



THE LEGISLATIVE PROCESS AND DRAFTING INSTRUCTIONS: A MANUAL FOR INSTRUCTING OFFICERS IN CARICOM MEMBER STATES

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on behalf of

THE IMPROVED ACCESS TO JUSTICE IN THE CARIBBEAN (IMPACT JUSTICE) PROJECT

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Preface

PREFACE

Background

The Improved Access to Justice in the Caribbean Project (IMPACT Justice) was developed from recommendations made by regional justice sector stakeholders at a series of meetings in the Bahamas and Trinidad and Tobago in 2011 for a comprehensive reform of the sector.

Two projects were recommended - one concentrating on the courts and judiciary and the other on civil society. The Caribbean Court of Justice and the University of the West Indies were the institutions identified as having the capacity, respectively, to implement these projects. In late 2012 they submitted proposals to CIDA which were approved in 2013/14 by the Canadian Department of Foreign Affairs, Trade and Development (DFATD) (of which CIDA was by then a division). Both projects commenced on April 1, 2014.

The civil society project - IMPACT Justice - is being implemented under a Contribution Agreement between DFATD and the University of the West Indies, Cave Hill Campus. The Project Implementation Unit is based at the Caribbean Law Institute Centre (CLIC) of the Faculty of Law at the Campus.

As a major part of its work, IMPACT Justice will assist the CARICOM and OECS Secretariats in drafting policy documents and model legislation. In some instances, it will also assist CARICOM Member States in drafting new laws or amending existing laws at the national level which fit within its regional agenda. Other Project activities include the development of a regional code of ethics; enhanced disciplinary procedures and continuing legal education for the legal profession; public legal education; the development of legal information databases; the development of regional and national frameworks for the promotion of alternative dispute resolution, and training in its use.

The Barbados workshops

This Manual is produced as a contribution to the first of these tasks – assisting in the drafting of policy documents and model legislation. It arises out of a meeting held in May 2014 of Attorneys General, Chief Parliamentary Counsel and others to discuss how the Project could assist them with their legislative needs. The meeting endorsed the hosting early in the life of the Project of workshops on the legislative process and drafting instructions and on procedures for drafting legislation. The output of the workshops would be manuals for the guidance of Permanent Secretaries, senior administrative officers and others who prepare Cabinet papers on legislation and drafting instructions, as well as for legislative drafters. The first of these manuals is attached.

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The workshop on the legislative process and drafting instructions was held in Barbados in November 2014 and was attended by participants from several CARICOM countries. They were all involved in drafting briefing papers for Cabinet or in preparing instructions for legislative drafters in relation to legislation sponsored by the ministries in which they worked.

The workshop looked at –

- The legislative process in CARICOM countries
- The policy-making process
- The need for drafting instructions
- The timing of drafting instructions
- Relations between instructors and drafters
- The contents and format of drafting instructions
- The legislative program
- Cabinet submissions
- Consultation within and outside government
- Policy issues: powers, delegations, exemptions, statutory bodies
- Final clauses: repeals, savings, transitional provisions, consequential amendments
- Enforcement, appeals, subsidiary legislation
- Financial and staffing implications.

This Manual broadly follows the same pattern and incorporates the views of those who participated in the workshop. It also draws on a number of other sources, as listed in the Bibliography, and can be said to represent a consensus of views on the topic around the Commonwealth Caribbean.

The Facilitators

The workshop facilitators were Mr. John Wilson, an experienced law drafting consultant from the UK recruited by the IMPACT Justice project, and Mrs. Segametsi Mothibatsela, a Commonwealth Fund for Technical Cooperation (CFTC) expert stationed at the CARICOM Secretariat in Guyana, whose support was agreed to by the Commonwealth Secretariat. They are primarily responsible for the contents of this Manual.

Purpose

This Manual is not intended as an exhaustive statement of the functions of administrators and others involved in the processing of legislation, but it represent a broad consensus in the region on the matters that instructing officers should bear in mind when preparing submissions on legislation to Cabinet or instructions to legislative drafters.

IMPACT Justice thanks the facilitators who brought their considerable experience both in preparing instructions for drafters and drafting legislation to bear on this exercise. It also thanks the representatives of CARICOM

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Member States who attended the workshop and participated fully in the exercise. The views and opinions expressed in this publication are those of the facilitators and the workshop participants. We hope that the manual, which will be distributed widely in the region, will lead to an improvement in the quality of submissions made by those who prepare documents for the guidance of Cabinet in relation to the drafting of new or amending legislation.

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ABBREVIATIONS/GLOSSARY

In this Manual, the following terms are used with the meanings shown. They are not intended as a preferred usage, but for convenience only.

‘AG’ means Attorney General (or Minister of Justice in those jurisdictions that have one);

‘AGC’ means Attorney General’s Chambers or equivalent (in some jurisdiction it might be the Ministry of Justice). It includes the Solicitor General and Crown Solicitor and Director of Public Prosecutions (DPP) as appropriate;

‘Bill’ means a draft of an Act that is intended to be introduced into the legislature for consideration and possible enactment;

‘Cabinet’ means the main executive body of a government includes an Executive Council, or equivalent;

‘CARICOM’ means the Caribbean Community established in 1973 and comprising 15 Caribbean nations and Overseas Territories;

‘Clerk’ means the clerk or other person responsible for processing of legislation through the legislature;

‘Constitution’ means the Constitution of the country or territory for the time being;

‘CSME’ means the CARICOM Single Market Economy;

‘drafter’ means the person responsible for drafting a legislative item, and includes a Legislative Counsel, Parliamentary Counsel or similar. It also refers to the drafting office if more than one drafter is dealing with an item of legislation;

‘drafting office’ means the office of a government responsible for the drafting of legislation and includes the Office of Parliamentary Counsel, Law Drafting Unit or similar;

‘Gazettal’ means the publication in the Government Gazette of a Bill or item of subsidiary legislation;

‘Head of State’ means the Governor General, Governor, President or equivalent authority of the country or territory;

Abbreviations/Glossary

‘instructing Ministry’ means a Ministry that has issued drafting instructions to a drafter;

‘instructing officer’ means the Permanent Secretary or head of department preparing the drafting instructions and responsible for overseeing the legislative process;

‘Interpretation Act’ means the local statute defining various standard terms used in legislation, and making general provisions about appointments, time, documents, etc.;

‘legislation’ means the process of making law, or the product of that process, according to the context;

‘legislature’ means the Parliament, House of Assembly or other body given power by the Constitution to make laws;

‘Minister’ means the member of the Cabinet responsible for a legislative item, including a Chair of a committee etc.;

‘Ministry ’ means a Ministry or other department of Government concerned with the preparation and passing of legislation;

‘Overseas Territory’ means a British Overseas Territory in the Caribbean;

‘Permanent Secretary’ means the permanent secretary or other chief executive officer of the instructing Ministry;

‘policymaker’ is used to mean the head of a department responsible, in consultation with and on the instructions of a Minister, for initiating policy on a subject for which legislation might be needed. It does not embrace all the wider meanings of the term ‘policy’ such as the general policy of a political party or of a government.

‘rules of procedure’ means the Standing Orders or other published rules governing the conduct of the business of the legislature;

‘statute’ means an Act;

‘subsidiary legislation’ includes rules, regulations, orders and other items of legislation made by a person or body to whom power to make them is given by the primary legislation.

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INTRODUCTION

Regulation by written law is all-pervasive in the modern world; hardly any activity is untouched by it. Good legislation promotes democracy and helps ensure that policies about the environment, resources, health and education are properly implemented. Poor legislation can result in misunderstanding and failure of application and provides scope for corruption and inefficiency. Badly drafted legislation can impose unnecessary bureaucratic requirements and unnecessary costs for both the regulated and the regulator. Well drafted legislation is therefore essential.

At the Amsterdam Intergovernmental Conference in 1997 the EU heads of State and government adopted Declaration No 39 on the quality of the drafting of Community legislation. They noted that “the quality of the drafting of Community legislation is crucial if it is to be properly implemented by the competent national authorities and better understood by the public and in business circles.” Accordingly, they called on the institutions to “establish guidelines for improving the quality of the drafting of Community legislation and to take the measures they deem necessary to ensure that these guidelines are properly applied.”

The agreed measures were –

- to ensure that officials and others receive training in legal drafting, making them aware in particular of the effects of multilingualism on drafting quality;
- to promote cooperation with the Member States with a view to improving understanding of the particular considerations to be taken into account when drafting texts; and
- to foster collaboration between their respective departments responsible for ensuring the quality of drafting.

The Commission Legal Revisers Group organised a series of seminars on quality of legislation and invited experts to speak at them. At a seminar in 2006 Dr. Francisco Caamano Dominguez of Spain, Secretary of State for relations with the Congress and Senate and Professor of Constitutional Law, spoke of the link between the quality of legislative acts and governance. He said –

“Quality of laws is an essential element of transparency and of informing the public. Citizens need to understand what is going on and to see what the benefits are. It is the responsibility of government to give adequate information about its laws and to ensure that the law making process is

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transparent. Laws must be framed in clear and accessible language and well-structured to serve as a channel of communication with the citizen so that they can contribute to cohesion and extension of shared democratic values.”

This statement applies equally and in all respects to the English-speaking Member States of CARICOM. The purpose of this Manual therefore is to help ensure that laws in the region are “well-structured to serve as a channel of communication with the citizen.”

It seeks to do this by providing guidance to Permanent Secretaries and other senior administrators on the preparation and processing of legislation, including Cabinet papers and drafting instructions.

Aim of the Manual

Confucius said, “When the State of Zheng formulates a law, Pi Chen first makes a draft, and Shi Shu gives his comments. Then the draft will be edited by Zi Yu and finally the draft will be polished linguistically by Zi Chan. The documents of law formulated by these four wise officials seldom contain mistakes.” (Analects 14.8)

This is an apparently simple and concise way of achieving perfect legislation. But it hides a number of questions, which need to be answered before legislation can emerge, at least in the context of CARICOM countries. The questions include - which is the policy maker; the drafter; the enacter; the enforcer?

It must be borne in mind that in broad terms –

- the decision whether to introduce new or amending legislation into the legislature is for the executive authority to make;
- the enacting of legislation is a matter for the legislature.
- the application and implementation of legislation is the responsibility of the civil service;
- the enforcement of legislation is the responsibility of the police or other enforcement officers and the courts;
- the drafting of most legislation is the responsibility of the drafting office.

Permanent Secretaries and others involved in new or amending legislation in CARICOM Member States need to understand all these stages. The purpose of this Manual is therefore to look at –

- the nature of legislation;
- the legislative process from the instructing officer’s viewpoint;

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- the respective roles of the policymaker and the legislative drafter in preparing the legislation;
- policymaking for new legislation;
- the need for drafting instructions;
- the topics that should be covered in such instructions and the form they should take.

Regional coherence

There is a general desire among the Member States of CARICOM for more regional integration and in particular for the realisation of the Caribbean Single Market & Economy (CSME). Harmonisation of the Community's laws can contribute to the achievement of that goal. This Manual therefore focuses on the legislative process in the English-speaking CARICOM Member States.

Except for Suriname and Haiti and to a lesser extent Guyana and St. Lucia, the Member States of CARICOM have a shared history and as part of the Commonwealth a common legal system (common law). While there are some differences in the manner in which the law is processed, there are, generally speaking, more similarities.

Most CARICOM countries are monarchies, with the Queen as Head of State, represented by a Governor General. Others are republics, with a President either in a formal role or with executive functions. In all the English-speaking CARICOM Member States, however, the system of government is based on what is known as the 'cabinet system' in that, like the UK, the Cabinet is drawn from elected members of the legislature, and the legislative program is controlled by the Cabinet.

Another feature common to most CARICOM Member States is the channelling of government Bills and regulations through an office dedicated to legislative drafting. These dedicated drafting offices provide an interface between the executive and the legislature. This interface involves transforming government proposals for new law into Bills, or subsidiary legislation. This Manual suggests ways in which a government department or agency can best communicate its proposals for new law to the drafting office.

Scope of the Manual

Legislative drafting has two aspects - the conceptual aspect, where the policymaker issues instructions, and the literary aspect, where the drafter selects the best means of expressing the policy concept. This Manual deals with the first aspect – the formulation of policy and the issuing of drafting instructions.

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The translation of policy into law is a vital part of promoting good governance and the rule of law in society. Properly managed and executed, the process –

- builds public confidence in the legal system;
- makes institutions and institutional frameworks more efficient and transparent.

It is a process which poses various challenges for those involved, from formulating policy and issuing the drafting instructions, to the actual drafting of the legislation.

The Manual therefore sets out what constitutes proper drafting instructions, how and by whom they should be communicated to the drafter and the interaction needed between the drafter and the client Ministry. It is a Manual rather than a set of rules and is therefore not designed or intended to cover every challenge that the instructing Ministry or drafter might encounter.

The Manual is intended as a training tool, but is written from the perspective of the legislative drafter and should not be taken as an exhaustive statement of the subject. It should be read in conjunction with the rules of procedure and other manuals on administration in each jurisdiction.

The Manual mostly deals with the drafting of new primary legislation, but its principles apply equally to amendment legislation, and to subsidiary legislation, although the process for making regulations etc. will be different.

The Manual draws on the experiences of participants from English-speaking Member States of CARICOM who attended the Barbados workshops, and on published and unpublished writings on the subjects – see the Bibliography. It uses some terms that might not apply to all the jurisdictions but that are common to many of them, such as Permanent Secretary and Ministry. It refers to ‘legislature’ rather than ‘Parliament’ and uses the term ‘Cabinet’ to mean the executive body of the government. It refers to the Attorney General’s Chambers (AGC) to include the advisory role of the Solicitor General and the Director of Public Prosecutions (DPP) as appropriate. It does not mention Ministries of Justice as such. See the Glossary for the meaning of other terms used in the Manual.

The Manual seeks to enhance the law making process in the CARICOM Member States, particularly as it relates to drafting instructions and their content, and so assist the governments of the Community put in place effective legislative drafting procedures. It is recognised that differences exist in the way in which

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legislation is processed in the various Member States, but it is hoped that this Manual will be of assistance to both instructing Ministries and legislative drafters in all the CARICOM Member States.

CHAPTER 1

THE NATURE OF LEGISLATION

The law, both statutes and common law, provides the framework within which a society functions. The rights and obligations of individuals and organisations in a society are determined by it.

The making of legislation is the most democratic means by which a Government is able to govern. By legislation, policies are transformed into enforceable written law through an elected legislature. The translation of policy into law is a vital part of promoting good governance and the rule of law in society. Properly managed and executed, the process, amongst other things, serves to –

- build public confidence in the legal system;
- transform institutions or institutional frameworks; and
- within the context of CARICOM, facilitate the harmonisation of the Community's laws, regional integration, and the realisation of the CSME.

Legislation is a statement of rules to alter the way that people behave i.e. stop them doing something, or make them do something. Or it might be to raise revenue for the government; to state a principle that society agrees on, for instance, a Leap Year; or to create and confer rights on, for instance, a statutory body.

The purpose of most statutes, and the one that this Manual is mainly concerned with, is to change the behaviour of people. A successful law is one that changes certain behaviour to reach a policy goal. The more clearly identified the people who are addressed and the more understandable and clear the language of the law, the more likely it will be to have the intended effect.

1.1. Legislation might not be appropriate

Changes in the law generally require legislation. However, any proposal for new legislation must be examined and analysed against existing legislation and other laws to see whether it is necessary, and how it can be implemented.

The policymaker should look at the existing statute book to see whether new legislation is really needed to effect the policy objective or whether an amendment to an existing law would suffice. It might be the case that there is a disregarded law lying little used on the statute book. Legal advice on this aspect should be sought from the AGC or the drafting office.

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If there is an existing law, it might need updating and revising to make it fit for purpose. This might be possible by an amendment Bill, or it might require a complete rewrite of the existing law. A consolidation exercise involving the updating and combining of several statutes might even be appropriate.

In considering whether to bring forward a proposal for new legislation, a policymaker should obtain legal advice at as early a stage as possible. This is because existing legislation might already cover the point, or there might be some legal reason why legislating in the proposed manner would not be appropriate (e.g. because it infringes standards of human rights or the Constitution). It is recommended that a memo to the AGC seeking such advice be despatched as early as possible so that agreement can be reached at an early stage on whether legislation is appropriate.

Consulting the AGC regarding any policy which is intended to be translated into legislation is critical in ensuring that the resultant legislation will be legally sound. The AGC will, amongst other things, be able to assist in determining whether the proposals for new legislation comply with the State's Constitution or international obligations.

The AGC will also be able to proffer other legal advice in respect of other legal matters which the proposals may raise.

Where there are court decisions which will influence the provisions of the proposed legislation, the AGC is able to bring them to the Ministry's attention.

This consultation early on in the process benefits the Ministry by revealing what areas, in its policy, might require adjustment or refinement and can make the Ministry's drafting of its Cabinet Memorandum easier than it would otherwise have been.

In seeking that advice, the Ministry must communicate briefly and succinctly –

- the reasons for wishing to enact the new legislation or to amend existing legislation;
- what the policy is;
- how it is proposed to carry the policy into effect;
- whether other Ministries, if any, who are or will be affected by the policy, or who are interested parties, have been consulted, and what their reactions to the proposed legislation are.

