



A GUIDE TO THE
**LEGISLATIVE
PROCESS IN KENYA**



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This is the 1st edition of the Guide to the Legislative Process in Kenya. Every effort has been made to verify the applicability and relevance of information contained in this Guide as of July 2015. Kenya Law Reform Commission however, does not accept responsibility for consequences of the use of the Guide's contents for other purposes or contexts.



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Acronyms

AHADI	Agile and Harnessed Assistance to Devolved Institutions
AG	Attorney- General
CA	County Assembly
CA	County Attorney
CAF	County Attorneys Forum
CAF	County Assemblies Forum
CGG	County Governments Act
CAJ	Commission on Administrative Justice
CAP	Chapter
CBOs	Community-Based Organizations
CEC	County Executive Committee
CIC	Commission for the Implementation of the Constitution
CoG	Council of Governors
CS	Cabinet Secretary
CSF	County Speakers Forum
FBOs	Faith-Based Organizations
IDLO	International Law Development Organization
IRPA	Institute for Research and Policy Alternatives
KIPPRA	Kenya Institute of Public Policy and Research Analysis
KLR	Kenya Law Reports
KLRC	Kenya Law Reform Commission
LSK	Law Society of Kenya
MDAs	Ministries, Departments and Agencies
NCLR	National Council for Law Reporting
NGOs	Non-Governmental Organizations
PFMA	Public Finance Management Act, 2012
PPDA	Public Procurement and Disposal Act
PAA	Public Audit Act
RIA	Regulatory Impact Assessment
SIA	Statutory Instruments Act
SUNY	State University of New York
TA	Transition Authority



PART I

PRELIMINARY



Foreword by the Attorney-General

I am very pleased to be associated with the publication of The Guide to the Legislative Process in Kenya. This is the first time that the whole spectrum of this critical process has been systematically documented and published. The Guide comprehensively consolidates the key procedural and substantive facets of law making in Kenya at both levels of government.



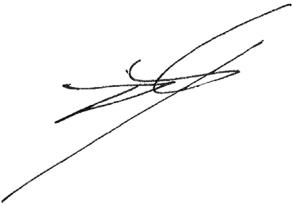
It cannot be overemphasized that lack of sufficient public information on the substantive and the procedural aspects of the legislative process coupled with capacity challenges that policy makers, drafters and legislators have had to surmount have greatly hampered the legislative process in the past. This state of affairs has not only impacted on the quality of legislation and led to inefficiency in the process, it has also deprived the public of the much needed ability to audit compliance at every stage to ensure development of sound policies and high quality legislation. The Guide canvasses in a succinct manner, issues around policy initiation, formulation and approval and the linkage with and transformation into law. These are all key tenets in the legislative chain that require proper scrutiny and public participation.

In the wake of a new constitutional order which demands transparency, accountability, participation and inclusiveness in governance, the Guide will go a long way in providing direction for citizens' involvement in the legislative process. The design and the content of the Guide specifically focus it as a useful tool in legislative quality control as the roles and responsibilities of key players and the manner of stakeholder engagement are clearly delineated. I commend its rich array of information and analysis to all those interested in policy formulation and its translation into legislation.

I appreciate the lead that the Kenya Law Reform Commission (KLRC) together with our partners has taken in the authorship of this long overdue publication. It will no doubt further cement the reputation of the Commission as a centre of reference for law reform in Kenya. I am pleased that together with my

Office, KLRC and the Commission for the Implementation of the Constitution (CIC) have successfully steered the constitutional implementation process by developing the Bills required to implement the Constitution. As a State agency, KLRC will always be at the disposal of both levels of Government to provide the required technical assistance in development and reform of the law of Kenya as the Guide promises. I encourage Ministries, Departments and Agencies (MDAs) at both levels of government, to support the Commission and make use of its professional and technical resources.

Finally, my Office sincerely thanks all the individuals and institutions for their contributions and feedback which no doubt enriched the contents of the Guide at the different stages of its development. Your dedication to the betterment of our Nation is always appreciated.

A handwritten signature in black ink, consisting of several overlapping, fluid strokes that form a stylized representation of the name Githu Muigai.

Prof. Githu Muigai, SC
Attorney-General
August, 2015



Note by The Cabinet Secretary, Devolution and Planning

In 2010, Kenya ushered in a new constitution that envisaged far reaching reforms with a view to achieving more accountable, effective and inclusive governance. Key to these reforms is devolution, which creates county governments; with both an executive and legislative arm. The Executive authority of the county is vested in the Governor and members of the County Executive Committee while the county assemblies core mandate includes inter alia oversight and passing legislation.



County legislation is essential in order to enable the full implementation of devolved functions. However, being entirely new entities, the effective exercise of this legislative function by county assemblies has to a large extent been hindered by inter alia a lack of sufficient technical legislative capacity, the absence of proper systems and structures at county level and the lack of a clear guide on the process of formulating legislation.

The publication of this Guide to the Legislative Process in Kenya, which my Ministry is happy to be associated with, is therefore timely. The Guide provides a rich and comprehensive overview of the legislative process in Kenya. It clearly delineates each stage of the process, the key players involved, their respective roles and expected outputs.

Instructively, it outlines the critical factors to consider at each of these stages with the constitutional principle of public participation getting deserved prominence. Extensively canvassed in the Guide is the continuum that attends policy initiation, formulation and approval and its linkage with the relevant law. This well articulated sequence should contribute to higher quality of legislation and minimize disharmony between national and county legislation.

The Ministry of Devolution and Planning is mandated by law to provide support to county governments to enable them perform their functions. Indeed, the Ministry has continued to do this through the coordination of capacity building activities to county governments guided by the National

Capacity Building Framework. The Ministry remains committed to rendering the requisite support to ensure devolution is fully realized. I believe that this Guide will go a long way in obviating the challenge of lack of legislative capacity at the County level.

I would like to congratulate the Commission, all agencies and individuals who were part of the team that cooperated and facilitated the formulation of this landmark publication. It is my sincere hope that what is contained herein will inspire, inform and most importantly empower our policy makers and legislators.



Anne Waiguru, OGW
Cabinet Secretary,
Ministry of Devolution and Planning
August, 2015

Preface

by The Chairperson, Kenya Law Reform Commission

The Kenya Law Reform Commission (KLRC) is established by the Kenya Law Reform Commission Act, 2013 as a successor to the Law Reform Commission formerly established under the Law Reform Commission Act (Chapter 3 of the Laws of Kenya) now repealed. The Commission is a body corporate with perpetual succession and serves both National and County governments in matters of law reform.



The Commission is obliged by the Constitution of Kenya, 2010 under the Sixth Schedule to coordinate with the Commission for the Implementation of the Constitution and the Attorney-General in the preparation of legislation required to give effect to the Constitution. Further, the establishing Act mandates the Commission to provide advice and offer technical assistance and information to the national and county governments with regard to the reform or amendment of a branch of law. In addition, the County Governments Act, 2012 anticipates that the Commission will assist county governments in the preparation and reform of their legislation.

It is in furtherance of its constitutional and statutory mandate that the Commission has formulated and published this Guide to the Legislative Process in Kenya. The primary idea behind the development and publication of the Guide was conceived out of the realization that hitherto there has been a dearth in procedural and substantive guidelines for policy makers, legislators and the public to address the complexities of generating policy and its interplay with legislation. Further, there has not been a clear indication of the various cannons to be observed at every step of the legislative process, especially exposition of the dictate that policy precedes legislation. This gap has continuously hampered the process of framing high quality legislative instruments, a state of affairs that has inevitably impacted adversely on the socio-economic, political and legislative development of Kenya.



As the name suggests, this is a guide to the legislative process in Kenya. Its essence is to properly equip the key players (policy makers, legislative drafters and legislators) at both levels of government with the necessary tools to improve not only the policy formulation and law making processes but also the quality of such policy and legislation. Further, it seeks to arm the people of Kenya with the knowledge of the core procedures and substance of law-making to enable them meaningfully engage as the primary stakeholders.

The Guide does not purport to prescribe the specific contents of policy and legislation neither does it act as the panacea to the entire gamut of challenges attendant to the legislative process. What it does is to offer the basic tenets and pillars essential in the process so as to meet the demands of constitutionality. It speaks to the factors to be considered when formulating policy and developing legislation, the requirement that policy precedes legislation and the process of embedding such policy into law. It also significantly discusses the requirement of public participation in the legislative process as anticipated under the Constitution. In its character as a basic comprehensive reference point, the Guide also dedicates a Chapter to the legislative drafting process including some key principles and the salient considerations and features to be observed.

Remarkably, the journey to the development of this Guide has taken just under one year. The process of collecting and collating information, consultations with stakeholders and validation has been just as interesting and fulfilling as compilation of the Guide itself. While initially the Commission had not foreseen the inclusion of some content in the Guide, the necessity of preparing a wholesome document became inevitable as the draft advanced.

As smooth as the process of the authorship of this Guide might appear to have been, it was not without hurdles which had to be overcome. For example, the challenge of collation and prioritization of amorphous content and reduction into a coherent Guide on matters of essential substance and procedure that specifically relates to the legislative process was always daunting. It took the minds of the authors, the Steering Committee and the various experts we consulted to determine the issues that were really pertinent.

The challenge of mobilizing sufficient resources to accomplish the development and publication of the Guide was always lurking around the corner. The Commission is therefore forever grateful to our partners particularly USAID (the AHADI Project), the Office of the Attorney- General and Department of Justice, Ministry of Devolution and Planning, International Law Development Organization (IDLO), Danish International Development Agency (DANIDA), the Commission for the Implementation of the Constitution (CIC), especially its Vice-Chairperson, Dr. Elizabeth Muli (Convener of the Executive and Security Thematic Team at CIC) and Prof Peter Wanyande (Convener of the Devolution Thematic Team at CIC), and the Council of Governors (CoG) for the invaluable financial and logistical support without which this Guide would not have seen the light of day.

I further wish to acknowledge with profound gratitude the efforts of all those who were instrumental in the development of this Guide. From professional colleagues at the Commission, the Steering Committee, the various institutions and stakeholders who participated in consultation and validation processes to our support staff without whose contribution and dedication the accomplishment of this milestone would not have been possible.

As we mark the Fifth Anniversary of our Constitution, allow me to underscore that the Kenya Law Reform Commission is privileged to be part of the country's constitutional history as one of the four organs of its implementation. This is something we do not take for granted and as an integral part of this milieu, the Commission continues to play its assigned role in the transition and constitutional implementation process with dedication. We urge and seek the support of all other players to use the legislative process so as to facilitate the achievement of Vision 2030 goals. I firmly believe that there are no alternatives to high quality policy and legislation and this Guide is a further step in this direction.

God bless Kenya.

A handwritten signature in black ink, appearing to read 'Mbage Ng'ang'a', with a long horizontal flourish extending to the right.

Mbage Ng'ang'a
Chairperson,
Kenya Law Reform Commission
August, 2015



Executive Summary

Good quality legislation is one of the most fundamental tenets of any modern and civilized democratic society. The process of developing such legislation is as critical as the product. It is important for legislative bodies, policy makers, draftspersons and members of the public to not only sufficiently understand, but also have the opportunity to participate meaningfully in the legislative process and to have the capacity to analyze and ensure strict adherence to established standards and procedures.

Our 2010 Constitution heralded various changes in the legislative process in Kenya. Among these are: a Bicameral Parliament consisting of the National Assembly and the Senate; creation of 47 County Assemblies in each of the 47 counties; and the requirement for public participation in policy making and legislation.

In essence the legislative process is now devolved. The rules and procedures of making legislation in Kenya have been sufficiently expanded and fundamentally altered. Under the devolved system of government, we now have the Senate and National Assembly at the national level and the County Assemblies at the county level as the primary legislative organs.

Used well, the new legislative regime could have a huge impact on development and ensure harmony between the laws developed at the county level as well as those developed at the national level. But this is only possible if constitutional principles, legislative requirements as well as tenets of drafting legislation are given sufficient consideration throughout the legislative continuum.

The basic function of a legislative body is to make, amend or repeal the law. The process of law making or the legislative process, in relation to Parliament or County Assembly, may be defined as the process by which a legislative proposal brought before it, is translated into the law of the land. All such legislative proposals are tabled in the form of Bills.

This Guide seeks to explain the process of law making in Kenya. It should be read alongside other relevant official guidelines and publications such as the Office of the President Circular on the Role of Government Institutions and the Commission for the Implementation of the Constitution (CIC) in the process of implementing the Constitution of Kenya dated 11th April, 2011;



the Office of the Attorney General and Department of Justice Circular on Proposed Legislation dated 20th May, 2013, and; the Attorney General Circular on Government Legal Advisory Services dated 3rd May, 2010.

The *Guide to the Legislative Process in Kenya* is among the Kenya Law Reform Commission's (KLRC's) key contributions to the process of proper legislation at both levels of government. It aims at achieving the extensive goal of guiding the legislative process and facilitating law reform that is conducive to social, economic and political development of Kenya.

The Guide emphasizes, with sufficient reasons, the factors that buttress every stage of the legislative process. Such observance will ensure that the process of making legislation is flawless and that such law can stand the test of constitutionality. Another key highlight is the fact that policy precedes law. The Guide discusses the process of law-making as it emanates from an idea to serve a particular goal in society, development of an appropriate policy and the decision to transmute the policy into legislation. This gradual process and attendant factors around policy decisions are elaborated.

The Guide is divided into 12 parts. Part 1 is the introductory part which introduces legislation and the legislative process in Kenya. It also gives the rationale for the Guide and its scope. Kenya Law Reform Commission and its roles, mandates, relationships and functions are discussed in Part 2, to give the reader an insight into the Commission's work as the agency that facilitates law reform. Part 3 delves into policy development, giving the reader an understanding of the factors to consider when developing policy. This part also heavily features the aspect of public participation as one of the pertinent elements of the legislative process.

Part 4 gives an overview of the policy formulation process, while Part 5 discusses how policy is translated into legislation. Part 6 delineates the key aspects of legislative drafting, giving the reader, be it a legislator, a drafter, or a member of the public the essential aspects to consider in developing or determining well written law. Part 7 discusses the pre-publication scrutiny of all. Parts 8, 9, 10 and 11 discuss post-legislative matters, including assent and referral, publication and amendment. Finally Part 12 discusses regulatory impact assessment, while Part 13 concludes by discussing contextualization and customization of model laws, another key plank of the Commission's support to county governments.

This Guide offers an opportunity to its reader to comprehensively appreciate all aspects that attend to legislation in Kenya. In doing so, it offers not only a road map to involvement in law making, but more importantly, to ensuring that law is used as a functional tool that will heavily contribute to Kenya's social, economic and political development.

Acknowledgements

The conceptualization, development and publication of this Guide were made possible by the selfless commitment of numerous individuals and institutions who contributed expertise and diverse resources to see this project come to fruition. Without their invaluable input, this publication would have been stillborn.

The Kenya Law Reform Commission expresses profound gratitude to the members of the Steering Committee whose Secretariat was the Commission and comprised the Judiciary, Office of the Attorney-General and Department of Justice, Ministry of Devolution and Planning, Commission for Implementation of the Constitution, Commission on Administrative Justice, Transition Authority, Law Society of Kenya (LSK), Council of Governors, County Speakers Forum, County Attorneys Forum and the County Assemblies Forum. It is through their enthusiasm, hard work and commitment that we credit the accomplishment of this mission.

Further, we commend Dr. Ken Nyaundi and his team at Institute for Research and Policy Alternatives (IRPA) especially Dr. Geoffrey Ayuka and Ms. Susan Kimani for the exhaustive research which laid the foundations of the Guide. Special mention must go to the Commission Vice Chairperson, Ms. Doreen Muthaura and the Secretary and Chief Executive Officer, Mr. Joash Dache for the excellent authorship of the Guide.

We also acknowledge and appreciate the efforts of Mr. Amos Omollo, the Consultant Editor and Ms. Michelle Seruya, the printer without whose expertise this Guide would not have been packaged in the prescient manner. They worked tirelessly with our Vice Chairperson and the Commission Secretary and Chief Executive Officer to constantly revise, edit and improve the contents of this publication and render it more reader friendly.

The Commission appreciates the exertion of its Commissioners, technical and support staff whose gallant efforts and dedication was evident throughout the process. We want to sincerely thank Mr. Nicholas Irungu, our Senior Economist and Mr. Jacob Otachi, our Corporate Communications Officer, for excellent coordination services involving the Secretariat, the Steering Committee, Consultants and Stakeholders.

Finally, the development and publication of this Guide was made possible through the generous financial support of the United States International Development Agency (USAID) through the Agile and Harmonised Assistance to Devolved Institutions (AHADI) Project and the Danish International Development Agency (DANIDA) through the International Development Law Organization (IDLO). We are forever grateful to Ms. Waceke Wachira, USAID-AHADI Chief of Party and Enid Muthoni, the IDLO Kenya Country Director, and their respective committed Teams.

Thank you!



PART II

Role of the Kenya Law Reform Commission (KLRC) in the Legislative Process

I. INTRODUCTION

The Kenya Law Reform Commission (the Commission) is established by the Kenya Law Reform Commission Act, 2013 (No. 19 of 2013) as a successor to the Law Reform Commission, previously established under the repealed Law Reform Commission Act, Cap 3. The Commission is a body corporate with perpetual succession, which serves both National and County governments in matters of law reform.

