Approval for lodging

- 7.10 As soon as the text of a draft Law or draft Regulations has been finalised, you should arrange for it to be submitted to ELT for “assurance”. This is a high-level consideration by officers to check that the legislation works and that there are no unintended consequences. If the legislation affects the responsibility of a Minister other than the Minister bringing forward the legislation, it should be submitted to COM. The approval stage requires an explanatory paper for authority to lodge *au Greffe*. The paper should include:
- 1) the draft;
 - 2) any advice from the Law Officers’ Department on any legal implications of the legislation, particularly as to its compliance with the European Convention on Human Rights and the Island's international obligations;
 - 3) where appropriate (see paragraph 6.2 above), confirmation that Treasury agreement has been given;

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- 4) any recommendation that the Minister wishes to make as regards the Member who will take the legislation through the States Assembly (the *rapporteur* – it is usually the Minister so “Minister” will be used to in Chapter 8 to refer to the Member presenting the legislation).
- 7.11 Note that once the Council of Ministers’ draft has been agreed, the drafter cannot alter the content of the draft, except for matters of detail that do not affect the main principles, minor technical amendments or typographical errors, unless COM authorises the alteration. If you find any technical or typographical errors, tell the drafter who will advise if they can be fixed.
- 7.12 If COM approves a submission, the next step is for the legislation to be lodged. You should notify the drafter when approval is given and the name of the Member moving the draft legislation. If the Council of Ministers requires any alterations to the draft, tell the drafter. The drafter will inform the legislation clerks that the legislation is ready for lodging. A legislation clerk will take the draft approved by the drafter and add the Report as indicated above before passing to the Greffe’s Publications and Data Editor who will arrange for the *projet* to be lodged. The Greffe will also arrange for the printing of the *Projet* and loading onto the States Assembly website prior to lodging.

Briefing and involvement of Scrutiny

- 7.13 The period after lodging enables Members to consider the draft legislation before it is debated. However, occasionally, particularly if the content of the legislation is particularly important or sensitive, the Government may choose to brief Members in advance of the debate about the legislation. The timing of a briefing is entirely a matter for you and your policy colleagues. You may well have involved Scrutiny in a much earlier stage if the draft Law or Regulations are likely to be of interest to them (see paragraph 6.4 above).
- 7.14 You will be expected to have briefed the Minister by the time it is made public.

Orders

- 7.15 Orders of course don’t need to go to the States, they are made by being signed by a Minister. You will receive an email from a legislation clerk informing you that the draft Order is on its way for signing. If it is urgent you may request to come and collect it. **Once the Order is signed it is very important that you send it straight back to the legislation clerks for numbering and publication.** There are some other arrangements available during the pandemic which are explained in the instructions send out.

Chapter 8 - Passage through the States Assembly

General

- 8.1 The general procedures for the introduction and passage of Laws and Regulations through the States Assembly are contained in the Standing Orders. Please note that the timetabling of business in the Assembly is outside the control of the Legislative Drafting Office and is the responsibility of the Assembly itself.
- 8.2 As explained above, Treasury agreement is required before legislation involving expenditure of public money or causing a reduction in Government income can be introduced. The financial consequences of the legislation must be described in the Report.

Lodging

- 8.3 A draft Law or draft Regulations to be introduced into the States Assembly has to be approved by the Bailiff and circulated to other Members prior to lodging. The *Projet* consisting of that draft legislation appears on the Order Paper and a minimum of 6 weeks must elapse before it can be debated (unless this is waived by the States). **It would be very unwise to plan your timetable on the assumption that the States will suspend standing orders and truncate the lodging period.**

Amendments

- 8.4 Any Member, Scrutiny Panel or Minister may lodge amendments to the draft legislation up to 2 weeks before it is due to be debated. Amendments must be within the scope of the legislation and not raise wholly unrelated matters. Amendments are drafted by the LDO, irrespective of the proposer of the amendment, normally by the same drafter who drafted the original legislation. The drafter provides a confidential service to any Member or Panel requesting the amendment. It is up to the Member or Panel whether or not to disclose the draft amendment to the Government in advance of lodging.
- 8.5 In the case of Government amendments, it may be that something has arisen after the legislation was lodged or it was not possible to include a matter before lodging. In that case you will need to instruct the drafter to draft an amendment, assuming you have gained the necessary Ministerial approval. The requirements are the same as for instructing the drafter at an earlier stage. The difference is that the drafter will produce a separate document, using the amendment format. When amendments have been finalised, a legislation clerk will notify the Publications and Data Editor and it will be for the member moving the amendment to ensure its inclusion on the Order Paper.