The Nature of Legislation

The AGC will, after studying the Ministry's proposal, advise whether or not new legislation is indeed required, whether any suggested amendment to existing legislation is necessary, or suggest other ways in which the Ministry's policy proposals can be effected.

Where the policy emanates from a Government White Paper, the Ministry, in forwarding its proposal for new or amending legislation should not only make reference to the Paper, but also forward a copy thereof to the Attorney General's Chambers.

Once that process is over and the AGC has agreed that indeed legislation is necessary, the relevant Ministry can proceed to the next step: the drafting of its Cabinet Memorandum.

1.2. Non-legislative options

A policymaker considering how to deal with an issue should not assume that legislation is the only or best answer. Indeed, given the time normally taken to enact legislation, the amount of paperwork involved, and the political imponderables of the legislative process, introducing legislation is sometimes the last resort. On the other hand, Ministers of government often like to have a statute enacted as part of their record of achievement while in office, and introducing legislation is often the best way to test public opinion on a policy.

Policymakers should not assume that a written law will solve every problem. There is a saying that, "If it is not necessary to legislate, it is necessary not to legislate". A policymaker should therefore think creatively about non-legislative approaches and, if legislation is necessary, should aim for a legislative approach that minimises the regulatory burden while achieving the required policy outcome and being consistent with the principles of good governance.

Some of the non-legislative approaches that policy makers can consider or employ include –

- administrative action, such as change in policing policy;
- the use of economic measures such as tax incentives or other benefits;
- self-regulation by means of a voluntary code by e.g. a professional body;
- use of market forces, by altering prices etc.;
- education, by way of changes to the school syllabus etc.; and
- publicity by way of a press campaign, Ministerial speeches, etc.

1.3. Types of legislation

If legislation does appear to be the best solution, the policymaker should consider the various types of legislation that can be employed. Should it be by way of new primary legislation, by amending existing law, or by subsidiary legislation under an existing statute?

1.4. Primary or subsidiary legislation?

It might be that all that is needed is for regulations or some other subsidiary legislation to be made under an existing law.

There are various types of subsidiary legislation, such as regulations, rules or orders.

Fees are usually prescribed by regulation, though they are sometimes in a schedule to the Bill. Forms are often prescribed by regulations, but they could simply be ‘approved’ and might not need subsidiary legislation.

There are also other types of instrument which can be described as ‘quasi-legislative.’ They include codes of practice, which set standards but do not result in a prosecution for a breach. Other such instruments might be procedural rules, directions, instructions and guidelines, or an interpretative guide to existing law. None of these are legislative but they help achieve the purpose of the law.

1.5. Types of Bill

Some Bills might be simple and in standard form and can be drafted quite speedily. Others might involve major new legislative areas and take months or even years to draft.

Appropriation Bills or other Bills involving public money usually have to go through a different process. Bills involving State powers might need to be approved by a body established for the purpose by the Constitution. (*See Chapter 2*)

Note that there should be no ‘intermixing’: distinct matters which have no connection to each other should not be dealt with in the same Act.

The majority of Bills that go to a legislature are Public Bills, introduced by the government to deal with issues that affect the population at large.

The Nature of Legislation

However, most jurisdictions also allow for Private Bills which affect the interests only of a specific group, such as a company, and are introduced on behalf of that group. They do not go through the Cabinet approval procedure, but they do go through the same legislative process. They are often drafted outside government, although they might need to be checked for consistency by the drafting office.

Another type of Bill that is not initiated by the Cabinet is the Private Member's Bill, which will also generally be drafted outside government. It will usually be on a matter of public importance, but limited to a particular constituency, or a specialist interest. The government might adopt a Private Member's Bill as a government Bill.

1.6. Effective, fair and transparent legislation

If legislation is the preferred option, there needs to be implementing arrangements in place to make the new scheme fully operational. The policymaker should consider –

- whether organisational structures and administrative procedures are in place to make the scheme work;
- what legal and other mechanisms are required to make it workable;
- whether the benefits of regulation justify the cost of implementing it;
- who would be affected by the legislation;
- how compliance will be achieved by the government and by the general public; and
- how people will know about the law i.e. how it will be publicised.

In considering whether to introduce new legislation, the policymaker also needs to consider whether –

- the proposed law will work fairly in all areas of the country;
- the law is appropriate for the political and geographical needs of the country (a law for an island state might work differently from a mainland one);
- distribution of its effects across society will be equal and transparent;
- anyone's human rights will be infringed;
- avoidable opportunities for corruption are created;
- decision-making will be fair and transparent;
- the law will be appropriate for the country's transport and communication system; and
- generally, the law will be appropriate to help develop the country's economy.

(See Chapter 5)

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1.7. Precedents

Precedents for legislation can be found in a number of sources readily available to instructing Ministries. They include –

- A Consolidated Index of statutes and subsidiary legislation for each Commonwealth Caribbean country produced by the University of the West Indies Faculty of Law Library. See the website at www.cavehill.uwi.edu.
- An index to the laws of all English-speaking members of the Pacific Islands Forum, kept by the University of the South Pacific. See the website at www.paclii.org.
- The British statute book (though not always completely up to date) which is maintained by the National Archives. See the website at www.legislation.gov.uk.
- Legislative handbooks on the implementation of UN conventions, which are available on the websites of the respective UN agencies, such as WHO, FAO, IMO and ICAO.

CHAPTER 2

THE LEGISLATIVE PROCESS

This Chapter deals with the steps involved in enacting new primary legislation or Acts. For subsidiary legislation (regulations, etc.) see the Chapter on Subsidiary Legislation.

2.1. Constitutional position

The constitution of a country usually provides for a legislature with authority to make laws *‘for the peace, order and good government’* of the country. The legislative process in each CARICOM Member State is governed by its constitution and local legislation and procedural rules and conventions of the legislature. It is important that policymakers familiarise themselves with the constitution and with the procedures of their respective jurisdiction. Reference can also be made if necessary to textbooks on legislative procedure, such as Erskine May's, *‘Treatise on the Law, Privileges, Proceedings and Usage of Parliament.’*

The legislatures of some CARICOM Member States have only one legislative chamber (unicameral), while others have a second or upper House (bicameral). The procedure in each House is usually substantially the same, but if there is a second House, more time is needed for the enactment of legislation.

2.2. Stages of law making

Although the passage of a Bill through the legislature is the most public part of the legislative process, there are several other steps involved in getting a new statute enacted. They can be identified as –

- **Policymaking:** This is a matter for the sponsoring Ministry and the Cabinet.
- **Drafting:** This is the task of the legislative drafter on the instructions of the sponsoring Ministry.
- **Consultation:** Consulting with interested parties (‘stakeholders’) both within and outside government is the responsibility of the sponsoring Ministry
- **Enacting the Bill:** This is the responsibility of the legislature on the initiative of the relevant Minister and the leader of each House.

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- **Publication:** The task of having the statute formally published in the Gazette and publicised in the media usually falls on the sponsoring Ministry.
- **Administrative implementation:** The primary responsibility for ensuring effective administrative processes such as finance and staffing, making appointments, issuing licences, etc. falls on the sponsoring Ministry.
- **Enforcement:** Enforcing the law is a matter for the police, or of inspectors and enforcement officers appointed for the purpose.
- **Adjudicating:** The adjudication of disputes arising out of the statute, and if necessary interpreting it, is a matter for the courts, or for tribunals created for the purpose.
- **Commenting:** Once a statute has been enacted – and even during the enactment stages – it is open for discussion and comment by the media and by academics and the public at large. This might continue for several years in the case of a complex statute, and might result in amendments to the law at a later stage.

2.3. Initiating legislation

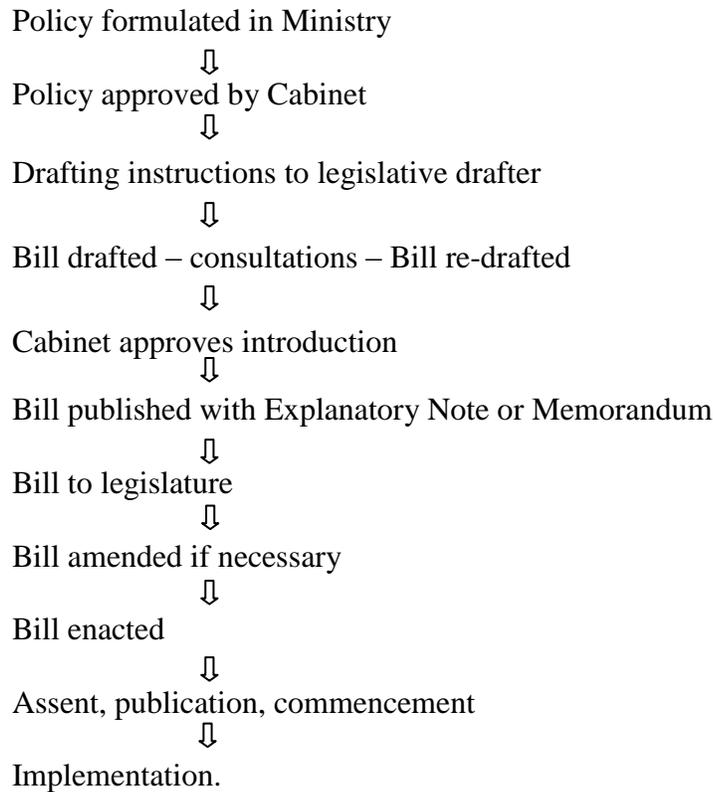
Among CARICOM Member States, most Bills originate in the Government, with few if any private members' Bills. The legislative process by which Bills are introduced and enacted is not the same in all jurisdictions, but it usually starts at the Cabinet level with a decision to have a policy implemented through legislation. The Ministry sponsoring the legislation therefore needs to seek approval and authorisation from Cabinet to draft the legislation proposed.

Once Cabinet approval is given, and drafting instructions are issued, the drafter will draft a Bill, which will be circulated to interested parties for comment until a final draft is agreed to by the sponsoring Ministry. The Bill then goes back to Cabinet for approval and if the Bill is approved, the Ministry liaises with the Clerk of the relevant House to ensure that the Bill is included in the legislative programme and goes through the necessary stages in the legislature. (Note that sometimes the procedural rules can be suspended to allow all stages of a Bill to be completed at the same time.)

The drafting of the Bill is the responsibility of the drafting office, on the basis of drafting instructions issued by the sponsoring Ministry.

2.4. Flowchart for processing of a public Bill

A typical flowchart for the processing of a public Bill is –



2.5. Stages of legislation of all Bills

The stages of the legislative process are usually –

- introduction and first reading;
- second reading debate;
- committee stage;
- third reading and passing of the Bill;
- assent; and
- commencement.

Under the Cabinet system the government usually has a majority and it can be assumed that most Bills introduced by the government will be passed, subject to amendments during their passage through the legislature.

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2.6. Introduction and publication

The Bill is published in the *Gazette* as a Bill and placed on the Order Paper of the legislature in the name of the responsible Minister. The Bill will usually have attached to it an Explanatory Note or Memorandum setting out the purpose and policy (or objects and reasons) of the Bill.

2.7. First Reading

This stage is sometimes combined with the Introduction. First reading usually consists of the short title of the Bill being read out by the Clerk. The Minister responsible for the Bill might also move that the Bill be introduced and read the first time. There is no debate on the Bill at this stage.

In a bicameral legislature Bills may in some jurisdictions be introduced in either House, but the usual practice is for all Bills to be introduced in the lower House. Money Bills usually cannot be introduced in the upper House, even though that House can amend them. (In some jurisdictions the Bill is referred to a committee after the First Reading, but it is more usual for that stage to occur after Second Reading).

2.8. Second Reading

The Minister responsible for the Bill moves the second reading of the Bill. A debate follows in which the focus is on the overall aims and policy of the Bill. Amendments are not usually permitted at this stage, but legislators have a chance to be heard (often over the radio) by their constituents, and the debate can become very wide-ranging.

2.9. Committee Stage

The Bill is debated clause by clause and amendments can be moved at this stage. This might be in a committee of the whole House for a minor or uncontroversial Bill. (The Speaker removes his or her wig, if any, and the mace is removed). A major or controversial Bill will usually be referred to a select committee, either a standing committee of the House or one set up for the purpose. At this stage, interested persons may make submissions to the Committee stating objections or suggestions in relation to the Bill.

2.10. Report stage

Here the Bill, as amended during Committee Stage, is reported to the House and the Minister responsible for the Bill moves that it be read a third time. Usually, the Clerk prepares a report summarising the deliberations and providing a clause by clause statement of any amendments proposed by the Committee.

2.11. Third Reading and passing

Amendments are usually not permitted at this stage. The Minister moves that the Bill be read a third time and passed. The motion is seconded, put to the vote and passed or, possibly, rejected. If it is passed, the Clerk reads out the title of the Bill and refers to it as an Act. Note that if there is an upper House, the same process from First Reading will be repeated, and the Bill might have to go back to the lower House for the stages to be repeated on an amended version of the Bill.

2.12. Assent

The Act (or Ordinance) is sent to the Head of State (i.e. the Governor General or President) for assent. By convention the Head of State always consents to legislation and cannot refuse assent, although in some jurisdictions the Head of State is entitled to send a Bill back with queries. In an Overseas Territory assent might require referral to Her Majesty's Government in the UK. Note that in Barbados the Head of State is required to assent to legislation within 6 months of receiving it, but this does not always happen, especially if regulations are to be drafted or other arrangements for implementation have to be put in place.

2.13. Publication

It is a normal requirement for an Act or Ordinance to be published in the *Gazette*, with a legislative or calendar year and number (or a Title number if the statute book is in a digital numbering format).

As with other notices sent for Gazette, the Government Printer should not accept a Bill or Act for publication unless it is sent officially by the Clerk or the AGC with instructions to publish.

2.14. Commencement

The general rule is that an Act comes into force on the date it is published in the *Gazette*. However, if the Act so provides, it comes into force on a date fixed by order (or proclamation).

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2.15. Implementation

It is the responsibility of the sponsoring Ministry to ensure that the Act is implemented. This might require action such as –

- making subsidiary legislation;
- creating the necessary administrative machinery;
- making appointments;
- setting up of a Board, commission or other agency; and
- issuing of licences.

2.16. Contents of a Bill

In order to be able to issue drafting instructions, it is helpful for a policymaker to know the general structure of legislation.

A typical sequence of provisions in a Bill is –

- Title
- Commencement
- Interpretation (definitions)
- Authority and scope
- Purpose (not all jurisdictions have a purpose clause)
- Main provisions
- Administration
- Offences and penalties
- Rule-making power
- Miscellaneous provisions (appeals etc.)
- Repeals & savings
- Transitional provisions
- Consequential amendments (how the statute book is affected).

The short title might be a ‘catchy’ one that the Ministry has chosen for political reasons. The long title will usually be decided by the drafter, as it will need to reflect the contents of the Bill.

2.17. Additional material

In addition to the text of the Bill itself, the policymaker must be aware of other parts of the Bill that must be checked for consistency and clarity.

2.18. Schedules

These are part of the Bill and are to be interpreted and applied in the same way. They are usually used to set out material that is too detailed, complex or unwieldy for inclusion in the main body of the Bill. A Schedule might include e.g. a list of endangered species, or the institutions that are approved for certain purposes.

These items are put in a Schedule rather than in subsidiary legislation because a Schedule can usually be amended only by the legislature. Sometimes it can be amended by resolution, or by a Minister, with or without express approval of the legislature, but on the authority of the primary statute. A Schedule might have one or more Appendices, with further details on some items.

2.19. Subsidiary legislation

Sometimes the key to a legislative scheme is in regulations or other subsidiary legislation, as mentioned in the previous Chapter. Subsidiary legislation must be prepared and scrutinised with the same care as is given to the Bill itself.

2.20. Explanatory material

It is usual for a Bill to have attached to it an Explanatory Memorandum or Note (sometimes called the Objects and Reasons.) This is usually drafted by the drafter, but sometimes by the sponsoring Ministry. It can be looked at by the courts in interpreting the Bill, and therefore needs care in its drafting.

2.21. Table of contents

This will be drafted by the drafter as part of the Bill, and will follow the sequence of clauses. However, the sponsoring Ministry should take an interest in the list of contents (and thus the sequence of clauses) as it gives an instant picture of the legislation and is sometimes the only item that is read by the press or public. The policymaker should be alert to the need for a clear and logical list of contents.

2.22. Legal report

In some jurisdictions it is necessary for the Attorney General to report to the Head of State on the contents of a Bill, or for the Governor to report to the Secretary of State. These documents require care in their drafting as they should accurately reflect the contents of the Bill and set out its policy and legal implications. The sponsoring Ministry should take responsibility for them jointly with the drafter and the AGC.

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2.23. Responsibilities of Permanent Secretaries

It is the responsibility of a Permanent Secretary to assist his or her Minister in the passage of a Bill through Parliament. This may include, as agreed with the Minister –

- drafting press briefings;
- drafting second reading speeches;
- attending in the legislature during the second reading debate;
- attending meetings of a sector standing committee (if the Bill is referred to a committee); and
- instructing the drafter on the drafting of any amendments needed in the light of the second reading debate or the committee stage report.

