

An exposition of legislative quality and its relevance for effective development

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Abstract

Effective legislative intervention matters for effecting government policies. It is dependent upon legislation being of a quality that is capable of achieving the outcome for which it was formulated and implemented. Whether there is legislative quality is dependent on the quality of the substantive content of legislation, the quality of the form and language of legislation, the quality of the operation of legislation and the quality of the processes for producing and implementing legislation.

This paper attempts to identify and explain the characteristics of quality legislation and the functional elements of law-creating and-implementing processes for producing quality legislation, which may be applicable in any legal system and to any subject matter. The purpose of doing so is to outline a theory of practice, based on the characteristics of quality legislation and the common elements of law-creating and implementing, for achieving quality legislation in developing countries. Such theory will provide useful guidance for developing countries, in defining and developing the procedures for producing effective legislation and assisting with strengthening the country's legal framework in a manner that supports economic and social reform, and the progressive improvement of governance and the rule of law.

1. Introduction

As “the initiative for law-making rests in most countries with the government”², the main goal for producing legislation³ is to give legal effect to a government policy decision for deliberate change to address a social, economic or political need. If governments are to achieve effective legislative intervention, they require legislation to be of a quality that is appropriate for effecting the policy outcome for which it was formulated and implemented⁴. This is important for

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²U.Karpen, (2012) at 168 and 172.

³ The references throughout this paper to legislation refer to laws or statutes enacted by parliament and secondary or delegated legislation made under the authority delegated by such laws and statutes. The references to draft legislation refer to drafts of proposed legislation produced until the final draft is presented to the lawmaker concerned.

⁴ W.Voermans (2013): states that “... we have come to understand that the quality of legislation ... do(es) matter for the effectiveness of government policies.”

Governments of developing countries⁵ that are seeking to effect changes that will assist with overcoming their countries' developmental challenges and in reducing poverty. The changes should also facilitate overcoming and alleviating powerlessness, and the enhancement of living conditions and quality of life. Development programs (whether undertaken by the government alone or with foreign assistance) often rely on some level of legislative intervention for effecting foundational policy and legal reforms, which are prerequisite for building a framework for change. Legislative intervention also facilitates the successful implementation of the program's activities and deliverables, in keeping with developmental objectives for social welfare and economic growth.⁶

However, legislative quality is complex. It is the standard for evaluating legislative effectiveness, yet there is no certainty about its content because it "... differs depending on the functions and purposes of legislation, on the needs and the priorities in specific historical, political and social contexts, on the viewpoints of different actors and on different legal traditions, types of polity, drafting traditions and practices ..."⁷. It is a trans-jurisdictional issue that is contextual, multidisciplinary and dependent on methodology.⁸ It is determined by the country environment and area of law concerned⁹, and also by the interrelationship of the law-making process, the substantive content of the legislation, the form and language of the legislative text, the manner of the implementation and operation of the legislation and its real world impact and outcomes.¹⁰ Its components are the characteristics of quality legislation commonly pursued, and the elements of the processes for creating and implementing quality

⁵ In this paper references to a developing country include references to a country in transition.

⁶ F.von Benda-Beckman (1989) at 129: "...there is little development policy and implementation which does not involve law."

⁷ M.Moumouti (2012 at 192-193) describes quality of legislation as an elusive and vague concept. V.Vanterpool (2007 at 170) writes that "(i)t should be stated forthrightly that the notion of quality legislation has so far not been reduced to a single definition."

⁸ In this paper references to the methodology for producing legislation refers to the processes by which a government of a parliamentary democracy formulates public policy and gives effect to the policy through legislation. The writer attributes the following components to those processes: identification of a policy objective, policy research and decision-making, designing and writing the legislative provisions, the enactment, publication and commencement processes, implementing and enforcing the enacted law and monitoring the implementation of legislation and evaluation of its effectiveness.

⁹ M.Moumouti (2012 at 194).

¹⁰ M.Moumouti (2012 at 194). V.C.R.A.C. Crabbe, *Understanding Statutes*, (1994) at 44 states that: "'Quality' ... has at least 3 aspects, namely the quality of (a) law's: (1) expression or form; (2) content or substance; and (3) practical operation. Achieving those ... depends, of course, on the processes followed to develop, consult on, refine, enact, and review (a) law." Xanthaki (2013) specifies the 3 concerns of quality as substance, form and process.

legislation commonly undertaken, to achieve effective law-making, regardless of legal tradition, legislative drafting techniques and the size, structure, level and processes of the legislative and administrative system. The required attribute of those characteristics and elements are that they are sufficiently flexible to be capable of universal application to all subject matter within the subjective factual context of any country.¹¹

This paper attempts to identify the characteristics of quality legislation and the elements of the processes for creating and implementing quality legislation that are capable of universal application and use and, in so doing, attempts to explain the content of legislative quality in a manner that informs the desire to produce better quality legislation. The aim is to be able to present a theory of practice for undertaking law-making activities, based on the universality of the characteristics of quality laws and elements of law-creating and law-implementing processes¹² identified. It will not only offer guidance for producing good laws, but also promote the adoption of methodologies that will increase the chance of producing good laws in developing countries.¹³ It is hoped that this paper will provide useful suggestions for defining and developing the law-creating and-implementing procedures of a developing country (including in project planning as part of a development program). This must be done in a manner