II. MANDATE OF THE COMMISSION

The Commission's remit is categorized into constitutional and statutory mandates as set out below:

A. CONSTITUTIONAL MANDATE

The Commission is expected under the Sixth Schedule to the Constitution to coordinate with the Attorney-General and the Commission for the Implementation of the Constitution (CIC) in preparing, for tabling in Parliament the legislation required to implement the Constitution. The legislation required under the Constitution includes the specific laws listed under the Fifth Schedule and any other law not specifically listed but necessary for the implementation of the Constitution as a whole. These laws must be in place not later than five years from the date of promulgation of the Constitution.

B. STATUTORY MANDATE

I. THE KENYA LAW REFORM COMMISSION ACT

The Kenya Law Reform Commission Act, 2013 outlines broad functions of the Commission. Section 6 of the Act mandates the Commission to—

- (a) keep under review all the law and recommend its reform to ensure:
 - (i) that the law conforms to the letter and spirit of the Constitution;
 - (ii) that the law is, among others, consistent, harmonized, just, simple, accessible, modern and cost-effective in application; and
 - (iii) the respect for and observance of treaty obligations in relation to international instruments that constitute part of the law of Kenya by virtue of Article 2(5) and (6) of the Constitution;
- (b) work with the Attorney-General and the Commission for the Implementation of the Constitution in preparing for tabling, in Parliament, the legislation and administrative procedures required to implement the Constitution;
- (c) provide advice, technical assistance and information to the national and county governments with regard to the reform or amendment of a branch of the law;
- (d) formulate, by means of draft Bills or otherwise, any proposals for reform of national or county government legislation; and
- (e) advise the national or county governments on the review and reform of their legislation;

II. COUNTY GOVERNMENTS ACT, 2012

The County Governments Act and most of the legislation relating to Devolved Government requires the Commission to offer technical assistance to and capacity building for the 47 counties in the formulation and reform of their legislation and policies to implement county governments' mandate. Besides assisting County governments in the preparation and review of their legislation, the Commission has developed and disseminated Draft Model Laws based on the functions of the County Governments in the Fourth Schedule to the Constitution for customization by the County Governments to suit their unique needs as distinct entities.

III. THE COMMISSION'S ROLE IN SUPPORTING NATIONAL GOVERNMENT IN POLICY AND LAW REFORM

The Commission, under section 6(1) of its Act, has the mandate of ensuring that all the law in the Statute Book are reviewed and aligned to the Constitution. Currently, Kenya has over 700 Acts of Parliament, which the Commission together with its stakeholders is reviewing. As a matter of practice, the Commission's technical officers participate in various MDAs Task Forces, Inter-ministerial Committees and similar undertakings to provide technical support during policy formulation and actual translation of the policy into legislative proposals. Equally, the Commission has a standing invitation from Parliament to participate in the pre-publication review and scrutiny of all bills including Private Members Bills. This broad law reform function situates the Commission as the link between government policy making and legislative processes.

IV. MEANING OF LAW REFORM AND RATIONALE FOR LAW REFORM AGENCIES OR COMMISSIONS

The exact import of the term law reform is notoriously difficult to define. One reason is that it can refer, widely, to any beneficial change or proposed change in the law or, more narrowly, to the process by which such a change is attempted or accomplished. Both of these senses are relevant to the history of law reform in Kenya.

The leading justification for the existence of a Law Reform Commission or agency is the simple proposition that “the law, like any other human creation has defects, some of them serious. It is in constant need of improvement. The need for reform arises for many reasons. Institutions fashioned in the past may no longer meet the demands placed on them by a growing population that functions increasingly in a globalized economy; developments in technology may spawn problems that humanity has not previously encountered; social attitudes and values may have changed in a manner that needs to be reflected in the law; and old laws may need to be refreshed to modernize their language and remove obsolete provisions. Since the whole body of the law stands potentially in need of reform, there should therefore be a standing agency of appropriate professional experts to consider reform continuously. Therefore law reform commentators are generally agreed that law reform as a function should repose in a Commission with at least seven distinguishing characteristics: it should be permanent, authoritative, full-time, independent, generalist, consultative and implementation-minded.

A. PERMANENT

The permanence of an institutional law reform agency provides some inherent advantages over more ad hoc arrangements in furthering the reform process. These include retention of process expertise, ability to engage in long-term projects and publicity.

B. AUTHORITATIVE

A critical factor in winning and maintaining respect for a law reform Commission is ensuring that its scholarship is absolutely first class. Law reform work must always proceed from a meticulous treatment of law and a clear understanding of the surrounding processes. Only after that is it possible to consider intelligently the possibilities for reform and to make recommendations that are authoritative, realistic and achievable so that, even where they are not acted on immediately, they may serve to shape attitudes, values and understandings into the future, laying the groundwork for reform at a later time.

C. FULL-TIME

Many different models have emerged in the Commonwealth and elsewhere about how to structure and manage the operations of standing law reform Commissions, driven mainly by considerations of funding rather than optimal performance.



Our view is that a standing law reform Commission needs to have at least some full-time and engaged Commissioners and a critical mass of excellent research staff in order to achieve high quality outcomes.

D. INDEPENDENT

It is fundamental to success that a law reform Commission maintains its independence. To some extent, this flows from the formal establishment of institutional law reform agencies by statute – although few enabling Acts specifically use the term ‘independent’.

Internally, this refers to a Commission’s intellectual independence – the willingness to make findings and offer non-partisan advice and recommendations to government without fear or favor. Without this essential quality, a Commission would be no different from a government department operating under political direction, or a consultancy contracted to deliver a desired result. Although intellectual independence must be fiercely guarded, it is also true that, as a public agency, a law reform Commission must remain accountable and operate within boundaries defined by their constitutive legislation and those relating to public accountability and oversight.

E. GENERALIST

With the great proliferation and dispersal of law reform activity in Kenya, much of it in the hands of ad hoc Committees, Task Forces and other organizations, one of the most important contributions that a standing law reform agency can now make is to remain a facilitative and generalist body, endeavoring to work in any area of law or procedure, when asked, and making a virtue of this flexibility. Indeed, the most exciting references are those that take one outside their comfort zone.

F. CONSULTATIVE

Another of the defining characteristics of a law reform Commission is that it operates fully in the public domain. A deep commitment to undertaking extensive community consultation as an essential part of research and policy development is the sine qua non of the law reform Commission. Ultimately, it is the attribute that distinguishes it from other bodies that have a law reform aspect to their work.

The element of public participation is especially important since our Constitution demands public participation in various spheres as demonstrated elsewhere in this Guide.

G. IMPLEMENTATION-MINDED

Other constitutional implementation Bills in the case of KLRC, a law reform Commission report is not self-executing. The Commission may provide advice and recommendations about the best way to proceed, but implementation is always a matter for others. The extent to which a law reform Commission can

influence policy and maintain public confidence and the respect of government will depend substantially upon its ability to craft recommendations that are practical and susceptible to ready implementation.

V. WHO ARE WE?

We propose to answer this question in plain language. We pride ourselves in being “A vibrant agency for responsive law reform”. This is our Vision. For what purposes? So that we can ‘facilitate law reform that is conducive to social, economic and political development’ of our country. This is our Mission. What do we stand for? We believe in Professionalism; Integrity; Innovation; Teamwork; Networking; Accountability; Consultations; being People-Focused; Results-Oriented; and we cherish Equity and Equality. These are our values.

VI. METHODS OF WORK

A. RESEARCH AND REVIEW OF POLICY OR LEGISLATION

- (i) A Reference or Proposal for Reform may ordinarily originate from the Attorney-General or any other person or institution.
- (ii) The Commission may also on its own volition conduct an enquiry.
- (iii) A Reference or Proposal for Reform should be as concise as possible, disclose a cogent legal problem that necessitates reform and delineate the affected legislation.
- (iv) A decision by the Commission on whether or not to prioritize Reference or Proposal for Reform of the nature described under [ii] will be dependent upon the urgency of the proposed changes, the running programmes of the Commission especially as determined by the obligations in the extant Performance Contract and the available resources, including research personnel.
- (v) Where the Commission is for any reason unable to take on board such Reference or Proposal for Reform, it will as soon as practicable, advise the person or institution originating the proposal and the reasons thereof.

B. PROJECT COMMITTEE

- (i) Where the Commission takes up a Reference or Proposal, a Project Committee comprising a presiding Commissioner and one or two legal research officers is constituted.
- (ii) In assembling the Project Committee, regard is had to specialization, experience and interest.
- (iii) It is the responsibility of the Project Committee to: manage and undertake comprehensive research to determine the prevailing legal position and the deficiencies in the law that may require rectification; set time-frames for the review; receive, collate and analyze views

[including peer review by other legal staff and Commissioners], organize the requisite consultative fora; and prepare the necessary reports and draft bill.

- (iv) A key product of the Project Committee's initial research is an Issues or Discussion (Position) Paper which must generally include the background information and specifically issues identified for examination.

C. CONSULTATIONS

- (i) The Issues Paper is routinely circulated to all Commissioners for discussion and input which may generate further research on particular issues.
- (ii) For purposes of adopting best practices, comparative study of the position in other jurisdictions is undertaken. It is after such excursions that concrete proposals for reform are formulated.
- (iii) A Discussion Paper which entails the products of the detailed research that has been taken up to that point is prepared next. It reveals a range of arguments that may exist on any issue and provides an outline of likely proposals for reform.
- (iv) It is the Discussion Paper that normally forms the basis of consultations with external Stakeholders.
- (v) These consultations may take the form of workshops, seminars, retreats, or county-based public meetings.
- (vi) The stakeholders are also encouraged to make written submissions or memoranda.
- (vii) The views emanating from these stakeholder consultations constitute the framework for the proposals for reform.

D. THE LAW REFORM REPORT

- (i) After considering and analyzing the views and inputs generated as a consequence of stakeholder consultations and conducting further research where necessary, the Project Committee prepares a Report outlining the proposed recommendations for reform and in the interest of transparency, the reasons underlying those recommendations.
- (ii) For purposes of efficiency, the Commission ordinarily formulates the recommendations or proposals for reform by means of a Draft Bill.
- (ii) The Final Report together with the Draft Bill are eventually subjected to Stakeholder validation and then submitted to the Attorney-General or the instructing Cabinet Secretary or head of MDA for the requisite action.



PART III

Policy Making and the Law: Some Basic Principles

1. INTRODUCTION

Every person engaged in the legislative process must take into account certain mandatory considerations prior to and during the process. Courts and independent tribunals also take due regard of the factors discussed in this Part when construing policies and legislative instruments developed by the Executive and endorsed by respective legislative bodies at either level of Government.

These ideals spring from the Constitution of Kenya, 2010. The Guide, and specifically this Part, seeks to identify, consolidate and simplify the mandatory tenets, values and principles of the Constitution that ought to be applied and considered by all actors involved in one way or the other in the legislative process. These considerations may be summarized under the following rubrics –

- (a) constitutional issues;
- (b) international treaties and conventions ratified by the State;
- (c) territorial Jurisdiction;
- (d) conflict of law;
- (e) national law and policy;
- (f) Policy parameters;
- (g) statutory harmony;
- (h) ethical and other concerns;
- (i) technical soundness or practicality concerns;
- (j) public participation; and
- (k) cost-benefit analysis as part of the process of Regulatory Impact Assessment (RIA), which will be explained later in the document.

A. CONSTITUTIONAL ISSUES

To appreciate the broad constitutional principles, it is imperative to understand that the Constitution of Kenya, 2010 takes the form of modern democratic constitutions and makes elaborate provisions aimed at achieving broad national goals. It does this by not only creating mechanisms for its implementation, it also comprehensively advances and upholds democratic ideals through democratizing electoral and legislative processes and strengthening institutions; secures the rights and freedoms of the people and expands the Bill of Rights; spells out the peoples and citizens responsibilities; safeguards the rule of law; promotes integrity and good leadership in public service; establishes governance structures, authorities, positions and offices; promotes peoples participation in government; promotes transparency and accountability in management of public affairs; allocates powers to offices and provides for checks and control thereof; promotes separation of powers and roles between various arms of government; sets national goals and objectives; strengthens the Judiciary; establishes avenues for equitable distribution of resources; provides a framework for land management and administration; recognizes the people, their values and aspirations and seeks to give the sense of identity and to unite them regardless of ethnic, cultural and religious diversities; and makes provisions for equality and affirmative action, amongst other pertinent issues.

As the supreme law of the Republic, the Constitution binds all persons and State organs at both levels of government. Any law, including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

Specifically, the Constitution creates State Organs and other public entities dedicated to the legislative process. Every person is obligated to respect, uphold and defend the Constitution. Accessing the Constitution and familiarizing oneself with its contents is therefore the first logical step in internalizing these principles. Copies of the Constitution may be purchased from the Government Printer in Nairobi, but are also available for free download from the Kenya Law Reports website, <http://kenyalaw.org/>.

In respecting and upholding the aforementioned dictates of the Constitution, the Executives and Legislatures at both levels of Government, legislative drafters, civil society organizations, the private sector, professional groups and any other person or entity engaged in the legislative process must ensure that the instrument in question (whether a policy, bill, order, or a set of rules or regulations) –

- (i) conforms to the letter and spirit of the Constitution and promote its purposive interpretation;
- (ii) respects the functional demarcations in the Fourth Schedule to the Constitution as both levels of Government are required to deal with matters within their respective mandates;

- (iii) respects the legislative competencies since the Constitution recognizes which State Organ has what powers to make provisions with the force of law in the Republic. These organs are Parliament at national level and County Assemblies at the county level. The Constitution further recognizes that this legislative authority may be delegated, through the Constitution or legislation, to other entities or persons. Where such delegation has been conferred, the Act conferring it expressly specifies the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority;
- (iv) upholds the values and principles of the Constitution provided for in Articles 10, 129, 174, 175, 201 and 232; and
- (v) respects and upholds the Bill of Rights and fundamental freedoms enshrined in Chapter Four of the Constitution. The State must not limit any fundamental freedom or right protected by the Constitution unless in accordance with the conditions stated under Article 24 of the Constitution. Specifically, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

B. INTERNATIONAL TREATIES AND CONVENTIONS RATIFIED BY THE STATE

The Constitution recognizes that all treaties and conventions ratified by the State and the general rules of international law form part of the law of Kenya. Consequently, policies formulated and legislation enacted after the promulgation of the Constitution must respect the general principles of international law. Further, such instruments must focus on the implementation of the relevant treaties and conventions ratified by the State.

It is important to mention that treaties and conventions ratified by the State may be directly enforced by courts of law without further domestication. In this case, it is pertinent for those who undertake the negotiation and ratification of treaties and conventions to pay close attention to the necessity to formulate, simultaneously or thereafter, measures required to ensure appropriate implementation of the international instruments prior to their ratification.

While doing so, the Executive should ensure that reservations are expressed at the drafting stages or earlier stages of treaty negotiations especially where the substance of such a treaty or convention does not conform to the letter or spirit of the Constitution of Kenya, 2010.

All core actors in the legislative process are therefore encouraged to take cognizance of treaties and other international instruments regulating the areas or realms on or over which they intend to legislate or formulate a policy. The Treaty Making and Ratification Act, 2012, gives effect to the provisions of Article 2(6) of the Constitution and provides detailed procedure for the

making and ratification of treaties. Further, the list and copies of international treaties are available for download on the Treaties Database page of the Kenya Law Reports website, <http://kenyalaw.org/treaties/>.

C. TERRITORIAL JURISDICTION

The general principle is that a State can only legislate to govern matters within its territorial boundaries. However, there are exceptions to the general rule, where the law of the State may apply extraterritorially. This is common when dealing with economic and other serious white collar crimes, crimes against humanity and child trafficking, amongst others. For Example, the Constitution, under Article 76, prohibits a State Officer from maintaining bank account outside Kenya. In this case, the extraterritorial application of Chapter Six of the Constitution is pegged on the nationality of the perpetrator.

It is important therefore, when developing a policy or drafting a Bill, where extraterritorial effect is intended, that the policy maker, drafter or legislator is conscious of possible challenges of implementation or violation of the corpus of the Bill of Rights.

D. CONFLICT OF LAWS

In undertaking their assigned responsibilities, players engaged in the legislative process must respect and uphold the relevant provisions of the Constitution on functional assignment in order to avoid potential conflict of laws. The idea here is that although Parliament may, subject to the Constitution, legislate on any matter for the Republic, either level of government may ordinarily make law on their respective areas of constitutional competency. Observing this key principle will certainly obviate unnecessary expenditure of public resources in the event of litigation engendered by such conflict of laws.

E. NATIONAL LAW AND POLICY

The Constitution provides that national legislation and policy applies uniformly throughout the country. Further, national legislation is expected to address matters that would prevent action by a County Government which would be prejudicial to the economic, health or security interests of Kenya or another country or that which would impede the implementation of national economic policy.

Essentially, national legislation is expected to deal with issues that cannot be effectively regulated through individual county legislation hence the necessity to establish uniformity in the regulation of that particular concern. Primarily, national legislation is considered necessary for –

- (i) the maintenance of national security;
- (ii) the maintenance of economic unity;
- (iii) the protection of the common market in respect of the mobility of goods, services, capital and labor;

- (iv) the promotion of economic activities across county boundaries;
- (v) the promotion of equal opportunity or equal access to government services; or
- (vi) the protection of the environment.