If the amendments are substantial or controversial, they should be agreed by Cabinet before being tabled by the Minister.

Permanent Secretaries should note that the time needed for passage of a Bill through the legislature includes –

- time for a committee to consider and report on the Bill. This will usually be the following meeting but may be a later one;
- time for the upper House to debate the Bill after it has passed the lower House. In some cases, this might involve a considerable delay; and
- obtaining the assent of the Head of State and publishing the Bill. This can only happen when all amendments to the Bill during its passage have been incorporated and may take several weeks.

CHAPTER 3

THE ROLE OF THE LEGISLATIVE DRAFTER

For a legislative proposal to be introduced into the legislature it needs to be converted into legislative language in the form of a Bill. This is the task of the legislative drafter, who must devise a legislative scheme that will give effect to the proposal and communicate it to a diverse group of statute users. It is therefore important for government departments and policymakers and instructing officers to fully understand the role of the drafter, who is often the ‘hidden face’ of the legislative process.

The drafter is an integral part of the government system and the post has various names e.g. Parliamentary Counsel, Legislative Drafter, Legislative Counsel. In some jurisdictions the drafting office is a separate and independent office, but in others it comes under the Attorney General, the Prime Minister or Ministry of Justice.

3.1. Functions of the drafter

The drafter should be prepared to do all or any of the following –

- Advise on the structure and title of a Bill. However, if the sponsoring Ministry has a policy reference in relation to these matters, it should be stated in the drafting instructions and the drafter should take account of it.
- Consider the “legislative package” i.e. the need for possible amendments to existing laws, repeal of laws, consolidating with other laws, etc. Legislative proposals often involve a mix of new law, amendments to existing law, and the repeal of law. The form of the legislative package should be considered in collaboration with the instructing Ministry.
- Consider the distribution of provisions between the proposed Act or Ordinance and subsidiary legislation. If subsidiary legislation is required, the drafter should advise the Ministry of the need for drafting instructions on it, the drafting resources available and the time needed to draft it.
- Maintain an orderly statute book. This includes maintaining a consistently modern style of drafting; avoiding unnecessary renumbering; using the Interpretation Act appropriately; making appropriate consequential amendments; avoiding conflicts between one Act and another; making proper use of any statute governing legislation, such as law revision.

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- Ask questions. A proposed law can be tested in many ways but one of the most valuable is by asking “What if?” Instructing Ministries should expect pertinent questions, which might well point out flaws and improve the legislative scheme.
- Raise issues of legal principle. Constitutional requirements, human rights issues etc. might arise in the drafting of a Bill. For example –
 - the Constitution might require independent institutions and commissions to have a proportion of women members, and the drafter needs to be alert to this requirement; and
 - a legislative proposal might offend fundamental principles of fairness e.g. making the law retroactive, powers of entry, search, and seizure, interference with individual rights, expropriation without compensation, etc.

If Ministries are aware of the need to consider such issues, they are more likely to be cleared up early in the drafting process. If they cannot be satisfactorily resolved with the Ministry concerned, the drafter should raise such issues at a political or other level.

- Refer unusual offence or penalty provisions to the AGC for comment. This would include e.g. double jeopardy provisions, retrospective provisions, provisions putting the burden of proof on the defendant, etc.
- Alert the instructing office to the need for repeals, savings provisions, transitional provisions, and consequential amendments to other laws. These matters are often overlooked and can take up as much time as the main body of the Bill.
- Identify possible implementation problems, e.g. financial and other resource implications. If a drafter sees significant financial implications for a Bill, the matter should be referred to finance officials. If the Bill is likely to have a significant impact on staffing, or the court system, the appropriate Ministry officials should be alerted.
- Draw attention to significant policy changes made to the instructions. It is common for instructions to change during the drafting process. If the change in policy is significant, approval may be required from the Minister, the Cabinet or a Cabinet committee.

The Role of the Legislative Drafter

- Ensure that the draft reflects the government's policy aims and intentions, that it does not contain ambiguities or lend itself to different interpretations, and that it will be clearly understood by the audience for whom it is intended.

The drafter will therefore need to –

- receive and review instructions from the instructing Ministry;
- raise any issues with the instructing Ministry that arise out of the instructions;
- seek further clarification of matters that are not clear, or identify gaps;
- advise, if necessary, on matters of policy that may not comply with constitutional or legal principles;
- produce drafts that are clearly drafted and that give effect to the policy intent;
- devise solutions to problems that arise during the drafting process; and
- assist in resolving conflicts between Ministries over the policy or provisions in a draft.

The drafter should liaise closely with the Government Printer about the publication of *Gazette* notices.

3.2. Continuing role of the drafter

The drafter's role does not end with the preparation of the draft, but continues in a number of ways. These might include –

- attending press briefings if required (but not as the main spokesperson for the department);
- attending at select committees and advising the legislature during the Committee Stage deliberations;
- drafting any amendments to the Bill needed at committee stage;
- ensuring that the assent copies of enactments passed by the legislature are accurate;
- preparing the Legal Report (if required) for submission to the Head of State to certify the constitutionality etc. of the law;
- drafting a commencement notice;
- advising on legislative implementation of the Act or Ordinance; and
- drafting any subsidiary legislation that is required.

The drafter should be given the opportunity to draft any amendments that are required as a result of the Second Reading debate or the Committee Stage in the legislature. During the course of the debate in the legislature, it may become

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apparent that some revision of the Bill will be appropriate before it is enacted. If amendments are to be proposed by the Minister in charge of the Bill, they should be drafted by the drafter, as consequential amendments to the Bill or to other Acts may be required.

3.3. Institutional framework

Drafting resources of a government are best organised as a single government unit which can develop the specialised legislative drafting competence required. In some jurisdictions, drafters are assigned to subject ministries so they can develop expert knowledge in the subject matter.

Common standards and uniform practices for preparing and drafting are most effectively achieved through the provision of a single set of directives, which have behind them the authority of the government and, as needed, the legislature. Ideally, all the directives concerned with legislative preparation should be collated into a single source (e.g. a Legislative Handbook) that is known and used by everyone involved in preparing legislation.

3.4. Role of the Drafting Office

In some CARICOM Member States, there is only one drafter, and the functions of the drafting office fall on that person. In larger jurisdictions, there are usually several drafters, with support staff and administrative support. References in this Manual to a drafter include the Drafting Office where appropriate, but the division of responsibility between an individual drafter and the Drafting Office or its head are not spelled out as they are matters for local and internal decision.

Where there is a Drafting Office, it is usually expected to –

- advise on statute law revision and codification;
- maintain adequate personnel resources for the drafting programme;
- advise on the practicality of the government's legislative timetable;
- maintain consistency of legislative style among its members;
- train instructing officers in the legislative process and the issuing of drafting instructions.

The Drafting Office should ensure that conflicting legislative proposals are not initiated and should notify other Ministries of legislative proposals that may affect laws under their administration. This is to avoid conflict if one Ministry objects to the proposals or if there might be consequential amendments to consider.

3.5. Role of the instructing officer

Effective legislation requires a partnership between the drafter and the instructing officer. Providing comprehensive instructions and understanding the roles and responsibilities of the drafter in advance of a drafting project mean that it is more likely the project will proceed smoothly.

The instructing officer should therefore –

- provide adequate and clear drafting instructions;
- have in mind a clear legislative timetable;
- understand the continuing role of the drafter after introduction of a Bill; and
- be able to work with those whose task it is to draft legislation.

When a draft of a Bill or item of subsidiary legislation is sent to the instructing officer, he or she should –

- ensure that the drafting instructions are correctly reflected;
- check references to sections, subsections, regulations and other laws;
- check for consistency of language;
- consult other Ministries affected by the legislation;
- send written comments to the drafter;
- if necessary convene a meeting with the drafter and others concerned.

The instructing Ministry must be satisfied that the draft meets the policy objective and should comment on issues of precision, consistency and clarity, as well as ensuring the draft meets their policy objective.

3.6. Relationship between instructing officer and drafter

The instructing officer and the legislative drafter are both key players in the drafting process. The time required to draft, and the quality of the drafting, depend on the quality of the drafting instructions and the communication skills of the instructing officer. On the other hand, there might be legislative and implementation issues that the instructing officer has not considered, that the drafter identifies in the drafting process and that must be thought through more fully.

The relationship between the drafter and an instructing officer is in some ways similar to that of a barrister and a solicitor. The drafter provides advice and drafting services in a professional and impartial manner. The drafter not only converts the instructions into legislative language but if necessary guides the

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instructing officer in identifying and exposing weaknesses in a policy or its implementation or the proposed legislative scheme generally.

The drafter provides a specialist form of legal service i.e. the preparation of legislation, but also has a greater role to play. The drafter is an advisor to the Government in its legislative role and should advise on proposals for legislation as well as the interpretation of statutes. The drafter therefore needs to work with the client department to ensure that, so far as possible, legislation is based on sound constitutional and legal principles, achieves the policy aim and is capable of being implemented and enforced.

The drafter is not concerned with policy formulation, but as the person who is probably the most conversant with the statute book, is able to identify legislative gaps which influence policy formulation. The drafter should bring these gaps to the attention of the instructing Ministry. In fact, the drafter is the policymaker's best friend during the exercise of turning policy into law!

Sound legislation is the product of collaboration between a skilled drafter and knowledgeable instructing officers. Sometimes instructing officers are reluctant to criticise drafts in the mistaken belief that the legal text is up to the drafter, and not of real concern to them. Or, they might have difficulty seeing the effects of drafts: they see the words but not the deficiencies or ramifications. It is therefore important that the instructing officer is able not only to prepare instructions and answer questions, but to view drafts with a critical eye to see that they do what is wanted.

The respective roles of the instructing department and the drafter can be summarised as follow –

- The instructing Ministry develops a policy involving a legislative proposal: the drafter comments on the proposal from the point of view of its legislative appropriateness and practicability.
- The instructing Ministry bids for or obtains a slot in the legislative timetable and sets a target date for commencement: the drafter says whether the proposed timetable is realistic.
- The instructing Ministry prepares a Cabinet submission seeking approval for the drafting to commence: the drafter might be asked to comment on the memo and to advise on its legal implications.

The Role of the Legislative Drafter

- The instructing Ministry prepares drafting instructions: the drafter expresses the policy in legislative language as clearly as possible on the basis of the instructions. If the drafter does not understand any aspect of the instructions he or she asks for clarification.
- The instructing Ministry checks drafts as sent by the drafter for internal consistency and for articulation of the policy. It also checks the drafts for ease of comprehension and presentation to the public, and for practicality of implementation.
- The instructing Ministry consults internally and externally on the drafts and reports the result of the consultations to the drafter: the drafter might attend the consultations at the request of the department, but would not normally answer queries.
- The drafter amends the drafts in accordance with further instructions.
- The instructing Ministry ensures that the draft once agreed goes to Cabinet in sufficient time for it to be introduced into the legislature in accordance with the timetable.
- The drafter writes the explanatory material and advises on the Cabinet submission as required.
- The instructing Ministry watches the progress of the Bill through the legislature and liaises with the drafter on any resulting amendments.
- The drafter might be invited to attend the Second Reading or Committee Stage on the Bill, but would not normally be expected to speak in committee.
- The instructing Ministry ensures that the Bill, once passed, goes for assent to the Head of State, with any necessary report: the drafter advises on any report if it involves explanation of amendments etc.
- The instructing Ministry ensures that the Act or Ordinance is published in the Gazette and other media: the drafter drafts a commencement notice.

3.7. Time needed for drafting

One of the issues that can sour the relationship between a drafter and an instructing Ministry is the time taken to prepare and draft and respond to

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comments. The drafter is of course expected to start work on a draft as soon as reasonably practicable once drafting instructions are received, and to respond to comments speedily. However, there are considerations that affect the speed at which the drafter can work, and these need to be understood by the instructing officer.

Cabinet Submissions

CHAPTER 4

CABINET SUBMISSIONS

Cabinet approval is usually required whenever a major policy initiative is contemplated, or any other matter of political significance is proposed.

The main functions of the Cabinet Office are:

- bringing together issues which relate to the Government's strategy and presenting them to the Ministers via the Prime Minister for collective decision;
- providing logistical support to Cabinet and Cabinet Committees to ensure that the business of Government is conducted in a timely and efficient manner;
- providing policy support to Cabinet and Cabinet Committees to ensure that proper collective consideration takes place before policy decisions are taken;
- taking lead responsibility for determining the size, structure and functioning of the Civil Service; and
- developing and supporting the modernisation of Government which includes identifying and prioritising key reform issues and evaluating the overall performance of government.

Cabinet approval is obtained by way of a Cabinet submission made by the Ministry seeking such approval.

In particular, a Cabinet submission is usually required –

- when there is a need for new or amending legislation;
- if it is proposed to enter into new international obligations;
- if a matter will have a significant impact on public or private sector employment, finances, welfare, etc.;
- if a matter is likely to impact on a particular group or have political implications;
- for appropriations from the Consolidated Fund and estimates of expenditure;
- for appointments to boards of statutory corporations; and
- if public property is being acquired or divested.

Assuming that legislation is the preferred option for achieving a policy initiative, it is the responsibility of a Permanent Secretary –

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- to decide, in conjunction with the Minister, what legislation to bring forward;
- to provide drafting instructions for the person who is to draft the legislation;
- to ensure the draft legislation meets the policy requirements of the Ministry;
- to arrange for consultation on the draft legislation with private and public bodies as appropriate;
- to assist the Minister in steering the draft legislation through the legislative process; and
- to oversee the implementation of the legislation once it is passed.

The Cabinet needs to be involved in all these steps and for this purpose there are two types of Cabinet submissions that need to be prepared –

- a submission seeking approval in principle for the policy position and issue of drafting instructions to the Chief Parliamentary Counsel; and
- a submission with the draft Bill attached seeking approval of the introduction of the draft Bill into the legislature.

The first of these is called in this Chapter Cabinet Submission 1; the second is Cabinet Submission 2. In some countries the submission of the draft Bill is made by a Legislation Committee. (*See Appendixes 1 and 2*)

It might also be necessary for the Cabinet to be involved at the Committee Stage of the Bill, if significant amendments are proposed which affect the policy of the Bill.

Cabinet papers, being confidential documents, should generally not be shared with persons or agencies outside the government. It is, however, sometimes necessary for the government to consult outside the government once a Cabinet paper has been drafted. What can appropriately be shared with outside agencies will be determined by the subject matter of the proposals.

The Cabinet is usually less involved in the making of subsidiary legislation. Subsidiary legislation might be included as a package with the first submission; or submitted separately by the Minister after the Bill has been enacted. Generally, the need for a Cabinet paper does not apply to subsidiary legislation unless it raises particularly difficult or sensitive issues. It is usually the Minister and department responsible to decide whether to raise a Cabinet paper on an item of subsidiary legislation.

Cabinet Submissions

4.1. Cabinet approval of drafting: Cabinet Submission 1 (See Appendix 1)

The general rule is that drafting should not take place until Cabinet approval has been given for it. This is because an item drafted without Cabinet approval may be subsequently rejected by Cabinet or may need extensive amendment during the drafting and legislative process. This wastes time and effort on the part of the drafter and uses up drafting resources.

In the case of a simple or urgent Bill, drafting instructions can sometimes be issued without obtaining approval in principle from Cabinet. The practice will vary among jurisdictions and advice should be sought from the AGC on this possibility.

As already indicated, Cabinet approval is usually obtained by way of a Cabinet Submission (by whatever name called) submitted by the relevant Minister. This is Cabinet Submission 1 which –

- forms the basis for the preparation of drafting instructions;
- informs the Cabinet of the action which the instructing Ministry proposes to take regarding a particular matter;
- prompts Cabinet to examine the proposal and express an opinion on it.

Except for legislation which falls within the responsibility of the AGC, it is the responsibility of the Ministry wishing to put in place new legislation or amend existing legislation for which it is responsible, to write and circulate its own Cabinet Submission 1.

4.2. Before presenting Cabinet Submission 1 to Cabinet

The Ministry will usually circulate a draft of its Cabinet Submission 1 to other Ministries and to the AGC for comments before finalising the memo and presenting it to Cabinet for approval.

Before a Cabinet Submission 1 is issued, the legislative and timetable aspects of the scheme should be cleared or commented on by the drafter. If there is any legal question to be resolved before drafting instructions are issued it should be taken up with the AGC at an early stage. Questions on a legislative scheme or legislative procedure should also be directed to the AGC in the first instance.

The Cabinet Submission 1 is in fact a miniature version of the drafting instructions, and should alert the Cabinet to the key policy and legal issues of the proposal.

4.3. Contents of Cabinet Submission 1

The policy matters that have to be considered by the policymaker before making a submission to Cabinet are essentially the same as those that apply to the issuing of drafting instructions. The Cabinet Memo 1 will not usually need to be as detailed as the drafting instructions, but must give the Cabinet a full picture of what is proposed.