Debate of legislation

- 8.6 The Greffier will read the citation and the legislation is automatically moved in first reading. For the second reading the Minister gives a speech, outlining the scope of the legislation. There is a general debate on the principles behind the legislation, rather than a clause by clause analysis, although references are frequently made to specific provisions. Following this debate the Minister moves the legislation in second

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reading. You must brief the Minister adequately so that he or she can respond to questions.

Consideration of the legislation in detail

8.7 If the legislation is passed in second reading, it is then considered in detail. The Minister may move consideration of individual or groups of Articles/Regulations or whole Parts en bloc, depending on the structure of the legislation and what is likely to be controversial. This stage of the debate gives Members the opportunity to debate individual aspects of the legislation, to seek an explanation as to the effect of particular provisions and to move and speak to their amendments. The precise procedure is governed by Standing Orders.

Third reading

8.8 After the consideration of the provisions of the legislation in detail the Minister moves the legislation in Third Reading and if Members agree the draft Law is adopted or, in the case of Regulations, they are made and that is the end of the process. (In the case of a draft Law see chapter 9 for the next stage).

Clerical corrections

8.9 Before the legislation is published it may be possible to correct clerical or typographical errors that do not affect the meaning. Where the legislation still has to be debated this is done by means of a corrigendum slip.

8.10 Any renumbering of the year in the title to the legislation or renumbering of provisions due to amendments is dealt with by the legislation clerks in the same way as clerical corrections.



Chapter 9 - Royal Assent and coming into force

General

- 9.1 To become a Law, every *projet de loi* that has been adopted by the States Assembly must receive the Royal Assent by the Monarch in Council (Privy Council).

Ministry of Justice procedure

- 9.2 After the draft Law has been adopted, a Royal Assent copy is printed and sent to the UK Ministry of Justice (“MoJ”) with a Royal Assent Memorandum prepared by the Law Officers’ Department and signed by the Attorney General. The Memorandum outlines the purpose and effect of the draft Law and includes an analysis of the Law’s compliance with the European Convention on Human Rights and any other international convention that the Law may impact upon. This procedure was agreed with the MoJ as part of a new system of handling Crown Dependency legislation and has brought down the turn-around times for our legislation from 4-6 months to around 2-3 months or even less.
- 9.3 If the draft Law is urgent it may be helpful to get the Law Officers’ Department to notify the Ministry of Justice in case Royal Assent can be expedited, though this should be reserved only for exceptional circumstances. The Ministry of Justice advises the Privy Council on Royal Assent. The legislation is considered at one of the monthly meetings of the Privy Council. Once Royal Assent is obtained and notification has been received in the Island steps are taken for the Law to be registered in the Royal Court at which point it is treated as having been passed.

Commencement

- 9.4 Article 3 of the **Legislation (Jersey) Law 2021** provides that if Jersey legislation is silent as to the commencement of any of its provisions, that provision comes into force on the day after it is made (except for legislation having effect only to commence other legislation or to give effect to a taxation draft). In the case of a Law, it is made when it is registered in the Royal Court. Regulations are made when adopted by the States and other secondary or subordinate legislation is made when signed by the person responsible for making it (see Article 2 of the Legislation Law). In practice it is normal, except in urgent situations, to provide for 7 days between making and coming into force so people can be aware of the change. If you do not want a Law, or occasionally Regulations, to specify commencement so many days ahead, because there are further steps needed before the Law should come into force you should instruct the drafter, as part of your original drafting instructions, to provide for the Law to come into operation later by means of a **Commencement Act** or **Commencement Order**, depending on whether you want commencement to be the responsibility of the States or the relevant Minister.
- 9.5 Here are some matters to bear in mind regarding which commencement option to choose -
- provisions creating offences or imposing obligations should generally not commence immediately on registration. The reason for this being that the public should have time to obtain a copy of the Law and consider its implications before being required to change their behaviour. However, all legislation is published