¹¹ The last 2 comments are based on the writer's view that, although lawmaking systems differ, there is nevertheless a degree of consistency and uniformity in the standard of legislative text desired and the legislative methodologies used for achieving regulatory efficacy. M.Mousmouti (2012) at 193 and 205, refers to identifying the essential contents and standards by which quality is determined; to elements existing in legislation and legislative processes in most countries, independently of the differences of legal systems and legislative styles; and to common attributes of quality. H.Xanthaki (2012, 2011, 2010 and in *On Transferability of Legislative solutions: The Functionality Test*, chapter 1 in C.Stefanou and H.Xanthaki (eds) (2008) 1) uses the expressions "common factors" and "universality" in relation to the concept of universal quality in legislation.

¹² The expression "law-creating" used in this paper refers to the processes by which draft legislation that is presented to the legislature, ministerial or other lawmaker concerned is developed (that is processes for determining and developing policy and designing and writing the legislative provisions). "Law-implementing" refers to the processes for implementing and enforcing legislation, and to monitoring its implementation and evaluating its effectiveness. The processes for enacting laws and statutes and making regulations and other legislative instruments, which are usually constitutionally regulated, executed by elected representatives or government officials and subject to political aspects, are outside the scope of this paper. This paper also does not deal with the duty of government to ensure access to legislation as soon as it comes into operation so that any person may read or purchase a copy of it and be in a position to know its content. In addition the expression "drafting" is not used in this paper to avoid confusing the meaning of that expression to refer either to all of the processes for policy development and designing and writing draft legislation or the process for designing and writing draft legislation only.

¹³ The argument that lawmaking is important for development and that an appropriate methodology is required for lawmaking to effect development aims is not new. See particularly the works of Ann and Robert Seidman, which include: A.Seidman, R.B.Seidman and T.W.Walde (eds), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*, (1999); A.Seidman, R.B.Seidman and N.Abeyesekere, *Legislative Drafting for Democratic Social Change (A Manual for Drafters)*, (2001), and A.Seidman, R.B.Seidman, P.Mbana and H.Huli (eds), *Africa's Challenge Using Law for Good Governance and Development*, (2007).

that takes account of the country's resources, and is compatible with its culture, traditions, legal and political systems. Compatibility also takes into account suitability to the national intricacies¹⁴ and peculiarities. The recommended approach is also aimed at promoting the rule of law and good governance, and the effective development that they facilitate.¹⁵

The following sections address different aspects relating to the activities for creating and implementing quality legislation. The next 2 sections discuss the characteristics of quality legislation and the elements of effective law-creating and-implementing processes. The fourth and final section discusses the notion of effective development and outlines a theoretical strategy for law-creating and-implementing, which, hopefully can be used to guide lawmaking for effective development.¹⁶

2. What are the common characteristics of quality legislation?¹⁷

The purpose of a piece of legislation initiated by government is to translate a governmental policy decision into a legislative solution that will achieve its objective reform. The aim of all persons who participate in the law-creating processes, regardless of the country or type of legal system, should be to conduct those processes in a manner that produces legislation of such quality, that it achieves its objective. In identifying what it is that has a positive qualitative effect on law-creating and-implementing activities, the first consideration must therefore be: what are the commonly desired characteristics of a quality product, being a “good law”?

Vanterpool states that legislation should be precise and effective in achieving the intended outcomes, yet unambiguous and simple to understand¹⁸. He refers to these as the 2 limbs of

¹⁴H.Xanthaki (2012, 2011, 2010 and in *On Transferability of Legislative solutions: The Functionality Test*, chapter 1 in C.Stefanou and H.Xanthaki (eds) (2008) 1) uses the expressions “national intricacies”.

¹⁵ SIGMA-OECD, SigmaPapers No. 18 (1997 at 3): “The quality of legislation can strongly influence economic development and the well-being of the citizens.”. The focus of this paper is therefore the values and processes for producing legislation that is likely to foster good governance, the rule of law and economic and social development. However, it is recognised that not all legislation impacts beneficially on the lives of people.

¹⁶ This paper is not intended to be a manual or to be presented as an authoritatively detailed source of approaches and methodologies for : policy development, legislative drafting, implementation planning, on-going management of the implementation of legislation and delivery of its policy objective, and ex ante and ex post evaluation processes.

¹⁷ Quality legislation is also referred to as good legislation, effective legislation, workable legislation or legislation that works.

legislative quality¹⁹. In so doing, he equated them with Jean-Clause Piri's categorisation of quality in substance and in form²⁰. He further comments that quality legislation is benchmarked by these 2 limbs²¹. The first limb concerns quality in the substance of the law, or the accuracy in representing legislative policy. Vanterpool describes this as being about the appropriateness, adequacy and precision of legislative provisions for solving the problem and effecting desired change through certain, predictable and equitable implementation. This also refers to the issue of a well researched legislative policy decision (which would include an analysis of the necessity for legislation, its proportionality and detailed analysis of the likely impact of the proposal) that is appropriate for implementation by legislation. Further, the type of legislative instrument chosen to implement the policy will be suitable to accurately represent the policy and to be effective in achieving the legislative aim. It requires that the law produced be consistent within itself, be legally sound (that is, it complies with the constitution and is compatible with existing laws and the legal system generally), fit in with existing government policies and be cost effective and implementable in a manner that is practical, transparent and accountable.