This predominance is mainly subject and issue-oriented and does not imply superiority of National Government over County Governments in law making. If a court is asked to pronounce itself on the conflict, the outcome would not infer the superiority of one law against the other but only mean that the offending provision is merely inoperative to the extent of its inconsistency.

F. POLICY PARAMETERS

The ideal and recommended position in the legislative process is that policy precedes the formulation of a Bill or any other legislative instrument. The importance of developing a policy framework first is intended to amongst other salient features allow the executors to determine a clear road map, conduct an assessment of the problem and possible solutions, and define the opportunity to be embraced and the modalities or approaches to realize the benefit prior to proposing the necessary legal framework.

The general policy consideration is a background check on the position of the executive to ensure harmony of the legislative agenda with the executive developmental initiatives. The legislative agenda should enhance and augment the vision of the executive and dovetail into the long-term vision of the government.

It is important for players in the legislative process to appreciate the necessity to formulate policy that will guide and clearly set out the best approach (es) to dealing with policy challenges at hand. It is however important to note that not all policy problems require legislative solution. It is at the policy making level that all these issues are canvassed in detail and apt solutions explored.

Absence of a policy framework to guide the formulation of a legislative instrument has in the past caused both legal and practicality challenges in the implementation stage. This has subsequently occasioned monetary losses amongst other implications that could have been averted.

In the overall scheme of things, a policy maker, drafter or members of the Executive and Legislatures must satisfy themselves as to the soundness of the legislative proposal in policy terms.

Factors to consider in this respect comprise the ideals that –

- (i) policy should always precede the law;
- (ii) the policy on which legislation is anchored should be well articulated and understood at the point of drafting;
- (iii) the policy outline is what gives the legislation the overall direction and what it hopes to achieve;

- (iv) the legislative proposal proceeds from an identified policy need;
- (v) the policy sets down how the legislation hopes to speak to and solve the need identified; and
- (vi) any legislation must be informed by the available policy options and reflect a choice of the best way to address the identified need.

G. STATUTORY HARMONY

Arguably, there are hardly any completely new ideas in the public sphere. Virtually, all situations legislated on or otherwise, have, invariably been previously encountered and addressed in some form or other. It is important therefore for persons engaged in the legislative process to undertake detailed research to establish amongst other relevant issues whether a legislative proposal before them has previously been legislated, who or which entity is or has been responsible for its execution, which other existing legal framework can be modified, amended or repealed to allow for the situation at hand to be redressed, and which other mechanism other than a legislative measure can be employed to deal with the matter.

It must also be appreciated that laws complement each other. Every new piece of legislation enacted by the legislative body is considered an addition of a chapter to the existing Statute Book. Internal harmony of the Statute Book is therefore paramount. The idea here is that the Statute Book must not contradict itself. No provision of law is less important than the other and as such, internal conflict may cause unnecessary legal incongruence and interpretation challenges.

A new Bill or legislative proposal must also respect the provisions of the Limitation of Actions Act (Cap 22) and the Interpretation and General Provisions Act (Cap 2) to the extent that the two Acts conform to the letter and spirit of the Constitution. These cornerstones may be safeguarded by conducting a Regulatory Impact Assessment (RIA).

H. REGULATORY IMPACT ASSESSMENT (RIA)

Regulatory Impact Assessment (RIA) is a systemic approach to critically assess the positive and negative effects of proposed or existing regulatory and non-regulatory alternatives. It is an evidence-based approach to policy making. RIA requirements apply to proposals for new and amending regulation and to policy proposals that may result in new or amending regulation (regulatory proposals). It is an instrument that authorizes the determination and consequences of introducing a new regulatory regime.

The Constitution of Kenya, 2010, demands that all legislation is prepared on the basis of transparent, comprehensive and balanced evidence. RIA is aimed at ensuring rigorous analysis of regulatory proposals, effective and appropriate consultation and transparency of process. The details and place of RIA in the legislative continuum are addressed in Part XII of the Guide.

I. ETHICAL AND OTHER CONCERNS

There are certain ethical or religious beliefs and practices that a policy maker, drafter or law maker must consider or where need be, remain silent on or exclude in legislative instruments. This may be necessary in order to avert possible legal challenges or public uproar and discontent. These key players must always remain alive to some of these somewhat contentious issues, point them out and notify the executive or relevant actors in the process. We canvass this very serious concern in more detail especially in relation to the legislative drafter in Part V of the Guide.

J. TECHNICAL SOUNDNESS OR PRACTICALITY CONCERNS

Technical soundness refers to the implementability of a legislative or policy instrument. When the policy, law or other legislative instrument is technically sound, it means it can be implemented devoid of unnecessary administrative bureaucracy or other hurdles.

In adopting an administrative mechanism to implement a policy framework or legislation, persons engaged in the legislative process must consider the most appropriate, cost-efficient, effective and efficient mode.

K. PUBLIC PARTICIPATION

The Constitution obligates the State and all State organs to ensure adequate public consultation on all public policies, legislation or any decision that is likely to impact on the people of Kenya. Failure to factor in the mandatory requirement of public participation exposes the legislative instrument or policy framework to constitutional challenges of legitimacy, hence making it actionable for unconstitutionality in a court of law.

Apart from being a constitutional requirement, public participation facilitates a two-way flow of ideas between the government and other sectors of society. Effective public consultation is based on principles of openness, transparency, integrity and mutual respect. In other words there must be genuine desire on the part of the State organ or agency to seek advice and genuine consideration of that advice. In this regard therefore the consulting party ought to furnish the public being consulted with sufficient background information and time and assurance that their feedback will receive genuine consideration.

This open process facilitates acceptability amongst the key stakeholders, subsequently facilitating efficient and effective implementation of the legislative instrument. Further, a citizenry that is often involved in matters that affect them is more amiable and acceptable to change and government directives.



L. COST-BENEFIT ANALYSIS

As a principle, the Constitution requires all State entities to ensure financial prudence and that public funds are administered and utilized in a sustainable manner which takes into account the needs of future generations.

It is therefore prudent to conduct a cost-benefit analysis of a proposed piece of legislation. This involves estimating the net economic value of a given policy, law or regulation to see if the benefits outweigh the costs. Where the balance favours public benefit, it may be feasible to legislate on the matter and if otherwise it would be advisable to consider other means or measures of solving the policy problem or challenge.

Further, there is need to make budgetary considerations while seeking to legislate in order not to legislate a law that has an onerous monetary implication that its implementation becomes unsustainable. This is because the efficacy of legislation and the success of the overall legislative agenda depends on the implementation of the legislation that comes off each circle of sittings. If the legislative initiative is beyond the budgetary possibilities, the remedy may lie outside the legislature.



PART IV

The Policy Formulation Process

A. INTRODUCTION

This Part seeks to explain the process of policy making in Kenya. As has been previously indicated, it is best practice for a policy to precede the law. In fact, most legislation, including subsidiary legislation, trace their foundation or anchorage on an agreed policy framework. Save for Bills emanating from the respective Houses, commonly known as Private Member Bills, the bulk of other Bills spring from policy proposals of the Executive, civil society, professional bodies, private sector and individual citizens or other organized groups.

The focus in this Part will revolve around the process before legislative proposals reach the floor of the House. It discusses policy development from an idea or realization that a particular situation or social-developmental need may require a law or a regulation. Developing the policy to deal with the requirement, the direction after policy formulation, the decision to proceed from policy to legislation and the role of policy in the legislative process are also elaborated in this section. However, commencing an examination of this nature requires an appreciation of the meaning of policy and attendant principles.

I. WHAT IS A POLICY?

A policy is a course or a principle of action adopted or proposed by government, party, business, or individual. It is defined by *Black's Law Dictionary* as "the general principles by which a government is guided in its management of public affairs."

In the context of legislation, policy is a document which outlines what a government or an individual aims to achieve for society as a whole. All policies start off as an idea. It may be the idea of a member of the executive, a bureaucrat, legislator, a stakeholder group or an individual citizen.

Essentially, a policy sets out the goals and activities planned to achieve a certain purpose. Policy discussions resolve whether or not a law is needed to achieve the aims set out in the policy or the most appropriate approach to



resolve a problem or embrace the opportunity at hand. For governments, in this case the National Government or County Government, policy-making is the process by which they translate their vision into programs.

II. THE CONSTITUTION AND POLICY MAKING

The Constitution recognizes in several instances the necessity to formulate, debate, approve and implement policies. In fact, Parliament is obligated to discuss and approve a number of policies, for example, the national land policy, economic policy, health policy and several others, mentioned in the Fourth Schedule to the Constitution. The Constitution recognizes the need for all arms of Government to engage the public in the formulation of policies.

Further, all State organs, State and public officers and all persons are obligated by Article 10 of the Constitution to apply and respect values and principles enshrined therein when making or implementing public policy decisions. These values and principles include inclusiveness, equality, good governance, integrity, transparency and accountability and sustainable development.

III. WHO INITIATES POLICY?

Policy ideas may originate from the Executive and the Executive entities, political formations such as parties, business associations, organized groups or individual citizens.

Any person may originate a policy idea since, according to the Constitution, any person has a right to petition Parliament or County Assembly to consider any matter within its authority. Parliament or County Assembly may, upon consideration, translate the idea into a policy. This may be done by the Speaker referring the matter to the relevant Committee for consideration and action.

The Political Manifesto of the Government of the day is also a recognized source of policy. The pledges projected in a Manifesto may require certain policies to be developed to facilitate their implementation. It is important to note that all public expenditures must be authorized by law and hence the necessity to anchor such activities on a policy or a legislative instrument.

It is always appropriate for the person who originates a policy idea to prepare a policy brief. The brief combines research synthesis and strategy recommendations. It sets down the methods and principles that will be followed in attaining the identified purpose.

IV. PUBLIC PARTICIPATION IN THE POLICY MAKING PROCESS

One of the most important features of our constitutional framework is the requirement of public participation in governance and other administrative activities. Specifically, the provisions of the following Articles are pertinent—

- (i) **Article 10** recognizes public participation as one of the national values;
- (ii) **Article 27** provides for equal treatment of all persons, while affirmative action in governance is provided for in Articles 54 and 56 of the Constitution;
- (iii) **Article 35** provides for the right of access to information held by the State or another person which is necessary for the exercise of any right or fundamental freedom;
- (iv) **Article 118** requires Parliament to conduct its business in an open manner and to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. It also prohibits Parliament from denying the public and media access into its sittings unless there are any justifiable reasons. Article 196 contains a similar requirement for County Governments; and
- (v) **Article 119** provides for the right of persons to petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation.

Public participation as the premise on which devolution is anchored is addressed under section 87 of the County Governments Act (“CGA”) which among other things provides for–

- (a) access to information and data relevant to and related to policy formulation;
- (b) reasonable access to the process of formulating policy and other government programs;
- (c) protection and promotion of minorities within counties; and
- (d) recognition of non-state actors in formulation and implementation of policies.

It is envisaged in the Constitution and law that the public may participate as individuals or as organized groups representing minorities and other interests. Equally, civil society has an entry point under the law to engage policy makers and the government in policy formulation.

V. CONSULTATION WITH AFFECTED STATE ENTITIES AND ACTORS

Consultation in the process of policy making is critical. The idea here is that problems to be addressed or opportunities to be embraced may be interrelated thus requiring solutions and input of various State and non-State actors. To this end, the Government and its entities must work as a whole. Consultation ensures that all affected entities or persons likely to be affected by the policy contribute to the process in its formative and influential stages for value addition and to avert possible delay, fiscal and other implementation constraints. That the Constitution underscores this principle of consultation cannot be overemphasized.

B. FACTORS TO CONSIDER IN THE POLICY MAKING PROCESS

The policy maker must consider the following—

- (i) Necessity to formulate a policy based on a need, emerging or possible change that may be anticipated (commonly known as the needs- based analysis);
- (ii) How the proposed policy will be managed and resourced from formulation to the point of implementation. This includes the personnel and specialized resources necessary for the full implementation of the policy;
- (iii) The time it will take to formulate the policy, work out its means of implementation and factor in the period it may need to develop the enabling legislation if necessary;
- (iv) Information requirements for the full understanding and implementation of the policy. In other words, analytical information on the situation if available, official surveys and data on population and other factors form a necessary background to policy formulation;
- (v) Pay attention to the model and process of devolved government as a requirement of policy initiatives;
- (vi) Public participation, debate or input as a new variant in the policy arena and a consideration of where and how to involve the public in developing policy;
- (vii) The principle of subsidiarity: meaning that policy development must be devolved to those at the frontline of service delivery. For example, in addition to involvement of the executive at the national or county headquarters, the other officers in the departments thereunder also have a say in policy formulation;
- (viii) The practical aspects of policy implementation;
- (ix) The connection between the expected outcomes (goals) and public policy. For example there is need to balance the sustainability of the ecosystem of a lake and the policy regulating access and fishing;
- (x) Tailor the policy framework to local needs by ensuring the policy answers to local questions and dilemmas and is not an imposition from outside the community. For example in developing a Wildlife Policy, communities in surrounding areas must be consulted to propose solutions that are best suited for the area;
- (xi) The constitutional and legal underpinning and authority for whichever level of government to initiate the process of policy formulation; and
- (xii) The functional assignment to the two levels of government.

C. SALIENT FEATURES OF A POLICY FRAMEWORK

A policy framework should amongst others reflect the following features–

- (i) Be forward-looking, that is, it must have a long-term view of the problem and offer a long-term solution;
- (ii) Benefit from the experience of others who have resolved similar situations;
- (iii) Seek new solutions to old problems by being clear on objectives and outcomes;
- (iv) Be based on a study or current analysis of the problem at hand;
- (v) Offer an inclusive solution to all the segments of the community in which it will be implemented;
- (vi) Fit into the current policies being implemented by other agencies;
- (vii) Borrow from best practices and learn from implementation mistakes and successes elsewhere;
- (viii) Must have an in-built communication strategy for dissemination to the public and all stakeholders;
- (ix) Should have evaluation and review mechanisms as one of its features; and
- (x) Provide a pre-legislation impact assessment statement.

Therefore, a generic policy framework must comprise–

1. Introduction;
2. Situation analysis;
3. Challenges or problem or issues to be addressed;
4. An analysis of the existing legal framework, including international law governing the matter, if any;
5. Strategies for its implementation;
6. Actors or stakeholders including their roles and responsibilities;
7. Targeted audience and their role and obligations;
8. Monitoring and evaluation mechanism;
9. Review measures;
10. Conclusion and way forward; and
11. Provision of a legal instrument to for its operationalization.

D. WHO ARE INVOLVED IN THE PROCESS?

The policy formulation process involves a variety of stakeholders. Our constitutional framework is such that we must look at who the key players are at both levels of government.

At the national level the key actors include –

- (a) the Executive, which includes the President, Cabinet, respective Cabinet Secretaries, State Department, State Organs or Agencies, their technocrats, drafters and policy analysts;
- (b) Parliament, which includes the Members and Speakers of the National Assembly and Senate, their Clerks, the respective Parliamentary Committees, researchers and others;
- (c) the Office of the Attorney General (State Law Office), Kenya Law Reform Commission and the Commission for the Implementation of the Constitution (CIC); and
- (d) the Government Printer for purposes of publication upon assent by the President.

At the County level the key actors include –

- (a) the Executive, which includes the Governor, County Executive Committee, responsible County Executive Committee Member, departments, agencies and other technocrats;
- (b) the County Assembly, which includes the Speaker, the Clerk, the members of the Assembly, Committees and their technocrats; and
- (c) County Government Press.

E. POLICY APPROVAL

Policy and policy formulation are no longer theoretical constructs devoid of legal consequences. The Constitution recognizes not only the role of the National Government in policy formulation but also as executive responsibility at both levels of Government. Moreover, as indeed explained comprehensively in this Guide, one of the key entry points of the public in governance is through participation in the policy formulation process.

Achieving these broad constitutional ideals in practical terms will therefore require that a policy framework must at the national level be proposed or sponsored by the respective Cabinet Secretary, approved by the Cabinet, passed by Parliament, adopted as a Sessional Paper and finally assented to by the President. The Sessional Paper is then numbered and published.

A County Government may, pursuant to the functions assigned to it under the Fourth Schedule, formulate and adopt a policy. Such a policy must be proposed or sponsored by the respective County Executive Committee Member, approved by the County Executive Committee, debated and passed by the County Assembly in accordance with the Assembly Standing Orders, and assented to by the Governor. Similarly such a policy document may be published by the County Government.

The above procedure does not in any way preclude the Executive at either level of government from formulating and executing executive policies. Curtailing



this inherent power of the executive would unnecessarily derail executive function. We must however emphasize that constitutional dictates of public participation must be observed whether a policy is approved and executed at the executive level or taken through legislative approval as demonstrated.

The primary idea encapsulated in the policy approval principle is that it enables proper functional analysis and ease of implementation whether at National or County Government level.

It is important to note that although members of the public, private sector, professional bodies, Civil Society, Non-Governmental Organizations (NGOs), Community-Based Organizations (CBOs), Faith-Based Organizations (CBOs) and International Development Partners may propose and even facilitate the formulation of policies, such policies may be adopted or implemented only if the above processes of adoption are strictly adhered to.