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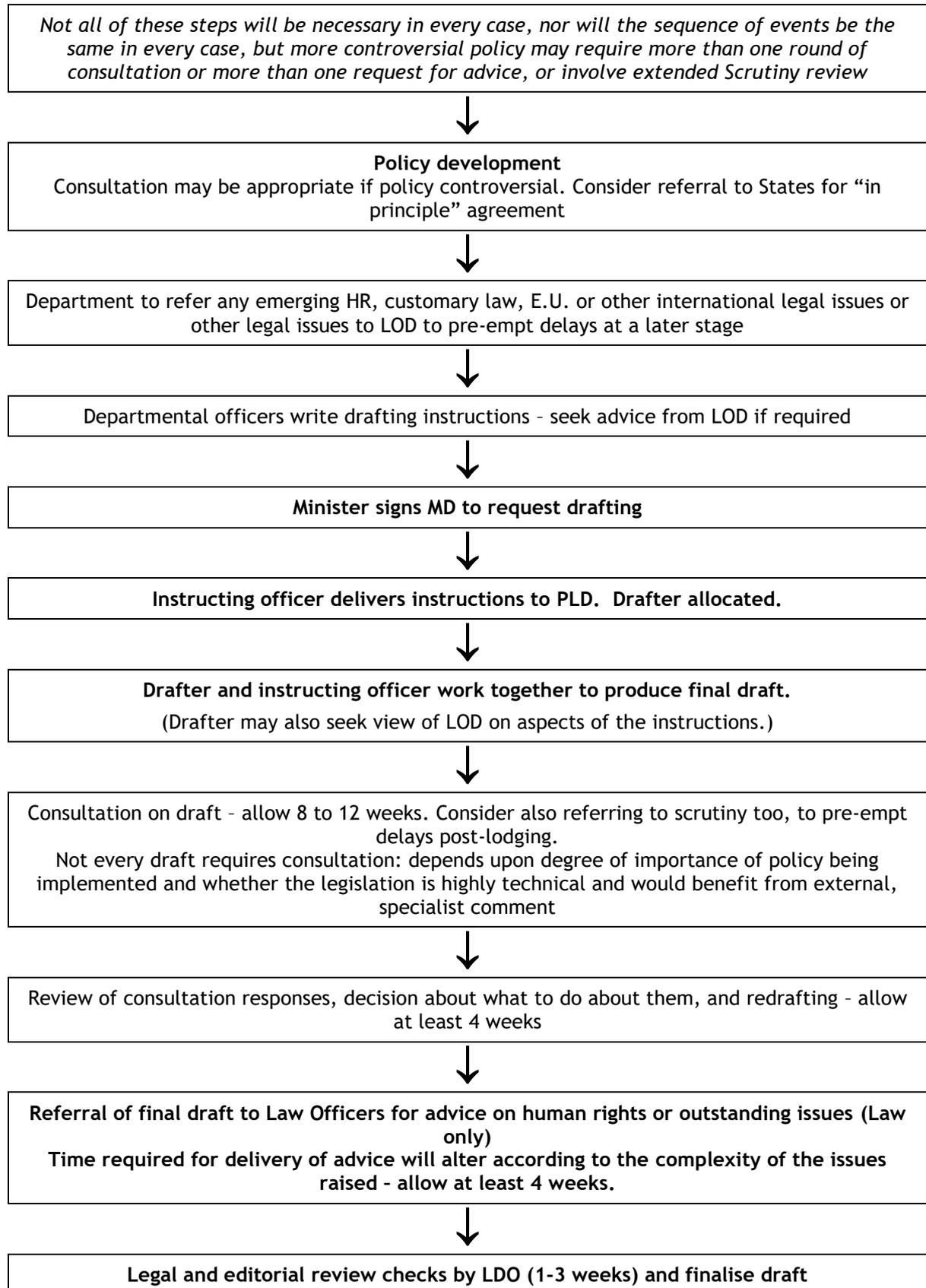
immediately on www.jerseylaw.je very soon after it is made. You may wish to consider what other publicity you want to give the law change, such as a press release;

- the need to have Regulations, Orders or procedural rules drafted, or to set up administrative systems, may also mean that commencement should be delayed till later. In particular **you must not commence a provision containing a requirement (as opposed to an option) for secondary legislation to be made unless that legislation is ready to come into force on the same day as that provision in the Law;**
- you can apply a provision retrospectively in secondary legislation only if expressly permitted by the Law and should then only do so if it is absolutely necessary;
- as a general rule, where commencement is by commencement Act or Order, the day chosen should give those affected reasonable notice of the time of commencement.

9.6 If secondary legislation is required to make the scheme operative, you should have discussed this with the drafter at the drafting stage. Separate drafting instructions are needed for the secondary legislation. If your Law does not commence immediately please do not forget about it and assume it is in force. Your part in the process should not cease until all of the Law is operative unless intervening events make further commencement undesirable. Your Law is the will of the elected Assembly and should normally be operative as soon as practicable.

