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Preparation, Drafting and Management of Legislative Projects

by

Professor Keith Patchett

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Preparation, Drafting and Management of Legislative Projects

Keith Patchett[1]

Introduction

1. For most countries, legislation is the major medium through which social and economic changes are instituted. It is the mechanism by which governments and parliaments may respond to the emerging needs of their societies. Typically, since it is enacted by elected representatives, it confers democratic authority for state action. It is usually seen as providing a settled framework within which individuals and firms can regulate their affairs with reasonable predictability. It is the source of the rules that define and aim to control conduct considered to conflict with community interests, thereby justifying intervention by state institutions.

2. Concerns about legislation are widespread. Complaints about the burdensome nature of legislation, its complexity, its inefficiency or failure to deal satisfactorily with the problems it purports to address and poor levels of enforcement and compliance are commonplace. Accordingly, a number of bodies have made recommendations as to the standards that new legislation should seek to embody[2].

Characteristics of "good" legislation

1. Achieves its objectives
2. Financially viable; cost-effective; benefits justify costs
3. Operationally practicable; efficient to manage and enforce
4. Likely to secure public acceptance and reasonable compliance
5. Predictable and stable in application; no likelihood of unforeseen or undesired consequences
6. Restrictions on community proportionate to intended benefits; fair in application and between different groups
7. Legally sound; consistent with the Constitution, treaties and existing law
8. Clearly drafted and reasonably comprehensible, especially to those affected or interested
9. Published promptly and readily accessible

3. In Europe many countries, both those with advanced economies and those in transition, have begun to examine the ways in which their laws are made with a view to improving their quality and effectiveness. Too often legislative failures can be attributed to defective development of the legislative scheme, and to inadequate scrutiny of the law as it is being made, and more seriously to the absence of a coherent system for those purposes. As with any product that is to be acceptable to the producer and the public, the processes by which legislation is developed and produced by state institutions have to be efficiently planned and managed.

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[1] Emeritus Professor of Law, University of Wales; consultant on public law issues and legistics. This paper draws on material contained in the author's "Report on Law Drafting and Regulatory Management" in SIGMA, *Law Drafting and Regulatory Management in Central and Eastern Europe*, OCDE/GD(97)176, Copyright OECD, pp.11-64, with the copyright holder's permission..

[2] See e.g. OECD, *Improving the Quality of Laws and Regulations: Economic, Legal and Managerial Techniques*, 1994, OCDE/GD(94)59;

Achieving "good" legislation

1. *Thorough preparation and drafting*
   - policy analysis
   - impact assessment
   - consultation within and outside Government
   - drafting according to prescribed standards
   - systematic verification

2. *Management of the preparation and legislative processes*
   - an authoritative framework for managing the law-making processes
   - programming and timetabling to allow adequate time for the preparation and legislative stages
   - coordination of the law-making procedures of government and of the legislature
   - setting and maintenance of preparation and drafting standards
   - thorough scrutiny of legislative drafts by the legislature

3. *Communication and publication of legislative material*
   - prompt publication of individual bills and laws
   - provision of helpful explanatory information
   - maintenance of a collection of current legislation
   - creation of a publicly accessible electronic database of legislation

4. *Evaluation of existing legislation*
   - review of the operation and effectiveness of selected important legislation
   - procedures for regular amendment
   - systematic revision of the statute book

1. Preparation and drafting of legislation

1) The preparation stages

4. In most systems, initiation of legislative projects rests primarily with Government, which is responsible for both developing the proposed statutory scheme and drafting the body of rules to give it full legislative effect. However, in many systems, the Legislature also may also exercise a legislative initiative, when development of the scheme and the drafting of the rules will be undertaken by a formally constituted committee or a group of members, typically with support from officials of the Legislature or external advisers. In such cases, difficulties may be experienced in ensuring that the Government and the Legislature apply the same quality standards. Although this may require both to adopt similar preparation and drafting processes, neither can dictate to the other how to carry out these tasks.

5. In theory, the development of a legislative project involves two stages: "*policy formation"*, followed by the composition of the legislative text ("*law drafting*") to give effect to the policy adopted.

a) Policy formation

During policy formation, certain key decisions are needed on such issues as:

- the precise nature of the problem to be dealt with, and the objectives for a policy that will resolve it;
- the preferred option of the possible options for giving effect to the policy;
- the type of instrument, legislative or non-legislative, necessary to give effect to the preferred option;
- the authorities or agencies that are to be responsible for putting the legislation into effect;
- the essential legal and administrative mechanisms that are needed to give effect to the preferred option, and make it workable.

6. Decisions on such issues as these are required before effective work can be done on the legislative text. The necessary work is properly the task of *policy-developers* (typically officials in the competent Ministry, in the case of Government bills) who are able to bring or draw upon the appropriate expertise in the particular subject matter, including legal expertise. The ultimate decision-making rests with those holding political office (i.e. the competent Minister and, ultimately, the Cabinet/Council of Ministers).

b) Law drafting

7. At the second stage of law drafting, these key policy decisions are converted into legal text. Expert legal skills are usually thought to be needed to prepare practicable, effective and clear legal rules that use the appropriate legal concepts and terminology, and follow the prevailing drafting conventions as to legislative

structure, form and style. This is properly the task of *law drafters* (typically officials with specialist legal training).

8. In Anglo-Saxon systems, the task of law drafting is typically separated from that of policy formation, at least in relation to Government bills. A central cadre of Government lawyers undertakes the drafting of all legislative texts. They give effect to detailed instructions as to the content of the bill that have been prepared by the policy-developers in the competent Ministry. Although the law drafters are responsible for composing the text, policy and legal inputs on substantive matters continue to be made by the policy-developers through a regular process of consultation. An experienced law drafter is often able to elicit policy refinements that enable greater certainty and practicability in the normative requirements in the text.

9. In other systems, e.g. in continental Europe, the functions of policy formation development and drafting are both typically undertaken by the same group of officials in the competent Ministry. The group may well include at least one official who has acquired special expertise in law drafting through experience and training. These arrangements are facilitated by the fact that most officials are lawyers.

c) Common shortcomings

10. In many countries, there is a tendency to concentrate on producing a legislative draft, with insufficient prior consideration of the policy that it should implement. Such an approach can lead to bills that lack a thorough appraisal of the true problem and of local needs and circumstances, and indeed may involve the state and private interests in unnecessary regulation or expenditure. It may result in drafts that draw heavily upon legislative precedents, including those from other countries, with little consideration for their suitability for the particular project. The policy shortcomings may become evident only after the draft is completed (or more seriously after the draft has been made law). Not only is this a waste of the time of the Ministries and the Parliament, it delays and almost certainly will impede the institution of necessary legal change.

2) Best practice in policy formation

11. A growing trend in a number of OECD countries is to make provision for systematic analysis as the first stage in any new policy initiative, not only to work out how best to deal with that problem but also to determine whether legislation is the most appropriate vehicle to bring about change.

12. The state has at its command a number of alternative instruments that can be made without involving the protracted processes associated with preparing and enacting Parliamentary legislation[3]. Although these may not have the same legal authority as that legislation, they may be effective in regulating official functions or because they rest on a basis of agreement with affected parties.

[3] The next box is adapted from the classification used by R Baldwin, *Rules and Government*, Clarendon Press, Oxford, 1995, 81-85.

Alternative instruments to Parliamentary legislation

- *Procedural rules*: governing the steps officials are expected to follow in carrying out specified administrative processes.
- *Practice rules*: stating the practices that are to be followed by officials in order to make a statutory scheme operative or effective.
- *Instructions* (from a more senior level of the official hierarchy): indicating by whom and how particular administrative powers are to be exercised.
- *Interpretative guides*: indicating how persons affected by statutory powers can expect those powers to be exercised.
- *Prescriptive directions*: indicating the actions that persons affected are expected to take in order to comply with statutory rules.
- *Recommendations*: providing advisory guidance as to appropriate action in order to implement specified policy objectives.
- *Codes of conduct:* prescribing guidelines or standards for action or behaviour in specified contexts.
- *Voluntary codes* (adopted by private sector bodies): providing for self-regulation on specified matters.

13. In addition, Government has a tool-kit of alternative devices for securing desired changes of behaviour that do not need legislation at all or may be available under existing governmental powers.