The second limb is quality in the form of the law and intelligibility. Vanterpool describes this as using language and organising material to produce a legislative instrument that is capable of outlining and communicating the policy proposal unambiguously, to those who will be affected by and have to comply with the legislation (which includes those who must administer and enforce it). This requires that legislative text be characterised by its clarity, simplicity, accuracy and unambiguity, together with a logical structure that will readily communicate the purposes and effects of the law. It also refers to publication and dissemination of the legislation, so it is accessible to those who must comply with it and to those who must interpret, administer and enforce it.

Karpen²² specifies the principles of necessity, proportionality, subsidiarity, transparency, accountability, participation, accessibility and predictability.²³ Likewise, other specified values

¹⁸ V.Vanterpool (2007 at 170).

¹⁹ Ibid at 202.

²⁰ Ibid, footnote 19 at 170.

²¹ Ibid at 202.

²² U.Karpen (2012 at 155-158 and 173-177, 2009 at 216-217 and 2008 at 166).

are: clarity, understandability, simplicity, consistency, legality, precision, stability, unequivocal plain language and a coherent structure for achieving better regulation. He states that legislation requires formal or textual quality (that is quality in language and structure) and substantive quality (that is efficacy, effectiveness, efficiency and stability). He requires that legislation be accessible and clear so that each individual can discover the law and (with advice if necessary) understand it and know what conduct is expected of him and what the consequences are for not taking that conduct. He also values the characteristics of certainty and precision, flexibility and adaptability so that, in addition to knowing the content of the law, individuals can trust or rely on it to be able to organise their lives accordingly, but at the same time, he expects a law to also be able to adapt to the inherent dynamism and constant change of a society, without requiring constant modification.

He proposes achieving quality and getting better legislation by improving efficacy, effectiveness and efficiency, as well as producing well-structured text in clear language that promotes clarity, precision, avoidance of contradictions, readability and comprehensibility, and is oriented towards the addressees and the function of the law. For him, efficacy, effectiveness and efficiency are the three important criteria of quality legislation. There is efficacy if legislation achieves the lawmaker's intent when implemented. An effective law is one that is implemented (that is executed and enforced) and obeyed by as many addressees as possible. Efficiency is achieved if there is a positive cost-result relation, that is, the intended result is accomplished cheaper than if by another measure. He claims however that effective implementation is the predominant quality criterion of a law.²⁴

For Xanthaki,²⁵ the universal qualitative goal for legislation is effectiveness, which is determined by the extent of the legislation's efficacy of regulation. Efficacy of regulation is the extent of legislation's ability to achieve the desired regulatory results. It is achievable if legislation is effective in delivering its intended changes in the desired manner, which is established by the extent of the causal relationship between the purpose for creating the legislation and the effects

²³ U.Karpen (2009 at 216-217) emphasises that for a law to be predictable it must not be retroactive unless it has a beneficial effect.

²⁴ U.Karpen (2012 at 173, 178, 182 and 185).

²⁵ H.Xanthaki (2012, 2011, 2010 and in *On Transferability of Legislative Solution: The Functionality Test*, Chapter 1 in C.Stefanou and H.Xanthaki (eds), (2008) 1).

(or outcomes) produced in implementing and enforcing it. This requires that legislation must be efficient and be in the form that communicates its purpose and the means by which it achieves the purpose. In addition, the means by which legislation delivers its changes must be fair, equitable, certain and predictable, so that arbitrary governments are excluded, and people can plan and undertake long-term business and personal life activities.

Xanthaki continues and notes that efficient legislation is resource efficient and is able to be implemented in a manner in which the costs of doing so are balanced by the benefit it delivers to the public welfare (by choosing the most financially appropriate solution). This is indicated by the financial costs of developing and implementing the law (which may have necessitated extensive public participation and publication processes or balancing conflicting interests by, for example, compensating interests that are diminished by the operation of the law) on the one hand, with the public interest and welfare that it serves, on the other.

Xanthaki's legislative effectiveness also refers to the ability of written law to communicate its purpose and the means by which it achieves that purpose, which is indicated by the clarity, precision and unambiguity of its provisions. Those characteristics require that the language and layout used be plain, clear, certain, exact of meaning and detail, grammatically correct, easily understood, gender neutral and generally non-discriminatory. The aim is that users of the legislation are able to comprehend the requirements imposed and opportunities offered under the legislation, and organise their affairs with confidence.

Finally, Xanthaki recognises that legislative quality is reliant upon the quality of the content and form of the legislative provisions concerned. It is also reliant on the quality of the processes undertaken for developing the content and form of the legislation, and conducting impact analysis of that content and form. Further, it requires implementing and enforcing the resultant legislation and monitoring and evaluating its operation.²⁶ This includes reference to the principles and values of open, participatory and transparent policy processes, necessity of legislation for achieving the policy goal, proportionality, consistency with existing legislation and law, accessibility, comprehensibility, clarity, unambiguity and simplicity of form and language.

²⁶ H.Xanthaki (2013).