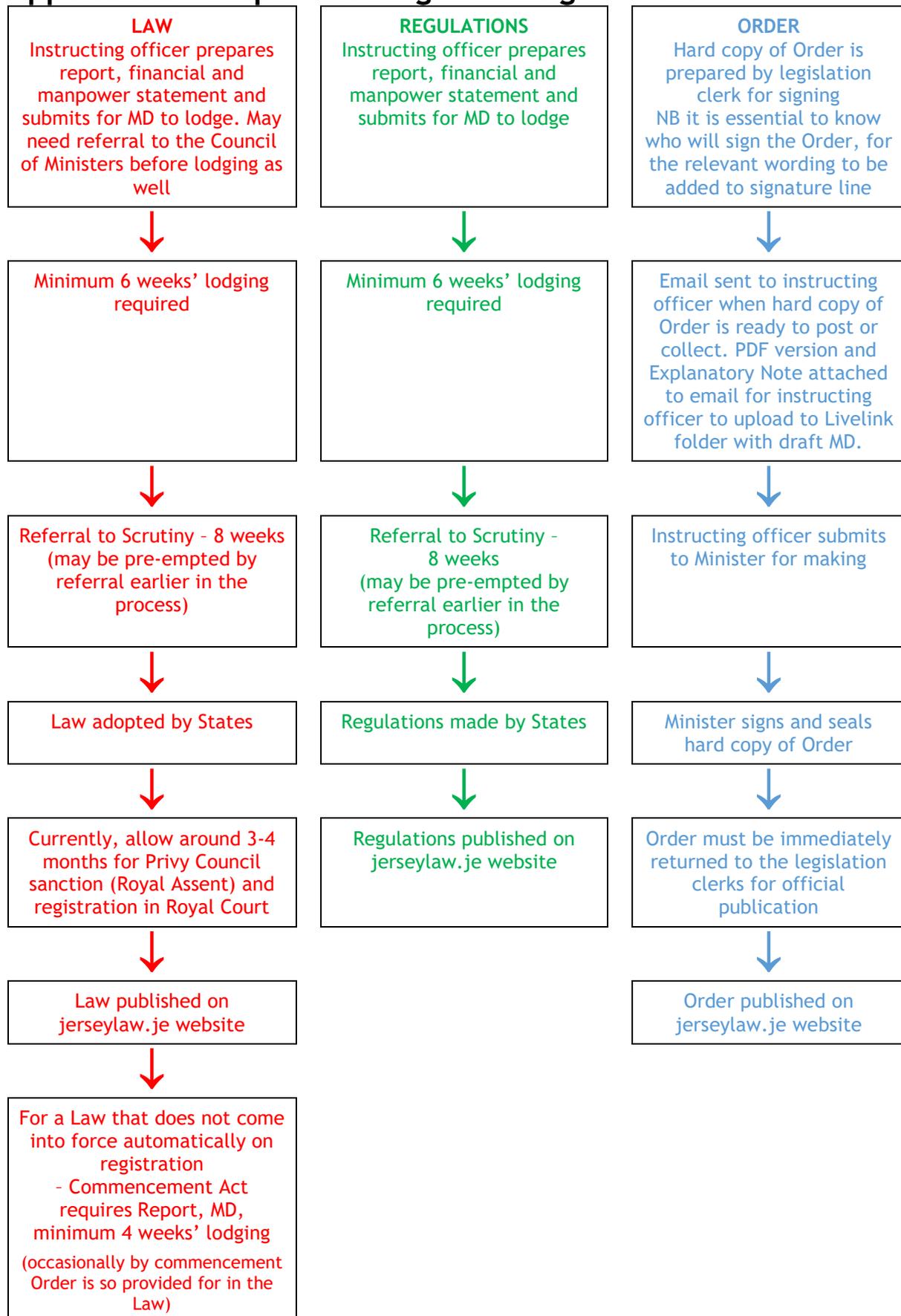


Appendix 1 - Steps in preparation of legislation up to finalising of draft

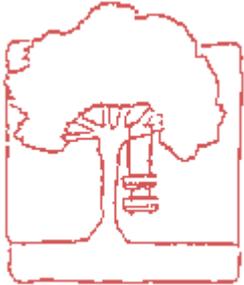
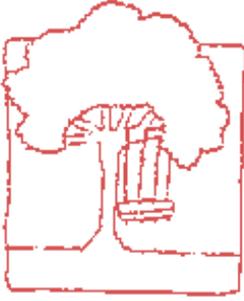
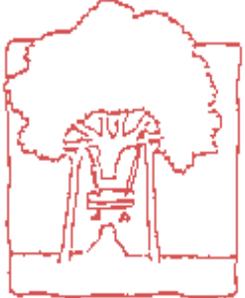
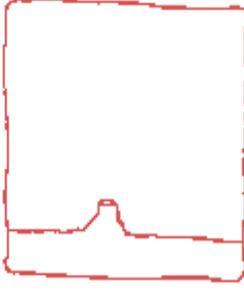
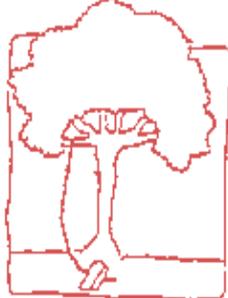
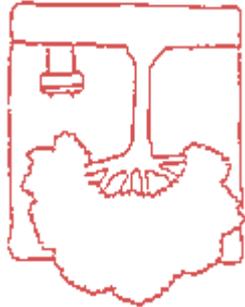
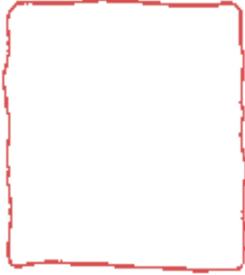
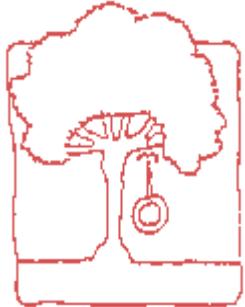


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Appendix 2 - Steps following finalising of draft



A lighter illustration of how a *Projet* becomes a Law

		
As lodged <i>au Greffe</i>	As suggested by Scrutiny	As Amended in the States
		
As Enacted	As Funded	As Implemented by the Department
		
As Reported by the JEP	As Understood by the Public	What Was Actually Needed

Appendix 3 - Structure of legislation explained



Jersey

SECOND-HAND DEALERS (JERSEY) LAW 2019

Report

[This is where the departmental report will be inserted. The report explains the policy intentions, i.e. the reason for the legislation, and the financial implications of the legislation. In the case of a Law, the report must also contain a statement confirming whether or not the legislation is compatible with the European Convention on Human Rights, as advised by the Law Officers' Department.]

Explanatory Note

[The Legislative Drafter will write the explanatory note which will be inserted here. The explanatory note will summarise the legal effect of changes that will be made by the draft legislation.]



Jersey

SECOND-HAND DEALERS (JERSEY) LAW 2019

Contents¹

Article

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¹ Table of contents – this is made up of the Article numbers and schedule numbers, showing on which page each may be found.



Jersey ²

SECOND-HAND DEALERS (JERSEY) LAW 2019 ³

A LAW to control the sale and purchase of second-hand goods ⁴

<i>Adopted by the States</i>	<i>[date to be inserted]</i>
<i>Sanctioned by Order of Her Majesty in Council</i>	<i>[date to be inserted]</i>
<i>Registered by the Royal Court</i>	<i>[date to be inserted]</i>
<i>Coming into force</i>	<i>[date to be inserted]</i>