The Government Tool-Kit

1. Information – The Power of Influence

Advice		Wide dissemination
Guidance		Selective distribution
Directions		Advertisement & publicity
Data and information	*by means of*	Targeting operators
Threats and persuasion		Responding to requests
Agreements		

2. Economic measures – The Power of Money

Bargains		Government contracts
Incentives	*by means of*	Tax inducements
Negotiated benefits		Grants, loans, subsidies

3. Administrative action – The Power of Government Resources

Provision of a specialist service
Use of official human resources
Administration through existing Government agency
Monitoring and inspection
Policing and corrective intervention

4. Inaction – The Power to decline to intervene

Reliance on market forces
Reliance on social controls
Reliance on self-regulation

(a) Policy analysis

14. Policy analysis offers a systematic approach to solving policy problems, with the objective of providing a clearer view as to the appropriate action to take and of the likely consequences of that action. It is designed to assist politicians to decide on legislation that will be affordable, work effectively and better realise their policy objectives. Ultimately, it can reduce the burden on governments of trying to implement poor quality legislation and of rectifying defects that are found to flow from new statutory schemes, as well as preventing the waste of public money.

15. In a growing number of countries, this kind of work is carried out by governments as a routine procedure in policy formation. In addition to this value, it offers the officials involved a more interesting and intellectually stimulating role. The following checklist[4] sets out the kinds of questions typically addressed.

Checklist for policy analysis

1. **What is the precise problem?**
   - what harm or other undesirable outcome do we want to prevent? who or what is being harmed?
   - how frequent or probable is the occurrence of the problem?
   - how many people or situations are affected, and how seriously?

2. **What is the 'base case'?**
   - what is the present state of affairs in reality (as opposed to in law)?

3. **What is the government's objective?**
   - what are the precise results that the government wishes to achieve?

4. **What are the options for dealing with the problem?**
   - what are the alternative courses of action, from doing nothing through to, e.g. a complete prohibition of specific activities?
   - what regulatory, financial and/or informational instruments might be used to achieve the government's objective?
   - can the matter be dealt with without resorting to legislation?
   - are there any alternatives that do not involve a governmental body?

5. **What is the likely benefit from each option?**
   - what is the probable benefit from each option; i.e. how far is it likely to reduce the estimated harm?
   - to what extent should this be discounted because the reduction in harm is likely to be lessened by persons altering their behaviour in response to the option?
   - to what extent should this be discounted because of indirect side-effects or other harms likely to flow from an option?

Cont'd

[4]The checklist that follows is based upon a checklist contained in the *Impact Assessment Manual* under preparation for the Government of Latvia.

Checklist for policy analysis (cont'd)

6. What is the monetary value of the expected benefits?
- in monetary terms, what is the value of the benefits that are expected to accrue from each option?
- to what extent is that value likely to be increased by other benefits in respect of which the monetary value cannot be fully calculated?
- what gains in terms of effectiveness or efficiency are anticipated?
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7. What implementation mechanisms are needed?
- is the mechanism for implementing each option the most practical and effective?
- in so far as the mechanisms involve public services, is that option an efficient use of public resources, given other claims?

8. What are the estimated costs of each option?
- overall, what are the costs (recurring and non-recurring) to the government budget of implementing each option?
- what is the cost of providing the administrative mechanisms (in personnel and non-personnel expenditure) necessary for each option?
- what are the likely direct costs (recurring and non-recurring) to the private sector in complying with each option?
- what are the likely indirect costs to the private sector in complying with each option, e.g. in terms of reduced competitiveness?
- what costs, direct or indirect, are likely to flow as consequences, desired or undesired, of each option?

9. How cost-effective is each option?
- how do the costs of each option compare with the expected benefits? Are they proportionate?
- how efficient are the administrative mechanisms necessary for each option, in terms of costs measured against the likely reduction in the harm?
- which option is the most cost-effective?

10. What issues of distributive fairness and public perception are relevant?
- are the costs and benefits fairly distributed between different groups in the society?
- what are the public perceptions about the extent of the harm and the need to eliminate it?

(b) Impact assessment

16. Some policy initiatives will have major impacts, by their scale or cost, on future government action or in the community. They may carry serious implications for the state budget and for the allocation by Government of financial and human resources at its disposal, or for the economy, e.g. in respect of commercial activity and competitiveness in the private sector, or for the environment or for social relations and behaviour. Such considerations are present during routine policy analysis, but typically they can be addressed without unduly sophisticated analytical techniques. However, a growing number of countries are finding it necessary to apply specialist methodologies to examine initiatives that are likely to make substantial economic or fiscal demands or to have wide-ranging environmental or social effects. Since these may call for quantitative methodologies and specialised econometric techniques or

require particular expertise, such assessments tend to be applied selectively, and in any case their depth and frequency are dependent upon the availability of appropriately qualified experts. However, such procedures are increasingly used as part of the budgetary process where bids by Ministries for new resources must be accompanied by the results of an impact assessment. In the European Union, environmental impact analyses are mandatory under European law.

(c) Policy analysis for laws initiated by Parliaments

17. In principle legislation initiated by Parliaments should be subject to the same quality standards as that of governments. Such factors as the cost to the public purse and possible economic, social and environmental impacts on the community have the same relevance. However, these kinds of analysis call for a degree of skill and experience, and access to data, that are mainly available to governments. They can rarely be undertaken to the required depth by those developing policies that will be incorporated into legislation initiated by Parliaments. Indeed, too frequently, scant attention is paid to these factors. But if the same quality standards are to be applied, consideration has to be given to enabling Government, which is likely to be concerned with the implementation, to evaluate and report on the draft legislation, using similar analytical approaches, before the legislation is enacted.

Assessing a legislative draft

Will the instrument meet the policy objectives?

Accordingly, determine, e.g. -

- $ any counterproductive side effects
- $ possibilities of non-compliance
- $ possible misuses
- $ whether the benefits and burdens are justifiable, consistent with the objective and fairly distributed.

What will implementation cost?

Accordingly, assess, e.g. -

- the likely costs to the public purse:
  - capital costs
  - recurrent costs - short term and long term
- $ the likely costs for affected businesses and members of the public in complying with the instrument
- $ any indirect social or environmental costs or burdens adversely affecting the economy or employment
- $ likely savings that may offset the costs
- $ whether the costs are proportionate to the expected benefits
- $ whether the draft can be revised to reduce costs without significant loss in effectiveness

Are the arrangements for administering the instrument practicable?

Accordingly, check that, e.g. -

- $ the instrument can be effectively implemented in the way provided
- $ it provides for all foreseeable cases
- $ the bodies responsible for the administration are clearly defined, capable and sufficiently resourced
- $ the administrative requirements are no more than is necessary
- $ the arrangements for the transition from the replaced scheme are provided for and workable.

(d) Consultation in the policy process

18. Consultation between Ministries concerning new legislative projects is commonplace in order that the full range of governmental interests is taken into account. Consultation with non-governmental groups is resorted to rather more reluctantly in many countries. This may be because of a belief that "Government knows best" or an unwillingness to reveal publicly Government's intentions or thinking before a policy has been firmed up or because such processes may extend the time required to develop a policy into a legislative draft, or because of the view that public responses should be channelled through Parliament. However, a marked change of direction can be seen to be taking place in this respect. In part, this derives from demands from more politically aware populations for a more direct participation in processes that affect them and for greater transparency concerning the functioning of state institutions.

Benefits that may be derived from external consultation

- a better understanding of the activities to be regulated and the problems to be solved
- a broadening of the range of policy options
- more informed choices as to the appropriate legal mechanisms to give effect to the preferred policy
- legal solutions that are more likely to encourage compliance
- clearer communication of the legal requirements
- facilitation of the collection of some categories of data needed for impact assessment
- verification of the results of completed assessments
- enabling government to be more responsive to the needs and interests of affected persons
- making the law-making process, and the reasons for policy choices, more transparent to affected groups.

19. To be effective, consultation for the purpose of policy-making has to be specifically designed to produce useful information, rather than as a device for arriving at a consensus with affected parties (although greater acceptability may follow). To be useful, it should be instituted at the time when it can be most helpful to the policy-formers, that is, typically, in the policy analysis and development stages, although it can also be used with advantage to obtain reactions to a more fully worked out scheme or even to draft instruments. The procedures adopted should enable those consulted to contribute special knowledge and relevant data derived from their experience. For this they need to be provided with a clear statement from the policy-formers of their current thinking on the problem and the possible options or the preferred option for its solution, and some guidance as to the kinds of information and response sought. For this, it is sometimes necessary to give advance assurances as to how the information will be used (since some may be e.g. commercially sensitive), and indeed that it will be closely considered.

