



Instructor Guidance Note— Instrument program and policy authority

Drafting resources for ExCo legislative instruments

1 To obtain OPC drafting resources for a legislative instrument made or approved by the Governor General (an **ExCo legislative instrument**), a Department must:

- arrange for the instrument to be included in the Department's bid for the relevant period; and
- obtain general policy authority for the instrument.

2 These requirements do not apply to legislative instruments the drafting of which is not tied to OPC, such as Ministerial rules. OPC's drafting of such non-tied instruments is subject to capacity, and whether one or more of the matters specified in *Instruments Drafting Guidance Note 1.1—Deciding if a non-tied instrument should be drafted by OPC* (available on OPC's website) applies to the instrument. There is no formal priority system for non-tied instruments.

Priority process for ExCo legislative instruments

3 OPC's priority categories for ExCo legislative instruments are as follows:

- priority 1 (critical): these are examples of priority 1 instruments—
 - (i) it is critical that the instrument be made during this bidding cycle; or
 - (ii) the instrument will be made in a later bidding cycle but it is critical that drafting resources be allocated during the current bidding cycle as a top priority (e.g. an instrument for which an exposure draft must be ready during the current bidding cycle, or an instrument that is so large that drafting must begin during the current bidding cycle);
- priority 2 (high priority): an instrument assessed by a Department as a high priority but not priority 1;
- priority 3 (medium priority);
- priority 4 (low priority).

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4 Before each Parliamentary sittings period, First Parliamentary Counsel seeks bids from Departments for ExCo legislative instruments to be drafted in that period. The ExCo Secretariat also sends out an Executive Council Circular advising Departmental Legislation Liaison Officers (**LLOs**) and Executive Council Liaison Officers of the deadlines for submitting bids.

5 Bids can only be made by portfolio Departments. They cannot be made by other agencies within a portfolio, even if such an agency may ultimately instruct OPC on the drafting of an instrument covered by a bid. Also, bids are made on a whole-of-Department basis, not by individual policy areas. Please contact your Department's LLO to find out your Department's process.

6 Bids should cover *all* ExCo legislative instruments that are expected to need drafting resources during the drafting period. This is the case even if the instruments are needed because of a Bill drafted, or being drafted, by OPC, and even if the need for the instruments has already been mentioned in a bid for that Bill.

7 In addition to the priority sought, bids should list the instruments in their relative order of priority within each priority category.

8 OPC then develops a legislative program for the drafting of ExCo legislative instruments, based on the information in the bids.

Changing priority or adding instruments

9 If a Department wants to change the priority that has been allocated to a particular instrument, or to add new instruments to the program with a particular priority, the Department needs to lodge a variation form with OPC. Variations are managed at a whole-of-Department level. Please contact your LLO to find out your Department's process for variations.

Carrying over instrument drafting projects

10 Sometimes, the drafting of an instrument is not completed in the drafting period for which it has been given a priority. If this happens, then, in order for drafting work to continue and be completed in a later drafting period, the Department will need to again bid for the instrument for that later drafting period. The previously allocated priority does not carry over to the later drafting period.

Commencement proclamations

11 Bids do not have to be made for commencement Proclamations, as they are drafted by OPC as they are needed.

Policy authority for ExCo legislative instruments

12 Instructing agencies must have general policy authority from the Minister or the Cabinet for the measures to be included in an ExCo legislative instrument before sending drafting instructions for the instrument to OPC. Instructions will generally not be allocated to a drafter until a copy of the authority from the Minister (or the Cabinet Minute number and date) is provided to OPC.

13 The purpose of these arrangements is to ensure that OPC's drafting resources are able to meet the demand for drafting of ExCo legislative instruments when required.

14 If an instructing agency has a particularly urgent matter where it would be more efficient to engage OPC in the development of an ExCo legislative instrument *before* general policy authority is obtained, drafting instructions, or a request for OPC services, may be sent to OPC by an SES officer in the instructing agency. The instructions or request should explain:

- the reasons for the urgency; and
- why it has not been possible to obtain the policy authority; and
- when the policy authority will be obtained.

15 If fundamental changes to policy emerge during the drafting process, OPC may require that further policy authority be obtained before proceeding with drafting. If the matter is urgent, an SES officer in the instructing agency may confirm the changed instructions and explain why drafting must proceed in advance of further authority being obtained.

Policy authority for other instruments

16 For instruments other than ExCo legislative instruments, there is no requirement to have policy authority in place before sending drafting instructions. However, in the interests of ensuring resources (both in the instructing agency and OPC) are efficiently used, it is advisable to ensure that the Minister or other rule-maker has approved the general policy to be implemented in the instrument.

More information

- More information about the priority system for ExCo legislative instruments (including templates for bids and bid variations) is available on the Instruments page of the OPC website. See, in particular, *Instrument Drafting Guidance No. 1.4—Timeframes for the development of instruments*.
- Advice on prioritisation issues for ExCo legislative instruments can also be sought from OPC's instrument advisers on (02) 6120 1390.

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The purpose of Instructor Guidance Notes is to assist agencies with general legislative drafting issues and preparing drafting instructions for Bills and instruments. The series is intended to be a starting point for instructors' own engagement with the matters covered. Instructor Guidance Notes are not statements of official policy and are not intended to be a comprehensive statement of the law. This Instructor Guidance Note should not be relied on as a substitute for legal advice.