The Cabinet Memo 1 should therefore state –

- the purpose of the proposed legislation, i.e. the problem to be dealt with and the proposed legislative solution;
- alternative courses of action and the reasons for rejecting them;
- the factual and political background;
- any constitutional or human rights or community relations implications;
- any international or regional obligations of the State that will be affected;
- the financial and staffing and other administrative implications;
- any unusual legal implications such as a reverse burden of proof, etc.;
- what consequential amendments, if any, will be needed to other legislation;
- the proposed timetable: this timetable should have been first agreed with the drafter. It should ask Cabinet to agree on –
 - o the meeting of the legislature at which the Bill is to be introduced;
 - o a proposed date for commencement of the resulting Act or Ordinance.
- how the legislation is to be implemented;
- what legal advice has been received on the proposal (including any advice from the drafter);
- what consultation is intended, both in and outside Government, on the proposed legislation.

4.3.1. Presentation of Cabinet Submission 1

Each CARICOM jurisdiction has its own internal rules about submissions to Cabinet, which must be followed, but it is common for a Cabinet Submission 1 to –

- be in writing and in a format that facilitates proper consideration;
- be based on agreed facts on which discussions can proceed;
- show evidence that consultations were held with all relevant Ministries and agencies;
- indicate realistic policy options and their implications;

Cabinet Submissions

- cite previous Cabinet decisions;
- ensure that recommendations are clear;
- be self-contained and cover all major issues on which decisions are to be made;
- be treated as confidential; and
- be limited to a length specified in the rules.

4.4. Approval of introduction of a draft Bill: Cabinet Submission 2

Once a Bill has been drafted, it must go to Cabinet for approval of its introduction. A Bill should only go to Cabinet for approval if it has been drafted (or vetted) and cleared by the drafter, or head of the Drafting Office if that is a different person. The approval should be sought in another Cabinet submission i.e. Cabinet Submission 2 (so there will usually be two submissions to Cabinet.) This should explain the purpose of the Bill, set out the financial implications, the staffing implications, any human rights implications and any international law implications of the Bill.

A Cabinet Submission 2 seeking approval for introduction of a Bill should draw the attention of the Cabinet to the commencement provision and its implications for the administration. It should be in a similar format to a Cabinet Submission 1 and is subject to the same rules about confidentiality, etc.

4.5. Subsidiary legislation

Subsidiary legislation does not always require the approval of the Cabinet, but the principle of collective responsibility means that a Minister proposing to make subsidiary legislation will normally take a submission to Cabinet. If an item of subsidiary legislation imposes a fee or a charge, the usual rule is that it should be submitted for Cabinet approval. The submission will be different from Cabinet Submission 1 or 2 described in this Chapter, but the rules about format etc. will be the same.

4.6. The Cabinet directive

Once Cabinet has approved the proposals presented by a Ministry, it will issue a written directive or other notice.

In the case of Cabinet Submission 1, the decision will authorise the issuing of drafting instructions and the drafting of the proposed legislation, or not so authorise. If authority is given, the drafting instructions can then be issued and drafting can commence.

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In the case of Cabinet Submission 2, the decision will authorise the introduction of a Bill into the legislature, or not so authorise.

Ensuring that Cabinet decisions are implemented is not the task of the drafter but of the Cabinet Office and each Ministry or department.

CHAPTER 5

POLICY CONSIDERATIONS

This Chapter seeks to indicate some of the considerations which should inform the making of policy, seen from the point of view of the drafter. It looks at some of the issues that the drafter will have in mind when drafting a law so that it will stand up to scrutiny by the courts and by the international community. The policy in question is policy that is intended to be expressed in legislation. The Chapter does not purport to be an exhaustive statement about policymaking generally either for political parties or for governments.

5.1. Policymaker's role

When considering the introduction of new or amending legislation, the policymaker (that is to say, the Minister and head of a department and other officials working as a team) should keep several considerations in mind, as well as the main policy aim. The same considerations apply –

- whether writing a Cabinet Submission 1 or issuing drafting instructions;
- to both primary legislation and subsidiary legislation.

The policymaker must ensure that effective drafting instructions are issued by the instructing officer. That officer must have sufficient understanding, and full authority, to give instructions that will enable the drafter to draft legislation that reflects the policy intention. The policymaker and the instructing officer (if different) both need to understand –

- what legislation is, and how it differs from other forms of writing;
- the relationship between policy and law;
- principles of good policy making;
- the role of the drafter;
- what policy and legal issues the drafter will be concerned with;
- the stages of the legislative process.

Both officers should be familiar with the procedural rules of the legislature, any Cabinet instructions on preparation of Cabinet submissions, public service regulations and financial regulations. They should also be familiar with –

- the Constitution;
- the Interpretation Act;
- the Statute Law Act if any;
- the Law Revision Act if any;

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- the procedures for Gazettal of notices;
- basic legislative principles;
- current legislative style and practices in the jurisdiction.

In addition, an instructing officer must be –

- able to explain the aims and policy of a legislative proposal to the drafter;
- familiar with the political and administrative considerations and the legislative context of the proposal;
- able to make decisions on issues arising during drafting;
- in a constant dialogue with the drafter.

5.2. Statutory interpretation

Ideally, the instructing officer should know something of the rules of statutory interpretation in order to understand the draft, to be able to check its implications, to understand how it relates to the policy goal, and to be able to criticise it knowledgeably.

There are a number of so-called ‘rules’ of interpretation, but in essence they mean that the courts must give meaning and effect to a statute if they can; they must look at the words of the text as the primary source of the meaning; but they can look to the purpose or ‘mischief’ to assist in understanding what the law is saying. This last point is significant in relation to explanatory material, which is the responsibility of the instructing department.

There are presumptions that –

- the law is not intended to produce an absurd result;
- the law is not meant to have retrospective effect;
- the law is meant to be consistent with human rights and international law;
- and
- the burden of proving any allegation will be on the person putting forward the allegation.

These presumptions, except the first, can however be displaced by explicit words in the statute.

There is also a principle of interpretation that tax laws and criminal offences will be strictly construed.

Some of these presumptions and principles are in fact contained in the Constitutions of most jurisdictions, as discussed below.

5.3. The formulation of policy

As legislation is the result of policy being translated into legislative form, before any legislation can be drafted, the underlying policy must be determined. The formulation of policy in government takes place in Ministries according to their portfolio responsibilities.

The steps in the formulation of policy are usually as follows –

- identify the problem or issue;
- decide the goals and objectives of the policy;
- analyse the options available to the government;
- consult interested persons and bodies ('stakeholders') both within and outside government;
- recommend which option will most effectively achieve the goals and objectives; and
- set out how the policy is to be implemented, monitored and evaluated.

At the policy development stage, ideas are usually expressed in very general terms. This general expression of ideas will not, however, suffice for the purpose of giving adequate drafting instructions later on. A sufficient amount of detail in the policy to facilitate the eventual preparation of adequate drafting instructions is essential.

Practical problems can arise if sufficient detail is lacking in the policy, for example –

- delays could arise during the drafting process as a result of unresolved policy issues while the drafter seeks clarification from the instructing Ministry;
- an additional Cabinet Submission might be required to deal with issues that were not covered in the original Submission 1 seeking approval of the issue of drafting instructions; and
- more amendments might be needed to the Bill in Committee Stage than would otherwise be needed.

In formulating legislative policy, a policymaker must consider some fundamental administrative and legislative principles, as discussed below.

5.4. Resources/implementation

The instructing Ministry will need to consider how the legislation will be implemented i.e. the administrative arrangements to make it work. They will need to consider –

- whether the Ministry has the capacity to implement the proposed legislation;
- whether finance will be available to implement the legislative scheme; and
- whether staffing resources within government will be available.

The Ministry will also need to consider –

- the likely effect of the proposal on the financial and staffing resources of other Ministries, and of private business; and
- the likely long-term effects of the proposed legislation on the economy generally, and on the moral fabric of the society, etc.

5.5. General policy issues

The policymaker must consider –

- the effect of the proposal on existing laws such as financial legislation;
- who is to be affected or bound; whether they include, for example corporate bodies;
- the needs of indigenous persons;
- the appropriateness of the proposed legislation in terms of the local culture; and
- the need for consultations both within and outside government.

The policymaker must also have regard to any constraints imposed by –

- the Constitution, which is the supreme law of the land;
- international obligations on human rights, the environment, etc., accepted by the State;
- customary international law;
- rules of interpretation (as discussed above); and
- existing legislation.

There is no obligation for policymakers to consider regional or foreign laws as such. However, especially in the area of trade, it may be of some benefit if policymakers are aware, for example, of foreign sanitary measures or product standards for goods that are to be exported. This is of particular relevance for

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CARICOM or ACP countries which enjoy preferential treatment of goods exported to the European Union.

There is also an obligation on CARICOM Member States to promote the harmonisation agenda of the Community and ensure the implementation of the CSME.

5.6. Constitutionality of proposal generally

In addition to the presumptions and principles mentioned above, the policymaker must be aware of any specific requirements or limitations imposed on legislation by the Constitution. One example might be a requirement for independent institutions and commissions to have a proportion of women members.

Most constitutions state some principles about legislation, such as that –

- as a general rule, strict liability offences should not be created;
- legislation should not be retrospective unless benefits are being conferred;
- legislation should not be extra-territorial, especially if international comity does not allow for it;
- there should be no deprivation of rights without compensation; and
- there should be no ‘double jeopardy’ i.e. a person should not be punished twice for the same offence or breach.

5.7. Good governance

An obligation on all policymakers is to promote principles of good governance. This is especially the case in developing countries which depend to any extent on overseas aid, as ‘good governance’ is usually part of the aid agenda, whether the donors are governments or NGOs. The elements of good governance can be summarised as natural justice, transparency and accountability, and the rule of law generally.

5.7.1. Natural justice

The common law has long incorporated requirements of ‘natural justice’, namely –

- hearing the other side (or giving each party an opportunity to be heard);
- being impartial in decision-making; and
- any deprivation of rights being proportionate to the intended result.

5.7.2. Transparency

This means that –

- decision-making should be an open and informed process;
- the results should be publicly available; and
- opportunities for corruption should be kept to a minimum.

5.7.3. Accountability

This means that –

- reasons for decisions should be given;
- decisions should be in writing;
- there should be a channel of appeal against executive decisions; and
- there should be a reporting requirement for the work of the relevant office.

5.7.4. Rule of law

This means that –

- the opportunity for arbitrary exercise of power should be removed or reduced;
- the right of the courts to rule on the exercise of executive powers should not be removed; and
- powers of search, entry and arrest should be strictly controlled.

If, for instance, the legislation contemplated is for a scheme which involves a licensing process, the legislation should –

- not involve a prohibitive fee for the application or the licence;
- not impose the licensing obligation before the law comes into force;
- not include a wide exempting power;
- not include a strict liability offence for failing to have a licence;
- not include a provision ousting the jurisdiction of the courts to decide on the legality of the decision;
- include a requirement for technical and public inputs into the decision-making process;
- include an opportunity for the applicant to support the application;
- include an administrative appeal mechanism, with an opportunity for the applicant to be heard; and

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- require the relevant official to report on the number of licences, issued, revoked, etc.

Similar considerations would arise in, for example, a registration scheme, and whatever the legislation, the principles of good governance should be observed.

5.8. Powers

The policymaker must decide who, in relation to a legislative scheme, is to be given what functions. For example –

- Is the level of decision-making to be the Minister, the Permanent Secretary or the Head of a department?
- What is to be the role of the Cabinet/Legislature/Head of State in the scheme?
- Should the functions be those of a government department or of a separate body?
- If a separate body, should it be a statutory corporation or just a statutory body?
- Should any of the powers be delegated?
- Should there be a power to issue directions about the working of the scheme?
- Should there be an exempting power?
- What reporting obligations should there be?

Sanctions and penalties

The legislative scheme should not be overloaded with proposals for provisions that can be dealt with administratively. The purpose of legislation is to make rules which require compliance, not to set out every administrative detail or to give illustrations.

If the proposed legislation will prohibit an activity, the policymaker must decide what sanction to propose e.g. by creating an offence, providing for cancellation of a licence, or for civil recovery etc.

If criminal offences are to be created, the policymaker should have a view on the relative gravity of the respective offences in relation to each other and in relation to similar offences in other laws. A decision is therefore needed on the level of penalty to propose. Usually, the final decision on maximum penalties will be made by the Attorney-General in order to achieve consistency. (In the case of a Bill, of course, the final decision rests with the legislature.)

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The policymaker should consider the various types of penalty available. These might include –

- fines and/or imprisonment;
- destruction of items;
- forfeiture/confiscation of assets;
- alternative sanctions - community service etc.;
- restitution/compensation; and
- customary sanctions.

The policymaker should consult the AGC, the police and the judiciary on these matters before issuing a Cabinet submission 1 or drafting instructions.

5.9. Adjudication

If the proposal involves any decision of an administrative character, the question whether the decision is to be reviewable, and if so, by whom, must be addressed. In the case of administrative appeals, it might be sufficient to provide for an appeal to the Permanent Secretary or the Minister, with rights of appearing, etc. Usually, it is preferable to provide for an appeal to an impartial tribunal, which might be a standing body, or might be set up *ad hoc* to hear individual cases.

In some legislative schemes it might be appropriate to provide for administrative penalties, which are imposed by technical officers. Care must be taken, however, to ensure that such mechanisms do not provide opportunities for corruption and that they provide a right to be heard and a right of appeal. The penalties must also be proportionate to the contravention.

Whatever a scheme is established, it should not displace the role of the courts to review the administrative decision.

If the scheme might confer on the courts a new form of jurisdiction, i.e. involve them in a different capacity from normal, the Chief Justice or rules committee should be given the power to make rules of court on the topic.

5.10. Other issues

Other issues that the policymaker needs to consider before writing Cabinet Submission 1 or sending drafting instructions include –

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- The scope and application of the legislation e.g. who it is to apply to, whether it is to bind the State or Crown, whether it should be extraterritorial, etc.
- Local appropriateness of the legislation i.e. whether it should adopt special rules of customary or religious law; the role of village/district/councils, etc.; whether it has environmental and gender implications.
- The method of service of documents; whether to include electronic service, etc.
- Publication of decisions and other notices – whether they should be in the *Gazette*, or in more accessible media such as press, TV and radio; whether they should be notified in district offices etc.
- Retrospective legislation. Generally speaking, new laws should not be given retrospective operation. If this is desired, the advice of the AGC should be obtained beforehand and the Cabinet Submission 1 and drafting instructions should state the justification.
- Need for consultation with any advisory body before decisions are made.

5.11. Other legislative policy matters

In the Cabinet Submission 1 seeking approval for the drafting of a Bill, and in the drafting instructions in due course, certain other legislative matters must be considered and dealt with by the policymaker. They include -

- The implications of the legislation on existing law. This is usually dealt with in what are known as the ‘final clauses’ or provisions. They are –
 - repeals of existing statutes or regulations, etc.;
 - savings of some of the provisions of existing laws;
 - transitional provisions to preserve existing rights and allow for the law to be smoothly implemented; and
 - consequential amendments to other legislation, either merely nomenclature, if a new body is created, or more substantive.
- Whether material should be included in the main body of the Bill or in one or more appended Schedules.

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- Whether material should be in the main Bill or in regulations, rules or orders made under it, and whether, for example, codes of practice or similar items are required.

5.12. Timetable

The Cabinet Submission 1 and drafting instructions should always indicate the proposed timetable for the drafting of the legislation and the target date for it to come into force. Cabinet should be made aware of how long it is likely to take for the drafting to be done, and for the legislative process to be completed. These matters should also be clearly set out in the drafting instructions.

PREPARATION OF DRAFTING INSTRUCTIONS

CHAPTER 6

DRAFTING INSTRUCTIONS: GENERAL

Legislative drafters draft Bills and statutory instruments (subsidiary legislation) in response to the requirements of a Government Ministry

6.1. Need for drafting instructions

Some Bills might be simple and in standard form and can be drafted quite speedily. Others might involve major new legislation and take months or even years to draft. Whatever the nature of the legislation, the drafting of it can only be effectively done on the basis of written instructions from the government Ministry with policy responsibility for the subject.

The time required to draft and the quality of the drafting both depend on the quality of the drafting instructions. They tell the drafter what is to be achieved by legislation and how the legislation is to achieve it. When a Ministry's aims are well stated, the drafter's task is easier; when the aims are unclear, or incomplete, those inadequacies are reflected in the drafting.

Drafting instructions describe and limit the content of the proposed legislation and also serve as a benchmark to determine whether the Bill to be drafted does what was authorised by Cabinet. Properly prepared drafting instructions –

- assist the drafter to understand what is required in the draft legislation;
- achieve speedier production of a first draft;
- reduce the number of drafts needed and thus save drafting time;
- reduce the number of issues needing to be resolved during the drafting process;
- minimise the number of meetings needed to clarify ambiguities; and
- reduce possible tension between the Minister, the Permanent Secretary and the drafter caused by misunderstandings as to what is required.

The drafter needs to know what the present state of the law is, what the law is to be, and why. Thinking these points through, writing them down, and discussing them help sharpen the issues from different points of view and often help create new ideas for better legislative solutions.

Once authority has been given for legislation to be initiated, therefore, the policymaker, or an instructing officer in the Ministry, needs to issue instructions to the drafter to draft the necessary legislation. The purpose of the following two

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Chapters is to indicate the topics that should be covered in such instructions and the form they should take.