20. A type of consultation that is suited to the particular case is needed. Sometimes where the policy will have wide-ranging consequences affecting substantial sections of the population, a general invitation to the public may be called for. In other cases, Ministries may use standing advisory, or ad hoc focus, groups of experienced or

expert persons whom they can engage in the discussion of options and impacts. Alternatively, consultation may be with umbrella bodies representing affected interests or a representative selection of entities that are particularly concerned with the subject area (e.g. small businesses or non-governmental organisations). Consultation can be through face-to-face meetings with officials, through written submissions, or, increasingly in advanced economies, electronically.

21. Developments such as these are best achieved if Government has an overall consultation policy that provides guidance as to when consultations will be expected, and how consultees should be selected and the type and mode of consultation and procedures to be followed. Examples can be found where Parliaments have stipulated in legislation that will have a serious impact on particular groups that bodies representing those groups must be consulted as to its implementation.

22. However, consultation comes at a price. Properly conducted it should provide valuable results, but the analysis of the information and data and the integration of the findings into the policy development process place additional demands upon the policy-formers. Inevitably, the time-scale for completion of the project will be extended, as time must be allowed for devising the consultation, carrying it out and collating and analysing the results. Accordingly, a decision to employ consultation must be taken in the context of planning the legislative project, when proper consideration can be given to its timing and the length of time required.

3) Best practice in law drafting[5]

a) Drafting standards

23. Converting a policy into a legislative scheme supported by the necessary body of normative rules is a specialist task calling for greater expertise than is sometime acknowledged. Even when the policy issues have been satisfactorily resolved and the mechanics of the scheme fully worked out, the composition of the draft law presents distinct problems. The instrument is in effect a communication of authoritative and binding requirements to those affected by the law and to those who have to administer and enforce it. Therefore, it should be drafted in terms that make crystal clear to those persons what is required. To do that, it must as closely as possible satisfy certain basic standards.

Basic drafting standards

To communicate effectively, normative provisions in a law should be:

- Clear (showing no ambiguity or obscurity)
- Certain (comprising precisely drawn norms)
- Concise (without unnecessary or superfluous provisions)
- Correlated (linking into a coherent structure)
- Consistent (with other provisions in the law and in other laws)
- Complete (covering all essential aspects)
- Comprehensible (readily understandable by potential users)

[5] See generally, A Seidman, R B Seidman & N Abeysekere, *Legislative Drafting for Democratic Social Change; A Manual for Drafters*, Kluwer Law International, 2001.

24. Although drafting is an act of creativity by the individual drafter responding to the specific demands of the particular legislative project, coherence between laws is obviously desirable. The statute book of the state should contain laws that exhibit uniform features and standardised characteristics. This is more likely to occur if drafters adopt similar methodologies and follow common conventions as to the mode of expression, format, structure and style. The use of external consultants to draft laws, as happens in some countries, has presented problems when those persons are not equally conversant in these matters. This is an issue of particular importance when drafting of legislation is the responsibility of more than one institution (as where bills are drafted by both Government and Parliament) and is undertaken by officials in a number of different agencies (e.g. Ministries). This is more likely to be achievable if adequate provision has been made for this specialist work to be provided.

Conditions contributing to effective drafting standards

- Availability of sufficient specialist drafters
- Separate budgetary allocations for drafting
- Training arrangements for drafters
- Setting of standard drafting requirements

(i) Specialist drafters

25. Drafting is an area of specialist legal practice for which many lawyers are unsuited or ill-equipped. A country that wishes to improve the quality of its legislative drafting has to invest in lawyers who have the aptitude and interest to undertake it. It should pursue a strategy for selecting adequate numbers of persons to be engaged in law drafting, for their systematic training and acquisition of essential experience.

26. Many countries do not, as a rule, establish posts in the public service that are specifically for law drafting. Although some legal officers may be regularly engaged in the work, there is usually no guarantee that they can have a public service career as a specialist drafter. In most Ministries, the less demanding drafting tasks, e.g. for minor secondary legislation, can readily be undertaken by its legal officers as one of their functions. But experienced legal officers with the specialist drafting skills are needed for the more complex tasks involved in drafting primary laws. Accordingly, deliberate steps should be taken to ensure that Ministries (and Parliaments) have posts that are filled by such persons. This can be met by creating designated posts of law drafter or by including appropriate qualifications in the job description of a number of the posts. It cannot be assumed that, because an officer has legal qualifications, he or she is competent to undertake law drafting at the level required.

27. A particular difficulty is that some Ministries are much less likely than others to be engaged regularly in major legislative projects; their drafting work may be largely confined to secondary legislation and occasional amending Bills. It is a waste of resources to have specialist and experienced law drafters in Ministries where their capacities are not used efficiently. Considerations such as these have led some countries to contemplate establishing a central drafting service to undertake the drafting on, at least, the most significant legislative projects for all Ministries and

government agencies. Such a mechanism is standard in many Anglo-Saxon countries. There are both advantages and disadvantages.

Advantages of a centralised drafting service

- Constitutes a standing resource of high quality lawyers with expert knowledge of existing legislation and extensive experience in solving legislative problems
- Contains collective experience and know-how in relation to drafting procedures and techniques, that can be handed on to new entrants
- Ensures that standard procedures will be followed by Ministries
- Leads to consistent standards and greater uniformity in legislation and legislative approaches
- Facilitates management of Government's legislative programme
- Makes the best use of limited numbers of experienced drafters.

Disadvantages of a centralised drafting service

- Usually is restricted to drafting Government bills, leaving secondary legislation to Ministries and Parliamentary projects to Parliamentary officials and members
- Has little specialist knowledge of substantive law (which rests with Ministries)
- Is rarely involved at the stage of policy formation
- Is, therefore, dependent upon Ministries for instructions as to the policy content, which may vary widely in quality
- May become an elitist cadre of specialists who perpetuate out-moded practices
- Tend to be subjected to tight timetables and extreme pressures to complete a legislative project.

28. Introduction of a centralised service to replace Ministry drafting involves a distinct shift of culture and the need to deal with legislative projects in very different ways. A more likely strategy is for those Ministries regularly involved in heavy legislative activity to develop their own drafting resources, and for some central facility to be available from which qualified drafters can be allocated to other Ministries when needed. That facility might perform other functions that are centrally required, such as coordination and verification of legislative drafts on behalf of Government.[6] A possible home for such a facility would be the Ministry of Justice.

29. However, drafting services should not be confined to governments. Legislatures are equally reliant upon these specialist skills; it cannot be expected that they are to be found among the members. The drafting of laws is a function central to a parliamentary legislative initiative, and to the preparation of amendments whether of a substantive nature or merely as a vehicle to enable a debate of government provisions. In systems where legislative projects are developed by committees the members should be able to call upon the services of those who are experienced in

[6] See below, para.47-49, below.

this kind of work and are conversant with the local drafting conventions and with good practice with respect to formulating legislative instruments. Otherwise, assistance will be sought from persons outside the legislature not only to provide guidance on the substance of the legislation but on its drafting. Too often such persons prove not to have the competence that comes with regular drafting practice nor familiarity with the processes of sound legislative preparation. The benefits to members of the legislature in having a cadre of appropriately qualified drafters permanently available both to undertake drafting tasks and to provide expert advice on legislation needs no illustration.

(ii) Budgeting for drafting

30. In most countries, no separate budget item is provided for law preparation or drafting. Since the costs principally relate to personnel, they are covered by the staffing and general administrative allocations. Accordingly, when staffing levels are under consideration for purposes of planning budgetary allocations, attention should be paid to the future demands that legislative preparation is likely to make upon the Ministry's or Parliament's human resources.

31. Where future drafting requirements are likely to be heavy or to involve complex issues, Ministries may need further funding to discharge theri functions to the appropriate standard. If none has been specifically allocated in the budget, expenditure on law preparation must compete with other claims. So, if it is anticipated that additional expenditure will be needed, e.g. in the form of consultants or contracted drafters from outside or for impact assessment or consultation, specific budgetary provision may need to be made. If the conclusion of the Government legislative programme can be integrated with the preparation of the draft budget, the estimated drafting costs in the coming year can be factored in. Such planning may avoid the possibility that legislative initiatives are frustrated or weakened because e.g. the responsible Ministry lacks the necessary funds.