Mousmouti²⁷ cites the qualities of : clarity, precision, unambiguity, simplicity, plain and gender neutral language, accessibility, comprehensibility, usability, flexibility, legality and legal certainty, consistency and coherence, efficacy, efficiency, effectiveness, transparency and accountability, systematic participation through consultation and compliance with the principles of necessity, subsidiarity and proportionality. For her, achieving legislative quality is clearly reliant upon the achievement of the legislation's specific policy goals or effectiveness of the legislative text.²⁸ She claims that effectiveness appears to be the "ultimate indicator of quality of legislative text"²⁹ because it is a measure of the causal relationship between the objectives of a law, the mechanisms and means provided for its enforcement, whether and the degree to which it is implemented, and its effects.³⁰ This envisages legislation that clearly communicates its objectives and purpose and appropriately enables its implementation and enforcement in a manner that enables achievement of its objectives.

In making a quick survey of other views of legislative quality, Florijn³¹ specifies the requirements for achieving legislative quality as effectiveness, efficiency, legal soundness, simplicity, clarity, accessibility, practicability and enforceability, being at the appropriate level and using the appropriate instrument, and balancing costs and benefits.³² Mader³³ lists the characteristics of good legislation as being intelligible, practicable, comparable to superior and like legal norms and principles, stable, implementable, equitable, effective and efficient. The EU³⁴ nominates the attributes of legislative quality as necessity, proportionality, subsidiarity, accountability, transparency, accessibility, effectiveness, usability, clarity, precision, simplicity, participation and impact assessment processes, consistency and comprehensibility. The OCED³⁵ specifies clarity, simplicity, accessibility, flexibility, consistency, legality, efficiency, transparency, accountability, administrative simplicity and having a clear regulatory and policy purpose.

²⁷ M.Mousmouti (2012).

²⁸ Ibid at 195-197 and 203-204.

²⁹ Ibid at 200.

³⁰ Ibid at 200 and 204.

³¹ N.A.Florijn, *Quality in legislation: A law and development project*, chapter 3 in J.Arnscheidt, B.Van Rooij, and J.M.Otto (eds), (2008) 75.

³² Ibid at 75-77, 88.

³³ L.Mader, *Legislative Procedure and the Quality of Legislation*, section 3 in U.Karpen, P.Delnoy (eds), (1996) 62.

³⁴ European Commission (1999 and 2002). See also discussion by M.Mousmouti (2012 at 194-195).

³⁵ OECD (1995, 2004). See also discussion by M.Mousmouti (2012 at 195-196).

These views collectively require good legislation to be : necessary, proportionate, accessible, intelligible, precise, appropriate, adequate, predictable, certain, effective, legally sound, cost effective, practically implementable, clear, simple, precise, comprehensible, based on participatory processes and impact assessment, and be able to promote transparency, accountability, order and fairness.³⁶ Those characteristics of quality are useful for analysing the extent to which legislative provisions fulfil their purpose, or their efficacy, and may be grouped in terms of the quality of the substantive content and operation of the provisions and the form and intelligibility of the provisions or, to use Xanthaki's categorisation, the provisions' effectiveness and efficiency, and their clarity, certainty and unambiguity.³⁷ The correlation of these sets of characteristics in indicating legislative quality is visualised in Diagram 1 on page 10.

Together the characteristics set a standard of quality which can be used for assessing whether particular legislation is good by indicating the efficacy, effectiveness and efficiency of a law and the quality of a law's form. The standard of quality can be used to ascertain the quality of both draft and operative legislation. It would indicate whether it is likely that the draft legislation is suitable to achieve its intended purpose, sufficiently intelligible to communicate that purpose and the mechanisms by which the purpose is to be achieved, and is likely to be complied with by the greatest number of people. It would also indicate whether (that is how and the extent to which) legislation that is in operation, achieves its purpose, communicates its purpose and is implementable and enforceable. The desire to achieve the standard of quality should be part of the approach in all stages in the law-creating and-implementing processes, as good legislation is the result of collaboration by all of the persons who research and determine the policy, craft its written provisions, implement, monitor and evaluate its implementation and impact.³⁸