F. EFFECT OF NATIONAL POLICY ON COUNTY GOVERNMENTS

All national policies apply across the entire nation and must be implemented by entities mentioned in them or in laws subsequently enacted in pursuance of the policy.

A policy framework must respect and uphold the constitutional assignment of functions to either level of Government.

The Constitution assigns functions to each level of Government and categorizes those functions as exclusive, concurrent and residual. Exclusive functions are functions specifically assigned to either National Government or County Government. Concurrent functions are those whose aspects are implemented by both levels of government. Finally, residual functions are those not assigned to either level of Government. The Constitution presumes that the residual functions are unless transferred by law, executed by the National Government.

The National Government may formulate policies in relation to the exclusive, concurrent and residual constitutional functions. If the National Government is however minded to formulate policies on functions that are exclusive to the County Government, the National Government must be alive to the principles of conflict of laws set out in Article 191 of the Constitution. However, the National Government must not through policies or legislation interfere with the independence and execution of the functions assigned to County Governments. Citizens and all stakeholders are reminded to remain vigilant to detect and highlight any possible excesses. Where any such excess is established to have occurred or is impending, one may formally petition the relevant constitutional Commission or State Organ for appropriate redress or seek any of the remedies provided for in law.

G. DISTINCTION BETWEEN POLICY THAT REQUIRES ADMINISTRATIVE PROCEDURES FOR IMPLEMENTATION AND THOSE THAT ARE SELF-EXECUTING

The nature of policies is such that some policies do not require enactment of legislation to facilitate their execution. These policies are known as self-executing policies. These types of policies lay out a clear administrative framework, mostly relying on the existing structures for their execution. It recognizes existing structures that are in turn accorded these additional functions to undertake. The cost of executing such function is provided for in the normal budgeting process. However, it is important to note that where such self-executing policies and legislation are adopted, care must be taken that the existing structures are, at least, brought into accord with the letter and spirit of the Constitution of Kenya, 2010. Chapter 13 thereof and in particular Article 232 on the values and principles of public service offer a good starting point.

H. HOW MEMBERS OF THE PUBLIC, CIVIL SOCIETY AND OTHER NON-STATE ACTORS ARE ENGAGED IN THE POLICY MAKING PROCESS

It is the constitutional obligation of persons responsible for policy formulation to ensure adequate public participation. The Executive is required to issue notices to the public and keep the public informed of policies under formulation and indicate how and where any person may access relevant information and how they can contribute to the policy making process. Public hearings are critical when developing a policy.

It is incumbent upon the Executive to streamline public involvement in this process. As already evident in many judicial decisions, absence of adequate public participation in the formulation of a policy may render the final product patently unconstitutional and challengeable in a court of law. It is therefore incumbent upon the National Government to develop a public participation policy framework and County Governments to legislate on and provide structures for effective public engagement.

I. WHAT ARE THE STAGES IN THE POLICY FORMULATION PROCESS?

In formulating a policy framework, it is paramount that the following stages are adhered to—

STAGE I: POLICY INITIATION

Policy initiation is a function of a number of players including government Ministries, Departments and Agencies (MDAs), citizens, institutions, and stakeholder groups among others. Once the proponent generates the idea,

they inform the National or County executive concerned who propels it to the ministerial level. The relevant MDA formulates policy guidelines, which is reduced into writing for discussion purposes within the MDA and other government departments.

STAGE II: RESEARCH

During this stage, it is expected that the respective MDA will undertake comprehensive and comparative research on the matter to be regulated. The MDA involved may undertake study visits, within or outside the Republic or County, to ensure that the policy benefits from international or national best practices. Expert opinion on the problem at hand should be sought. The National or County entity should work closely with State Agencies tasked with the obligation of assisting the two levels of government in the process of formulation of policies and legislation. Kenya Law Reform Commission (KLRC) and Kenya Institute of Public Policy and Research (KIPPRA) are very instrumental in this regard. MDAs should take advantage and use these entities as they are statutorily tasked to assist with these specialized competencies.

It is at this stage when taskforces, committees and other consultative machineries may be constituted with a view to ensuring that all entities likely to be affected by the policy contribute to the policy process at the formative stages. This approach will facilitate acceptability and ownership of the final product by all relevant MDAs and other actors.

STAGE III: NEGOTIATION AND PUBLIC PARTICIPATION

This stage is the longest one in the legislative process. It is at this level that substantive contents of the draft policy framework are debated and negotiated with various stakeholders, such as opposition parties, the public, non-governmental organizations and all other interest groups. During this time, the MDAs prepare discussion documents on the policy or law to facilitate debate, comment and feedback.

Stakeholder participation may take different forms such as attending Parliamentary committee hearings, setting up meetings with the Cabinet Secretary or departmental heads, organizing workshops, seminars or retreats, using the media to outline the issues and similar entities to lobby, publication of extracts in newspaper articles or other online platforms and making contributions during public fora and submitting written opinions and memoranda.

STAGE IV: FINALIZATION OF THE POLICY

Stage four of the process is the finalization of the policy by the relevant MDA. This comes after the policy has been properly debated whereupon the concerned MDA crystallizes the issues and options available and draws up a final policy document.

STAGE V: CABINET OR COUNTY EXECUTIVE COMMITTEE APPROVAL

Once the respective Cabinet Secretary, in the case of National policy, or County Executive Committee Member, in the case of a County policy, is satisfied that proper analysis has been conducted, different approaches have been identified and discussed, and that the policy document, as is, speaks to the best option available to redress a situation, the Cabinet Secretary or County Executive Committee Member submits the policy to the Cabinet or the County Executive Committee, respectively, for approval.

The Cabinet Secretary or County Executive Committee Member explains to the Cabinet or the County Executive Committee with adequate background information, the salient features of the policy and justification. The Cabinet Secretary or County Executive Committee Member must ensure that fiscal, constitutional and other possible implications of the policy are clearly brought out to enable the Cabinet or the County Executive Committee make an informed decision.

STAGE VI: PARLIAMENTARY OR COUNTY ASSEMBLY APPROVAL

Upon approval by the Cabinet or the County Executive Committee, the Policy document is published and tabled in the respective House for debate and approval.

The Assembly or House to which the policy is subjected for debate and adoption is dependent on the subject matter and functional jurisdiction as earlier discussed.

The respective legislative body shall, in accordance with the Standing Orders, introduce the policy document in the House, subject it to the relevant House Committee for scrutiny and further consideration. The Committee reports back to the whole House. The policy document may be approved with or without amendments.

Where significant changes are likely to be made on the policy, the House invites views of the Executive, for value addition and further clarification. Further, like all State entities, subject to the mandatory constitutional principle of public participation, the House may subject the policy to public and stakeholder consideration.

STAGE VII: ASSENT

Upon passing by the respective House at either level of Government, the Speaker of the respective House submits the approved policy to the President, in the case of National Government or the Governor in the case of County Government, to formally endorse, by affixing the National Seal or County Seal respectively, and signing the policy. This process is called assent.

STAGE VIII: PUBLICATION

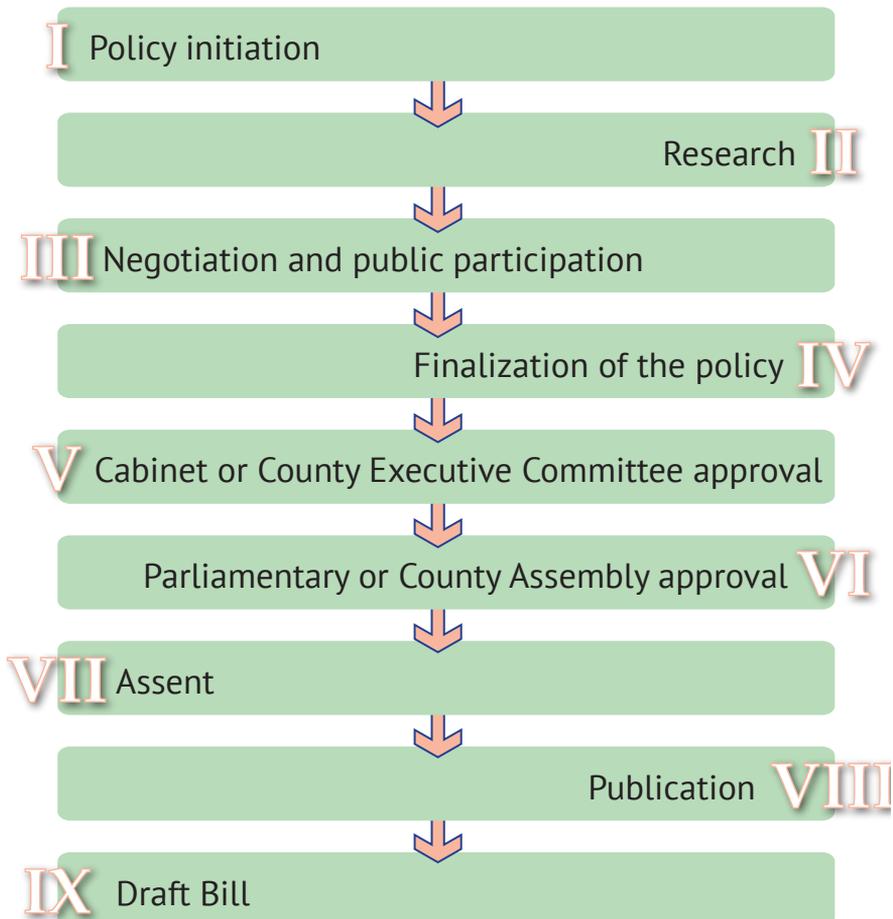
Upon assent, the policy is published as a White Paper. The Executive is expected to widely circulate the policy and to keep the public informed of the likely effects of the Policy. The White Paper is a statement of intent and a detailed policy plan, which often forms the basis of legislation.

STAGE IX: DRAFT BILL

As already alluded to above, the policy (White Paper) often forms the basis of legislation. If it is determined at the ministerial level that a new law is necessary to achieve its objectives and aid implementation, the concerned MDA will commence the process of drafting the Bill to give full effect to the policy directives. In its early stages before a new law is tabled in the House, it is called a legislative proposal. Once it has been so tabled it is called a Bill.

As has been seen, not all policies end up requiring legislative instruments to be implemented. Such policies are known as self-executing policies. This means that they are effective immediately without the need for ancillary legislation, or other type of implementing action.

Fig 1: Stages in The Policy Formulation Process





PART V

Translating Policy Into Legislation

A. INTRODUCTION

Legislation should spring from a policy as a means of giving it justiceable basis and implementation framework. A person or organization that spearheads the development of a Bill starts from the point of generating policy. As discussed above, a policy framework lays out in detail how best a matter or a challenge at hand is to be redressed.

Although the compliance with the requirement that policy precedes legislation is the most ideal and effective approach, there are instances where the process may not have been adhered to. Instances have been witnessed for example, in cases of Private Members' Bills or Bills urgently required to meet the constitutional time lines under the Fifth Schedule.

On most occasions cited above and especially owing to cost and time constraints, it is not always possible to commence the legislative process by first appreciating and embracing the requisite policy platform. The practice, albeit improper, has been to work backwards, where the policy is formulated after a law has been enacted. The latter has had immense challenges, beginning with implementation difficulties of the just enacted law, coupled with demands for immediate amendments to rectify anomalies that could have been forestalled or foreseen if the ideal process had been followed.

B. DO WE NEED A LEGISLATION TO GIVE EFFECT TO POLICY?

The other way of expressing this question is: Is regulation the best form of government action? The most plausible answer to this question is largely in the affirmative. However, legislation is not the only option available to implement or give effect to a policy decision. There are other options which the Government may adopt to deal with a policy problem. These include possible direct implementation through ministerial order, administrative measures, economic instruments, voluntary agreements, self-regulation, information disclosure, persuasion or developing legislation to give full effect to the policy.

C. WHAT ARE THE FACTORS FOR CONSIDERATION PRIOR TO LEGISLATION?

The decision to proceed to legislate is based on the following considerations—

- (i) whether the policy is self-executing;
- (ii) the cost-benefit analysis of the proposed legislative remedies;
- (iii) the existence of similar applicable law; or
- (iv) whether the issue can only be resolved by way of other legislative initiatives.

D. WHAT ARE THE COST-BENEFIT IMPLICATIONS FOR ADOPTING THE LEGISLATIVE REMEDY AS OPPOSED TO ADMINISTRATIVE OR OTHER MEASURES?

Before taking the legislative approach, the Executive and the person responsible for drafting legislation should undertake a cost benefit analysis of the options available. The latter should advise the Executive on the constraints that adopting the legislative approach could engender. These include the cost, both fiscal and time related, and inflexibilities occasioned by stringent demands that an Act of Parliament or a County legislation may occasion, amongst others.

E. JUSTIFICATION FOR LEGISLATION

Owing to their significance, certain matters can only be executed through legislative measures. In making this determination, the Executive must respond to the following questions —

- (i) What are the legal consequences of not formulating a law to regulate the matter in question?
- (ii) What does the Constitution demand, for example, if it is a question of limitation of rights?
- (iii) What are the enforcement mechanisms necessary to give full effect to the policy?
- (iv) Will there be need to create criminal sanctions to enforce the law?
- (v) Are there fees, charges or other fiscal penalties to be imposed?
- (vi) What procedural and process matters are needed?; and
- (vii) Are there strict time lines to be adhered to in implementing the policy and, if so, what are the chances that they may not be complied with if a different option was adopted?

J. FACTORS TO CONSIDER IN SETTLING FOR A LEGISLATIVE SOLUTION

In determining which is the most appropriate instrument to implement a policy, the drafter should appreciate that all Regulations, Rules, Orders and other

forms of subordinate legislation must originate and borrow legal backing from an Act of Parliament or County legislation. Further, all subordinate legislation must be *intra-vires*. In other words, such subsidiary legislation must conform to the primary legislation in all respects.

In deciding whether to adopt general administrative procedures other than subordinate legislation to implement a policy, one has to be persuaded that the content and nature of policy directives and basic guidelines to be adhered to, do not necessarily attract criminal or legal penalties.

Official government communications such as ministerial circulars, letters and memoranda are essential in communicating the executive directives but may be considered less binding and hence not easily enforceable in a court of law.

One should be able to appreciate the impact of the directive in determining what instrument is best placed to implement the policy. In other words, the appropriate legislative instrument to propose after settling the policy question depends on the nature of the problem at hand.

Here several factors are considered—

I. NATURE OF THE CONTINGENCY

A complicated long term situation that affects a large part of the population may need a legislative solution by the respective House. An issue that regulates a temporal situation such as, for example, accommodation of railway construction workers in a county or the movement of large or noxious cargo may require regulations from the Ministry or Department of Transport.

II. REGULATORY OPTIONS

The existence of another regulatory option in an existing law or regulation that may be activated to deal with the mischief may also suffice. A legal extension to cover the issue and area may become necessary in that instance.

III. COST

The cost of legislation and implementation of the proposed instrument must be weighed against the mischief sought to be addressed. If for instance the biomass of fish in a lake is too low in economic value, the policy initiative could be restocking and conserving and not varying the mode of fishing.

IV. MACRO-ECONOMIC FACTORS

Macro-economic factors and the projected impact of the legislative instrument on the larger society in socio-economic terms may influence the choice to be made.

V. ENVIRONMENTAL FACTORS

Environmental factors and other common concerns that impact the living environment of the community affected by the proposal are useful in determining issues that motivate the legislative proponent.

VI. POSSIBLE LIMITATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Article 3(1) of the Constitution mandates every person to respect, uphold and defend the letter and spirit of the Constitution. Chapter 4 of the Constitution bestows fundamental rights and freedoms on the people of Kenya. Further, Article 24 restates that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

If the policy directive is likely to limit a right or a fundamental freedom enshrined in Chapter Four of the Constitution, such limitation may only be effected in accordance with Article 24 of the Constitution.

K. SOURCES GOVERNMENT'S LEGISLATIVE AGENDA

The government's legislative agenda explains the means by which the Executive ensures legal backing to its programs. In most jurisdictions, the government's legislative agenda is set by a Ministerial committee pronounced by the head of government in the opening session of Parliament.

The Executive liaises with the House leadership who presents it in the Parliamentary or County Assembly Business Committee and then sets the legislative agenda for the government for the ensuing cycle. In Kenya, the legislative agenda is set from an outline of policy priorities made in the presidential or governor's speech at the opening of a new Session of Parliament or County Assembly. The agenda is set as follow –

- (i) The President's or the Governor's speech at the opening of each Session of Parliament or County Assembly outlines in broad terms what the government hopes to achieve and the necessary legislative measures that may be required for the tasks set out;

- 
- (ii) The priorities in the legislative program are set for the ensuing legislative circle of the House;
 - (iii) The number of bills and their relative urgency is set by the executive and managed through the office of the Leader of Majority;
 - (iv) The government legislative agenda may also be set by the budget outline for the coming financial year. However, to fulfil some aspects of the budget, it may be necessary to legislate; and
 - (v) The coming into operation of international treaties and conventions and obligations that arise therefrom may influence the legislative agenda.



PART VI

Legislative Drafting

A. INTRODUCTION

The purpose of this Part is to provide an overview of drafting legislation generally and to highlight salient features and tenets that guide drafting of legislation with specific reference to Kenya.