(iii) Training drafters

32. The best training of a skill such as drafting is derived from experience and working closely under the guidance of experienced senior drafters, although the quality of on-the-job training depends upon efficient supervision by competent seniors, which is not always available or provided. A case can be made for providing all legally qualified entrants to public service with induction training in the basics of drafting. A general awareness of the standards and techniques required for drafting legislation can only serve to improve the overall quality of the officials' work in that respect. Those who show particular aptitude may be encouraged to raise their level of skills through further in-service training when they might then be in a position to concentrate on this work. Budgets, under the general heading of training, might allocate funding specifically to enable entrants to obtain induction training in drafting and existing law drafters to upgrade their skills.

33. Foundations for learning on the job can be laid through formal training programmes that provide a basic understanding of how to draft and introduce newcomers to essential procedures and techniques, e.g. by practical exercises. Such courses are not yet available in most countries; they are not usually offered in university law courses nor in institutes providing training in public administration.

34. With respect to advanced training, many countries arrange short workshops and seminars for the purpose, though these are not usually organised with the specific objective of enabling law drafters to improve their qualifications. All drafters need to be introduced systematically to new practices to ensure that they will be adopted consistently throughout the public service. Similar training is needed too for Parliamentary officials who are engaged in this kind of work for Parliament.

(iv) Standardising drafting requirements

35. Both legislators and users of legislation find difficulties if different laws are drafted in different ways so as show a lack of consistency in the legislative approach between similar instruments or in their mode of expression, format, style and terminology. Although individual laws must be written in the way that most effectively communicates their content, uniformity or at least standardisation is called for where possible. Especially where the responsibility for writing legislation is shared among a range of bodies, perhaps even extending to non-governmental consultants, it is desirable that common standards are published and are applied by all drafters. As is suggested below[7], this can best be achieved through officially approved instructions and guidelines, which are monitored in the case of Government drafts by a body acting on behalf of the Cabinet/Council of Ministers and in the case of Parliament by e.g. a specialist unit in its Secretariat. In particular, a power in the monitoring body to send back an instrument that falls seriously short of the standards strengthens its authority.

b) Drafting Procedures

36. Drafting legislation calls for a systematic, often painstaking, application of a particular expertise in a range of analytical and writing skills. Law drafters are primarily concerned with converting policy into a coherent body of normative rules. It is their function to ensure that the draft is compatible with other legislation, that the methods it uses will be practical and legally effective, that it follows conventional forms and uses appropriate and comprehensible language and terms. Accordingly, in the course of composing the legislative provisions, drafters should apply a series of verifications to ensure that these responsibilities have been fulfilled. Other persons concerned with the policy development should also carry out similar, confirmatory checks, particularly after each version of the draft law is completed[8].

37. The drafting process, it has been suggested[9], should follow a logical progression through five stages.

Five stages in the drafting process

1. Understanding the project
2. Analysing the project
3. Designing the legislative scheme
4. Composing and developing the draft
5. Scrutinising and testing the draft.

[7] Paras.61-63, below.

[8] See further, para.47-49, below.

[9] G Thornton, *Legislative Drafting*, 4th ed, 1996, p.128. These stages are not self-contained. It is often necessary to go back to an earlier stage if a new issue arises as the drafting progresses.

(i) Understanding the project

38. Before choosing the appropriate legislative approach, legal concepts and means of implementation, and deciding on the appropriate legislative structure and language, drafters fully inform themselves about the policy background and aims. In particular, they need a complete understanding of the intended objectives of the project, the mechanisms selected to achieve those objectives, and foreseeable consequences of implementation. Much of that information should be available if the policy development has been effectively carried out. If the information has not been provided, it must be sought from the policy formers. For drafters must ensure that any outstanding issues or any uncertainties that affect the drafting of the normative rules are resolved. This may call for consultation with the appropriate persons or bodies in other Ministries or outside Government.

39. In Anglo-Saxon systems, where the drafting is distinct from policy formation, this information is typically provided in a systematic and narrative form ("instructions"), usually written by lawyers from the policy group (who are likely to have legal expertise in the subject matter). But more generally, the provision of such information is a sound preliminary step to drafting as well as a good discipline. Moreover, it provides a resource that can be drawn upon when political endorsement of the policy is being sought or explanatory documentation prepared[10].

(ii) Analysing the project

40. In principle, before embarking on composition, drafters should analyse the project from a drafting standpoint. The way in which they draft individual provisions will be determined by their understanding of the policy seen in the wider context of existing law and the requirements of a coherent legislative scheme.

Matters to be verified at the analysis stage

- the extent to which the project impinges upon matters already governed by existing law
- compatibility of the project and the legal means to be used are with the Constitution, especially the provisions guaranteeing individual rights
- provisions that need to be drafted in a special way to ensure that compatibility with the Constitution, applicable treaties and existing law
- repeals and amendments needed to existing law where it is incompatible with the project
- how the proposed means of implementation and enforcement may need to be formulated to ensure fairness and transparency
- the purposes for which secondary legislation is likely to be needed to supplement the new law
- whether the project should be given effect by amending an existing law or by a self-contained bill.

[10] On explanatory matter, see paras.72-75, below.

(iii) Designing the legislative scheme

41. A legislative instrument, as any writing project, should be carefully planned before composition of its content is started. Accordingly, drafters need to decide, and approve with the policy formers an outline of the new law, and in particular:

- the basic legal approach that the law is to take to regulate the subject matter of the project
- the principal topics that are to be dealt with in the law
- the administrative mechanisms that are needed to put the law into effect.

42. Decisions on these matters enable the drafter to work out and to list the normative provisions that are likely to be needed, and then to organise them into a rational sequence. The deliberate step of devising a structure for the contents of the entire instrument ensures that it is organised in the most logical form to aid communication. This is particularly important in the case of complex or lengthy legislation. Designing a plan has other advantages too.

Benefits from devising a legislative plan

- reduces the likelihood of major restructuring changes, during the composition, that may delay preparation
- encourages initial decisions as to the basic concepts and terminology to be used in the legislative text
- is a useful tool for testing that all aspects of the policy that require legislative support have been identified
- provides a checklist, for use during composition, of matters that require legislative provisions.

43. The plan for the structure must take into account such matters as:

- the usual position of formal and technical provisions in legislative instruments
- the local conventions for dividing legislative instruments e.g. into chapters and parts
- the conventional structures used for particular types of legislation, e.g. financial, amending.

44. But good practice requires that the substantive provisions should be arranged to produce a logical relationship that makes them accessible and understandable to users and that will facilitate debate in the Legislature.

Principles of legislative design

- Gather related or linking provisions together in the same part of the bill, and create separate chapters or parts for distinct groups of such provisions
- Order groups of provisions, and Parts, according to the principles that govern individual provisions (as follows)

Cont'd

Principles of legislative design (cont'd)

- Place the primary (or basic) provisions before those subsidiary provisions that develop or expand or depend upon them
- In particular, place general propositions before any exceptions to them
- Place provisions of universal or general application before those that deal only with specific or particular cases
- Place provisions creating rights, duties, powers or privileges ("rules of substance") before those that state how they are to be exercised or enforced ("rules of administration or procedure")
- Place provisions creating bodies before those that govern their activities and the performance of their functions
- Place provisions that will be frequently referred to before those which will not be so regularly used
- Place permanent provisions before those that will apply for only a limited time (e.g. during a transitional period)
- Set out provisions regulating a series of related events or actions in the chronological order in which those events or actions occur
- State the objectives of the law at the beginning, since they set the context in which the provisions that follow must be read
- Explain basic concepts and terms used in law before they are used
- State the general cases to which law does or does not apply before the provisions containing the substantive rules.

(iv) Composing and developing the text

45. The mode of expression and the legislative style that drafters adopt are generally dictated by drafting conventions that reflect the local language and grammar. As we have seen, these practices are often supported by style manuals. Some systems require legislation to be composed at a much higher level of generality than others that place greater emphasis upon specific rules setting out rights, powers, duties than upon statements of principles. Such factors can have marked effect on the length and complexity of the draft law.