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law ⁵ –

1 Interpretation ⁶

In this Law –

“dealer” means a person who carries on a business for the purpose of dealing in, buying or selling second-hand goods, and includes a pawnbroker;

“inspector” means a person designated by a licensing authority as an inspector for the purposes of this Law;

“licensing authority” means the Minister;

“Minister” means the Minister for Economic Development, Tourism, Sport and Culture;

“prescribed” means prescribed by Order by the Minister;

“second-hand goods” means goods that have been previously sold at retail for use or consumption, but does not include goods specified in Schedule 1.

² Coat of Arms – this is the insignia of the Government of Jersey and signifies the formal authority of the Law. It’s automatically added by our document template.

³ This is the short title of the Law. It is the name that may be used to refer to the Law.

⁴ This is the long title of the Law. It is a formal statement of the scope of the Law.

⁵ These are the enacting words, which will be read out in the States Assembly.

⁶ The interpretation provision provides definitions for certain terms used in the piece of legislation.

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2 Licences for dealers ⁷

A person must not carry on the main business of a dealer without holding a licence for that purpose issued under this Law.⁸

3 Application for licence

(1)⁹ An application for a licence (including the renewal of a licence) must be made in the prescribed form to the licensing authority, which may issue the licence after consultation with the Chief Officer of the States of Jersey Police and subject to payment by the applicant of the prescribed fee.

(2) A person aggrieved by a refusal to issue a licence may appeal to the Minister within one month of the refusal.

4 Licence to be posted

(1) A licensed dealer must keep the licence posted in a conspicuous place on the premises where the dealer carries on business as a dealer.

(2) A licensed dealer must keep exhibited at or over the entrance to the premises, a sign-board of the prescribed size and type with the words “Licensed dealer in second-hand goods” printed on it.