6.2. The role of the instructing Ministry

Few undertakings for a government Ministry are more challenging than preparing legislative drafting instructions and shepherding a large Bill or complex regulations through the legislative process. Most government Ministries engage in a major regulatory project only once a decade or so. Departmental officers are unlikely to be involved in a significant legislative drafting project more than once or twice in their professional careers. Even if they are, they may be in a different position with new responsibilities.

Political issues add to the practical difficulties of researching and designing a regulatory scheme. Short time frames, limited resources, inadequately planned legislative programs, and policy changes in the middle of a project all tend to be the norm, adding to the complexities and challenges of a legislative drafting project.

For these reasons, any significant legislative proposal should have a strategic plan for the project, and an officer assigned to it full-time, with sufficient dedicated resources.

The issues requiring consideration include the following –

- whether any of the proposed provisions constitute unnecessary repetitions of provisions in Acts of general application such as the Interpretation Act;
- whether the proposed provisions vary from those in an existing Act of general application, and whether there is a good reason for the decision to depart from the latter. Conflicting provisions must then be identified and properly dealt with;
- whether the proposed legislation deals with matters that are also dealt with by another Bill that is being drafted or which has been introduced into the legislature. If so, the relevant Ministry should be consulted about the overlap; and
- whether the proposed legislation is intended to respond to a court decision, legal opinion or international convention the Member State is party to. If so, the instructing Ministry should supply a copy of the court decision, etc. to the drafter.

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The instructing Ministry should be aware that preparing draft legislation is an interactive and collaborative process and should at an early stage give the drafter the contact particulars of the officer with direct responsibility for the legislation. It is also a good idea for an instructing officer, before preparing drafting instructions, to have a meeting with the drafter to establish a relationship, find out anything the drafter needs to know and be guided by the drafter's advice.

The instructing Ministry should also be prepared to be consulted from time to time by the drafter for information and clarification on the instructions.

6.3. Supplementary instructions

If consultations with the drafter result in a change of policy on the Bill or other item, the instructing Ministry might have to consult other Ministries, and even refer the matter back to the Cabinet for approval. Once approval for the change is given, formal amended drafting instructions should be issued.

Once the drafter has completed the final draft of the legislation requested, and the instructing Ministry is satisfied that its instructions have been adequately reflected in the draft, the Ministry should seek the approval of Cabinet to introduce the Bill into the legislature, by way of Cabinet Submission 2. (*See Chapter 4*) Any amendments made to the Bill in Cabinet should be communicated in writing to the drafter by the instructing Ministry. This will usually be treated as instructions to amend the draft Bill.

If, during the Committee Stage of the Bill, amendments are made to the Bill, the instructing Ministry should send written instructions to the drafter to draft the amendments. It is then the responsibility of the Ministry to ensure that the amendments are incorporated in the Bill before it goes for assent.

Once the drafter has started work on an item, any further instructions sought by him or her should be supplied without delay. These supplementary instructions should also be in writing.

CHAPTER 7

DRAFTING INSTRUCTIONS: CONTENTS

The drafting instructions should cover all aspects of the scheme from the big picture to matters of relatively minor detail. They should tell the drafter what is to be achieved by legislation and how the legislation is to achieve it.

In addition, instructions should identify, at least in general terms, rules or objectives that are proposed to be implemented using subordinate legislation. This allows the drafter to bring to the instructing officer's attention at an early stage any possible concerns about the proposed split of matters between the statute and subordinate legislation under it.

7.1. General principles

The drafting instructions should –

- be consistent with the instructions for related legislative proposals; and
- be expressed in simple, non-technical language.

The instructions should set out –

- the problem to be addressed or the object to be achieved by the legislation, i.e. what the Ministry wishes to happen (the desired outcome);
- why it cannot happen without legislation (the mischief);
- how the Ministry thinks the law should be changed in order for it to happen (the remedy);
- whether Cabinet has already considered the matter;
- the existing law on the subject;
- any legal issues that need to be taken into account;
- how the legislation will be implemented;
- what consultation has taken place inside and outside Government and the outcome of that consultation;
- proposals for further consultation; and
- the target date for the enactment of the Bill or the making of the regulations and for implementation of the scheme.

The instructions should set out in relation to each main feature of a Bill exactly what the drafter is required to achieve. They should therefore –

- indicate any administrative provisions considered necessary to give effect to the proposal;

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- if the proposal would result in some activity being prohibited or regulated, indicate the sanction proposed for the enforcement of the provision;
- suggest the penalties to be imposed for any offence arising under the provision;
- indicate existing legislation that will require amendment or consideration to give effect to the proposal;
- indicate any transitional or saving provision required to be included in the law;
- state whether any provisions of the law are to have a retroactive or retrospective effect;
- in the case of instructions for amending legislation, indicate the provisions of the principal legislation which the Ministry considers should be amended to give effect to the proposal;
- if the Ministry has a view on either the form or position of the legislative provision in the statute book, give particulars;
- provide references to any decided cases or copies of any legal opinions available to the Ministry that might affect the proposal;
- provide any model legislation or precedent the Ministry wishes to adopt and indicate how it should be adapted;
- state any specific regulation-making powers that might be required; and
- provide copies of reports, etc., or if the reports are not readily available, references to reports that deal with the proposal.

7.2. Detailed contents

It is not the responsibility of the drafter to decide what should or should not be in the Bill. The drafter may assist by suggesting solutions or giving legal advice if necessary, but the primary burden for the contents of the Bill lies on the instructing Ministry. The instructions should therefore include the following matters, as appropriate-

7.2.1. The identity of the sponsoring Ministry

Title

The instructions should include –

- the name of the proposed legislation;
- a proposed short title for the Bill or a topic title.

The choice of short (and long) title should generally be left to the drafter, but the instructing Ministry might be committed to a particular name.

7.2.2. Contact details

The instructions should give the name and contact information (office, phone, e-mail, etc.) of the official in the Ministry responsible for giving instructions and answering questions. It is desirable, if possible, for two officers to be nominated, so that in the absence of one, the other can give instructions and respond to queries. These officials must be able to confirm whether drafts meet the Ministry's requirements and provide any clarification needed. The instructing officer should tell the drafter if he or she is likely to be absent for significant periods of time; the drafter should do the same for the instructing officer.

7.2.3. Policy approval

Whatever the local requirement for approval may be, the drafter must be informed when policy approval has been given for the drafting to commence. If that approval has not yet been obtained, the drafter should be told what steps are being taken to obtain it. A copy of any approval, or approval application, should be attached to the instructions. (*See Chapter 4*) [Note that different considerations may apply to e.g. statute law revision or other technical amendments.]

7.2.4. General background and legislative environment

The instructions should contain sufficient background information to enable the drafter to understand the problem or initiative, how it has arisen, and why it is being proposed. Proposed legislation often has a history which contributes to the solution proposed by the instructing Ministry. The drafter needs to know this, but care should be taken to distinguish between background information and the actual legislative proposal.

The instructions should –

- mention any alternative remedies that have been considered;
- identify any other legislation that is relevant to the proposed legislation; and
- explain the relationship between the proposed legislation and existing legislation.

7.2.5. Scope of the legislation

The instructions should identify the persons or things to which the legislation is to apply. They should say whether the legislation is to bind the State or Crown (i.e. the government) and whether they are to have extraterritorial application.

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If the legislation is to bind the Crown or State the instructions should say so, since the normal rule is that the State is not bound by legislation (although the rule is the opposite in some jurisdictions; check the Interpretation Act.) If the legislation is for the control of, for example, building standards, labour practices, environmental pollution etc., it is not appropriate for the Government to be exempt, and the drafter should be asked to include a clause binding the Crown or State.

7.2.6. Background material

The instructions should give a brief history of the working of the existing law. They should give information about relevant background material e.g. reports of UN committees, law reform bodies, laws of other countries, etc. on which the proposals are based.

They should attach copies of discussion documents, texts or articles and any relevant Government report, court decision, legal opinion, international agreement, etc., or state where they can be found.

They should also mention any legislation in other countries that might provide useful guidance and that is known to the department.

7.2.7. Precedents

The instructions should not in general submit a lay or departmental draft or a precedent from another jurisdiction or even from a consultant in place of proper instructions. Such drafts may however be referred to and annexed to instructions, if agreed by the drafter.

If the instructions are to draft a Bill based on a Model Law or to implement the government's obligations under a Treaty or Convention, a copy of the Model Law, Treaty or Convention should be attached.

7.2.8. Related proposals

The drafter should be told if the proposal is part of a package of legislative proposals. The instructions should therefore mention any other proposals that relate to the main proposal. They might be matters that have already been given effect to in other legislation, or that are being drafted in parallel, or that are proposed for future legislative action e.g. a tax proposal related to a land ownership proposal.

7.2.9. Government context

The related proposal might be one being dealt with by another Ministry. If the proposed legislation affects legislation of other Ministries, the instructions should mention those other Ministries and say whether they have been or will be consulted.

7.2.10. Practical implications

The instructions should mention any politically sensitive aspects of the proposal. They should also –

- state whether other Government Ministries and agencies are affected by the proposals;
- indicate the main financial and human resource implications for the government; and
- explain the effect the proposed legislation will have on existing legislation, if any.

7.2.11. Legal issues

The instructions should –

- state the existing law on the subject, including common law, case law and statute law, its application in practice, and the proposed changes;
- mention any constitutional or devolution issues that are likely to arise and any significant human rights, gender, environmental or regional issues the legislation might give rise to; (*See Appendixes 3 and 4*)
- say whether there are any other legal aspects to be considered e.g. deprivation of rights, evidentiary rules, displacement of presumptions, retrospective effect, exclusion of court review, etc.; and
- if appropriate cite relevant case law e.g. on tax liability in the case of a revenue statute.

7.2.12. Legal advice

The instructions should mention any advice on the proposal received from the AGC, Director of Public Prosecutions or other specialist section, or from outside consultants.

They should include information about relevant court cases (including any pending litigation known to the Ministry) legal opinions and research; also relevant court decisions and legislation in other jurisdictions that might provide

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assistance. Instructing officers should not assume that the drafter will be aware of such matters.

7.2.13. Any unresolved issues

The instructions should mention any unresolved issues which have a bearing upon the matters to be included in the legislation, accompanied by any opinion, legal or otherwise, and the views of the instructing Ministry on the opinion.

They should indicate any gaps in the instructions or particular areas where advice is being sought or is required. It is better for the drafter to know of the uncertainties than for the department to conceal them. The instructions should mention areas of concern on which the advice of the drafter is sought.

7.2.14. Substantive provisions

The instructions should include instructions as to the substantive provisions required. These would include powers and duties and the level of decision-making generally. Thus, for instance, if a licensing or registration body or authority is to be set up under the proposed legislation, the instructions should set out, among other things –

- the name of the body or authority;
- the number of members and how they are to be appointed, etc.;
- the qualifications and terms of office of members;
- the functions, powers and duties of the body and how they are exercised; and
- the main procedural rules (which can be in a Schedule).

The instructions should include any incidental or supplemental provisions needed to support the remedy or that need to be considered during the drafting process.

Note that the Interpretation Act usually contains provisions about corporate bodies, appointments etc., and the new legislation might not need to spell all these matters out. This is something the drafter will advise on, however.

7.2.15. Offences and penalties

The instructions should state clearly what acts or omissions are to be offences and what the maximum penalties for those offences are to be. Advice on maximum penalties will usually be a matter for the AGC and any advisory body, but the instructions should indicate the level that is aimed at.

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The instructions should mention any provision that is required for administrative appeals, etc.

7.2.16. Subsidiary legislation

The instructions should say whether any subsidiary legislation is contemplated, so that the drafter can include the necessary powers in the Bill. If a power to make regulations is envisaged, the instructions should identify the kinds of things that are intended to be dealt with by the regulations.

7.2.17. Repeals

The instructions should mention any Act or Ordinance or subsidiary legislation that is to be repealed. Note that repeal may be whole, partial or implied.

7.2.18. Saving provisions

The instructions should mention anything done under a repealed law that needs to be saved i.e. to remain in effect. Examples would be existing appointments, licences, etc.

7.2.19. Transitional provisions

These deal with the period between existing legislation ceasing to be of effect and the coming into force of the new legislation. The need for them will in any event be considered by the drafter, but the instructions should mention any requirements for transitional or transitory provisions needed to cover the transition from the old law to the new e.g. appointments, prosecutions etc. Note that time for conforming to the new law might be required.

7.2.20. Consequential amendments

New legislation sometimes affects provisions in other legislation. If that happens, consequential amendments to the legislation affected are necessary. Such amendments, whether in nomenclature or in more substantive matters, should be set out in the drafting instructions.

Searching an electronic database is a useful, though not infallible, way to find these. Such a search might reveal problems with the main proposal, for example, that the strategy proposed will not work properly in relation to other legislation.

7.2.21. Timetable

The instructions should indicate the priority that has been given (or that is being sought) to the proposed legislation, and the target date for its introduction. They should set out the proposed timetable for the enactment and implementation of the Bill and or making of the subsidiary legislation.

They should indicate whether there are any matters that may affect the timetable for the Bill (e.g. whether consultations on the draft are required; whether the Bill is to be prepared only as an indicative or exposure draft).

7.2.22. Commencement

The instructions should include instructions regarding commencement (i.e. the coming into force) of the Act or Ordinance or subsidiary legislation.

An Act or Ordinance might come into force on gazettal or other publication, but otherwise the usual provision is for a Minister to be given power to declare the commencement date by notice, order or proclamation. However, it is possible for the legislature to reserve to itself the power to appoint a commencement date or dates.

It might be appropriate to phase in the new legislation, and the drafter should be given instructions on this. Care should be taken in such a case that all relevant provisions are brought into effect at the same time.

In some cases, the commencement might need to be synchronised with the commencement of another piece of legislation, either one already enacted, or one being drafted in parallel.

Note that –

- different dates can be appointed for different provisions; a complex statute might even require a schedule of commencement dates;
- the Interpretation Act (or equivalent) usually gives the government power to do some things pending commencement e.g. make appointments, make regulations, etc.; and
- retrospective application of legislation is not generally encouraged, so there must be a good reason if it is proposed.

The instructions should therefore state the Ministry's intentions regarding the date of coming into force of all or part of the legislation, or information about how the

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law is to come into force, and the reasons for suggesting different dates for different provisions.

7.2.23. Amendment Bills

If dealing with amending legislation, the instructions should indicate –

- the legislation being amended;
- the sections to be amended;
- how they are to be amended; and
- an explanation of why previous amendments (if any) were made.

If in doubt about what to include in the drafting instructions or how to tackle a problem, the drafter's advice should be sought.

Occasionally, time constraints mean that drafting must start while some facets of the policy are still being developed. In those circumstances, matters still undergoing consideration or subject to change should be clearly identified.

CHAPTER 8

DRAFTING INSTRUCTIONS: FORMAT

There is no standard format for the way in which drafting instructions should be given, provided they tell the drafter what has to be done, why it has to be done and when it has to be done by. However, there are certain formalities in relation to the instructions which should be observed for better legislation to be achieved.

8.1. Source

The instructions should come from a government Ministry, not from the Cabinet, or even a Minister personally. They should come from the head of a department or his or her authorized delegate and not from a head of a division, unless the Cabinet has approved the instructions.

Normally a Cabinet minute approving the drafting of legislation does not itself constitute drafting instructions. However, in some jurisdictions it is accepted practice for the Cabinet Submission 1 (as discussed in the *Chapter 4*) to be treated as drafting instructions, if it is approved and includes the matters mentioned in the previous Chapter.

8.2. Instructions should be in writing

The instructions should be in writing. This protects the drafter if a dispute arises as to whether the draft reflects the government's policy. It is also useful if there is a change of personnel, either in the instructing Ministry or in the Drafting Office. It also provides an institutional memory, so that anyone who picks up a file will be able to appreciate the historical background of the instructions and be able to advance work on the proposed or draft legislation.

Oral instructions can easily be misunderstood, forgotten or miscommunicated. Follow-up action then becomes difficult or impossible, and unnecessary delays can also occur. Oral instructions might be acceptable in exceptional or emergency circumstances. But even then, an e-mail record should be kept if possible, for the reasons just stated.

Instructions should normally be signed by the Permanent Secretary or his or her deputy. This shows the drafter that they have the authority of the department head.

8.3. Narrative form

Drafting instructions –

- should normally be in memorandum form in ordinary narrative prose, though they may be partly in tabular form if that is more convenient;
- should normally be written in plain English to enable the instructing officer's intentions to be readily understood;
- should be in non-technical language as far as possible. If technical terms are used, they should be explained.

Words should be used consistently throughout the instructions to avoid misunderstanding or misinterpretation. Any conventions that have been adopted in the instructions (e.g. acronyms or abbreviations) should be explained.

8.4. Departmental drafts

The instructions should not be in the form of draft legislation, unless the drafter has expressly consented to instructions in that form or it is a very straightforward item. This is because it might be difficult for a drafter to think a legislative scheme through properly if presented with an existing draft; it can tend to produce 'tunnel vision'.

The drafter will need to ensure that a departmental or 'lay' draft is constitutional, deals with any legal issues arising from the proposed legislation, and is consistent with the rest of the statute book. Trying to redraft or re-arrange someone else's draft can be very time consuming and is not always a simple task, so that sending a lay draft might actually slow down the drafting process.