Principles of legislative composition

- Express normative rules in a direct prescriptive form, rather than as a narrative
- Include only norms that perform a legal function
- Amend existing legislation expressly and specifically
- Avoid long sentences and articles comprised of numerous sentences
- Aim for plenty of "white space" on the page, e.g. by breaking up longer propositions with internal paragraphing
- Ensure that the contents of each article have a unity of purpose
- Use plain language, avoiding legalistic and antique modes of expression, but use the appropriate legal terms for legal concepts
- Follow standard word order and grammar
- Use terminology consistently, in particular the same term for the same case and a different term for a different case
- Avoid using words that are superfluous or repetitious

Cont'd

Principles of legislative composition (cont'd)

- Avoid expressions that are ambiguous and terms that are vague or obscure in meaning
- Limit incorporation by cross-referencing of provisions from other legislation
- Use a consistent system of numbering for articles, paragraphs and tabulations
- Express normative requirements through formulae, diagrams and charts where they contribute to clarity

46. Almost all legislative projects call for the drafting of several versions of the instrument, the actual number depending upon the complexity of the drafts and the time available. Ideally, opportunities should be programmed for policy-formers to review each draft so that matters that need further attention or reconsideration can be dealt with in the subsequent version.

(v) Scrutinising and testing the draft

47. In addition to the continuous scrutiny by the drafters themselves in the course of composition and the reviews by policy-formers, best practice indicates that each version of the text should be subjected to specific verification scrutiny to ensure that the text fully achieves its intended purposes in the clearest and most comprehensible form. In the process of development, legislative text can easily come to contain provisions that are defective or overlook relevant considerations. These may only become evident when systematically tested as an integrated system of rules.

Legislative verification

Checks for legal compliance

- Compatibility with the Constitution, especially Basic Rights and Freedoms
- Compatibility with existing or pending treaties
- Compatibility with existing law, especially at a higher level in the hierarchy of laws, and inclusion of provisions for repeal and amendment of displaced provisions of existing law
- Removal of provisions that are unnecessary or repetitious or can be dealt with by non-legislative means
- Consistency of concepts and legal approach with existing law
- Inclusion of transitional provisions to ensure legal continuity

Checks as to operational features

- Inclusion of all provisions necessary to make the scheme operative and enforceable
- Effectiveness, fairness, consistency and transparency of administrative, enforcement and adjudication procedures
- Modes of expression that diminish the likelihood of disputes and aid settlement and adjudication
- Easy to use legislative provisions

Cont'd

Legislative verification (cont'd)

Checks as to secondary legislation

- Provisions enabling the making of secondary legislation to the extent needed to supplement the law
- Appropriate limits upon the making of such legislation

Checks as to form, clarity and comprehensibility

- Compliance with the standard requirements as to format, presentation and style
- Compliance with best practice as to legislative expression and composition
- Provisions that can be expressed more simply or directly
- Logical and accessible organisation of the provisions

48. The advantages of having fresh eyes looking at a draft will be self-evident to any author. Accordingly, in some countries, administrative directives require the final versions of Government draft laws to be accompanied by a certificate that they have been formally scrutinised and necessary changes made before they are submitted for the final approval of the Cabinet/Council of Ministers. This task may be undertaken by a central Ministry, such as the Ministry of Justice or by the State Chancellery or other body that supports the Council of Ministers. In other countries, draft legislation must be submitted for review by an administrative tribunal, e.g. a Conseil d'Etat, where such a body exists.

49. The true test of the practicability of new legislation is when that legislation is implemented. How, for example, the public respond to it and whether it will secure a satisfactory level of compliance can only be assessed when the law is in operation. However, in some countries from time to time draft legislation is opened to public scrutiny in the final stages of preparation before approval is given for it to be presented to the Parliament. Responses may give a better indication of the ease with which those affected can use the law and the likely effect upon their activities. As with other forms of consultation[11], this practice adds to the expense of legislating and to the preparation time, since the results of the consultation must be analysed and the draft legislation reconsidered. Accordingly, it is unlikely to be made a standard procedure, rather being reserved for subjects on which there is wide public interest or of a specialised nature when the views of the interest groups most concerned will be sought. Care has to be taken in analysing the responses, which may have been deliberately skewed to favour the interests of those responding.

4) Preparation and development of projects initiated by Parliaments

50. Parliaments in many countries have power conferred by the Constitution to initiate new bills of their own as well as to propose amendments to Government bills submitted to them. The quality of that legislation has to be measured by the same standards as are applied to bills prepared by Government. If, as suggested earlier, policy analysis and verification should be conducted from early in the policy formation process, in respect of their own initiatives, Parliaments seem ill-equipped

[11] See paras.19-23, above.

to carry this out to the same standard as Governments. As we have seen, such processes depend upon information and expert knowledge of the subject matter, as well as a working understanding of administrative and operational factors and resources, that are usually found in the competent Ministries. Parliaments, in preparing new bills of their own, tend to rely upon outside specialists or experts or upon individual Members who have specialised interest in the subject area. This may be satisfactory in cases where the new law will make no demands on the budget or on the administrative capacity of the state. But where public resources are involved or the project will have important consequences for the economy or the environment, it is questionable whether a Parliamentary committee serviced by Parliamentary staff and external experts, can explore the issues at the development stage to the standard that Government sets for its own projects.

51. There is a second difference. Although Parliaments may scrutinise all legislation, wherever it originates, in the course of the legislative process, typically Governments have no constitutional right to verify legislation initiated by Parliament. Although Government may have the responsibility of implementation, the Parliament may develop a legislative project without the Government having an opportunity during the formation stages to consider its implications by carrying out the kind of policy and impact assessment it might apply to its own projects[12].

52. These difficulties have been met in part in some countries by the adoption of procedural devices, e.g. in the Standing Orders of the Parliament. For example, the Parliamentary working group or committee dealing with a legislative initiative may be authorised to request from Government information or data relevant to the project under development, or indeed to request an impact assessment. Again, Parliaments can be required to send a copy of every draft law developed in Parliament to the Government well before it is taken by the Legislature in plenary session, and the Government may be accorded the right to convey its views or opinion to Parliament within a given timeframe. This provides an opportunity for Government to inform Parliament e.g. about the implications for the state budget and public spending priorities. In the last analysis, though the Government may not be able to prevent the enactment of such laws, many constitutions vest a power in the President to veto or require reconsideration of laws that may be invoked where a law was legally or substantively defective.

[12] See further, para.66, below.

2. Management of the preparation and drafting processes

53. Sound legislation is more likely to emerge if adequate time and resources are allocated for preparation and drafting. The more hurried the processes the more probable it is that matters will be overlooked or that lower standards of drafting will have to be tolerated. On the other hand, political imperatives commonly lead to pressures to complete the processes quickly in order that new law can be put promptly into operation. At the same time, account must be taken of the fact that legislative projects may make significant demands in financial and human resource terms. In that case, it is clearly wasteful for substantial work to be done on projects that have low priority or are unlikely to be put before the Legislature within a reasonable time.

a) A regulatory framework

54. These considerations point up the importance of systematic planning and management of the preparation and drafting processes, with a view to determining priorities, to programming on-going legislative projects and to ensuring that the necessary resources are provided. This enables timetables and deadlines to be set for individual projects and the work of Government to be integrated overall and coordinated with that of the Legislature.

55. To achieve these ends, many governments establish a regulatory framework that authoritatively defines the procedures that must be followed to determine their annual legislative work plan and by Ministries in fulfilling that plan. These procedures are typically formalised and published in e.g. Rules of Procedure for Government Business. The authority responsible for setting and maintaining the framework should have sufficient standing and political authority to ensure compliance. In some countries, the task as far as Government is concerned is given to the Ministry of Justice. However, this is seen in other countries to elevate one Ministry above others, and accordingly the function is vested in a body that derives its authority from the Cabinet/Council of Ministers (such as the Cabinet Office or the State Chancellery).

56. Different considerations apply with respect to legislation initiated by Parliaments. Typically, draft laws are submitted first to an appropriate subject committee that determines its own work priorities for the drafts before it at any one time. Similarly, laws that emerge from those committees for consideration by the plenary legislature will be subject typically to decisions on timetabling by the relevant Parliamentary committee. Not least because the numbers of major draft laws from the parliamentary initiative tend to be lower than those coming from Government, an elaborate regulatory framework would be unusual. Rules of Procedure that contain arrangements for programming the work of the Legislature are generally adequate for accommodating such instruments.

b) Legislative programming and timetabling

57. At the heart of such procedures are those by which Government determines the legislative projects that are to be undertaken for submission to the Legislature in the coming year. In some countries an extended time frame may be adopted to enable Ministries to undertake more elaborate projects over a longer period in the confidence that they are destined for submission to the Legislature in a subsequent

session. Settling such a legislative programme enables Government to agree collectively where its legislative priorities lie, especially where the Ministries' demands for legislative time are likely to outstrip the Legislature's capacity to deal with new legislation. It also provides a basis upon which the Legislature can establish for its own timetabling purposes the flow of draft laws that will be placed before it. In a number of countries, the programme will be submitted to the Parliament for its consideration and, in some, for its approval.