Legislative drafting is the process of converting policies, pronouncements or declarations into legislative instruments. A legislative drafter provides the technical drafting service and prepares the required legislative instrument. This is the person who translates the agreed policy framework into draft bill or legislative proposals that is presented to the House for enactment.

B. PRINCIPLES AND TENETS OF LEGISLATIVE DRAFTING

While traditional drafting was characterized by legal jargon, long sentences and dull lacklustre provisions, modern drafters observe principles and tenets of plain language drafting. Legal practitioners have been accused of writing complex legal instruments, marred with highly technical language and legalese. This is the practice drafters the world over are moving away from. As discussed earlier, drafters must contribute to the rule of law. Persons subject to the law should be able to easily understand the laws that govern them.

Drafters should, as much as possible, try to reduce the complexity in law. Technical matters should be simplified and the details on those technical issues provided for in subsidiary legislation or other administrative measures. A drafter should always have the end-user of the law in mind while drafting the law. Where the intended users are highly technical or specialized and trained persons, the law should be able to communicate to them. A qualified drafter must be able to strike this balance and at the same time communicate the desired outcome.

Legislative drafters and policy makers must pay keen attention to the legislative sentence, language and syntax.

I. LEGISLATIVE SENTENCE

This is the arrangement of words to express a command or state a prohibition. The sentence must contain: the legal subject, i.e. the person to whom the law applies; the legal action i.e. the law which is to apply; and the circumstances in which the law is to apply. The sentence states –

- (i) *how* i.e. manner in which the law is to operate;
- (ii) *What* i.e. nature of the legal action;
- (iii) *When* i.e. the conditions under which the law is to operate;
- (iv) *where* i.e. the circumstances in which the law will operate;
- (v) *who* i.e. the legal subject, the person given responsibility or on whom is placed an obligation or prohibition; and
- (vi) *why* i.e. the policy considerations of the law.

II. LANGUAGE AND SYNTAX

Language deals with the means of conveying the message of the law. Syntax on the other hand refers to the arrangement of words and phrases to create well-formed sentences in a language. In drafting, it is important to observe the following language and syntax rules –

- (i) **Familiarity**-The drafter should use short familiar words and phrases;
- (ii) **Brevity**- Good drafting uses short sentences which communicate only one message;
- (iii) **Consistency** – The same word should be used to express one meaning within the Bill;
- (iv) **Spelling**- The Bill should demonstrate consistency in the spelling of the words recurring in it;
- (v) **Standard language**-The drafter should utilize the standard form language of the drafting office. In Kenya, this is called the house drafting style whose custodian is the Office of the Attorney-General;
- (vi) **Clarity**-A Bill should be in clear, simple and precise language. The draft Bill should be clear about the audience it addresses, those it regulates and those that are responsible for its enforcement;
- (vii) **Harmony**- The draft should correlate with other existing laws on a similar subject matter; and
- (viii) **Logic**- The material in the proposed law should be organized in a logical manner with the same subjects dealt with separately and sequentially.

Drafters and those who review bills must look out for and avoid using archaic words such as aforesaid, before-mentioned, herein before-mentioned, whatsoever, whomsoever, among others. Drafters should also not use Latin expressions while drafting as well as avoid using more words than necessary.

They should also pay careful consideration to words and phrases such as listed below –

- (i) *shall* which is generally used to impose duty or obligation;
- (ii) *any* which means one or some and is often misused while referring to a person or thing;
- (iii) *each* and *every*—*each* refers to two or more in a numerical context while *every* implies a class;
- (iv) *all*—this is mostly a spurious form of emphasis and should be avoided;
- (v) *On or after*—this should be used when the specified day is to be included;
- (vi) *and* or *or*—“*And*” is used conjunctively to imply togetherness while “*or*” is construed disjunctively to propose a choice between two or more options; and
- (vii) *which* and *that*—while the word “*which*” is non-restrictive, “*that*” is used in restrictive context;

The Drafter should also ensure that they use proper tenses since laws are meant to be of continuing application and should be written in the present tense and observe proper punctuation since this eases the readers’ understanding of the law.

C. KEY REFERENCE LAWS IN DRAFTING (DRAFTING TOOLS)

The importance of certain key tools to the legislative drafter cannot be overemphasized. These laws give the basic principles that inform the art and practice of legislative drafting. They include the following—

- (i) The Constitution of Kenya, 2010. Article 2 restates the supremacy of the Constitution. Therefore every law must be consistent with this provision, otherwise it will be null and void to the extent of the inconsistency. Further, it must be confirmed that the proponents of the law have the legal capacity and mandate to propose and pass the particular laws;
- (ii) Interpretation and General Provisions Act (Cap. 2): This Act gives the basic structure of drafting; clarifies the rules of construction of laws; avoids repetition and promotes consistency of language. The Act also deals with amendments, repeal of legislation and gives attendant general guidelines;
- (iii) Revision of Laws Act (Cap. 1): The Act deals with the revision of laws to ensure that the statutes are up to date. Revision of laws and allocation of Chapter (Cap) numbers is done by the Attorney General and the National Council for Law Reporting (NCLR), which exercises delegated authority of the Attorney-General in this respect; and
- (iv) The public financial management laws need to be considered in order to ensure that the proposed law conforms to requirements of public resource management. These include the Public Finance Management

Act, 2012, the Public Procurement and Disposal Act, No. 3 of 2005, the Public Audit Act, No. 12 of 2003 and the Statutory Instruments Act, No. 23 of 2013.

Most of these key reference statutes and other related legal documents are available for purchase at the Government Printer in Nairobi and also for free reading and download at the Kenya Law Reports website, www.kenyalaw.org.

D. DRAFTING INSTRUCTIONS

Before embarking on a drafting assignment, a drafter must be clear on the mischief or defect intended to be remedied or the opportunity to be embraced. A drafter must appreciate in detail the task ahead. This can only be possible if the drafter is afforded proper drafting instructions. Even after getting drafting instructions, the drafter must continuously work in close collaboration with the instructing department and ensure that, as far as possible, legislation is based on sound legal principles, gives effect to the intended policy and is clear, understandable and practicable.

Drafting instructions must among others state—

- (i) General factual background information on the current legislative framework or solutions to the social problem which the new legislation aims to address and the reasoning for their characterisation as inefficient. This may be informed by issues raised and discussed in the media, political decisions, judicial precedents, academic opinion or similar sources abroad;
- (ii) Legislative priority, that is, an indication of the proposal's priority as given by the Parliamentary or County Assembly Business Committee or the Executive. If this has not yet been given, the drafter seeks advise on the priority being sought and what is being done to obtain that priority and possible legislative solutions drawn from other jurisdictions, their impact and possibly comments on transferability;
- (iii) Procedural background information on policy authority; Cabinet (or County Executive Committee) approval for major policy initiatives; ministerial approval for minor policy; and drafting or technical matters;
- (iv) Aims of proposed legislation (in detail);
- (v) Comments on the possible scenario for the achievement of these aims, such as possible legislative solutions, any existing impact analyses of the proposed legislative solutions, thoughts of the policy maker on proposed or existing administrative arrangements to be used and their cost or risk analyses;
- (vi) Information on the time-scale for the required legislative solution: gradual or measured entry into force of the proposed legislative solutions, retroactive or retrospective effect and transitional arrangements;
- (vii) Information on the boundaries of the legislative solution, including clarity on any possible extraterritoriality (e.g. between or amongst Counties);

- (viii) Legal opinions of the relevant MDA or constitutionally recognized source of legal opinion (including the Office of the Attorney-General, Kenya Law Reform Commission and County Attorneys (for County Government));
- (ix) Detailed instructions on specific politically sensitive issues, ethical concerns and any details which may assist the drafter in the compilation of effective solutions;
- (x) Affected provisions and consequential amendments: other provisions of either the Act being amended or other legislation which will need to be amended as a consequence of the proposed amendment which, if not properly handled, might possibly trigger endless reviews, amendments or changes;
- (xi) Administrative or judicial review considerations: is any decision of an administrative character reviewable and by whom?
- (xii) Consultations with other Departments which are required when a legislative proposal impacts on the Department's legislation, or when a legislative proposal involves policy considerations for which another Department is responsible;
- (xiii) If the Bill impinges on the activities of another Department, indicate the extent to which that Department has been consulted and outline possible solutions to any concerns raised;
- (xiv) Commencement issues: namely the date of entry into force on a specified day, or on a day dependent on a specific event (for example, the coming-into-force of another Act); or on a day to be fixed by order;
- (xv) Practical details (name of instructor, contact details, planned leave etc.); and
- (xvi) Any other information that the drafter may from time to time require, for purposes of getting a clear grasp of the mischief intended to be remedied.

E. PREPARING A LEGISLATIVE PLAN

A legislative plan is a document which provides the drafter with the basic outline of the legislation, raising issues and possible content of the proposed legislation. It is the drafter's answer to drafting instructions. It includes –

- (i) Objects of the required law;
- (ii) Proposed title: although this is usually provided by the instructing agency, the drafter may also develop a title that captures the overall objectives of the Bill;
- (iii) Substantive issues to be covered by the law such as, for example, if establishing a body, one must propose the relevant body, the qualifications of people to serve in the body, the procedures for appointment including other substantive issues such as the functions of the institution, the powers, etc.;

- (iv) Implications of the proposed law. This involves making the following considerations:
 - (a) Analyzing the existing law to check if the proposed law has any impact thereon, or vice versa;
 - (b) Constitutionality of the proposed law; and
 - (c) Analysis of the required standards of the law, such as the competence of the instructing organization, effect on fundamental rights and freedoms, retrospective application (permissible in civil, but not in criminal matters) and introduction of extraterritorial jurisdiction, which may not be permissible.

I. THE STAGES OF DRAFTING A BILL

A drafter with full instructions of the instructing department follows the path outlined below to prepare the desired draft legislative instrument—

- (i) Receives and reviews instructions from the instructing department;
- (ii) Conducts a factual background check into the area of legislation and other related areas;
- (iii) When necessary, seeks clarification from the instructing department on policy issues and any necessary information on the intended legislation. The consultation may go beyond the instructing department to other departments that may be affected by a policy or those with an implementing role in the intended legislation;
- (iv) The drafter must, arising from the consultation, make a draft that is clear on the policy intentions of the instructing department;
- (v) Undertake comparative research to ensure that the draft legislative instrument benefits from international best practices;
- (vi) Devise ways around any problems that may arise out of the proposal and harmonize any departmental conflicts in content and policy;
- (vii) In case of drafts that are the subject of Parliamentary or County Assembly committees reviews, draft and incorporate any amendments that the committees make and certify that the assent copies are accurate as debated and passed;
- (viii) Certify that the Minister/Cabinet Secretary has powers to make subordinate legislation and that the same are accurate and in line with the delegated authority; and
- (ix) Ensure that the draft legislative instrument conforms to the letter and spirit of the Constitution.

II. SALIENT FEATURES OF A BILL (ENACTING FORMULA, LONG TITLE, ETC.)

Upon completion of the other preliminary drafting stages, the drafter proceeds to the actual stages of drafting the bill. Here the drafter must appreciate the

salient features that must be present in any bill. These features therefore form the broad framework of the proposed bill and are as follows –

I. Preliminary Provisions

A. ARRANGEMENT OF SECTIONS

This part gives an indication of the arrangement of the parts, sections and subsections of the bill. They use the same wording as that contained in the head or marginal notes. These do not form part of the Act but are a useful index for the Act.

B. BILL TITLES

Each Bill has two titles—a short title and a long title.

(I) LONG TITLES

The long title of the Bill is also referred to as the title. The long title could be thought of as a description of the Bill and the short title could be thought of as its name. The long title is used to describe the contents of the Bill. This is usually done in a very general way. For example:- “A Bill for an Act to amend the law relating to taxation.”

This is an indication of the objectives and intention of the law. It includes the scope and the general purpose for which the law is enacted.

Drafting of the long title is very important as it must encompass all the matters included in the Bill. If there are matters that are not covered by the long title, the Bill may need to be withdrawn from Parliament or County Assembly and then reintroduced.

When a Bill receives the Presidential or Governor’s Assent and becomes an Act, the words “A Bill for” are dropped from the long title and the words “An Act” is substituted in its stead.

(II) SHORT TITLES

The short title is the name that is used to refer to a particular Bill or Act. It basically indicates how a certain Act shall be cited, for example “Income Tax Act”. Short titles are always shown in italics.

While a Bill is in Parliament or County Assembly, the name includes the word “Bill”. This is changed to “Act” when the Bill receives the President’s or Governor’s Assent. The year in the Act title is the year in which the Act passes Parliament or County Assembly. This is usually, but not always, the year in which it receives the Assent. The short title of an Act can be amended by a later Act. This would be done, for example, where amendments render the short title incorrect or misleading.



As a general rule, a drafter should take particular care when naming a Bill to ensure that the name chosen is as informative as possible (within reason) and does not cause unnecessary confusion to the legislative body or to any other users of legislation.

C. PREAMBLE

A preamble explains the reason for an enactment. It represents the spirit and principles behind the law and is mostly contained in Constitutions, Celebratory, Epochal or International Instruments.

D. ACT NUMBERS

Each Act is given an Act number which is made up of the year in which it receives Assent and a number based on the order in which Bills were assented to in that year. For example the 45th Bill assented to in 2005 would be Act No. 45 of 2005.

As the year in the Act number is the year of Assent, it occasionally does not match the year in the Act name. Even when the year in the Act name is amended the Act number does not change.

E. COMMENCEMENT PROVISIONS

Commencement provisions set out when the Act, instrument or provision comes into operation. One way of looking at this is that it is the time when the text is “written” into the statute book. This will always be a point in time. It is reflected in a clause such as: *Date of commencement: 10th January 2014.*

According to Article 116(2) of the Constitution, an Act of Parliament comes into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date on or time at which it will come into force.

Similarly, under the County Governments Act, 2012 a County legislation comes into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, unless the legislation stipulates a different date on or time at which it shall come into force.

F. DEFINITIONS

Definitions are an important tool in legislative drafting. The definition section is usually one of the most preliminary sections of the Bill and has traditionally been ‘Section 2’, although in some Acts it may be different. They are used for a number of purposes. Primarily, they are used to make legislation more readable by labeling concepts that are used throughout the legislation thereby precluding the need to repeat text.

However, the overuse or misuse of definitions can reduce the readability of legislation. Therefore, it is important to ensure that definitions are used carefully. “One expression, one meaning” is the approach adopted in Kenya. Under this approach, an expression is not defined to have different meanings in different parts of an Act or instrument.

G. UNITS OF TEXT IN ACTS AND SUBSIDIARY LEGISLATION OR STATUTORY INSTRUMENTS

For Acts, the basic unit of text is a section. These can be grouped into Chapters, Parts, Divisions and Subdivisions. Sections can be divided into subsections, paragraphs and subparagraphs. Some sections are also divided into sub-subparagraphs.

For subsidiary legislation and statutory instruments such as Rules, the basic unit of text is a rule. These can be grouped into Parts, Divisions and Subdivisions. Rules can be divided into sub-rules, paragraphs and sub-paragraphs.

There is also a range of other units of text in Bills and instruments.

H. NUMBERING AND LETTERING

It is generally considered that Arabic numerals are more familiar and easy to understand than Roman numerals. They are also simpler when expressing large numbers.

I. NAMING CONVENTIONS

The conventional way of referring to units below the section level is to use the smallest unit of text. For example:

- (a) Section 12;
- (b) Subsection 12(1);
- (c) Paragraph 12(1)(a); or
- (d) Subparagraph 12(1)(a)(ii).

This can be contrasted with the approach used in some other jurisdictions of referring to all of these items as “section” (e.g. section 12(1)(a)(ii)).

J. HEADINGS

Headings in legislative instruments are often written in Roman italics. There are not meant to be introductions or preamble to the Part. The main purpose for headings is that of labeling or sign posting. The language used in headings must be consistent with the content of that part or the remainder of the Act. Headings must not be in abbreviated form.

K. MARGINAL NOTES

All legislative instruments must have marginal notes. These marginal notes are usually found on the right hand side of the section, rule or regulation. They offer the reader and user of a legislative instrument a concise indication or synopsis of the content of the section. They also enable readers to direct their attention quickly to the portion of the Act which they are looking for. Marginal notes must be accurate and must not contradict the content of the section or regulation to which they refer. Like a signpost, the marginal note must be brief and to the point. It must be pointing where it says it is pointing.

L. ENACTING FORMULA

This is a statement indicating which legislative authority enacted the legislation. It is a statement in active voice that indicates that Parliament (National Assembly or Senate) or the County Assembly of County X, is exercising its constitutional legislative powers.

M. APPLICATION PROVISIONS

The purpose of an application provision is to provide exactly how the “new” law will apply and how the “old” law will cease to apply. This may involve providing for the “old” law to continue to apply for limited purposes despite the fact that the old law has been repealed.

Application clause may also limit or expand the scope of an Act to a category of persons, the Government or bring about the partial or complete extraterritorial application of the law. It is basically applied to remove uncertainties, especially on which circumstances and geographical area the Act applies.

N. INSTRUMENT NUMBERS

Each instrument that is part of the Select Legislative Instrument series is given a number which is made up of the year in which it is made and a number based on the order in which instruments that are part of the series were made in that year. For example the 45th instrument in the series made in 2015 would be No. 45 of 2015.