Another consideration is that the drafter might interpret the words used in the lay draft in a way different from that intended and might misunderstand the policy and purpose of it. Without clear explanation, the drafter may not fully appreciate the precise nature and extent of the legislative proposal. If a draft produced in the Ministry is submitted, therefore, it should be annotated with explanations, and accompanied by written instructions.

In exceptional circumstances, such as where the subject matter of the proposed legislation is particularly complex or technical, instructions in the form of a draft, supplemented with an explanatory memorandum, may be forwarded to the legislative drafter. Precedents from other jurisdictions can also be useful where the subject matter is complex or technical, or if the particular jurisdiction has no legislation of its own dealing with new situations which other jurisdictions have dealt with successfully.

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The legislative drafter is not, however, under any obligation to adhere to the language, form or content of the lay draft or of any precedents (unless judicial decisions have been based on their language). Lay drafts are instructions only and instructing officers should avoid committing to any particular form of words or expression, because these may not survive the drafting process. For this reason, it is not desirable for a Ministry to consult stakeholders on a lay draft, as significant differences might arise between that draft and the draft introduced into the legislature. If the Ministry wishes to consult before a formal draft has been drafted, it should involve the drafter early to get the drafter's input on the proposals.

A lay draft is usually inappropriate for minor amendments to existing legislation or for apparently straightforward documents, such as commencement notices because the issues may appear deceptively simple. However, if the drafter agrees, and there is no possibility of misunderstanding, an instructing Ministry may provide instructions in the form of a marked update of existing legislation. An example would be if all that is involved is an update of fees in a fee schedule. However, normally there is no substitute for comprehensive instructions in narrative form.

There are some recognised exceptions to the above principles –

- A Bill drafted by or for the Law Reform Commission or Committee by the Drafting Office might be acceptable as drafting instructions if the background and provenance of the draft are explained.
- Instructions can refer to precedents for the kind of scheme the Ministry has in mind, but should include copies if they are not likely to be readily available to the drafter.
- Instructions can include examples, illustrations and other aids to comprehension. They should not however be overloaded with annexures and should not consist simply of a covering memo with a report by some overseas expert or body; nor should they attach the department file.

8.5. Consultants' drafts

Draft legislation prepared by an outside consultant, either as a model for the CARICOM region, or specifically for a Member State, can be very useful as a supplement to the drafting resources of the jurisdiction. However, such drafts need to be treated with the same caution as a draft prepared by the instructing

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Ministry, as they are not always complete, they might not include the ‘teeth’ of the scheme that will be needed in subsidiary legislation, and they might not be drafted in the local style.

8.6. Attachments

The instructions should have attached any report of consultations already held and the conclusions of any committee set up to advise on the proposal. Attachments should include copies of directly relevant background material e.g. texts, articles, Government reports, court decisions, legal opinions, the law of other countries, a regional model law on which the proposals are based which are not likely to be readily available to the drafter. Alternatively, the location of these materials may be given.

If the Ministry would like the legislation to be modelled after a foreign legislative precedent, a copy of that precedent should accompany the instructions.

The following guidelines are recommended for both the AGC and other Government Ministries and Departments –

- (a) before engaging a consultant, seek advice from the AGC as to whether it is in fact necessary to do so. Engaging consultants is extremely expensive and unless the AGC is unable to assist Government to prepare proposed legislation, it is probably better to have the AGC do the job;
- (b) where a consultant *is* engaged, the instructing Ministry should ensure that the terms of reference for the consultancy are clear;
- (c) since the AGC’s clients are the instructing Ministries, the legislative drafter should deal directly with consultants when a relevant Ministry official is also present. This is to avoid, amongst other things, any misunderstandings regarding instructions. Interaction between the consultant and the legislative drafter is usually through a Task Force or Committee of some sort set up specifically to deal with a project;
- (d) once the consultant completes their task, they should forward their recommendations, in the form of a report, to the instructing Ministry. It is the latter’s responsibility to forward the report to Cabinet for its consideration and decision;

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- (e) only when Cabinet approves the consultant's report (including any lay draft which may be part of or attached to, the report) can the instructing Ministry forward instructions to the Attorney General's Chambers for the vetting or other finalisation of a consultant's draft; and
- (f) all legislative drafts prepared by consultants must be vetted by the legislative drafter and must be endorsed by the Attorney General before they go to Parliament.

8.7. Formalities

To make it easier to refer to particular provisions in the instructions when issues are being discussed, it is helpful if instructions are –

- given a reference name or number;
- dated;
- set out in numbered paragraphs; and
- set out on numbered pages.

If instructions are incomplete, or are subject to possible change, this should be pointed out in the instructions.

CHAPTER 9

SUBSIDIARY LEGISLATION

9.1. Nature of subsidiary legislation

Much legislation is contained in regulations or other types of written law made by a person or body under powers delegated by the legislature. For that reason it is sometimes called ‘delegated legislation’ or ‘subordinate legislation’ but in this Manual it is called ‘subsidiary legislation’.

Subsidiary legislation includes regulations, rules, orders and other written instruments which have legislative effect i.e. make law for the community at large. They contain details needed to ‘flesh out’ the Act; the administrative or procedural matters relating to the implementation of an Act. Subsidiary legislation usually, but not always, takes less time to draft and make than primary legislation, and it is easier to amend than an Act.

- **Regulations** are the most common form of subsidiary legislation and can cover a wide range of topics. They might include things that are going to be changed regularly, such as fees (but not fines.) Fees are sometimes in a schedule to the Bill. Forms are often prescribed by regulations, but they could be simply ‘approved’ and might not need subsidiary legislation.
- **Orders** are usually made for single matters such as designating a prohibited area, designating times for certain actions, etc.
- **Rules** are made by, for example, the Chief Justice to govern procedure in the courts.

All the above items will usually be published in the *Gazette* as Statutory Instruments, and are sometimes known as ‘S.Is.’ They become part of the statute law of the jurisdiction.

- **By-laws** (or bye-laws) are made by local authorities, universities and other statutorily incorporated bodies. They are legislative in nature, but the process for making and publishing them will be governed by the statute conferring the power and they might not appear in the statute book.
- **Proclamations** are usually made by the Head of State, for example to prorogue or convene the legislature. As such, they are not legislative in nature and do not need incorporating in the statute book.

9.2. Quasi-legislation

There are various types of instrument made under powers conferred by primary legislation that are not strictly legislative. Sometimes what is required might be quasi-legislative, such as a code of practice, which would set standards but would not result in a prosecution for a breach. Other examples of such instruments are –

- Procedural rules, governing the steps officials are expected to follow in carrying out specified administrative processes.
- Practical rules, stating the practices that are to be followed by officials in order to make a statutory scheme operative or effective.
- Instructions, 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.
- Guidelines or standards for action or behaviour in specified contexts. These normally have no statutory effect, but failure to follow them would be evidence of failure to comply with the primary legislation.

Notes

- Codes of Practice and similar instruments are not subsidiary legislation but give guidance in setting standards against which conduct can be judged. Whether they are published in the *Gazette* or incorporated in the statute book is a matter for each jurisdiction and should be stated in the primary legislation.
- Advice on whether a particular instrument is legislative in nature can be obtained from the AGC or the Drafting Office. Advice on the most appropriate type of instrument should also be sought from the AGC.

Subsidiary Legislation

- This Chapter is concerned with statutory instruments, that is, regulations, rules and orders which are legislative in nature.

9.3. Power to make

Most subsidiary legislation is made under powers conferred by primary legislation i.e. an Act or Ordinance. Some subsidiary legislation is made under powers conferred by the Constitution, and in an Overseas Territory might be made under the royal prerogative, but these instances are comparatively rare and do not affect the general principles stated in this Chapter.

The power to make subsidiary legislation (known as ‘*vires*’) is usually given to a Minister, or sometimes to a head of a technical department. In some jurisdictions it may be given to the Cabinet or to the Head of State. Power may also be given to a public body, or, for example, to the Chief Justice to make rules of court. A corporate body that is not a public body cannot make regulations, although it might have the power to make by-laws for the conduct of its own members or on its own premises. (A definition of ‘public body’ may be included in the local Interpretation Act.)

The power is usually limited to specified objects. A person proposing to make subsidiary legislation should ensure that the necessary power exists. Sometimes an Act or Ordinance needs to be amended just to provide the necessary regulation-making power. This is something on which a Ministry needs to be satisfied before issuing drafting instructions, and advice, if needed, should be sought from the AGC. The power can be circumscribed by for example, a requirement to consult or obtain advice from some other body.

9.4. Cabinet approval

Subsidiary legislation does not always require the approval of the Cabinet, but the principle of collective responsibility means that a Minister proposing to make subsidiary legislation will normally take a submission to Cabinet. Generally, the need for a full Cabinet submission does not apply to subsidiary legislation unless it raises particularly difficult or sensitive issues. Where any subsidiary legislation imposes a fee or a charge, the usual rule is that it should be submitted for Cabinet approval.

The decision whether or not to make a full Cabinet submission in respect of subsidiary legislation usually rests with the Ministry responsible.

If subsidiary legislation is to be made by a person or body other than a Minister, it does not need to be submitted to the Cabinet. However, if such an item has to be

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endorsed by a Minister, and if it imposes a fee or a charge, or creates offences, or is politically sensitive, the Minister would normally seek Cabinet approval before endorsing it.

If any subsidiary legislation is so urgent that Cabinet cannot be convened, the Minister should –

- certify the fact in writing to the AGC;
- report the circumstances as soon as possible to Cabinet;
- seek retrospective approval.

9.5. Processing

In the case of subsidiary legislation, there are no three readings, Committee Stage or enactment in the legislature. In other respects, the same principles apply to the drafting of subsidiary legislation as apply to the drafting of primary legislation, i.e. –

- it should be on the basis of drafting instructions, which have taken into account all the relevant policy and administrative considerations;
- time should be allowed for consultations and re-drafting.

Sometimes the subsidiary legislation may be more complex than the Act. Adequate drafting instructions are therefore as important for major items of subsidiary legislation as for Bills.

Drafting instructions for subsidiary legislation should normally have been expressly approved by the relevant Minister. However, in the case of routine subsidiary legislation made by a statutory officer, the instructions can usually be issued by the relevant officer in accordance with established precedents.

In the case of routine items of subsidiary legislation, a draft can usually be prepared by the Permanent Secretary (or his or her delegate) or by the relevant statutory officer, in accordance with current drafting style, and sent to the drafting office for vetting.

A Minister should not be asked to sign a subsidiary instrument that has not been drafted or vetted by the Drafting Office.

If the necessary powers (*'vires'*) already exist, subsidiary legislation can be made at any time, subject to any statutory requirement for consultation and to any need

Subsidiary Legislation

for a Cabinet submission. However sufficient time should be allowed for the drafting of the subsidiary legislation.

Subsidiary legislation might be –

- included as a part of a package with the first submission seeking approval for the drafting of a Bill;
- included with a submission seeking approval for the introduction of a Bill; or
- submitted separately by the Minister after the Bill has been enacted.

It may sometimes be necessary to amend an Act before regulations can be made under it, in order to provide the requisite powers. In this case, the drafting instructions should instruct the drafter to draft an amending Bill, as well as the draft regulations. The draft regulations can then be considered by Cabinet when the Bill is considered, so that the whole legislative scheme can be seen together. Once the Bill has been enacted, the Minister or other person empowered to do so can make the regulations.

Care should be taken by the instructing Minister to ensure that any regulations to be made under an Act are made in time. Instructions for the drafting of regulations should therefore be given to the drafter as soon as possible following enactment of the Act. It is better to give the instructions at the same time as the instructions for the Bill, if possible.

9.6. Approval by the legislature

Because legislative power is vested solely in the legislature, the Constitution or the Interpretation Act may require that all subsidiary legislation be –

- published in the *Gazette*; and
- laid before the legislature.

The laying is usually done by ‘laying on the table’ of the respective House for a period, typically 30 days (or sitting days) after publication, to enable the members, either individually or as a sector committee, to scrutinise the item. The item may then be subject to either a ‘negative resolution procedure’ or a ‘positive resolution’ procedure depending on what the enabling Act (or the Constitution or Interpretation Act) provides. An enabling Act can override the Interpretation Act provision (but not a constitutional provision) by specifying which of these methods applies to subsidiary legislation made under it.

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Under the ‘negative resolution procedure’ the regulations etc. are valid unless disallowed by the legislature within the specified period, typically 30 days. Under the ‘positive resolution procedure’ they have to be approved by the legislature before they can come into force.

‘Laying on the table’ can be facilitated by appointing a scrutiny committee to report to the legislature on any amendments needed etc.; it does not require scrutiny of all regulations by the whole House.

9.7. Validating of subsidiary legislation

If subsidiary legislation is not laid before the legislature as required, the legislation is technically invalid, and anything done under it has no effect. This can be an embarrassment if action has been taken – sometimes for years – on invalid subsidiary legislation. Some jurisdictions ignore this, but others do from time to time enact a Validating Act or similar legislation to give effect to subsidiary legislation that has not been laid on the table of the legislature. This is not very satisfactory, and those responsible for legislation should try to ensure it is not necessary.

9.8. Commencement

Subsidiary legislation usually comes into force on publication (i.e. in the *Gazette*), but the commencement might be deferred to a date appointed by the maker of the item e.g. to a date appointed by the Minister by notice in the *Gazette*, or published in the legislation itself. The same considerations about multiple commencement notices, etc. apply as with primary legislation.

Subsidiary legislation cannot come into force before the enabling statute comes into force.

CHAPTER 10

TIMETABLE FOR LEGISLATION

10.1. Introduction

Allowing enough time for the drafting to be done is one of the most important requirements for a smooth working relationship with the Drafting Office, but is often overlooked. The instructions should state the priority to be given to the item in the legislative programme (if any) and the expected time frame for its completion. They should set out any deadlines that are likely to apply to the project as a whole.

The drafting instructions should state the target date for the enactment of the Bill or the making of the regulations, and should be provided in sufficient time for the Bill to be introduced, or for the regulations to be made in accordance with the intended timetable.

The drafter is entitled to refuse to accept instructions that do not include a timetable, as the Drafting Office might have many items to work on and needs to prioritise them. This is particularly important in a small jurisdiction with limited drafting resources.

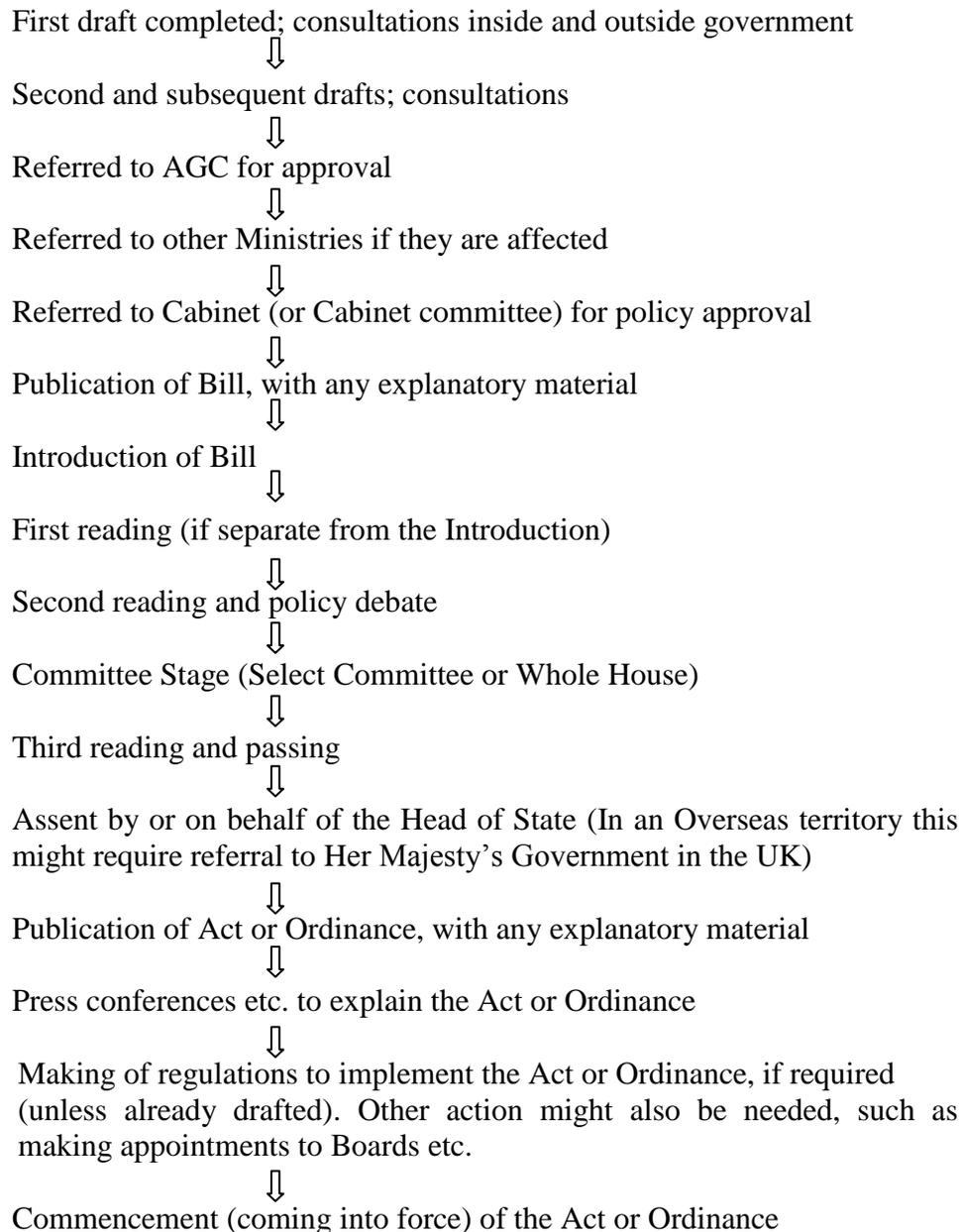
The time needed for drafting will obviously vary, depending on the complexity of the legislation, but if the job is to be done properly, enough time must be allowed. A first draft may need to go through several revisions before it is ready to be introduced or made. There may also need to be consultation with outside bodies.