Requirements for legislative programming

- A body (e.g. a committee of the Cabinet/Council of Ministers) responsible for working out with Ministries the forthcoming programme of legislation, for approval by the Cabinet/Council of Ministers
- Regulations prescribing the procedure to be followed by Ministries in submitting claims for inclusion of projects in the programme and by the programming body for determining priorities between those claims
- A timetable for completing the programme annually, sufficiently ahead of forthcoming session of the Legislature to allow sufficient time for the draft laws to be completed
- Approval of the negotiated programme by the Cabinet/Cabinet of Ministers
- Procedures for dealing with urgent projects that arise after the legislative programme has been approved
- A requirement that Ministries are not to proceed with the preparation of draft laws that have not received approval by inclusion in the programme

58. Once programming is practised, timetabling is inevitable. Decisions need to be made as to when the draft laws are to be placed before the legislature, and in consequence timetables for their preparation have to be set centrally, and monitored and enforced by or on behalf of the Cabinet/Council of Ministers. An overall timetable is needed to fix realistic timescales for preparation of individual projects that allow Ministries adequate time to prepare and draft the agreed laws. This will enable Ministries to make internal plans and detailed timetables for their legislative work and to allocate the resources that will be necessary to complete the projects by the set deadline. An overall timetable will also facilitate the timing of submission of completed drafts to the Cabinet/Council of Ministers for their consideration and approval, as well as forward planning of the work of the Legislature.

59. A necessary concomitant of timetabling is the authorising of a body, such as the office supporting the Cabinet/Council of Ministers to monitor, on its behalf, compliance with the overall timetable, as well as a procedure for making timetable adjustments in altered circumstances.

c) Coordination of Government and Legislature

60. If the Government's legislative priorities are to be achieved with reasonable despatch, some guarantees need to be provided that the drafts it sends to Parliament will be considered there with some promptitude. For their part, Legislatures need to have some assurance that Government legislation will be sent at regular intervals so that their work can be suitably spaced across the annual session. In some circumstances Government may be able to exert direct political influence through having majority representation or through parliamentary leaders who support it. Parliamentary Rules of Procedure may set a timeframe after presentation within which work on Government drafts must start in the Legislature. In a number of countries, Governments assign to a member of the Government the responsibility of liaising with the Legislature on the legislative processing of government drafts.

d) Setting drafting standards

61. Common standards and uniform practices for preparing and drafting legislation can be advanced if contained in official directives that are backed by the authority of Government or Parliament. In a number of countries, essential features of legislation are regulated by law, which has the advantage of binding both Government and Parliament. More detailed requirements as to drafting methodology and legislative form and style are typically provided administratively through directives or secondary legislation.

62. Guidelines as to expected drafting practice can also be provided through officially authorised drafting or style manuals. Such documents can demonstrate, in a less prescriptive manner, preferred ways to deal with particular drafting circumstances or with difficulties that often occur. They can illustrate how legislative language can be made more accessible to ordinary users, and to support plain language drafting. They can show how to avoid poor practice, e.g. unduly legalistic language, and are invaluable as a means of informing drafters from outside public services of current best practice, and as a training aid.

63. Similarly, a number of countries have developed formalised checklists of matters that must be borne in mind at a particular stage in the preparation or drafting process.[13] Some are of a general nature reminding the user of factors to be verified at particular points; others relate to issues to be reviewed in specific types of legislation[14]. These are in addition to such lists that individual drafters tend to work up for their personal use.

e) Scrutiny through the legislative process

64. Parliaments are constitutionally responsible for giving the necessary validation to law drafts through the formal legislative process. The process of debate and consideration of amendments tends to focus on policy features rather than technical aspects of laws. In order to engage fully with the former, members of the Legislature need to be reasonably conversant with the context of the proposed legislative scheme, its objectives and approach and the way that law is likely to be

[13] See *The Design and Use of Regulatory Checklists in OECD Countries*, 1993, OCDE/GD(93)181. A relevant example is *Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe,* SIGMA Paper No.15, 1997.

[14] E.g. *Civil Service Legislation Contents Checklist*, SIGMA Paper No.5, 1996, OCDE/GD(96)21.

applied. The legislative instrument itself will provide little by way of background information and may need relatively expert analysis to understand how it is likely to work. This can constitute a handicap for many members who will have relatively little expertise about the subject matter and how to analyse a law.

65. In some systems where draft laws are put before a parliamentary committee for preliminary consideration, the committee may be authorised to consider for itself and report on the budgetary and economic implications, or the political or social impact of the laws and whether in their view they are likely to be complete and effective. In other systems various devices are in use to provide the necessary information that the Parliament may need, e.g.:

- A formal requirement that all drafts must be accompanied by explanatory material justifying and elaborating on the contents in a narrative form[15];

- Provision enabling Parliamentary committees to seek an oral justification from a Government Minister;

- Provision enabling Parliamentary committees to take evidence from persons outside Parliament, expert or experienced, concerning the impact of legislation, to be reported on when the draft comes under consideration by the plenary Parliament ("pre-legislative scrutiny");

- Availability to Parliament of expert advisers in particular fields who can assist members to examine drafts more thoroughly.

66. At the same time, some safeguards for the Government are needed to ensure that the Legislature does not adopt provisions that are unrealistic or would present operational problems for Government when enacting legislation initiated by the Legislature or making amendments to Government-sponsored laws. A number of devices are in use for this purpose.

Safeguards for Government legislation

- The right of Government to receive advance copies of all amendments to be considered and to submit an opinion
- The right of Government to submit amendments of its own
- The right of Government to withdraw its bill at any time
- The right of a member of Government to participate in sittings when Government legislation is under consideration
- The right of a member of Government to make an oral justification before the relevant committee

[15] See further, paras.72-75, below.

67. In addition to examining the substance of legislation, Parliaments in a number of countries have instituted arrangements for formally verifying draft legislation. In the main these relate to legal or technical matters and are typically carried out by officials in their Secretariats and considered in a preliminary committee process. In particular, attention is paid to such matters as consistency with the Constitution, treaty obligations and compatibility with existing law. In a number of respects these checks may duplicate those carried out on Government drafts by Government, but they serve to reinforce that work. Their principal value lies when used to verify drafts prepared following a parliamentary initiative. They may serve to prevent draft laws being proceeded with for the time being, when they do not match the similar standards as those set for Government-sponsored laws. But here again, the capacity to do this work depends on the availability of the officials qualified to undertake this kind of work. It strengthens the case for Parliaments to institute their own cadre of drafters who can carry out this function as well as assisting in the drafting of parliamentary projects and amendments to Government drafts.

3. Communication and publication of legislative material

68. It has been asserted earlier that legislation is the formal medium through which binding legal requirements and regulations are communicated to the public, and particularly to those who will be affected by them. It follows then that failure to communicate in ways that enable concerned parties to understand how they are to adjust their behaviour to the demands of the law is a contradiction of legal values. In a democratic state, since legislation is made by the elected representatives, members of the public not only are entitled to know promptly what has been enacted in their name, but have the right to make known their views as to what that law might be before it is enacted. Such a position may sometimes be hard to maintain in societies where literacy levels are low, where the media do not engage themselves very fully with public issues or where parliamentary functioning is seen as an elitist activity and legal matters the prerogative of lawyers. But prevention of abuse of law requires legislation to be knowable and readily accessible in the public domain.

a) Publication of laws and draft laws

69. In principle, in systems that practise the rule of law, legislation should be available in the local language to any person who needs to refer to it as soon as the enactment process is completed, and, with few exceptions, before they come into force. In particular the relevant instruments should be to hand for every official in government and the judicial system who is concerned with their implementation. Complete collections should be provided for the use of the members of the Legislature and the courts and be easily obtained by legal practitioners at a reasonable cost. The responsibility for the authoritative publication rests with the state, as the guarantor of accuracy and authenticity.

70. In many countries Government have the responsibility for publishing legislative instruments in an Official Journal or Government Gazette as soon as practicable after they are made. In some, legal rules stipulate the range of legislative instruments and the regularity and frequency of publication, as well as the mode of classification and numbering. Typically, the fact that the instrument is printed in such a publication is sufficient for it to be taken for all official purposes as authoritative.