O. PORTFOLIO FOR SIGNATURE PAGE OF REGULATIONS

The portfolio of the Cabinet Secretary, County Executive Committee Member or Chief Executive Officer who is responsible for a set of Regulations (also known as the countersigning Authority) is shown on the signature page of the Regulation.

If there is an “Acting” Cabinet Secretary, County Executive Committee Member or Chief Executive Officer within the portfolio, that Officer’s name is used in the signature block. For example, if the Attorney-General is away and the Cabinet Secretary for Home Affairs is Acting Attorney General, the Minister for Home Affairs name is inserted in the signature block.

II. Principal Provisions

A. SUBSTANTIVE PROVISIONS

Substantive provisions are dependent on the objectives of the legislative instrument. Often, this is the crust of the Bill. It establishes the body, offers the body corporate status and related matters. In other instances, substantive provisions provide in detail for the matter to be regulated and how it is regulated and further makes a mention of who is involved in the regulation of the matter at hand. This part sets out the duties imposed on the entity created and powers conferred on it. In whole, substantive provisions are the sections

that set out the basic objects and main principles of the Act. This is mainly the reason why the Act was enacted.

B. ADMINISTRATIVE PROVISIONS

Administrative provisions give information on organizational matters, including the manner in which the law would be implemented. It provides for the framework on which the law is expected to function. It provides for provision on establishment of a body or entity, employment of staff and other procedural matters. In other words, these provisions deal with implementation of the law, for example through establishing the bodies and related administrative vehicles.

C. FINANCIAL PROVISIONS

This Part identifies the resources available to the entity established in the legislative instrument. It may confer the entity with borrowing or lending powers. It may allow the entity to enter into partnerships with other entities or development partners. It also allows the entity to receive donations. It further provides for investment and accounting provisions, accounts and audit, disposal of profits and annual report. In this Part, the County Assembly or Parliament is obligated to ensure sufficient funds are allocated to the entity for effective delivery of its functions.

D. MISCELLANEOUS PROVISIONS

Although referred to as miscellaneous provisions, this Part provides for equally significant matters. It provides for the power to make Rules or Regulations, penal provisions or other information regarding the enforcement of the law.

Miscellaneous and supplementary provisions may also include financial matters, offences, search, seizure and arrest. They generally cover matters arising out of the main objects of the Act.

III. Final Provisions

These include savings and transitional provisions. They address issues of repeals and consequential amendments and schedules. These cover final matters, such as where the law is changed by a new enactment or amendment of an existing Act. Transitional provisions direct how to apply the new law to situations already in existence, while saving provisions preserve the existing rights that would otherwise be lost when the law is operationalized. There are many types of transitional provisions. The most common type of transitional provision modifies the effect of the “new” law.

Other types of transitional provisions—

- (i) modify the effect of the “old” law (as it continues to apply by virtue of an application provision);
- (ii) override the presumption against applying retrospectively;

- (iii) ensure that an amendment does not affect the interpretation of the “old” law; and
- (iv) ensure that the repeal of an amending Act, or of amending provisions, does not affect the operation of amendments made by the amending Act or amending provisions.

Ordinarily therefore, the purpose of saving provisions in law is to preserve or save a law, a right, a privilege or an obligation which would otherwise be repealed or cease to have effect. The function of transitional provisions is to make special provision for the application of legislation to the circumstances which exist at the time the legislation comes into force.

IV. Schedules

Schedules form part of the Act. They are used as helpful devices for clearer presentation and more efficient communication of content of legislation. The general principle is for matters of principle to remain in the sections of the statute while lesser, procedural matters of machinery or details be arranged in the Schedules.

The principle is to ensure that the main sections of a statute are not cluttered by material of secondary or incidental importance.

III. CONVENTIONAL MATTERS OF STYLE AND FORMATTING

In drafting legal instruments, style is very important. As significant as choice of words is to a legislative instrument, so is the style adopted. The manner and style of expression and presentation of a legislative instrument is important. Style should not only aid communication but also facilitate ease of reference, readability, application and implementation of the law. In Kenya, we have a standard format or style in which all Bills and subsidiary legislation must be drafted. All drafters and stakeholders in this process are expected to comply with this acceptable format. In other words it must not be the intention of a drafter to surprise users and readers of law.

IV. USE OF PLAIN LANGUAGE

The purpose of drafting legislative texts in plain language is to enhance democracy and the rule of law by making legislation accessible to the people whose lives it affects.

Plain legal language is language that is clear and comprehensible to its intended reader. As a writer of plain legal language, the drafter’s aim is always to be understood. Sometimes, a drafter will aim to be understood by the ordinary reader, but not always. At times, the drafter knows one need only reach those who are familiar with the context and understand the terminology. Plain language inspires confidence in both the reader and the writer. Clear writing is evidence of clear thinking.

Benefits of drafting in plain English or language are to increase efficiency and understanding. Legal instruments drafted in plain English or language is easier to read and understand. They are more direct to the intended point of action and are easily absorbed. The plain language text is shorter since it avoids unnecessary detail and repetition. The other benefit of plain language drafting is the potential for reducing mistakes and errors. Traditional drafting tends to hide inconsistencies and ambiguities. Errors are harder to find in dense and convoluted prose or sentences. Further, plain language drafting facilitates compliance with statutory requirements.

VI. SIMPLE CLEAR, CONCISE, AND UNAMBIGUOUS LANGUAGE

Legal instruments have several functions. These include carrying a legal purpose, to communicate, to inform and to persuade. Legal documents must not communicate to lawyers and persons engaged in the practice or administration of the law only. The law should speak to all persons including those who are required to comply with the law or for general information.

Drafters bear the obligation to maintain the rule of law. As part of that burden, drafters should take care that laws drafted by them are clear, precise and consistent. Without clarity, precision and consistency, the law has no predictability. The rule of law demands that, as much as possible, people should know what the law demands of them, what the law grants to them and what sort of behavior they can expect from officials.

In pursuit of clarity, Garth Thornton, a renowned legislative drafter and scholar sets the standards and criteria to be followed by all drafters to ensure clarity in the formulation of legislative instruments—

- (i) Write simply but precisely;
- (ii) Draft for users with their various standpoints always in mind;
- (iii) Be very clear about the purposes of the legislation and make sure that the purpose is manifest;
- (iv) Organize materials logically, and chronologically where appropriate, at every level (i.e. the whole statute, Parts, Subparts, sections, schedules);
- (v) Consider the use of supplementary aids to facilitate communication (diagrams, examples, notes etc.);
- (vi) Develop consistency of style and approach;
- (vii) Revise the text with simplicity and precision in mind (as often as circumstances permit);
- (viii) Test the draft in relation to comprehensibility;
- (ix) Draft in the present tense;
- (x) Avoid long sentences, particularly if un-paragraphed;
- (xi) Prefer the active voice to the passive;

- (xii) Prefer the positive to the negative;
- (xiii) Avoid double negatives;
- (xiv) Follow conventional word order;
- (xv) Don't split verb forms unnecessarily;
- (xvi) Paragraph with restraint and care;
- (xvii) Avoid subparagraphs and sub-paragraphs;
- (xviii) Avoid nominalizations;
- (xix) Use cross-references with restraint;
- (xx) Punctuate conventionally and with restraint;
- (xxi) Omit unnecessary words;
- (xxii) Prefer the familiar word;
- (xxiii) Choose the exact word;
- (xxiv) Avoid archaic words and legalese;
- (xxv) Avoid non-English expressions;
- (xxvi) Avoid emotive words;
- (xxvii) Use informal and recently coined words with discretion;
- (xxviii) Use one word and not more if one word will do; and
- (xxix) Use words consistently.

VII. GENDER-NEUTRAL LANGUAGE

Gender-neutral language is used to make the language of legislation more inclusive. This approach does not make provisions more cumbersome or lead to a proliferation of “his and hers”, etc. throughout new legislation as drafters tend to use the description of the relevant person (e.g. “the taxpayer’s”) instead.

In many cases this makes the provision clearer than if just “his” was used and may also avoid ambiguity where there is more than one person referred to in the provision.

A drafter must, at all times, avoid the use of demeaning or patronizing language. Men and women should be dealt with in legislation as individuals in the same fashion and shown the same respect. Care should be taken to use parallel language when referring to men and women. For example: the words “husband and wife” should be used and not “man and wife” or use “ladies and gentlemen” and not “ladies and men”.

A. USE OF MASCULINE AND FEMININE PERSONAL PRONOUNS

A masculine personal pronoun in legislation must always be accompanied by a feminine personal pronoun (and vice versa) except in the very rare case of legislation intended to apply to people of one sex but not the other (e.g. maternity leave legislation).

Drafters should use their discretion in deciding, in individual cases, whether it would be better to avoid the use of pronouns altogether by repeating the relevant noun instead.

B. USE OF “CHAIR” (INSTEAD OF “CHAIRPERSON” OR “CHAIRMAN”)

“Chair” should be used (instead of “Chairperson” or “Chairman”) when establishing new offices. If your instructors do not wish to use “Chair”, you will need to explore other titles such as “President”, “Senior Member”, “Convener”, etc.

So far as possible, occupational references should be the same for men and women. By referring to a “lady doctor” or a “woman advocate” it is implied that the standard is male and that a female is non-standard. This is not acceptable in drafting.

VIII. USE OF VARIOUS EXPRESSIONS IN LEGISLATION

There are a range of miscellaneous matters that need to be taken into account when using expressions in legislation. These include avoiding using registered trademarks and paying close attention to matters to be aware of when borrowing legislation from other jurisdictions.

These matters are—

- (a) issues to be aware of in choosing expressions to be used in legislation;
- (b) words and expressions to be used in legislation;
- (c) definitions of specific expressions;
- (d) Government terminology; and
- (e) financial sector terminology.

IX. DRAFTING CONSTITUTIONAL LAW

Constitutional law is extremely important to drafters. There are two main aspects to this. First, every provision of every Act must be supported by a constitutional power. Secondly, there are a number of constitutional prohibitions that must not be contravened.

Constitutional law also impacts on a number of procedural matters such as the House in which certain Bills must be introduced or level of Government to deal with the matter. Please refer to previous discussions on constitutional factors for consideration when drafting a constitutional law.

X. TAXATION (MONEY BILLS)

The Constitution sets out a variety of procedural requirements in relation to taxation Bills which drafters need to be aware of.

A drafter must consider the following matters —

- (a) the House of introduction for Bills that deal with taxation or that amend Acts that deal with taxation;

- (b) obtaining notices for Bills dealing with taxation;
- (c) that taxation is to be imposed by express words; and
- (d) when to structure provisions as provisions imposing tax.

XIII. EXERCISE OF DELEGATED POWERS

There are a number of issues that drafters need to be aware of when conferring powers on persons. A drafter should not include provisions that confer substantive powers in definitions. A drafter should also be careful about assuming that powers can safely be conferred by implication and should consider whether an express conferral of power would be more appropriate.

If by an Act, the exercise of a power or the performance of a duty is conferred upon or is vested in the President or Governor, the President or the Governor may, by order, transfer the exercise of that power or the performance of that duty to a Cabinet Secretary or a Member of the County Executive Committee respectively.

The powers transferable by an order made in this manner shall include a power to make rules. An order made under an Act of Parliament or County Assembly may be varied by a subsequent order made in the same manner and subject to the same conditions.

If by an Act the exercise of a power or the performance of a duty is conferred upon or is vested in the President, the Attorney-General or a Cabinet Secretary, the President, the Attorney-General or the Cabinet Secretary, may, unless by law expressly prohibited from so doing, delegate, by notice in the Gazette, to a person by name, or to the person for the time being holding an office specified in the notice, the exercise of that power or the performance of that duty, subject to such conditions, exceptions or qualifications as the President, the Attorney-General or the Cabinet Secretary may specify in the notice.

Nothing stated above authorizes the persons mentioned to delegate –

- (a) a power to make subsidiary legislation; or
- (b) a power to issue warrants or to make proclamations or to hear an appeal, under a power in that behalf conferred upon or vested in any such person by an Act.

A delegation made may be varied or cancelled by the person by whom it was made by notice in the Gazette.

XIV. ROLE OF DRAFTERS IN THE RESPECTIVE ENTITIES IN THE LEGISLATIVE PROCESS

A drafter must guide the MDA, County Government, Executive, Legislature or any other client on expectations, content and other matters related to drafting.

Drafters are mostly lawyers who are also subject to respective institutions, codes of ethics and other professional demands. A drafter must be impartial and true to the Constitution.

A legislative drafter has a professional responsibility to the client. As a public officer, the expectations are higher. This is owing to the fact that in addition to professional obligation, the set regulations governing public officers are binding on them. A drafter owes the duty of loyalty to the State and the people of Kenya. They must earnestly appreciate the scope of duty ahead and competently undertake the duty in compliance with the Constitution and the law. As a public officer, the drafter is expected to comply with the values and principles enshrined in the Constitution such as, for example, Article 10 provisions on rule of law, integrity, transparency, accountability and ensuring prudent use of public resources.

XV. THE ROLE OF A LEGISLATIVE DRAFTER—SOME ETHICAL AND OTHER CONCERNS

It is possible to consider the role of the drafter as purely technical and value judgement-neutral. However, the legislative drafting process is arguably inherently political and ethical hence the unavoidable overlap with policy-making decisions. It is therefore important for drafters to be made aware of their policy-making potential and to require them to preserve for the client as many policy-making decisions as possible. The practicalities of these challenges are illustrated below.

(a) Taking Instructions

The initial instructions by a client are usually a rough idea of what the proposed legislation should include. A client will rarely have thought through all the possible details. Therefore a drafter who fails to get comprehensive information from the client may usurp the client's policy making function by filling the gaps with their own ideas or perceptions. The drafter makes choices not only on the words to use but also on policy choices involved.

(b) Evaluating Alternatives

The responsibility placed on the drafter to consider other related factors before drafting the bill has considerable influence on the final legislative instrument. For instance, questions as to whether the legislation is necessary; whether there are statutory or constitutional restrictions that prohibit the intended law; or whether the underlying problem can be solved by an appropriation of funds or by an opinion of the Attorney-General, can substantially change the content of the legislation or even determine whether the bill should be drafted.

1.1. Research Methods

The research methods applied by the drafter can have substantial implications on the perspective of the Bill. For instance the drafter may seek guidance from



an expert with the result that, considering the time constraints of the task, the balance required may be lost.

1.2. *Analysis*

At this stage in drafting the legislation, the drafter's choices are equally value-loaded and, in some instances, may be unreviewable by the client. For instance, in analyzing the information gathered, a drafter may place more weight on some information e.g. a legal opinion that changes the perspective of the Bill.

1.3. *Gender-Neutral Language*

Drafters are required to apply gender-neutral language. This may appear as a matter of structure but to eliminate gender-based references is an intensely "political" issue. The drafter cannot assume that the traditional use of 'he' includes both male and female. The drafter is therefore placed in position to unilaterally decide and determine whether the Bill will attract politics of 'gender'.

1.4. *Use of vague language*

A drafter has to ensure clarity, accuracy and precision. However, the degree of clarity or precision in a draft can have substantial political implications. Sometimes a politician-client will have to decide between the risk of losing the Bill and leaving the law obscure as a compromise for support by a section of stakeholders. Although it is politically correct to introduce vague clauses in exchange for support, questions of professional ethics arise for the drafter. The drafter may choose to maintain independence and professionalism, though such choice may kill a Bill by the degree of clarity, accuracy and precision applied by the drafter.

1.5. *Drafting the Memorandum of Objects and Reasons*

A drafter may use the memorandum of objects and reasons to emphasize or minimize various aspects of the Bill's contents. Since some legislators only read this portion to comprehend the Bill's contents, the drafter's choices can significantly influence the direction of the debate in the House or even the passage or defeat of the legislation.

(c) Conclusion

In conclusion, it has to be understood that drafters may be unaware of their power to influence the content of legislation in accordance with their personal or political views. Such views may however lead to policy judgments. Therefore legislative drafters should be aware of this conundrum and strive to ensure balance and objectivity in drafting legislation for posterity.



PART VII

Pre- Publication Scrutiny

A. Introduction

Pre-publication scrutiny of legislative proposals is an important step in the legislative process. It traces its constitutional foundation in Articles 118 and 119 of the Constitution which respectively relate to public access and participation and the right to petition Parliament. Specifically these provisions demand conduct of business of Parliament in an open manner; facilitation of public participation and involvement in the legislative and other business of Parliament and its Committees; and guaranteeing the right to petition Parliament to consider any matter within its authority including enactment, amendment or repeal of any legislation. Parliament has given practical effect to these provisions in its Standing Orders as well as in the Petition to Parliament (Procedure) Act (Cap 7C of the Laws of Kenya). Similar provisions in relation to County Assemblies are found in Article 196 of the Constitution and given specific effect in the County Governments Act, 2012 and respective County Assembly Standing Orders.

B. Role of the Commission for the Implementation of The Constitution (CIC), Kenya Law Reform Commission (KLRC) and the Attorney-General (AG) in the Constitutional Implementation Process

Article 261 of the Constitution obligates the Commission for the Implementation of the Constitution, the Attorney-General and the Kenya Law Reform Commission to coordinate in the preparation of legislation required to implement the Constitution. This is a constitutionally-recognized framework to which the three constitutional implementation organs have had to devise the best ways of giving practical effect.