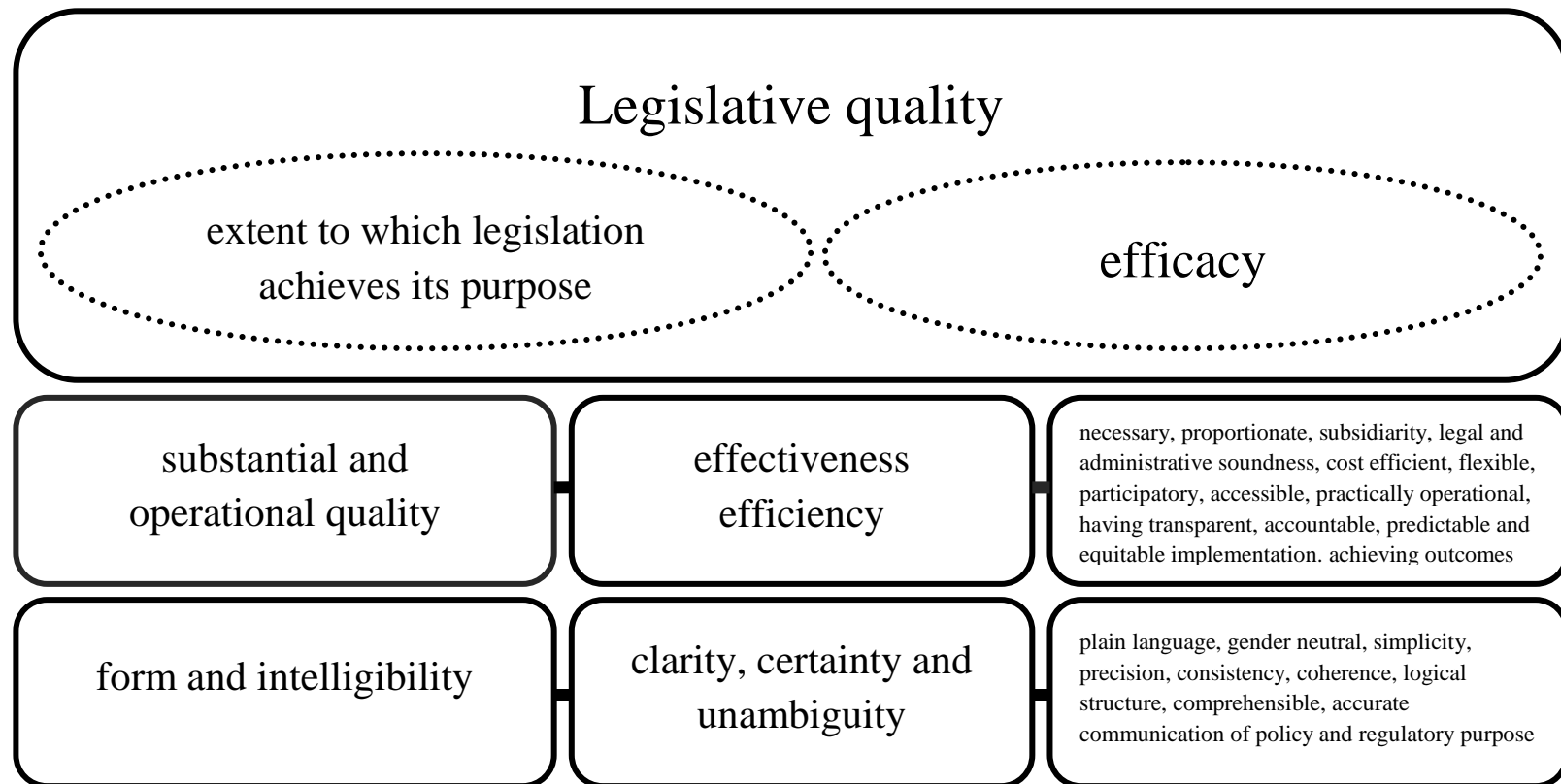
³⁶ Conversely, the characteristics of a bad law are readily identifiable. Primarily a bad law will not effect its regulatory purpose or it may not be efficient in doing so because it is any one or more of the following: unnecessary, impractical and not easily implementable, inconsistent with existing laws, unintelligible, ambiguous and imprecise, unpublished or otherwise inaccessible, not delivering fairness, transparency and accountability or resulting in greater economic costs due to high administration costs and the need for legal advice and litigation to understand how the law applies. The result is that time and resources are wasted in producing, enacting and commencing the law and subsequently in amending or repealing it. Achievement of the policy objective is delayed or not achieved which can result in loss of confidence in the law and lawmaking process.

³⁷ H.Xanthaki (2013), (2012) and (2011).

³⁸ V.Vanterpool (2007) at 173: "In pursuit of quality in legislation, it must be emphasised that there are many players who must contribute to this achievement"; and at 204: "...it is significant to note that achieving quality legislation is a standard that must be collectively pursued and can only be achieved by the efforts of all parties to the legislative process."

Diagram 1

The characteristics of quality legislation



3. What are the common elements of good law-creating and law-implementing processes?

Having identified the characteristics of a quality legislative product that will likely contribute to attaining government social, political, legal and economic objectives, the second consideration is what to do to produce such appropriately workable legislation³⁹. This requires identifying the common elements of the procedures to create and implement legislation, which may be used in any subject area and in any country.

As governments initiate most legislation, the discussion below conceptualises the elements of law-creating and-implementing as six functions of governments for producing legislation⁴⁰. Each function is undertaken as a set of processes derived from the full set of lawmaking activities comprising the life-cycle of legislation. This is depicted in diagram 2 on page 12. The functions facilitate description of the key elements and their interrelationship, but in practice, the processes form a series of steps⁴¹ for developing policy, writing the legislative text⁴², implementing the legislation and evaluating and reviewing legislation (which may lead to the on-going law-creating

³⁹ L.Mader, *Legislative Procedure and the Quality of Legislation*, section 3 in U.Karpen and P.Delnoy (eds), (1996) 62 at 62-63.