5 Retention of certain goods

A licensed dealer who acquires from a person other than another licensed dealer any second-hand goods specified in Schedule 2 must retain the goods for not less than one month before disposing of them or in any way altering their condition or appearance.

6 Keeping of registers by dealers

A licensed dealer must keep a register in the prescribed form and must record in the register ¹⁰ –

- (a) the prescribed particulars for all second-hand goods that the dealer may possess from time to time;
- (b) the time at which the dealer obtained the goods; and
- (c) the person from whom the dealer obtained the goods, including the address of that person and a description of the person’s business.

7 Power of inspection

(1) A licensed dealer must, whenever so required by an inspector, produce for inspection all second-hand goods in the dealer’s possession or subject to the dealer’s control and all books and papers relating to the goods.

(2) A licensed dealer must not keep second-hand goods at any place other than the place specified in the dealer’s licence where the dealer is authorised to keep second hand goods.

⁷ This is the Article heading for Article 2.

⁸ This is Article 2. It contains a substantive provision, i.e. part of the main body of the Law. Articles 3–8 also contain substantive provisions.

⁹ (1) and (2) in this Article are paragraphs.

¹⁰ This is an unnumbered paragraph. It is subdivided into sub-paragraphs (a), (b) and (c).

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8 Information

- (1) A police officer may give information to a licensed dealer as to any stolen property or as to any property that has been lost.
- (2) If any property described in that information is, or has since its theft or loss, been in the possession of a licensed dealer or is offered or shown to a licensed dealer, the licensed dealer must, without unnecessary delay, give information to that effect at the nearest police station or to any police officer, with the name, address and description of the person in whose possession the property was seen.

9 Offences

- (1) A person who contravenes a provision of this Law commits an offence and is liable–
 - (a) in the case of a first offence, to a fine of level 1 on the standard scale;
 - (b) in the case of a second or subsequent offence, to a term of 12 months' imprisonment and to a fine of level 2 on the standard scale.
- (2) If a dealer licensed under this Law is convicted of an offence, in addition to any penalty imposed under paragraph (1), the licence issued to the dealer under this Law may be withdrawn.

10 Orders

The Minister may make Orders for the purpose of bringing this Law into effect and in particular for the purpose of prescribing –

- (a) the procedure to be followed, the forms to be used and the fees to be charged in connection with the grant of licences;
- (b) licence conditions, which may include the giving of a security bond, to be attached to licences;
- (c) the size and type of sign-boards to be exhibited by licensed dealers at or over the entrance to their premises; and
- (d) the forms of registers to be kept by licensed dealers and the particulars required to be recorded in them.

11 Power to amend Schedules

The Minister may, by Order amend the goods or classes of goods specified in Schedules 1 and 2.

12 Citation and commencement

This Law may be cited as the Second-Hand Dealers (Jersey) Law 2019¹¹, and comes into force on a day to be specified by the States by Act.¹²

¹¹ This is the short title of the Law. It is the name that may be used to refer to the Law.

¹² The commencement provision specifies, in the case of a Law, the mechanism by which it will be brought into force. An alternative formula, if there is no need to postpone commencement, is 7 days after registration. In the case of an Order or Regulations, it will specify when the piece of legislation will come into force e.g. 7 days after it is made.

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SCHEDULE 1¹³

(Article 1¹⁴)

LIST OF SECOND-HAND GOODS

Books, magazines and newspapers.

Furniture.

Gunny bags, sail cloth, canvas.

Bottles.

Old iron and metals, other than gold, silver, platinum, brass, bronze, copper, lead, pewter, zinc, or any combination of any such metals.

Kerosene tins, oil drums, and other similar empty receptacles.

Wooden and tin lined boxes and cases.

Motor vehicles.

Ships, vessels or boats.

Refrigerators.

¹³ This is a Schedule. Schedules contain matters of detail that are best covered separately.

¹⁴ This is a reference to the provisions of the Law in which the Schedule is mentioned

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SCHEDULE 2

(Article 5)

GOODS TO BE RETAINED FOR ONE MONTH

Articles of gold, silver, platinum, brass, copper, lead, pewter, zinc or block tin, or any combination of any such metals.

Bicycles, bicycle parts and bicycle accessories.

Cameras.

Clocks and watches.

Computers, and apparatus and articles used in connection with computers.

Field glasses and other optical instruments of any kind.

Film projectors.

Furs.

Gramophones and radiograms.

Jewellery and jewels and all articles of personal adornment.

Lawnmowers and motor mowers.

Musical instruments other than pianos.

Radio and television receiving and transmitting equipment, and all parts, apparatus and articles used in connection with such receiving and transmitting equipment.