71. It is also common practice for draft laws or bills to be published in a similar way prior to their consideration by the Legislature. The timing of such publication, however, has important implications. If this takes place too close to the beginning of the legislative process, little opportunity is afforded for the public or interest groups to express views either publicly or to the members of the Legislature, or indeed for individual members to familiarise themselves with the project and perhaps carry out their own consultation and for groups in the Legislature to determine their approach to the legislation when the legislative debate begins. It follows therefore that if formal examination of the legislation by the Legislature is to be effective, an appropriate interval between the official publication and the commencement of the legislative process is desirable. It is also sensible for public notice to be given through the media of the publication and for copies of the legislation to be publicly available at a reasonable cost.

b) Explanatory material

72. In most cases, legislation is not self-explanatory. Drafters include in it only those matters that require legal regulation and compose it in the form that contributes most appropriately to its legal implementation. Although the objectives may be expressly stated, albeit in legislative language, the context and problems that it is designed to alleviate are not usually made explicit. Nor is it possible to gather easily how the scheme is intended to work, what it will cost in financial and human resource terms and how it is expected to impact upon the community. Yet these are factors of considerable concern both to those affected and to members of the legislature who are asked to enact the instrument.

73. A growing trend therefore is to require, sometimes by law, that a bill presented to the Legislature must be accompanied by full explanatory material, that some countries term a "justification". In the past these have tended to be short and formal statements in descriptive language of what the law contains. However, increasingly, regulatory directives state that such explanatory matter must include information of the kinds that result from policy analysis, as well as a full account of how the legislative scheme is intended to operate. In particular, this accompanying memorandum may explain the expected effects of the legislation on the economy and the environment and the predicted social consequences, as well the financial costs and the changes necessary to the administration of government services. In some cases, the material will contain a detailed commentary on the legislative text that supplements the rules with additional information about matters that will be regulated by secondary legislation or will be dealt with through administrative procedures.

74. Documentation of this kind is of great value where the legislation is far-reaching or complex. It enables those who are not comfortable with the conventions of legislative drafting – and this can include members of the Legislature – both to understand the project and to scrutinise the legislation in a much more informed way. However, it considerably extends the task of those preparing the legislation, since the information to be provided goes far beyond the scope of the legislative text, yet must be completely congruent with it. It adds a cost in terms of time and human resources, and it must be factored into the programming of the legislation. Where a thorough policy analysis has been carried out, it can be expected that the results can be drawn upon substantially for this purpose.

75. At the same time care has to be taken as to the future use of this material. Although immensely valuable for members of the public in understanding new proposals, the information may not be reliable for use in working with the legislation as ultimately enacted. Unless the memorandum is deliberately amended to take account of changes that may have been made during the legislative process, there is a danger that the original version will no longer reflect accurately what is contained in the final law. Where a narrative account of a law exists, many prefer to use that than to wrestle with the legislative text, which may lead to actions that do not comply with the strict law. In a few countries only the final version of the published law is accompanied by the explanatory documentation that has been revised in the light of changes made in the Legislature. In these, the legal status of the material for purposes of interpretation and application of the legislation by the courts may need to be resolved.

c) Maintenance of a collection of laws

76. It is not enough that individual pieces of legislation are systematically published as they as made. Most states endeavour to maintain authenticated collections of laws that have been collated and organised for ease of access and use.

Authenticated collections of legislation

- Annual volumes of primary and secondary legislation made during the year
- Consolidations of primary legislation and of secondary legislation in force at a specified date
- Supplementary volumes published at regular intervals to keep the consolidations up to date
- Indices of primary and secondary legislation currently in force, published at frequent and regular intervals

d) Electronic data base of legislation

77. Increasingly, states are developing electronic databases of legislation for the purpose of maintaining a collection of instruments currently in force, as well as an archive of those that have been replaced. Unlike print-based collections, such databases can be brought up to date with considerable speed, as well as offering sophisticated indexing and search tools and hyperlinking between documents. Many states make these databases available through the Internet as well as through an internal governmental or parliamentary network. Access and downloading facilities are proving valuable as means of making draft laws, as well as current legislation, available to the public at a much lower cost than in the past.

78. The initial costs of this development may be considerable, not least if the previous arrangements for collecting legislation were unsatisfactory. But the introduction of an electronic system not only provides an opportunity to create a database that contains a comprehensive statement of current law but it is an invaluable aid for drafters. Provided that drafters are themselves engaging in computerised drafting, a database facilitates their task by enabling a more complete search of related legislation to be carried out to determine those provisions that should be amended or repealed. It can lead to the drafting of new laws in ways that contribute to reliable integration with existing laws, as well as greater standardisation in legislative expression and technique. In particular, it encourages the desirable practice of making changes to existing provisions that are no longer consistent with the new project, by removing or replacing them precisely and explicitly.

4. Evaluation of existing laws

79. Few countries have procedures for the regular evaluation of the operation and effectiveness of existing laws. Rather, those governmental bodies implementing legislation, when faced by difficulties or new problems, tend to bring forward limited proposals for amendments to remedy the immediate shortcomings without sustained consideration of whether the original scheme is meeting its objectives or is working as intended. Typically, for their part, legislatures do not undertake any systematic assessment of the legislation they have enacted. In consequence, legislation that is not operational or has only partial implementation remains on the statute book. Such "paper laws" (which exist more on paper than in reality) present unacceptable uncertainties for those purportedly subject to them, and create an impression of greater effectiveness of policies than is actually the case.

a) Review of the operation of legislative projects

80. One response to these circumstances in some countries has been the institution of formal procedures for evaluation of legislation after it has been in effect for a period of time[16]. These *ex post* assessments have much in common in their approach with the policy assessments made *ex ante* as described earlier, and indeed may be the precursor for fresh policy assessments if change is found to be needed. However, their essential purpose is to compare the actual effects and impact of the legislation with those intended, and in particular whether or to what extent the projected objectives have been achieved, and accordingly whether the legislation should be replaced, amended or done away with[17].

81. Evaluation procedures tend to be expensive and time consuming, and will be justified only if concerned with legislation of some significance, for example because they involve the state in substantial expenditure or have significant financial implications for sectors of the economy. In consequence, evaluations of this nature, which may involve a degree of econometric analysis, are typically conducted by Government and may be tied in with the budgetary process[18]. For their part, Legislatures are more inclined to institute reviews of particular aspects of legislation that have social impact, when they are able to examine effectiveness by taking evidence from those affected by the scheme as well as those implementing it.

[16] See "Evaluation of Legislation", Proceedings of the Council of Europe Legal cooperation and assistance activities (2000-2001), www.coe.int/T/E/Legal%5FAffairs.

[17] Luzius Mader, *L'Evaluation Legislative*, Payot Lausanne, 1985.

[18] See further, SIGMA/OECD, *Improving Policy Instruments through Impact Assessment*, SIGMA Paper 31, CCNM/SIGMA/PUMA(2001)1, Paris. The general approach to *ex post* evaluation is described in the *Policy Assessment Manual* in preparation for the Government of Latvia.

Typical questions addressed in *ex post* evaluation

- Have the original objectives been achieved in quality, quantity and time, when measured against the base case of what would have happened without intervention?
- To what extent has the intervention brought about the achievement of the objectives or has it induced activity that would not otherwise have occurred?
- Has implementation been affected, adversely or advantageously, by external factors?
- Have any significant unexpected side effects resulted?
- Have all the inputs required from Government and the private sector been made as planned?
- Have any of the allocated resources been wasted or misused?
- How efficient was the administration of the scheme?
- Has the scheme led to any unfairness or disadvantage to any sector of the community?
- Could a more cost-effective approach been used?
- What improvements could be made to the scheme that might make it more effective or cost-efficient?
- Overall is the scheme well suited to meeting the desired objectives?

82. Evaluations of this kind carry a cost not only in official time and expenditure but because they typically depend upon the acquisition of information from outside Government. As with policy assessment, consultation, particularly with key groups among affected interests, is generally necessary if relevant data is to be obtained and an accurate evaluation of effectiveness is to be made. In these circumstances, it is usually beyond the capacity of legislatures to conduct systematic evaluation of entire legislative schemes. Nonetheless, the results of government evaluations can provide the basis upon which parliamentarians can question and hold to account those responsible for the policy and its implementation. It follows that if evaluations are to be used for this purpose they must not be restricted to internal government use but must be placed in the public domain. These may be encouraged by the insertion in new legislation of a review clause that specifically directs that an evaluation of the operation of the legislation must be carried out at a particular point of time. On the basis of the report, the legislature may then be asked to determine whether the legislation should continue with or without modification. A variant of this is the “sunset clause” that requires legislation to expire after a given period unless the legislature on the basis of the evaluation continues it in force.