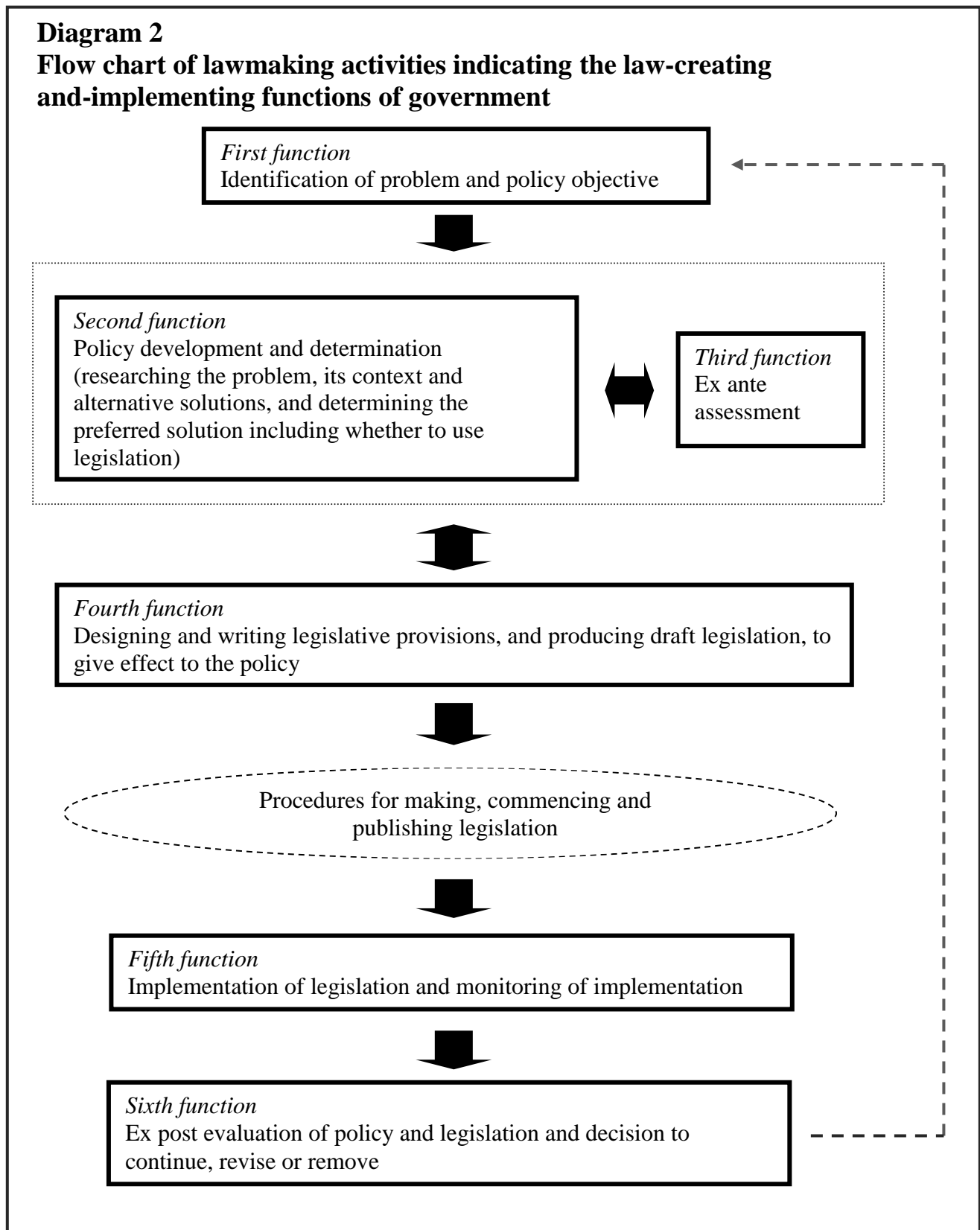
⁴⁰ The functions proposed in this paper are: identifying the problem, conducting the policy processes (researching the problem and its context and determining the preferred solution), assessing ex ante the likely effectiveness of the policy, designing and writing appropriate legislative provisions to effect the policy and producing draft legislation, implementing the legislation and monitoring the implementation to ensure it is occurring as planned, and assessing and evaluating ex post the legislation's effectiveness. Problem identification would be mostly a political process and processes for developing the policy, ex ante evaluation and drafting the legislation would be undertaken by the relevant ministries or government authorities. Implementation would likely involve the same ministries and government authorities as well as law and justice activities. Ex post evaluation could be conducted by the ministries, a separate government authority or an external contractor. See also descriptions of the policy development stage in Ministry of Social Development (2007) at pp 17-20; and see L.Mader, *Legislative Procedure and the Quality of Legislation*, in U.Karpen and P.Delnoy (eds), (1996) 62 at 62-63; L.Mader (2001 at 121) and M.Mousmouti (2012 fn 33 at 196) for descriptions of the steps to lawmaking;

⁴¹ L.Mader (2001 at 121) refers to methodological steps or sequences; M.Mousmouti (2012 at 196) refers to a rational and systematic process of several interrelated logical steps; and U.Karpen (2012 at 174) refers to a multi-step procedure.

⁴² In this paper, this process is referred to as designing and writing legislation. Refer footnote 8.

Diagram 2

Flow chart of lawmaking activities indicating the law-creating and-implementing functions of government



and amending process⁴³). Each step requires different competencies which have implications for the professional expertise required to undertake the work and relationships with the stakeholders and interest groups concerned. The simplification and depiction as discrete functions, are not neatly compartmentalised in reality, and may, particularly those required in developing the policy, conducting ex ante assessment and writing the legislation, overlap as they proceed⁴⁴.