Scrap gold, silver, platinum, brass, copper, lead, pewter, zinc or block tin, or any combination of these metals.

Tape recorders and other recording apparatus.

Tools of trade.

Tools, parts and accessories of motor vehicles of all kinds.

Travelling rugs.

Typewriters.

Wire or cable, made of, or containing, copper.

Appendix 4 - Drafting instructions - checklist

Part A: Contacts

1. Name of sponsoring Minister
2. Date of MD and date instructions submitted.
3. Name and contact details of Instructing Officer.
4. If LOD has provided any advice relating to these instructions, give the name and contact details of LOD officer.

Part B: Introduction and overall structure

5. Use numbered paragraphs and pagination
6. Outline the policy, giving –
 - a. the background;
 - b. an overview of the policy;
 - c. why the law is needed;
 - d. what effect the new law is to have on existing law and practice.

Part C: Detailed instructions

7. THE EXISTING LEGISLATIVE FRAMEWORK
Set out in detail how the existing law operates in practice. (Assume that the drafter is not familiar with the subject.) –
 - a. Give examples of how the law operates in practice. If the practice is not the same as the law requires/permits then explain;
 - b. Explain any case law or customary law that is relevant
 - c. Consider whether a historical analysis of the legal framework is necessary (e.g. why any recent amendments have been made);
 - d. Explain recent changes to the law or other changes that are in the Government Legislative Programme;
 - e. Explain how any LOD or other advice may be relevant to the policy approach being taken (e.g. any advice given on ECHR/EU issues or data protection).
8. WHAT IS PROPOSED
Set out the proposals in a logical order to tell the story –
 - a. Explain, in relation to each proposal, why it is necessary to legislate, including how any existing legislation is to change;
 - b. Analyse the present obstacles or defects;
 - c. Explain what needs to be achieved by way of the proposed law and how things are intended to work in practice after the amendments are made. If there are existing precedents which you believe have the intended effect, refer to them and explain exactly how the adoption of similar provisions will achieve the intended effect;
 - d. Set out the circumstances in which the new provisions will apply;
 - e. Explain if other options have been considered and why they have been rejected or if there has had to be a compromise when reaching the policy decision;
 - f. Describe any procedures to be included (e.g. procedures for applications, licences etc.);
 - g. If there are new independent public appointments to be made, ensure that they do not run for more than 9 years in total. Consider the pension position, as

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sometimes such appointees are initially appointed as States employees as a shadow appointment, but when appointed formally under new legislation not as a States employee different pension arrangements need to be made;

- h. If the legislation introduces new controls or restrictions, identify the person or authority responsible for administering and enforcing them. If they involve a registration or licensing system, include full details;
- i. Describe envisaged enforcement mechanisms and any sanctions and appeals mechanisms. Identify those acts and omissions that are to constitute criminal offences or for which a system of civil penalties is required, and suggest appropriate penalties;
- j. Describe other powers needed (e.g. to make codes of practice, give guidance, directions etc. and who will exercise those powers);
- k. If it is intended to make subordinate legislation describe in detail what will be covered in the subordinate legislation and who will have the power to make it (States or Minister);
- l. Explain any consequences for other legislation and what consequential changes to other legislation may be needed;
- m. Explain transitional, transitory or savings that may be required (these are concerned with how you treat the existing situation when the new regime comes in – see example below);
- n. Include suggestions as to the commencement of the legislation (and of different provisions, if appropriate), and the reasons for them;
- o. Specify any matters on which you need the advice of a drafter.

Part D: Other information

9. Provide any other relevant information (explain relevance) –
 - a. Specify any treaties, conventions or international agreements to be implemented by the legislation, and include web-links or copies, together with any reports of experts or committees on the treaties etc.;
 - b. If the recommendations in any report of a commission, committee or inquiry are to be implemented by the legislation or are otherwise relevant to it, specify them and include a web-link or electronic copy of the report, together with any associated papers;
 - c. Identify any other documents relevant to the legislation, and include web-links or electronic copies;
 - d. Give details of any consultation and the date it ends/ended and include copies of consultation papers, responses to them and the Department's views on the responses;
 - e. Explain if the instructions incorporate changes required as a result of the consultation responses and if not, then explain why not;
 - f. If the legislation is intended to introduce a similar regime to that operating elsewhere, specify the relevant legislation and supply copies (other than existing UK legislation or where there is a link to the legislation on line), and indicate any substantial changes sought;
 - g. Set out the nature of the project and its likely scale (i.e. is it stand-alone, or part of a series of projects that are to work and/or be brought into force together?);
 - h. Set out any known timetable or deadline that is likely to apply to the project as a whole;

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- i. Set out the policy officers' understanding of the status of the project and its importance to the States of Jersey.