Example of a sunset clause

25. 1. The Government is to carry out a review of the operation and effectiveness of this Law as soon as practicable after the expiry of 5 years from its coming into force.

2. The review must include an evaluation of:

a) the extent to which the objectives of the Law have been attained;
b) the effectiveness, and in particular the cost-effectiveness, of the administration of the Law;
c) the need for the continuation of the Law;
d) other matters that appear to the Government to be relevant to the operation and effectiveness of the Law.

3. The Government is to submit to the National Assembly a report of the findings of the review as soon as practicable after the review is completed.

4. This Law expires upon the expiry of 6 years from its coming into force unless before that date the National Assembly otherwise resolves.

b) Procedures for regular amendment

83. In principle, the making of legislation should follow a policy cycle in which implementation of a new policy through legislation is followed by evaluation that feeds into reassessment of the original policy and, where necessary, the development of modifications and the enactment of amendments to the original law. However, it is rare that such a smooth process is feasible given the continuing demands for legislative activity in other fields. Nonetheless a common failing in many systems is the want of any systematic up-dating of legislation. Rather, changes to existing legislation tend to be driven by short-term considerations or immediate priorities. It is helpful if Government Ministries adopt a strategy for progressive re-examination of the legislation within their responsibility that enables them over a period of years to reassess the need to retain or amend the full body of such legislation. In some countries, Government has required all Ministries to review their legislation from specified standpoints, for example in respect of particular overarching features, such as the statutory treatment of women or of children, the impact of regulation on small businesses or the adequacy of legislative provisions for environmental protection. In suitably discrete areas the appointment of an inter-departmental committee or even an independent body is likely to contribute to a more coherent policy for legislative amendment.

84. In some legislatures, specialist subject committees monitor and scrutinise the activity of government in their subject area, in the course of which the operation of particular pieces of legislation may come under consideration and proposals for amendment may be forthcoming. The effectiveness of this kind of work commonly depends upon the quality of support from expert advisers and from the parliamentary Secretariat and upon procedures that enable the committees to

acquire the information they need both from the government and, by oral and written hearings, from those affected.

c) Review of the statute book

85. Over a period of years legislation that may have been useful in the form in which it was originally enacted may become outdated or cease to serve its original purpose. However, the process of identifying legislative provisions that are spent or have been rendered of little value by changed circumstances rarely has high priority. Given their commitments with regard to new policy initiatives, Ministries deal with these kinds of case sporadically at the best. Instead, some states have established governmental bodies or commissions with the specific function of keeping the statute book under review and bringing forward proposals for legislation that repeals provisions no longer required or for rationalising related instruments into a more coherent form without substantially altering their content.

86. But difficulties in enacting those proposals can follow if the necessary legislation must compete for legislative time in the Parliament with policy-driven projects. In some systems, therefore, special parliamentary procedures for dealing with that legislation have been evolved, alongside the standard legislative process. Since the proposals are essentially for clearing away dead wood, accelerated and less formalised arrangements may be used that avoid the need to follow in all their rigour every stage of the usual legislative process.

A Note on Secondary Legislation

87. Governments (and in some countries individual Ministers) are commonly vested with the constitutional power to make secondary legislation to supplement or elaborate upon primary legislation. In some systems, the power has to be conferred individually in the Law to which the secondary legislation relates. In Anglo-Saxon practice[19] where this latter approach is followed, it is usual to spell out with some precision the purposes, circumstances or cases for which the legislation can be made, as a safeguard enforceable by judicial review against misuse of the power. Such an approach emphasises that the authority to make law rests with the Legislature, and that if a different body exercises that power it does so as a delegate of Parliament and within the limits set by the Parliament. It has led to the institution of procedures in some legislatures for specific consideration of the way in which such delegated powers are drawn in any particular bill, to ensure that the powers are no more than are necessary.

88. In a number of these countries, legislation makes provision for the more substantive instruments to be tabled before the Parliament, in more important cases for approval or disapproval, and for parliamentary scrutiny of the technical features of the instruments. These processes provide a level of political checks as to the use of the powers, but they do not constitute control over the use. It is generally thought that the values in secondary law-making – the saving of parliamentary time on matters of detail or technicality or routine nature and the relative convenience and expedition of the law-making process – justify only limited involvement by the legislature.

89. Elsewhere, however, much less attention is given to these issues. In many, a general constitutional power to make secondary legislation may obviate the need for the legislature to deal with such powers when enacting new primary laws. However, a growing trend can be seen towards the incorporation of authorisation clauses into new laws, although they tend to be drafted in generalised terms that do not set precise legal limits as the circumstances in which they may be used.

90. Parliaments frequently have no specific procedures for examining either the form in which the power is drafted or the way in which the power will be or has been exercised. Since the tendency of legislatures is to focus on policy issues rather than technicalities when considering laws, such provisions commonly receive scant attention. It can be argued that these trends reflect a democratic deficit in the legislative process, especially if the content of the secondary legislation may have wide-ranging effect upon sectors of the community, rather than being confined to matters that relate to the administrative operation of the primary law.

91. A case can be also made for the legislature to have an opportunity to examine at least in outline the secondary legislation that will supplement any new piece of primary legislation that they are considering. In principle, this requires the implementing body to prepare the instruments in draft alongside the draft Law to provide a complete picture of the new legislative scheme. Such an approach has

[19] See, e.g. Report of the Hansard Society Commission on the Legislative Process, *Making the Law*, London 1992.

the added advantage of addressing a problem experienced in a number of transition countries where implementation of new laws has been seriously delayed because the necessary supporting secondary legislation has not been completed at the time the law becomes legally effective. This integrated drafting, however desirable, is not always feasible, not least if the primary law undergoes material changes during its passage through the legislature. However, some countries have accepted that at least the explanatory documentation accompanying a draft law must indicate the secondary instruments that will be issued. In those systems where the commencement of laws cannot be postponed once they have passed through the legislative process, the importance of advance timetabling of the total preparation programme, including that relating to the issue of implementing instruments, is apparent.

92. The quality standards that are applicable to primary laws have equal force in relation to the preparation and drafting of secondary instruments. The drafter of the Law should have a clear picture of the kinds of matter than will need to be dealt with by the initial set of secondary instruments and should make quite sure that the legal authority to make them either exists already or is contained in the Law. These are matters that are part of the total preparation process and accordingly the planning of the legislative project should accommodate them, and allocate the required time. Here too benefits are to be gained from a regulatory and managerial framework that takes full account of this form of law making, whether it accompanies the primary law or it takes place at a later date when the need for new secondary instruments arises. Similarly, the same standards as to the way in which these instruments are drafted and expressed, and to accompanying explanatory documents, should be applied. In some respects greater care may be needed to formulate them with the required clarity since, on occasions, they have to deal with the detail of the legislative scheme that may be both complex and lengthy.

93. This activity is commonly seen as largely an executive function, and accordingly compliance with the standards and practices, for example stipulated in Drafting Directives, is seen as a matter for Government rather than Parliament. It is not unusual to find a requirement that draft instruments have to undergo a verification procedure, for example in the Ministry of Justice before they can be adopted by the Government. At the same time, there is value in procedures that enable the legislature to scrutinise important instruments, whether in draft or after they have been made. Legislative provision may be needed to establish such a requirement and to determine the types of instrument to which it applies, and the powers, for example of veto, that the legislature may exercise.

Sponsor The member of the legislature who introduces legislation.Â Suspend the Rules A motion to expedite passage of legislation whereby any member recognized by the Speaker may â€œmove to suspend the rules and pass the bill.â€ This requires a two -thirds vote in the House and majority in the Senate. This curriculum was developed for professionals and students in North Carolina to support their efforts to live up to the expectations of the NASW Code of Ethics. Developed by Dan Beerman, ACSW, LCSW, Professor with the NC A& T State University and UNC-Greensboro JMSW Program. Revised by Pamela Siobohn Moye, CCADS, MSW Intern, UNC-Chapel Hill; Doaw Xiong, BSW In