First function: identification of problem and policy objective

The first function is identifying a problem that requires governmental action and its derivative broad policy objective, which may be suitably addressed through means of policy intervention. A problem could be, to deal with an emergency situation, stimulate economic growth, improve living standards, alleviate an economic or social difficulty or meet a technological change.⁴⁵ The problem may be identified through routine government policy and law review processes, recommendations from commissions or other bodies of inquiry or independent statutory offices, a court decision interpreting existing law, international or regional obligations, arrangements for funding or assistance with international organisations or bi-lateral development partners, election promises or pressure from the media or international and national interest groups. The policy objective is to solve the problem. Recognising and accepting the suitability of the objective and its underlying problem, as being appropriate for application of government resources to develop and implement a policy to overcome the problem and achieve the objective, are done through ministerial or government approval processes. These could include: specifying its level of priority, setting the agenda for the policy development and implementation processes and negotiating funding and technical assistance with international organisations or other development partners.

⁴³ The processes are potentially cyclical and continuous as the ex post evaluation may identify a problem that stimulates further processes for amending legislation or making new legislation. M.Mousmouti (2012 at 205) emphasises the interrelation between the different phases of the legislative lifecycle and the need to look at them as a continuum.

⁴⁴ See comments by Legislation Advisory Committee (2001 at 21); C.Cowan Buchwald (1998 at 54); and L.Mader, *Legislative Procedure and the Quality of Legislation*, section 3 in U.Karpen and P.Delnoy (eds), (1996) 62 at 63.

⁴⁵ An identified problem could be the high number of poor persons in a country and the objective would be to reduce poverty and improve the quality of life of the poor. Another problem could be increased road fatalities. In resolving the problem, the objective could be to improve road safety and reduce the road toll.

The policy objective would probably be described in the most general of terms, for example, to enable equal opportunities for disabled employees, to increase food production, to reduce corruption, to improve road infrastructure or to reduce the incidence of heart disease. If, in the course of subsequent government policy processes, it is decided to implement the policy wholly or in part by legislation, achieving the objective and addressing the underlying problem or difficulty becomes the objective of the legislative intervention, and the content of the resultant law will depend on the objective pursued.⁴⁶

Second function: developing the policy that will address the problem and achieve the objective

The second function is the set of processes for researching and formulating the content of the government policy to address the problem and effect the objective⁴⁷. This also involves confirming the policy objective and determining the mechanisms and resources to implement the policy, including the decision whether to implement by legislative instrument and, if so, the level of legislative instrument to be used. The third function deals with designing and writing the legislative provisions that will communicate and effect the policy. In this way, if it is decided to implement by legislative instrument, legislation is a tool for effecting public policy⁴⁸.

This set of processes entails: researching, analysing and explaining the problem and the problem's current legal and policy context⁴⁹. With these, a determination is made as to whether government action is necessary. They also involve choosing and detailing the solution and the

⁴⁶ P.Delnoy, *The Role of Legistics and Legists in the Determination of the Norm Content*, in *Contributions to the Methodology of the Creation of Written Law*, section 1 in U.Karpen and P.Delnoy (eds) (1996) 25 at 26: "...the law serves as an instrument for achieving its objectives; therefore the content of the rule depends on the aim that (it) wants to reach through law."

⁴⁷ For example, after undertaking research and analysis, the objective to reduce poverty and improve the quality of life of the poor could require a number of different solutions for improving the national economy, increasing employment, increasing food production, ensuring provision of clean water and increasing service delivery outcomes in health and education. The solution adopted to improve road safety and reduce the road toll could be to introduce compulsory wearing of seat belts reduce speed limits and remodel the roads in selected areas, increase warning signage, introduce speed cameras, increase penalties and conduct a public awareness campaign.

⁴⁸ L.Mader (2001 at 122) talks about legislation having "at least an instrumental purpose". P.Delnoy, *ibid*, fn 31.

⁴⁹ SIGMA-OECD, Papers no. 18 (1997 at 11): "There is a developing understanding that both the content and methods by which policy is developed must be responsive to the context in which it is to operate."

manner by which the solution will be effected.⁵⁰ The processes are a framework for national and local problem analysis and solving. This framework also embraces participatory democratic processes of accountability and transparency, which involve public awareness, consultation, debate and media coverage. However, they must be undertaken in accordance with the administrative instructions and other defined governmental procedures (which will determine the ministry or other government authority that has the responsibility for preparing the legislation and supporting documentation, such as the explanatory memoranda, the approvals required and its priority and degree of importance within the government's policy and legislative programmes).

Essentially, the function of policy development provides answers to the following questions:

- (a) what is the precise nature and context of the problem (that is, the issue and its nature and scope) that needs to be addressed;
- (b) what are the policy objectives for resolving the problem and is there justification for taking government action and using government resources to resolve the problem and effect the objectives;
- (c) what is the legal, political, policy and administrative status quo in relation to the problem;
- (d) what are the possible options (legislative and non-legislative) for overcoming the problem and effecting the objectives;
- (e) what are the mechanisms (legal and non-legal) for implementing and enforcing each option, and making each option workable⁵¹;
- (f) what are the anticipated benefits, costs, difficulties, impacts and risks associated with giving effect to each option;
- (g) what is the preferred option to solve the problem and meet the policy objective, why is it preferred and why are the other options rejected⁵²;

⁵⁰ Prof. Dr. Popelier (2013 at 11 and 15) refers to a decision-making process that is not based on mere assumptions, but is evidence based.