Part E: Documents

10. Send the following documents or explain why any such documents are not included) –
 - a. Ministerial decision;
 - b. Reports or propositions laid before the States;
 - c. Consultation document;
 - d. Responses to consultation;
 - e. All legal and technical advice relied upon in preparation of the instructions from LOD (Note: all legal advice provided by lawyers in the private sector must also be shared with LOD and LDO);
 - f. All European or other international documents that the proposed legislation is intended to implement;
 - g. Any other relevant documents.

Example of consideration of transitional issues:

A licensing scheme is replaced by a completely new licensing scheme (but the purpose of the scheme is essentially the same). Transitional issues for the instructor to consider might include:

- Should a licence granted under the old scheme continue to have effect after the new scheme comes into existence? If yes, should it have effect under the old scheme (with the old scheme preserved or “saved” for that purpose), or should it have effect as if it were a licence granted under the new scheme?
- If an application for a licence under the old scheme is still being considered when the new scheme commences, should the consideration of the application go ahead after that commencement, or should the applicant have to make a new application under the new scheme? If consideration of the application should go ahead, should it go ahead under a preserved version of the old scheme, or should it be translated into an equivalent application under the new scheme?
- The old scheme and the new scheme both provide for regulations to specify licence conditions. Should the regulations made for this purpose under the old scheme have effect as if they were Regulations made for the same purpose under the new scheme, or will a completely new set of Regulations be needed for the new scheme? Usually, it is preferable for new Regulations to be made before the new scheme comes into operation.

Appendix 5 - Human rights

1. Article 4 of the Human Rights (Jersey) Law 2000 states that so far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights (meaning the rights set out in the ECHR to which Jersey is bound). Article 5 enables the higher courts in Jersey to make declarations of incompatibility in relation to Jersey legislation. Under Article 7 it is unlawful for a public authority to act in a way which is incompatible with a Convention right. You should also be familiar with Article 16, which states –

16 Statements of compatibility

- (1) A Minister who lodges *au Greffe* a *projet de loi* must, before the second reading of the *projet* –
 - (a) make a statement to the effect that in the Minister’s view the provisions of the *projet* are compatible with the Convention rights (a “statement of compatibility”); or
 - (b) make a statement to the effect that although the Minister is unable to make a statement of compatibility, he or she nevertheless wishes the States to proceed with the *projet*.
 - (2) The statement referred to in paragraph (1) must be in writing and be published in such manner as the Minister making it considers appropriate.
2. In advising the Minister to make the statement set out in Article 16(1)(a) at the very least the balance of arguments must support the view that the provisions are compatible. The Minister will form a view on the basis of appropriate advice from the Law Officers’ Department. The advice will indicate which rights are potentially engaged and whether the provisions of the draft Law are likely to stand up to challenge on Convention grounds before any courts. The most common ECHR rights that are potentially engaged by legislation are (1) Article 5 (right to liberty and security), (2) Article 6 (right to a fair trial), (3), Article 7 (no punishment without law), (4) Article 8 (right to respect for private and family life) (5) Article 10 (freedom of expression) and (6) Article 1 of Protocol 1 (protection of property). However, in the end it is the Minister’s decision whether or not to make the statement.
 3. The Report will contain that statement of compatibility. The Report should not simply record the fact that an Article 16 statement has been made, but also briefly draw attention to any Convention issues in the draft Law together with conclusions on compatibility. In some cases, it may be sufficient simply to state that an issue has been considered, and that a particular conclusion has been reached. In other cases, you may refer to the policy justification for what is proposed. You are not expected to list every human rights point which could be taken on the Law, or to cite case-law supporting the conclusions on compatibility.
 4. For many *projets*, the information will most conveniently be contained in a single passage in the introductory section of the Report. For longer *projets*, or those containing several different subjects, a series of passages at the beginning of each part of the Report may be more suitable. If the Report contains factual information or policy analysis relevant to the human rights issues being discussed, the passage on compatibility might usefully contain cross references.

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Useful references and contacts

Jersey legislation: <https://www.jerseylaw.je/laws/unofficialconsolidated/Pages/search.aspx>

UK legislation: <http://www.legislation.gov.uk/>

Guernsey legislation: <http://www.guernseylegalresources.gg/>

Isle of Man legislation: <https://legislation.gov.im/cms/>

Legislative Drafting Office:

<https://www.gov.je/government/nonexeclegal/statesgreffe/pages/legislativedraftingoffice.aspx>

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