At the national level, any MDA or State organ that is responsible for a legislative instrument which in any way seeks to implement the Constitution is expected to consult the Kenya Law Reform Commission as the primary State agency which links government policy making and legislative processes. The



Commission assists the MDA or State organ in framing the policy or legislative proposal into a Draft Bill. The Bill is then submitted to the Attorney-General's office for review. Upon approval by the AG's Office the legislative instrument is submitted to the Commission for the Implementation of the Constitution for scrutiny to assess the instrument's conformity to the letter and spirit of the Constitution. CIC undertakes internal review of the draft legislative instrument. It may commission or engage the services of both internal and international experts to assist in the review. CIC invariably subjects the legislative instrument to stakeholder review as part of public participation.

CIC thereafter convenes a 'roundtable' to engender discussion on and finalization of the draft legislative instrument. Key participants in the roundtable are the CIC, AG, KLRC and the responsible MDA. The decisions reached at the Round Table constitute the final consensus on the contents of a Bill and may only be varied at the Cabinet or amended by Parliament. After the Roundtable, CIC forwards the draft legislative instrument to the Attorney-General for technical appraisal. This is not only because the Attorney-General is the principal legal advisor to the Government but also because the Office of the Attorney-General is custodian of Kenya's legislative drafting 'house style'. Subsequently, the Attorney-General and the responsible Cabinet Secretary transmits the Bill to the Cabinet for approval.

The reason for the Cabinet involvement at this critical stage in the legislative process is two-fold: The Cabinet is the highest policy making organ of the government. Concomitant to this truism is the fact that the implementation of the Constitution is primarily premised on policy, legislative, institutional and administrative reforms which are core purviews of the Cabinet as already argued. The implication is that although the Constitution has created dedicated organs for its implementation, policy formulation and implementation remains the domain of the executive hence Cabinet involvement. Subject to appropriate modifications, the County Executive Committee plays the same role as the Cabinet in the legislative process at the County level. The main difference here being that the Office of the Attorney-General and CIC are not as directly involved unless a County Executive or Assembly seeks their views or input. However, as explained elsewhere in the Guide, the Kenya Law Reform Commission plays the same role in the county legislative process as it does at the national level.

After the Cabinet or County Executive Committee approval, the Bill is transmitted to the Leader of Majority and the respective Speaker for purposes of tabling in Parliament or County Assembly after which the Parliamentary or County Assembly processes and procedures take over.

It is however important to note that although CIC is commendably discharging its assigned responsibilities, the framers of the Constitution and Parliament recognized its time bound mandate and inserted sunset clauses in relation to its operations both in the Constitution and its constitutive legislation, the CIC Act, 2010. Be that as it may, the lapse of CIC mandate must not occasion



an unnecessary lacuna. This is because in keeping with the reality that the constitutional implementation framework is heavily dependent on policy, legislative, institutional and administrative reforms, the constitutional and statutory mandate and design of KLRC is such that it should be able to ensure continuity in this regard. It must however be pointed out that KLRC will require the support of the relevant constitutional Commissions, State Organs and other Intergovernmental structures to ensure full implementation of the Constitution through comprehensive review and constitutional alignment of all existing legislation.

C. Factors to Consider

In the pre-publication scrutiny, the following comprise the key indicators considered by CIC, AG and KLRC –

- (a) conformity to the letter and spirit of the Constitution;
- (b) statutory harmony;
- (c) practicality of implementation; and
- (d) technical soundness.

Specific elements of these indicators are extensively canvassed in Part III of the Guide.

D. Engagement with Parliamentary and County Assembly Committees

Based on an arrangement agreed with the leadership of both Houses of Parliament immediately after the first General Elections under the Constitution and through mutual and sustained consultations with County Assemblies, KLRC, CIC and AG's office work closely with the relevant Committees of Parliament and County Assemblies in the review and improvement of Bills remanded to these Committees. Under this framework, the Clerks of Senate, National Assembly and County Assemblies routinely submit the Draft Bills to these organs of implementation of the Constitution for consideration and comment. This procedure applies to constitutional implementation bills, executive sponsored bills and Private Member Bills. Although the timelines given by the Clerks for feedback is often a challenge, 21 days is ordinarily the optimum turn-around period.



PART VIII

The Legislative Process

As already comprehensively explained in the preceding Parts of this Guide, development of legislation is a significant aspect of governance in modern democratic States. For starters, it is a process which involves many stakeholders. Article 1 of the Constitution declares that all sovereign power (including legislative authority) belongs to the people and is delegated to, among others, Parliament and County Assemblies. The remit of this Part of the Guide is to give a synopsis of the the practical application of these broad constitutional dictates.

A. Who are the Actors in this Process?

I. NATIONAL LEVEL

- (i) The National Executive, which is the source of most of the legislation;
- (ii) The Cabinet Secretaries or respective MDAs;
- (iii) Parliament (National Assembly and Senate);
- (iv) Political Parties;
- (v) The Public;
- (vi) AG., CIC and KLRC; and
- (vii) The Civil Society and other non-State actors.

II. COUNTY GOVERNMENT LEVEL

- (viii) The County Executive;
- (ix) Members of the County Executive Committee;
- (x) County Attorney;
- (xi) County Assembly;
- (xii) The Public; and
- (xiii) The Civil society and other non-State actors.

B. Main Stages in The Legislative Process

The main stages in the legislative process may be broadly summarized into the following –



- (i) Preparation of an annual legislative program (MDAs identify scope, purpose priority, medium and long term legislation)
- (ii) Issuing of drafting instructions;
- (iii) Preparation of Bills and their circulation;
- (iv) Involvement of the people (Stakeholder consultations);
- (v) Approval by the Executive;
- (vi) Introduction to Parliament or County Assembly;
- (vii) Approval of Bills by relevant House Committee;
- (viii) Amendments before the House;
- (ix) Debate and passage;
- (x) Publication;
- (xi) Preparation of regulations or subsidiary legislation;
- (xii) Implementation; and
- (xiii) Review and reform

C. Process in Parliament

I. WHAT IS A BILL?

A Bill is draft legislation for consideration by Parliament or County Assembly. Each member receives a copy of every Bill which is for introduction in the House. Upon approval and assent to by the President or Governor, it becomes an Act of Parliament or County Assembly.

II. STAGES IN THE MAKING OF A LAW

House Standing Orders require that Bills must pass through certain stages. These stages must be undertaken consecutively and not more than one stage of a Bill may be taken at the same sitting without the leave of the House.

At the level of Parliament, a Bill passes through the following stages:

A. PUBLICATION AND CIRCULATION

A Bill is published in a special or supplementary issue of the Kenya Gazette that may be released occasionally. The purpose of publication is to notify the public and invite representations through the elected Members or direct submission of memoranda and petitions.

B. FIRST READING

This is intended to draw the attention of the Members and the public to the Bill. At this stage, the Bill may be referred to the relevant Sectorial Committee.

C. SECOND READING

The Mover introduces and outlines the main purpose and objectives of the Bill including the details. Members discuss the Bill and the views of the Mover together with the report of the Sectorial Committee. At the end of the Second Reading, the only amendment that could be made is to defer its Second Reading for six months, which is literally, "*killing the Bill*".

D. COMMITTEE OF THE WHOLE HOUSE

At this stage the Bill is considered clause by clause. Members may propose amendments but no amendment is permitted if it implies a direct negative of the original proposal, or elimination of its main purpose/ objective. The correct way of expressing a contrary opinion is by voting against the Motion.

(E.) REPORT STAGE

The Committee informs the House sitting in Plenary of their consideration of the Bill.

(F.) THIRD READING

Members may again debate the principles of what is already in the Bill but further amendments should not be proposed, except to defer its Third Reading for six months, literally- “*killing the Bill*”.

III. WHICH BILLS MAY GO TO WHAT HOUSE

Parliament exercises its legislative power through Bills, which may be introduced by any member or committee of the relevant House of Parliament.

The National Assembly may originate any Bill while a Bill concerning County Government may originate from the National Assembly or the Senate.

The procedure of processing a Bill in this case depends on whether it is an Ordinary, Special or Money Bill.

A Bill concerning County Government is one that contains provisions affecting the functions and powers of the County Government, relates to the election to a County Government office or affects the finances of County Government.

In the case of Ordinary Bills concerning County Government, if one House passes the Bill and the second House rejects it, the Bill is referred to a mediation committee. If one House passes the Bill and the second House passes it in an amended form, it is referred back to the other House for reconsideration. It is however important to note that irrespective of which House from which a Bill emanates, amendment to a special Bill concerning counties by the Senate may only be vetoed by two-thirds majority vote of the National Assembly.

A Money Bill is one containing provisions dealing with tax, imposition or variation of charges on a public fund, appropriation, receipt, custody, investment or issue of public money, or raising or guaranteeing of any loan or its repayment. A Money Bill may only be proceeded with in accordance with the recommendations of the relevant committee.

A. PROCESS IN THE COUNTY ASSEMBLY

At the County Assembly level, a Bill passes through the following stages:

I. PUBLICATION AND CIRCULATION

A Bill is published in a special or supplementary issue of the Kenya and County Gazette that may be released occasionally.

II. FIRST READING

This is intended to draw the attention of the Members of the Assembly and the public to the Bill. At this stage, the Bill is assigned a tracking number and referred to the relevant Sectorial Committee.



III. SECOND READING

The Mover introduces and outlines the main purpose and objectives of the Bill including the details. Members discuss the Bill and the views of the Mover together with the report of the Sectorial Committee. At the end of the Second Reading, the only amendment that could be made is to defer its Second Reading for six months which is literally, *“killing the Bill”*.

IV. COMMITTEE OF THE WHOLE HOUSE

At this stage the Bill is considered clause by clause. Members may propose amendments but no amendment is permitted if it implies a direct negative of the original proposal, or elimination of its main purpose or objective. The correct way of expressing a contrary opinion is by voting against the Motion.

V. REPORT STAGE

The Committee informs the Assembly sitting in Plenary of their consideration of the Bill.

VI. THIRD READING

Members may again debate the principles of what is already in the Bill but further amendments should not be proposed, except to defer its Third Reading for six months, literally- *“killing the Bill”*.



PART IX

Assent and Referral

A. WHAT IS ASSENT?

Assent is a constitutional and statutory requirement in the legislative process. It is not an event or an optional requirement or stage in the legislative process. Article 109 of the Constitution states that “Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.” Articles 110 (5), 111(3), 112(2)(b) and 113(3) recognizes the mandatory requirements for the President to assent to Bills passed by Parliament.

Article 115(1) requires the President to assent to a Bill passed by Parliament within 14 days. The Article thereafter sets out other conditions for assent and consequences of failure to assent.

Further, Article 116(1) of the Constitution recognizes that a Bill can only acquire the force of law if that Bill has been passed by Parliament and assented to by the President, and published in the Gazette as an Act of Parliament within seven days after assent.

Section 21 of the County Government Act, 2012 provides that a County Assembly shall exercise its legislative power through Bills passed by the county assembly and assented to by the Governor.

Similarly, section 24 of the County Governments Act, 2012 requires all County Bills to be assented to by the Governor. It also sets out other circumstances and conditions in relation to assent of a Bill passed by County Assembly.

B. WHO ASSENTS

A Bill passed by Parliament can only be assented to by the President. At the County level, a Bill passed by the County Assembly can only be assented to by the Governor. Assent is not a function that can be delegated.

C. WHAT DOCUMENT IS ASSENTED TO

A vellum copy of the Bill is the document that is assented to. The Government Printer, in consultation with the Speaker and Office of the Attorney-General, prepares a vellum copy of the Bill. This is the document presented to the President or the Governor for assent. On the last page of the vellum copy there is a provision for the President or Governor's signature. The page preceding the last page has a provision for the signatures of the Speaker and the Clerk of National Assembly, the Senate or the County Assembly, as the case may be. Both the Speaker and the Clerk must append their signatures to the vellum copy certifying its authenticity prior to the President's or Governor's assent.

D. IS IT MANDATORY TO ASSENT TO BILLS?

It is mandatory for the President or the Governor to assent to Bills passed by Parliament or the County Assembly, respectively. The Constitution under Articles 115 and 116 provides for mandatory assent of Bills passed by Parliament. The Constitution also provides for instances where a Bill may, upon publication, acquire force of law without assent. This happens if the President or the Governor has not assented to a Bill or referred it back within the period prescribed by the Constitution, or assented to it under Article 115(5) (b). In that case, the Bill shall be considered as having been assented to on the expiry of seven days.

Similarly, section 24 of the County Governments Act makes it mandatory for the Governor to assent to a Bill that has been passed by the County Assembly. The Act further provides for situations where assent may be waived.

E. DOES ASSENT ALONE AMOUNT TO COMING INTO FORCE OF A LAW?

Assent does not complete the legislative process. An Act must be published for it to acquire the force of law.

F. WHO SHOULD BE PRESENT AT THE ASSENT OF A BILL?

At the national level, the practice is for the Speaker and Clerks of respective Houses of Parliament, the Attorney-General and the Solicitor General to be present to witness the President assent to an Act of Parliament. This is to signify that the due constitutional process has been adhered to, respected and upheld in the entire legislative process. This also confirms that the content of the Act being assented to is that which was passed by Parliament as prepared by the respective drafting offices.

At the County level, the Speaker and Clerk of the County Assembly and County Attorney witness the assent of the Act of a County Assembly by the Governor. Both the Speaker and the Clerk must append their signature on the vellum copy of the Act to confirm that what was debated and passed by the Assembly is the same content being assented to by the Governor.



A person should not in any way change the content of the Bill passed by Parliament or County Assembly. That amounts to violation and breach of the Constitution and the law. Amendment to an Act of by Parliament or County Assembly can only be made in accordance with Standing Orders and within the timelines set by those Standing Orders. A fresh Bill is submitted to the respective Assembly 6 months after the Act has been published. The process set out in the Standing Orders is to be followed. This includes adherence to the constitutional values and principles, public participation and regulatory impact assessment.

G. TIMELINES WITHIN WHICH THE ASSENT MUST BE MADE

Upon receipt of the Bill from the Speaker of the National Assembly or Senate, the President assents to a Bill within 14 days. Similarly, the Governor assents to a Bill passed by the County Assembly 14 days upon receipt of the Bill from the Speaker of the County Assembly. Within the 14 days' timeline, the President may refer a Bill back for reconsideration; Parliament may amend the Bill in light of the President's reservations or pass the Bill a second time without amendment. Where Parliament has amended the Bill fully accommodating the President's reservations, the appropriate Speaker shall resubmit it to the President for assent.

Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported by two-thirds of members of the National Assembly and two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.

If Parliament has passed a Bill un-amended, the appropriate Speaker re-submits it within seven days to the President and the President shall within seven days assent to the Bill.

If the President does not assent to a Bill or refer it back within the period of 14 days, the Bill shall be considered as having been assented to on the expiry of that period.

The same procedure applies with necessary modifications to county legislation.

H. EFFECT OF FAILURE TO ASSENT

Assent is a constitutional and statutory obligation of the President and Governor. It is an integral part and stage in the legislative process. Inordinate delay or failure to comply with this constitutional and statutory obligation amounts to violation of the Constitution and the law. It is also an abuse of the due legislative process and disregard of other State organs and arms of government.

I. GROUNDS FOR THE PRESIDENT OR GOVERNOR REFUSAL TO ASSENT

The President, as the Head of State and Government of the Republic of Kenya, has an obligation, to the people of Kenya to ensure that their best interests are protected, respected and upheld. The President has an obligation to ensure and assure the people of Kenya of their security, health, protection of their property and environment and economic stability, amongst other overarching responsibilities. Further, the President must also ensure that the laws of the land respect and uphold the Constitution of Kenya. He or she as an obligation to ensure that the laws passed are implemented and the cost of doing so is factored in before assent. The President is obligated to broadly look into any law passed by Parliament to ensure that laws are not just passed devoid of an implementation plan. Practicality, cost benefit assessment and effect on the economy, health and environment should be considered. Further, as the Head of State, the president should be sure that laws passed respect general international principles and laws and the treaties ratified by the State.

The President may send back a Bill to Parliament for reconsideration or necessary changes citing any of the aforementioned factors.

Similarly, the Governor is the Head of the County Government. Article 176 of the Constitution defines a County Government as County Assembly and County Executive. Prior to assent of any Bill passed by the County Assembly, the Governor ascertains that the Bill respects and upholds the values and principles enshrined in the Constitution and that it respects the functional jurisdictions or divisions set out in the Fourth Schedule to the Constitution. The administrative framework and other practicality concerns set out in the Bill should be realistic and capable of implementation.



PART X

Publication: Gazettement and Coming into Force of Law

A. PUBLICATION

Publication is a constitutional and statutory requirement. All Bills passed by Parliament or County Assembly must be published for them to acquire the force of law.

Bills are published at two levels. First publication of a Bill is done prior to tabling of the Bill in the respective legislative body (pre-publication scrutiny). This publication is governed by Standing Orders and the second one is done after scrutiny and approval by the relevant House Committee and tabling for consideration by the whole House.