The instructions should set out the time expected to be taken for each step in the legislative process. The instructing officer therefore needs to consider not just the desired date for a first draft, but the intended date for the Bill or subsidiary legislation to come into force. This in turn requires the instructing officer to work out a realistic timetable, not only for the drafting of the item, but for its enactment or making and its coming into effect.

10.2. Time involved in processing a Bill

The following are the steps typically involved in the processing of legislation. Some of them might be omitted or combined, if a Bill is very minor or urgent, but in setting a timetable, the instructing officer should bear in mind the need for all these steps.

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If there is a Senate or other Upper House, time also needs to be allowed for the introduction, debate and passing of the Bill in the Upper House. Time might also be required for the Bill to be reconsidered in the Lower House.

Note that a Bill intended for introduction to the legislature on a particular date normally needs to be submitted to the Cabinet office several weeks before that

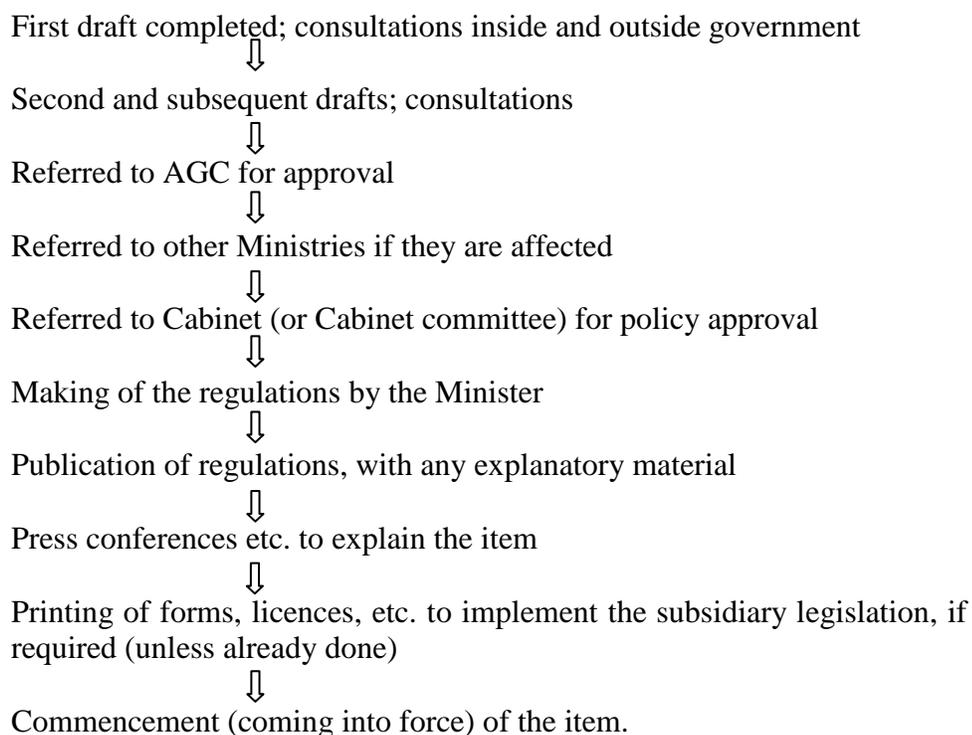
Timetable for Legislation

date. This is to enable the Bill to be published after the Cabinet meeting in accordance with the rules of procedure. These typically require –

- notice of the Bill to be Gazetted several days before the day on which the Bill is to be read for the first time; and
- copies of the Bill to be distributed to Members several days before the day nominated for its first reading.

10.3. Subsidiary legislation needed?

If subsidiary legislation will be required for the legislative scheme to be effective, the instructing officer must take into account the time needed for drafting and processing the subsidiary legislation in setting a target date for commencement of the scheme. A typical process would be –



Subsidiary legislation often requires the approval of the legislature (including the Upper House, if there is one.) In some cases this might only require a negative resolution procedure, which does not affect the validity of the subsidiary legislation and can happen after the legislation has come into effect. In other cases, a positive resolution might be needed, and time for this must be factored into the timetable.

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In both cases, the timetable must allow time for drafting of amendments if they are likely to be required. It must also allow time for consultations at each key stage.

It is useful for the Ministry to consult the drafter on the feasibility of the proposed legislative timetable at the time of or before issuing the drafting instructions. If there is likely to be any difficulty meeting the deadlines, early notice should be given to the drafter and the Clerk so that possible solutions can be found.

10.4. The legislative program

The drafting instructions should state the priority to be given the proposed legislation, as well as the expected time frame for its completion. They should state the Ministry's understanding of the current status of the project in the legislative programme and its importance to the Government.

The decision on what Bills to introduce to the legislature is one for Cabinet to take. Normally, an indication of the Bills to be introduced each year will be given in the speech by the Head of State at the start of the legislative year. More important, however, is the question of what Bills are to be introduced during each meeting of the legislature, since a Bill cannot be introduced until it has been drafted. It is therefore essential to have close liaison between every department that has legislation in mind and the drafting office on this question.

A legislative programme requires –

- allocation to a body at the head of Government with the responsibility for developing the programme on behalf of, or for approval by, the Cabinet;
- a process to enable that body to decide legislative priorities, i.e. which of the legislative projects are to be part of its next program and in what order;
- a timetable for Ministers to make the policy decisions that will enable drafting to progress.

The programme should be worked out far enough ahead to give Ministries time to complete larger, more complex legislative projects. There should also be a procedure for dealing with urgent legislative projects that arise after the legislative program comes into effect.

The timetable for drafting should recognise that it takes time to develop policy and if policy involves agreement with other Ministries (e.g. the

Timetable for Legislation

Ministry of Justice on the creation of criminal offences and the imposition of criminal or civil penalties) extra time will be needed. Time also needs to be allowed for securing collective agreement to the policy through the relevant Cabinet committee.

To work out a legislative programme and co-ordinate drafting projects, it is a common practice to have a Cabinet committee or sub-committee on which all Ministries of the Government are represented. It is also useful to have guidelines setting out the criteria for making the necessary decisions.

10.5. Time needed to draft a Bill

The time needed to draft an item of legislation depends on its length and conceptual complexity and the progress of the discussions and consultations. Many issues, including policy issues, will need to be addressed during the drafting process and the time required to draft legislation may be much longer than the instructing Ministry and the drafter anticipated.

The time available for the drafting might be reduced by the need to meet policy demands, but the time needed for drafting might be increased by legal complications. The task of the drafter and the instructing officer is to reconcile these requirements. There might be a need for periodic reconsideration of the timetable in the light of difficulties encountered and changes to the legislative programme.

It must be appreciated that in any jurisdiction there might be emergency situations that call for urgent legislative action. If legislation is required so urgently that a Ministry considers it should be given priority by the drafter over other Bills already in progress, the Permanent Secretary of the Ministry should write to the drafter giving reasons for requesting priority.

Once the drafter receives approved drafting instructions, the drafting should commence as soon as possible. The drafter will need to review the instructions and undertake legal and factual research before actually drafting, which takes time. Once a first draft is complete it will be sent to the instructing Ministry for its comments in writing, and this also takes time. Note that several versions of the draft Bill or other instrument may be required before it is finalised.

The instructing Ministry should bear in mind that –

- the drafter often has several drafting projects in hand at the same time;

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- complex laws benefit from reflection and the drafter should be given adequate time to reflect on key provisions;
- consultation with other Ministries and outside bodies might be needed during the drafting process; and
- editing of the draft once completed also takes time (grammar, numbering, checks for clarity, logic, compliance with the instructions, etc.).

If the drafter is unable to deliver within the agreed time frame, he or she should say so, giving the instructing Ministry reasons for the delay, and suggesting a reasonable alternative completion date.

In most large jurisdictions, legislative drafters work in teams, with an experienced drafter taking the lead in drafting of a Bill. This serves the dual purpose of ensuring quality control and facilitating on the job training or mentoring of the less experienced drafters in the drafting office. However, in some CARICOM Member States there is only one drafter.

What all this means is that, even if the instructing Ministry only wants a simple Bill or item of subsidiary legislation, the drafting instructions should be sent to the drafter several weeks before the intended commencement date. If the Bill or item is complex, the time needed might well be several months.

Consultations

CHAPTER 11

CONSULTATIONS

11.1. Introduction

Consultations by an instructing Ministry are usually required at some stage during the process of getting a Bill drafted and enacted. The consultations might be –

- with other Ministries within the government;
- with relevant stakeholders outside the government; or
- with the drafter.

Consultations might be needed –

- before issuing the drafting instructions;
- during the drafting process; or
- during the passage of a Bill through the legislature.

There is sometimes a statutory requirement for consultation before subsidiary legislation is made.

11.2. Policy or drafting

Consultations might be –

- about policy, before a proposal for legislation is submitted to the Cabinet; or
- about the drafts that emerge from the drafting office.

They might also be needed if amendments to the draft are required in committee stage.

Consultations on policy can do much to assist the instructing Ministry to clarify and better define its policy, and will feed into the Cabinet Submission 1 and, eventually, the drafting instructions. They might be with other government Ministries, or with outside bodies such as NGOs and UN agencies or other civil society organisations.

Consultations on policy are the responsibility of the instructing Ministry not of the drafter, although it might be appropriate for the drafter to attend such consultations.

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Consultations on actual drafts are usually confined to within the government or even within AGC, but consultations outside the government might be appropriate in the case of a major Bill.

11.3. Within the government

Consultation with other Ministries is needed if, for instance, the proposed legislation assigns duties or powers to another Ministry. (The grant of a licence might, for instance, be conditional upon an applicant satisfying a condition under a revenue statute.)

Such consultation early on in the process benefits the instructing Ministry by revealing what policy areas might require adjustment or refinement and thus facilitate the writing of the Cabinet Submission 1.

A Ministry that is considering introducing new or amendment legislation should at an early stage, in writing, consult the AGC as the Government's principal legal adviser. In seeking advice from the AGC, the instructing department should explain –

- the reasons for wishing to enact the new legislation or to amend existing legislation;
- what the policy is;
- how it is proposed to carry the policy into effect; and
- what other Ministries have been consulted, and what their reactions to the proposed legislation are.

The AGC will advise on –

- whether new legislation is in fact required;
- whether any amendment to existing legislation is needed;
- other ways in which the policy proposal can be achieved;
- whether the proposal complies with the Constitution, human rights, natural justice and international and regional obligations; and
- any relevant court decisions or precedents in other jurisdictions.

The AGC will also advice on a realistic timetable for the drafting of the legislation and its passage through the legislature.

Consultations

11.4. Outside the government

Consultations with persons and bodies outside Government can be useful in assisting the instructing Ministry to gauge the probable reaction, by persons and bodies outside Government, to the policy proposal or the draft, as the case may be. Comments from external sources can also help the government refine the policy by providing fresh insight from a different perspective. They also foster good relations between the government and the public, and demonstrate the principle of transparency.

With whom and for how long consultations should be held will depend on the subject matter and complexity of the policy issues. They might be with a specialised group having a particular interest in the proposal, e.g. accountants, doctors, or farmers. They might be with the public at large on the basis of a ‘White Paper’ or similar policy document put out by the government. Alternatively, there might simply be a press announcement about a proposed legislative initiative. A ‘White Paper’ might have attached to it a draft Bill prepared by a Law Reform Commission or the Drafting Office. If the Drafting Office prepares such a Bill, it should be on the basis of drafting instructions and sufficient time for the drafting needs to be allowed.

Consultations outside the government usually invite public response and set a deadline for responding. They will usually involve liaison with the press and media. Public consultations might be held in different areas of the country and involve regional or district administrative officers.

The time likely to be needed for public consultations should be included in the timetable for the proposed legislation to come into effect. Patience may be required, and it is necessary to strike a balance between the urge to ‘get on with it’ and the necessity to ‘hear the other side’. The drafter might be invited to attend consultations outside government, but should not be expected to be a spokesman for the government on policy. Nor is it the drafter’s job to contact stakeholders directly.

CHAPTER 12

CONSULTANTS

12.1. Introduction

Sometimes consultants are employed to supplement Government's skills and resources. This can be of great benefit to the recipient country, but care needs to be taken when engaging the services of a consultant for a project involving legislation.

A consultant might be appointed to assist in the formulation of policy, the drafting of legislation, or both. In some cases, the expertise needed is in the technical subject, leaving the drafting to be done 'in house'. In other cases, the need might be for a drafter to supplement the technical knowledge of the Ministry with drafting skills. In some cases, the requirement is a two-person team of consultants – one with expertise in the technical aspects of the subject, and the other to do the drafting.

12.2. Risk avoidance

It is quite rare for the same person to have both technical expertise in a subject and an adequate level of drafting skill. Drafting is itself a specialised skill, and it should not be assumed that an expert in e.g. environmental, maritime or aviation matters can produce a workable, complete and up-to-date draft of a Bill on the subject. There is a danger that a consultant will produce a draft Bill that –

- is not complete, and does not deal with repeals, transitional and saving provisions, etc.;
- requires supplementing by regulations drafted locally;
- is not drafted in the local legislative style;
- does not fit local conditions in terms of administration and resources.

These defects can usually be avoided if the TORs for the consultancy are suitably worded, and it is therefore desirable, if a Ministry proposes to engage the services of a consultant for a legislative project, for the TORs to be cleared by the AGC.

There are other reasons why it is useful if, before engaging a consultant for a project involving legislation, the Ministry seeks the advice of the AGC. The AGC can advise whether it is in fact necessary to engage a consultant, and the type of consultant that should be sought. Before hiring a drafting consultant a Ministry

Consultants

should (a) seek advice from the AGC as to whether it is necessary to do so. Engaging consultants is expensive and unless the AGC is unable to assist Government to prepare proposed legislation, it is probably better to have the AGC do the job; (b) be satisfied that the consultant is familiar with current drafting techniques in the Commonwealth and the CARICOM region, and with the local legislative style and practices.

Since the AGC's clients are the instructing Ministries, the legislative drafter should not, save in exceptional circumstances, deal directly with consultants. Interaction between the consultant and the legislative drafter is usually through a task force or committee set up specifically to deal with a project.

The usual tendering procedures should be observed for the employment of consultants, and fees should not be paid until the drafting work is complete.

12.3. Processing a consultant's work

If a consultant is employed to give advice on legislative policy, the drafting office should be informed at an early stage. Once the consultant completes the task, he or she should forward the recommendations, in the form of a report, to the instructing Ministry. It is the latter's responsibility to forward the report to the Cabinet for its consideration and decision.

Once the Cabinet (or a committee of the Cabinet) approves the consultant's report (including any lay draft which may be part of or attached to, the report) the instructing department can forward instructions to the drafting office for the vetting or other finalisation of the consultant's draft.

If the consultant is employed to draft legislation, the consultant should be asked to liaise with the drafting office at an early stage on legislative style, legislative procedures and timetable.

Whether the consultant deals directly with the drafting office after that is a matter for local preference. In some jurisdictions, interaction between the consultant and the drafting office is through a task force or committee set up specifically to deal with a project.

The consultant should normally also draft an Explanatory Memorandum and any other materials needed to explain the legislation and assist its approval by the Cabinet and its enactment by the legislature.

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Any legislative draft prepared by a consultant should be vetted by the drafting office before going to the Cabinet for approval, for introduction to the legislature (Cabinet Submission 1) and time must be allowed for this.

Summary and Conclusion

CHAPTER 13

SUMMARY AND CONCLUSION

DRAFTING INSTRUCTIONS: SUMMARY LIST

A good working relationship between the drafter and the instructing officer is essential to good legislation, and thus to good government. It is hoped that this Manual and the following summary of the contents of good drafting instructions will help achieve that.

Summary List

Below is a summary of items discussed at greater length in the *Chapter on Drafting Instructions: Contents* and reference should be made to that Chapter for a fuller discussion of each item.

Before issuing DIs

- Consider impact on other Ministries and on the public at large
- Consult as necessary – Other Ministries, the AGC or Drafting Office, stakeholders
- Consider legislative timetable
- Ensure finance will be available
- Consider staffing implications
- Prepare Cabinet Submission 1
- Obtain Cabinet approval

Issuing office

- State the Ministry or Ministry issuing the DIs.
- Give a contact name and phone number and e-mail address.

Title

Propose a short title for the Bill, or a topic title for the project.

Policy authority

Give details of the policy authority i.e. the Cabinet decision (including whether there are matters for which policy authority has not yet been given)

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Background

- Outline the factual and political context in which legislation is being proposed.
- Indicate any international or regional issues involved.

The mischief aimed at

- Describe the problem that the Ministry wishes to address.
- Summarise the proposed legislative solution.
- State the reasons for choosing legislation as the option.

Existing law

- Describe the relevant existing law and its application in practice.
- Mention any problems in the application of the existing law.

Amendment Bills

If the proposed legislation is an amendment Bill, identify the Act to be amended, the sections to be amended and the manner in which they are to be amended.

Legal issues

- Mention any legal issues that need to be taken into account.
- Summarise any AGC advice that has been given on the proposal and any other legal advice to or within Government or pending litigation that could be relevant.

Application and scope

Say whether the legislation is to apply to the Crown/State and state its intended territorial scope, etc.

Substantive provisions

- Indicate the main provisions that the legislation should include.
- If the proposal is to set up a regulatory body such as a Board or a Commission, suggest the name of the body; the number of members and how they are to be appointed, etc.; the qualifications and terms of office of

Summary and Conclusion

members; the functions, powers and duties of the body and how they are exercised; the main procedural rules; and any other relevant matters.

Powers

In all proposals involving the exercise of powers, say who is to have what powers, how they are to be exercised, whether they can be delegated, whether there is to be a power of direction, etc.

Administrative machinery

State any requirements about publication of notices, issuing of licences, inspection of premises, service of documents, etc.

Offences and penalties

Indicate what behaviour is to be an offence and what penalties should apply. Indicate any proposed alternative enforcement machinery.

Adjudication

State whether the courts need any special jurisdiction, or rule-making powers, and what the appeal mechanism is to be, if any.

Subsidiary legislation

State whether any regulations, orders or other items of subsidiary legislation are contemplated, and if so when they are to be drafted.

Repeals

State whether any repeal of existing laws is required, and if so whether there is to be any saving provision.

Transitional provisions

State what should happen during the period between existing legislation ceasing to be of effect and the coming into force of the new legislation.

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Consequential amendments

Mention any existing legislation that will or might require amendment to give effect to or as a consequence of the proposal.

Consultations

Indicate what consultations, within and outside Government, have been held on the proposal and what further consultations are anticipated.

Timetable

- State the priority in the legislative programme allocated to the proposal, or the priority for which the department is bidding.
- State the desired date for introduction of the Bill or making of the regulations, etc.
- State the intended date for coming into force of the Act or regulations, etc.

Precedents and reference material

- If there is a lay draft or a precedent, or a model law, or treaty, that the Ministry wishes the drafter to refer to, attach it to the written instructions.
- Also attach any relevant government report, legal opinion, court judgments, etc., or state where they can be found.

Miscellaneous

The drafting instructions should –

- state if the proposal is related to other legislative proposals by the instructing Ministry or other Ministries;
- say if the instructions are contingent (e.g. on collective agreement) and if they might change;
- include other relevant information about the current state of the project;
- mention any convention that has been adopted in the instructions (e.g. acronyms or abbreviations.)

Summary and Conclusion

Conclusion

This Manual is based on the following premises –

- Good government requires good laws.
- Good laws are laws that are not only clear to the well-disposed, but that cannot be misunderstood by the ill-disposed.
- Clear and unambiguous laws require clear drafting instructions.
- Those giving drafting instructions need to be familiar with the legislative process and with the requirements of good governance.

It is hoped that this Manual, though not exhaustive, will be of assistance to all those involved in the processing of legislation and issuing of drafting instructions in CARICOM Member States.

If a drafting exercise involves unusual provisions, such as the implementation of a treaty, some additional considerations may arise. There may also be urgent cases which require some of the steps to be omitted. But urgency should never be allowed to be the enemy of legislative integrity, and although drafters are used to performing miracles, they cannot achieve the impossible. Enough time should therefore be allowed for the drafter to do his or her job properly.

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APPENDIX 1

OUTLINE OF CABINET SUBMISSION 1

Name of Ministry:

Submission No.:

Year:

[TITLE]

Purpose (problem to be dealt with and proposed legislative solution)
“Cabinet is being asked to approve...”

Background

Issues

Analysis (constitutional, human rights, international, regional, financial,
environmental, gender-based implications)

Options (alternative courses of action and reasons for rejecting them)

Consequential amendments, if any, to other legislation

Consultations

Recommendations

“Cabinet is being asked to approve...”

[NAME OF MINISTER]

[TITLE OF MINISTER]

[DATE]

APPENDIX 2

OUTLINE OF CABINET SUBMISSION 2

Purpose

The Legislation Committee is being asked to consider and approve a draft/an amendment to [*name of Act*] to...

Background

By way of Decision No. [*Cabinet Decision Number*] dated [*Cabinet Decision date*] Cabinet approved the issue of drafting instructions to the Office of the Chief Parliamentary Counsel to amend /draft the [*name of Act*]

Issues

[State what the Bill is to achieve;
How it will achieve this;
State whether there is need for additional amendment or consequential legislative changes to other Acts]

A copy of the draft Bill is attached.

Consultations

Comments on the Bill were sought and obtained from...

[Refer to all unresolved points raised in these consultations, if any]

Recommendations

The Legislation Committee is being asked to recommend to Cabinet that the Bill be approved for introduction into the House of Assembly and the Senate.

[NAME OF MINISTER]

[TITLE OF MINISTER]

[DATE]

APPENDIX 3

GUIDELINES AND CHECKLIST FOR ENVIRONMENTALLY FRIENDLY POLICY

As part of the commitment of the Government of ----- to sustainable development, the ----- will ensure that all its policies adequately consider potential environmental effects and impacts, and where these are adverse, incorporate appropriate measures to reduce or eliminate these effects and impacts.

To this end, the government will be implementing a systematic, proactive process for evaluating the environmental consequences of policies in order to ensure that they are fully included and adequately addressed at the earliest appropriate stage of decision-making, along with economic and social considerations. This process is referred to as the strategic environmental assessment of policies, plans or programmes.

CONDUCTING A STRATEGIC ENVIRONMENTAL ASSESSMENT

1. **Conducting a Preliminary Scan** – considers:

- if the policy proposal has outcomes that will affect natural resources;
- if the proposal has a known direct or indirect outcome that is likely to affect the achievement of the country's environmental quality goals;
- if the proposal involves a new process, technology or delivery arrangement with important/significant environmental implications;
- if the scale and timing of the proposal could result in significant interactions with the environment.

If the Preliminary Scan does not identify the potential for important environmental considerations, no further analysis is required.

2. **Scoping** – identifies the main issues related to the appraised proposal and takes account of:

- the scope and nature of potential effects – including cumulative effects which could result from the use of, or changes in atmospheric,

Appendix 3 – Guidelines and Checklist for Environmentally Friendly Policy

terrestrial, aquatic resources, physical features/conditions or human components of the environment;

- scope and nature of residual effects – potential environmental effects that may remain after taking into account mitigation measures;
- a classification of each effect as positive or negative;
- an analysis of both positive and negative effects;
- an estimation of the likelihood and magnitude of each identified effect;
- if the scale and timing of the proposal could result in significant interactions with the environment.

3. **Mitigation Measures** – identify:

- measures that could reduce or eliminate potential adverse environmental consequences of the PPP proposal;
- recommendations that could result in changes in the proposal; conditions that may need to be placed on policies; activities arising from the proposal or compensation measures;
- steps for identifying uncertainties and determining the means to acquire more information about unknowns.

APPENDIX 4

GENDER ANALYSIS CHECKLIST

Gender analysis is part of the policy analysis process which helps to assess the differential impact of a policy or programme on men and women, which are sometimes masked or obscured. Government planners are then able to understand the social processes and their effect on relations between men and women, allowing them to respond with informed and equitable policy options.

When gender is explicitly considered, the full effects of the policy are revealed and previously hidden impact can be fully weighed in the decision-making process to ensure a positive development outcome.

Considerations of gender must be incorporated from the very beginning of the policy making process. The following checklist provides an example of the type of gender sensitive questions that should inform the policy process at each stop.

1. Define the Issue(s):

- What is the policy proposal intended to address?
- Why has it become an issue?
- Who says it is an issue?
- Who needs to be involved in the solution?
- Will it affect men/women most?
- How does the issue impact on men/women?

2. Determine the Desired Outcomes:

- What are expected outcomes?
- Do outcomes differ for men and women?
- What outcome indicators are needed?
- Are they the same for men and women?
- How would the indicators differ for men and women?
- Are there gender specific factors that could modify the specific outcome?
- Do men and women have equal access to the resources to bring about the expected outcome?

Appendix 4 – Gender Analysis Checklist

3. Research and Consultation

- Are sex-disaggregated data available?
- What are the information sources?
- Who are the partners?
- What are the gaps in the data?
- Are men and women most disadvantaged by the data gaps?

4. Design and Develop the Policy

- What are the design options?
- Are there differential consequences for men and women?
- Is one sex disadvantaged by particular options?
- Do the options support gender equity?
- Do men and women have access to resources, time and assets to take full advantage of particular options? If not will the policy address this gap?
- Are there cultural factors that make particular options unattractive?

5. Implement the Policy

- Is there a differential impact for men and women?
- Do existing gender relations affect the practicality of policy?
- Are there cultural factors that will affect the implementation of policy?
- How do existing power relations affect the implementation of the policy?
- Will special allowance have to be made for men/women?
- Who is most directly affected by this policy?

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APPENDIX 5

**GUIDELINES FOR INSTRUCTIONS TO DRAFT AND PROCESS
LEGISLATION**

PART 1: PREPARATORY	YES	NO
1. Have the issues to be dealt with in the policy been clearly identified and articulated?		
2. Have the goals, objectives and various options open to Government to achieve those goals and objectives been identified and clearly articulated?		
3. Has the manner in which the policy is to be implemented been clearly spelt out?		
4. Have internal consultations taken place and the Ministry's capacity to implement the proposed policy and resultant legislation been ascertained?		
5. Have consultations with stakeholders such as other Ministries, the Attorney General's Chambers and civil society where appropriate, taken place and all feedback been into account in finalizing the policy?		
PART 2: ADEQUACY OF INSTRUCTIONS	YES	NO
1. Are the instructions in accordance with the Cabinet Directive authorizing the drafting of the Bill?		
2. Have you included a copy of the Cabinet Directive?		
3. Are the instructions in writing and under the hand of the CEO?		
4. If there is a lay draft or a precedent you wish to forward to the AG's Chambers, have you attached it to the written instructions? How about any relevant Government Reports/Papers, legal opinions, court judgments, etc?		
5. If these are instructions to draft a Bill based on a Model Law or to bring into force your country's obligations under a Treaty or Convention, have you included a copy of that Model Law, Treaty or convention?		
6. Have you set out, in clear unambiguous terms – a. what the problem to be resolved is? b. the solution(s) proposed? c. the effect your proposed legislation will have on existing		

Appendix 5 – Guidelines for Instructions to Draft and Process Legislation

<p>legislation (if any)?</p> <p>d. what acts, under the proposed legislation, constitute offences?</p> <p>e. the penalties to be imposed for infringements, i.e. the exact fines and terms of imprisonment to be imposed for infractions of the proposed legislation?</p> <p>f. if your proposed legislation is an amendment bill, the exact name of the Act to be amended, the exact sections to be amended and the manner in which they are to be amended?</p>		
<p>7. If your proposed legislation is setting up a regulatory body such as a Board or a Commission, have you clearly set out –</p> <p>a. the number of members making up that body?</p> <p>b. who appoints those members?</p> <p>c. terms of office of those members?</p> <p>d. What will disqualify a person from being a member of that body?</p> <p>e. the functions/powers/duties of the body and who exercise those functions/powers/duties?</p> <p>f. how a member may resign from the body?</p> <p>g. should the member declare any interest, and if so, in what manner and to whom?</p> <p>h. whether or not alternate members, and if so how many, may be appointed?</p> <p>i. Any other relevant matters in connection therewith?</p>		
<p>8. Have you clearly indicated what should happen during the transitional period between your existing legislation ceasing to be of effect and the coming into force of your new legislation?</p>		
<p>9. Have you indicated when your new legislation is to come into force?</p>		
<p>PART 3: TOUCHING BASE WITH THE DRAFTER AND CONSIDERATION OF DRAFTS</p>	YES	NO
<p>1. Have you held a preliminary meeting with the drafter to ensure that he has understood the policy and the instructions and is ready to begin work on the draft legislation?</p>		
<p>2. Now that a copy of the draft Bill has been sent to you for comments, have you –</p> <p>a. read the document carefully to ensure that your instructions are reflected?</p> <p>b. checked all references and cross references to sections, subsections, regulations, sub regulations or Acts made in</p>		

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<p>the draft to make sure they are correct?</p> <p>c. consulted with other Ministries where they are affected by your legislation?</p> <p>d. communicated, in writing, with AG's Chambers, your comments and queries on the draft, as well as the comments of those you consulted?</p>		
PART 4: GOING TO CABINET	YES	NO
<p>1. Now that the final draft of your Bill has been sent to you for your consideration, have you indicated in writing to the AG's Chambers –</p> <p>a. your approval or disapproval thereof; and</p> <p>b. your request for AG's Chambers to prepare Cabinet copies of the Bill to enable you to take the draft of Cabinet to seek Cabinet's approval of it?</p>		
<p>2. Now that Cabinet has considered your draft Bill, have you –</p> <p>a. Timeously informed the AG's Chambers, in writing, of Cabinet's decision?</p> <p>b. Forwarded a copy of that decision to the AG's Chambers for their records?</p>		
<p>3. Where Cabinet has approved your draft Bill you –</p> <p>a. requested the AG's Chambers to arrange for Cabinet copies to be made and sent back to you to forward to the Cabinet Secretary?</p>		
PART 5: GOING THROUGH PARLIAMENT	YES	NO
<p>1. Have you received the Presentation and Notice Copies of your Bill from the AG's Chambers?</p>		
<p>2. If you have not received them, have you requested them in writing from the AG's Chambers?</p>		
<p>3. If you have received them, have you forwarded the Presentation Copies to the Minister Notice Copies, without delay, to the Clerk of the National Assembly to enable him to include the Bill on the Notice and Order Papers and circulate the necessary copies to the Leader of Government and the Leader of the Opposition?</p>		
<p>4. Are you keeping track of your Bill as it goes through Parliament?</p>		
<p>5. If any amendments have been proposed as it progressed through Parliament, have you communicated the amendments to the AG's Chambers in writing so that the</p>		

Appendix 5 – Guidelines for Instructions to Draft and Process Legislation

amendments can be incorporated into the Bill?		
6. Have you ensured that the amendments drafted are in accordance with your instructions and have you forwarded them without delay to the Clerk of the National Assembly?		
PART 6: PUBLICATION OF YOUR LEGISLATION	YES	NO
1. Where Parliament has passed your Bill and it has received the President's/Governor's Assent, have you made the necessary arrangements for its publication in the Gazette?		
PART 7: COMMENCEMENT ORDERS/NOTICES	YES	NO
1. Where your legislation which was published in the Gazette is to commence on notice, have you – a. decided the date on which it is to commence? b. instructed the AG's Chambers to prepare the necessary commencement Order or Notice as the case may be?		

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APPENDIX 6

CHECKLIST FOR LEGISLATIVE DRAFTERS

PART 1: ADEQUACY OF INSTRUCTIONS	YES	NO
1. Has the instructing Ministry forwarded the necessary drafting instructions to you under the hand of its CEO?		
2. Are the instructions sufficiently detailed to enable you to begin drafting?		
3. Have you determined the purpose and subject matter of the policy and understood them?		
4. If not, have you carried out any research thereon or sought clarification from the instructing Ministry?		
PART 2: AUDIENCE	YES	NO
1. For whom is the legislation intended?		
2. Is the subject matter one they will understand?		
3. What can you do to ensure that they do?		
PART 3: THE DRAFT	YES	NO
1. Have you carried out all necessary legal research and ascertained what the existing law is?		
2. Have you communicated the client's policy intentions in a clear, logical manner? If not, how can you rectify this?		
3. Have you read through the draft to that it – a. contains key provisions such as the long title, enacting formula, short title, commencement and interpretation provisions, as well as savings and transitional provisions where required? b. does not contain provisions which are inimical to the rule of law (such as ouster clauses) c. does not offend against the Constitution d. does not have (grammatical errors, spelling mistakes, wrong cross reference, etc)		
PART 4: TIME LINES	YES	NO
1. How urgent is the legislation?		

Appendix 5 – Checklist for Legislative Drafters

2. Will you be able to satisfy the client’s time line expectations?		
3. If not, have you communicated that to the client in a timely manner?		
PART 5: GOING THROUGH PARLIAMENT	YES	NO
1. Now that the Bill is ready to go to Parliament, have you forwarded the necessary Presentation and Notice copies to the CEO of the instructing Ministry for his further action?		
2. Are you keeping track of the Bill as it progresses through Parliament to ensure that you do not any amendments made during the Committee Stage?		
3. Now that you have received the Ministry’s instructions regarding amendments made during the Committee Stage, have you amended the Bill and forwarded the amended/final version to the CEO of the instructing Ministry for his approval and further action?		