B. WHAT IS THE KENYA GAZETTE OR KENYA GAZETTE SUPPLEMENT?

The *Kenya Gazette* is the official publication of the government of the Republic of Kenya. The Gazette publishes notices of new legislation, notices required to be published by law or policy and announcements for general information. The *Kenya Gazette Supplement* is an annexure to the *Kenya Gazette*. It mainly publishes that which has been referred to or published in the *Kenya Gazette*. Owing to their voluminous size and content, all Bills and Acts of Parliament are published in the *Kenya Gazette Supplement*.

The publication of the *Kenya Gazette* takes place every week, usually on Fridays, with occasional releases of special or supplementary editions within the week.

C. STATE ENTITY RESPONSIBLE FOR PUBLICATION

The Government Printer is a State agency charged with the responsibility of publishing all official Government communication.



Like all State organs and agencies, the Government Printer is required by Article 6 of the Constitution to ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

The County Governments Act, 2012 prescribes additional requirements in respect of the publication of county legislation as contemplated in Article 199 of the Constitution. Section 23 of the County Governments Act, 2012 is to the effect that a County Assembly Bill shall be published by including the Bill as a supplement in the *County Gazette* and the *Kenya Gazette*. It is therefore mandatory that County Assembly Bills are published in both the *Kenya Gazette* and the *County Gazette* for them to accord with the law.

D. WHO SUBMITS THE BILLS AFTER ASSENT FOR PUBLICATION?

Parliament and County Assemblies cease taking responsibility for a Bill they have passed immediately the Bill has been assented to. It is hence the responsibility of the Executive to ensure that the Bill is published in accordance with the timelines set out in the Constitution and the County Governments Act. Upon assent by the President the Bill is handed over to the Attorney-General who ensures that the Bill is published within the timelines set out in the Constitution. Publication is a constitutional obligation and an integral stage in the legislative process. At the County level, the County Attorney is responsible for the publication of the Bill. The County Attorney is required to liaise with the Office of the Attorney-General and the Kenya Law Reform Commission to ensure that Bills passed by the County Assembly and assented to by the Governor are published within the timeline set out in the County Governments Act.

E. TIMELINES WITHIN WHICH THE PUBLICATION IS DONE

After a Bill has been passed by Parliament and assented to by the President it is published in the Gazette as an Act of Parliament within seven (7) days after the assent.

The Constitution declares that the Act comes into force on the 14th day after its publication in the Gazette, unless the Act stipulates a different date or time at which it will come into force.

With regards to county legislation, Article 199 (1) states that it does not take effect unless it is published in the Gazette.



PART XI

Amendment of Legislation

A. INTRODUCTION

Principal and amending legislation must always be construed to form one coherent whole. Effecting amendments requires the drafter to take care to acquaint themselves comprehensively with the law to be amended and other related laws.

There are three major considerations which must be taken into account in the drafting of amending legislation –

- (a) The language and style of the amending Act must be consistent with that of the principal Act and other statutes in material respects;
- (b) The effect on other legislation of the instructed amendments must be studied and all necessary consequential amendments made; and
- (c) The amending provisions must where necessary be related to circumstances as they exist when those provisions come into force by specific commencement, application or transitional provisions.

B. HOW ARE AMENDMENTS EFFECTED?

There are two techniques –

- (a) Direct and textual- insertion, substitution or deletion of words, paragraphs, sections or subsections in or from the principal Act; and
- (b) Indirect, referential and cumulative- a narrative statement is made in the amending law stating the effect of the amendment.

The direct method is preferred since it –

- (a) produces law which is much simpler and easier to understand, particularly if reprints or revisions are produced frequently;
- (b) reduces the proliferation of statutes;
- (c) to some extent, makes consolidation a running exercise thus facilitating the production of consolidated reprints or revisions without the need for specific legislation;

- (d) by encouraging the integration of new and modified provisions with the old, develops a view of the law on a particular subject as a whole rather than as a series of interwoven but separate parts; and
- (e) facilitates annotation.

C. DRAFTING DIRECT AMENDMENTS

(i) Reference to the section amended: Each amending section should begin by referring to the section which is to be amended. For example:

Section 50 of the principal Act is amended by repealing the words, “ and the commissioner,”

Section 8 of the principal Act is amended in subsection (3) by repealing paragraph (b).

“The principal Act is amended by inserting after section 17 the following new section-”

Section 19 of the Land Act, 2012 (in this Act referred to as the principal Act) is amended by...

(ii) Extent of amending section: As a general rule, it is preferable that one amending section should not amend more than one section of the principal Act, but there is no objection to including in one section a series of amendments to one section. The ordinary devices of paragraphing may be used in such cases. For example –

Section 76 of the Principal Act is amended —

- (a) by repealing subsection (2);
- (b) in subsection (3), —
 - (i) by repealing paragraph (k); and
 - (ii) by inserting in paragraph (l) at the end of the words “ costumes”; and

“Sections 9 to 11 of the principal Act are repealed and the following sections are substituted” —

While amending a word or expression which occurs more than once in the sentence and the amendment is of application to all occurrences of the word or expression, the phrase “wherever it occurs or appears” is suitable.

For example –

Section 23 of the principal Act is amended by repealing the words “or a child” wherever they occur.

If the amendment is not of application to all occurrences, phrases such as “where it first occurs” or “where it last occurs” or “at the beginning” may be used.

For example –

Section 23 of the principal Act is amended by repealing the words “or a child” where they first occur; or

Section 23 of the principal Act is amended by repealing the words “or a child” where they occur after the word “mother”; —

Section 24 of the principal Act is amended by inserting at the beginning the words-

“Subject to section 19A,”

(iii) Numbering: Where a paragraph, subsection or section is inserted or repealed, subsequent paragraphs, subsections or sections should not generally be renumbered, since it may lead to misunderstandings, especially in relation to existing cross-references. Sections are usually numbered after the sections they follow but alphabetical letters are added to the numbers.

For example –

New parts of an Act inserted in between Parts such as between Part V and Part VI should be numbered VA, VB etc.;

Sections inserted between sections 6 and 7 should be numbered 6A, 6B, 6C etc.;

Subsections inserted between subsections (1) and (2) should be numbered (1A), (1B), (1C) etc.;

Paragraphs inserted between paragraphs (c) and (d) should be lettered (ca), (cb), (cc) etc.; and

Sub-paragraphs inserted between sub-paragraphs (ii) and (iii) may be lettered (iia), (iib), (iic) etc.

In cases where the existing section does not consist of subsections and is to be amended by the addition of a subsection, the existing section may be numbered subsection 1, while the new subsection is numbered as (2).

For example –

Section 10 of the principal Act is amended by numbering the existing section as subsection (1) and inserting the following new subsection —

“(2)...”.

Section 10 of the principal Act is amended by inserting the following subsection, the existing section thereby becoming subsection (1), -

D. REPEAL AND RE-ENACTMENT

If a section, subsection or paragraph has to be extensively amended, or has previously been amended, consideration should be given to the repeal and

(iii) Repeal of words

Section 5 of the principal Act is amended in paragraph (b) of subsection (5) by repealing the words “or a child”.

(iv) Substitution of part

Part II of the principal Act is repealed and the following part is substituted-

“Part II.
.....”

F. AMENDMENTS IN SCHEDULE FORM

Minor and consequential amendments contained in legislation of a substantive nature may, where the number justifies it, be arranged in the form of a schedule. In legislation which is directly amending in nature, a schedule is not normally used but may be of use to dispose of a large number of amendments similar in character. For instance The Statute Law Miscellaneous Act, 2012 which includes amendment of different provisions of different existing laws, can be amended in schedule form. For example –

The principal Act is amended as set out in the Schedule –

FIRST SCHEDULE

AMENDMENTS RELATING TO DECIMAL CURRENCY

Provision amended	Repeal	Insert
Section 15 (5)	Two thousand pounds	Four thousand dollars
Section 16 (1) (a)	Ten thousand pounds	Twenty thousand dollars
Section 41	One hundred pounds	Two hundred dollars
Section 54A	Twenty-five pounds	Fifty dollars



PART XII

Regulatory Impact Assessment

Regulatory Impact Assessment (RIA) is usually undertaken before a new government regulation is introduced.

Conducting RIA within an appropriate systematic framework can underpin the capacity of the government to ensure that laws are efficient and effective in a changing and complex world.

Many countries have now adopted some form of RIA, whose purpose is to assess positive and negative effects of a new law in order to assess whether the regulation is likely to achieve the desired objectives (cost benefit analysis).

A. What are the Benefits of RIA?

RIA is an important factor in designing a good-quality law as it helps to provide valid arguments supporting a planned regulation. The process is designed to improve the quality of regulation by ensuring that the decision maker is fully informed when making regulatory instruments. The RIA process is designed to encourage careful consideration, at an early stage, of the fundamental question of whether regulatory action is required or whether policy objectives can be achieved by alternate or non-regulatory measures, with lower costs for business and the community. RIA may sometimes indicate that non-legislative measures are the best solution to a particular social and economic problem. Thus, RIA helps to avoid the production of redundant laws and reduce the bureaucratic burden on enterprises.

B. Steps in Conducting RIA

- (i) Define the *problem and assess its magnitude*: problem definition will provide the prima facie case for regulatory intervention and the reason for discussing options;
- (ii) *Distinguish between causes of the problem and symptoms of the problem*: root cause identification;

- (iii) *Define the objectives*: The objectives should summarize the Government's policy intentions, but also inform how any potential regulatory solution(s) will be evaluated for effectiveness;
- (iv) *Identify the full range of feasible options*. This should include regulatory and non-regulatory options; and
- (v) *Analyze the options*: Analyze the costs, benefits and risks of each option. The analysis needs to show how each option would alter the status quo, which option is likely to be the most effective for solving the problem, and which option has the highest net-benefit.

C. Factors that RIA Must Respond To

The key considerations while conducting RIA comprise the following –

- (i) What is the nature and scale of the problem, how is it evolving, and who is most affected by it?;
- (ii) What are the views of the stakeholders concerned?;
- (iii) What are the main policy options for reaching these objectives?;
- (iv) What are the likely economic, social and environmental impacts of those options?;
- (v) How do the main options compare in terms of effectiveness, efficiency and coherence in solving the problems?;
- (vi) How could future monitoring and evaluation be organized?;
- (vii) What is the status quo – in terms of the existing policy or legal framework, and how adequate is it?;
- (viii) Are there any relevant *court decisions* on the challenges or gaps in the status quo?;
- (ix) What is the economic impact, fiscal cost, compliance cost, social, environmental and cultural impacts of the proposed legislation?;
- (x) *Risk assessment* – Risks should be expressed in terms of how exposed each option is to future uncertainty. Some form of sensitivity or scenario analysis should be presented. A qualitative description of any risks and uncertainties – particularly for intangible costs and benefits – should also be given;
- (xi) *Determine who to consult* – conduct a stakeholder mapping. This is intended to feed directly into the process of detail and meaningful consultation and participation. The purpose of consultation is to provide confidence about the workability of proposals and that options have been properly considered. The benefits of consultation in RIA include: better information, contributing to better quality regulatory proposals; increased scrutiny of officials' analysis and advice, allowing potential problems to be identified early; durability as better designed policies are less likely to need amendments once introduced; increased public

buy-in or acceptance as stakeholders are more likely to accept a proposal they have been involved in developing, and; improved understanding and compliance (therefore improved regulatory effectiveness); and

- (xii) *Conclusions and recommendations*: These should clearly explain what decisions are required, what choices are available, and what stage of the policy process the RIA reflects. Failing to clearly articulate the difference between the status quo and the outcome that is being presented via the Cabinet or CEC recommendations (either the preferred option or any of the alternatives) will limit the transparency of the RIA.

D. Contextual Basis of RIA

The need for RIA arises from the fact that regulation commonly has numerous impacts and that these are often difficult to foresee without detailed study and consultation with affected parties.

The assessment is an analysis of the impact of legislation on –

- (i) the state and county budget line;
- (ii) macroeconomic and social indicators;
- (iii) the cost and benefit analysis against other options to regulate the issue at hand;
- (iv) the impact on the operation of the target group of the legislation; and
- (v) environmental and other regulatory concerns.

The impact assessment should cover the following –

- (i) identification of the problem sought to be solved by the legislation;
- (ii) specifying the desired objectives;
- (iii) identifying viable options that solve the problem;
- (iv) identifying possible socio-economic, environmental and other effects of the legislative measure;
- (v) valuation of the costs and benefits of each option;
- (vi) consideration of enforcement and implementation issues; and
- (vii) planning for continuous evaluation.

E. Who Commissions RIA?

Regulatory impact assessment is undertaken by or on behalf of the following –

- (i) The proponent of the legislation in question. The person promoting the piece of legislation has the background information necessary to assess the possible impact on all the parameters above;
- (ii) The government at the request of the legislature or the interest group behind the legislation;

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- (iii) Parliamentary bodies in the form of standing committees or by way of research undertaken by the legislature;
 - (iv) Research institutions on behalf of the legislature or in their pursuit of knowledge; and
 - (v) Political parties in the normal pursuit of their programs or implementation of manifestos.



PART XIII

Contextualization and Customization of Model Laws

I. INTRODUCTION

Model legislation refers to uniform legislation proposed for adaptation by a legislative body. The purpose of a model law is to establish a useful framework which enables legislative bodies to have some uniformity in their governance, organization, and management. It helps institutions to conduct their functions smoothly and discharge their responsibilities in an effective manner.

In adopting a model law, a legislative organ is entitled to make modifications to the extent necessary to meet its needs.

Use of model laws is an appropriate vehicle for county governments to enable them harmonize, modernize and standardize their legislation. It is expected that county governments will make adjustments to the model law in order to accommodate local requirements that vary from county to county and where strict uniformity is not desirable.

In the Kenyan context, the idea of developing model laws for counties was intended to provide an acceptable tool to achieve some degree of unification of the county government legal and institutional frameworks.

II. WHAT IS THE VALUE OF MODEL LAWS?

- (i) It is one of the recognized methods used in harmonization of laws not only within different legislative bodies in a country but also among States regionally and internationally;
- (ii) It provides governments with an effective way of harmonizing their respective laws based on the principles contained in the model legislation;
- (iii) Use of model laws adds value in identifying principles and making recommendations in line with cross cutting national policies;

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- (iv) Development of model laws benefits from contribution from many counties thus enhancing ownership of the end product;
 - (v) County legislation based on model laws will have a national character given the application of uniform principles; and
 - (vi) Model laws are flexible and afford every county government the opportunity to adapt the model to accommodate its unique characteristics and needs.

A list of the Model Laws already done by KLRC and disseminated to the County Governments with the support of the Ministry of Devolution and Planning is annexed.



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Annex

List of Draft County Model Laws

1. Draft County Model Law on Revenue Administration;
2. Draft County Model Law on Rating;
3. Draft County Model Law on Public Participation;
4. Draft County Model Law on Trade,;
5. Draft County Model Law on Tourism;
6. Draft County Model Law on Cooperatives;
7. Draft County Model Law on Trade/ Business Licensing;
8. Draft County Model Law on Liquor Licensing;
9. Draft County Model Law on Early Childhood Education;
10. Draft County Model Law on Child Care Facilities ;
11. Draft County Model Law on Public Entertainment and Amenities ;
12. Draft County Model Law on Cultural Heritage;
13. Draft County Model Law on Vetting of Public Officers;
14. Draft County Model Law on Fire & Rescue Services;
15. Draft County Model Law on Disaster Management;
16. Draft County Models Laws on Agriculture;
17. Draft County Model Law on Public Entertainment;
18. Draft County Model Law on Village Polytechnics;
19. Draft County Model Law on Outdoor Advertising;
20. Draft County Model Law on Public Nuisance;
21. Draft County Model Law on Public Amenities;
22. Draft County Model Law on Transport;

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23. Draft County Model Law on Ward Development Fund;
 24. Draft County Model Law on Water;
 25. Draft County Model Law on Sand Harvesting and Quarrying ;
 26. Draft County Model Law on County Assembly Service Board;
 27. Draft County Model Law on Public Service Board;
 28. Draft County Model Law on Small and Medium Enterprises Fund;
 29. Draft County Model Law on Abattoirs;
 30. Draft County Model Law on Designated Parking Places;
 31. Draft County Model Law on Taxi Cab, Wheel Barrow and Cart (Licensing);
 32. Draft County Model Law on Omnibus Stations and Parking;
 33. Draft County Outdoor Advertisement;
 34. Draft County Model Law on General Nuisance;
 35. Draft County Model Law on Waste Management;
 36. Draft County Model Law on Livestock Auctions and Sales;
 37. Draft County Model Law on Public Markets;
 38. Draft Garissa Model Law on County Hawking;
 39. Draft County Model Law on Business Permits;
 40. Draft County Model Law on Persons Living with Disabilities;
 41. Draft County Model Law on Promotion of Primary Health Care;
 42. Draft County Model Law on Tourism Development;
 43. Draft County Model Law on Horticulture Development;
 44. Draft County Model Law on Affirmative Action;
 45. Draft County Model Law on Maternal Health Rights Bill;
 46. Draft County Model Law on Reproductive Health Rights;
 47. Draft County Model Law on Planning;
 48. Draft County Model Law on Investment and Promotion and Development;
 49. Draft County Model Law on Control of Drugs;
 50. Draft County Model Law on Animal Welfare; and
 51. Draft County Model Law on Agricultural Development Fund.