⁵¹ Questions to be considered for each option include: what personnel, institutions, systems and procedures are needed to achieve the objective, how will compliance be achieved, what sanctions are suitable for violations, which body or bodies will have the authority and responsibility for implementing and enforcing each option and how does each option fit in with the law and government policies and budgets?

⁵² That is, which option will achieve the outcome that will be most appropriate for the county's particular constraints and resources?

- (h) how will the implementation of the option be monitored; and
- (i) how and when will any legislation giving effect to the policy be reviewed to evaluate its effectiveness, efficiency and appropriateness.⁵³

Initially the emphasis is on investigating and analysing facts (which would include relevant social, economic, cultural and legal factors) to attain the knowledge and information on which to ground the policy and its delivery. The aim is to collect statistics and other data and learn about and understand the problem and the policy objective for overcoming the problem in order to inform the decision making process that determines which action to take to achieve the desired objective⁵⁴. There are various research methods used for this. These include: desktop and physical research of existing materials on the subject matter of the problem and objective; reviewing and analysing existing national and international legal and policy frameworks; and identifying and conducting appropriate surveys, studies, consultative processes and workshops with experts, stakeholders and interest groups. National, regional and local awareness campaigns and dialogue processes may also provide relevant information. In addition, this is increasingly seen as requiring the use of up-to-date research methodologies and social analyses and assessment of the subject matter. Most likely therefore, the research and analysis undertaken to investigate and define the problem, clarify the objective and provide the rationale for the policy and its substantive content, will require a multi-disciplinary expertise (possibly anthropological, sociological and socio-economic), and involve observation techniques, qualitative and quantitative surveys of sample populations, setting up focus groups and direct one-on-one interviewing of key stakeholders to gather relevant facts about the nature and causes of the problem and assist determine policy objectives and design appropriate solutions.⁵⁵

As it is vital that public policy reflects the dynamics of society and the motivations, understandings and conduct of people in relation to the identified problem and its associated policy objective, social science research is increasingly used to identify and assess peoples

⁵³. See SIGMA-OECD, Sigma Papers: No. 15 (1997 at 8, 29 and 30) and No. 18 (1997 at 12-114), and description of processes by U.Karpen (2012 at 174-175).

⁵⁴ It is usual for ministerial officials with expertise for developing policy and expertise in the specific subject matter of problem to be responsible for researching, developing and producing documentation presenting the policy. The decisions as to the content of the policy and whether to implement it will usually be taken by the responsible minister or cabinet.

⁵⁵ Other analytical methods include: modelling, pilot schemes, case studies, focus groups, cross-cultural analysis.

interests, attitudes, perceptions, motivations, aspirations, values, interactions, needs and practices, and provide an understanding of how people behave and the factors that influence their behaviour. An understanding of same should be incorporated into the policy development⁵⁶. This enables the policy developers to tackle the reasons for the behaviour and to propose incentives and other policy mechanisms, which could balance competing interests and induce the people to conduct themselves in a manner that accords with the policy objective, to the extent that the objective is achieved. Likewise, it may assist in avoiding or minimising the effect of unintended consequences of policy decisions (which could defeat the proposed government action).⁵⁷

It is also important to determine the manner for implementing the policy⁵⁸. Consideration must be given to what the legislative and non-legislative options are for overcoming the problem and achieving the objectives in a manner that is timely, effective and within budget. How will each option be implemented, what resources (time, financial resources, governance arrangements, technology and appropriately trained personnel) are available to fulfil anticipated roles and responsibilities, to implement the options, and will they be available when required? What are the risks, costs and benefits⁵⁹ of each option and are there any barriers to effective implementation⁶⁰? Will implementation be effected in phases? Can the problem can be

⁵⁶ A.Seidman and R.B.Seidman, *Between Policy and Implementation: Legislative Drafting for Development*, Chapter 19 in C.Stefanou and H.Xanthaki (eds) 2008 287 at 312: "Legislation will only work if based on accurate estimates of the behavioural consequences of proposed legislative interventions ... (which) depends upon accurate information about the social circumstances within which the new law will function. ...The information required plainly falls within the general purview of the social sciences."

⁵⁷ Ministry of Economic Development (2006). See also the discussion about the Uzbekistan Water Project by J.Brown, A.Kudan and K.McGeaney (2005 at 52). The Uzbekistan Water Project provides a good example for understanding how social assessment can help fill in knowledge gaps, including having the right legislation at the broadest level. The government of Uzbekistan had legislation that was ready to be passed that would have legislated free water to the entire country. However, through the social assessment process associated with the project, the government learned that water would not be conserved, the project would not be financially viable and as a result, the poorest members of society might not receive adequate water and would have to continue to purchase it from water vendors for up to four times the amount that the middle-class paid for piped water. As a result, the legislation was changed. In addition, the social assessment process looked at many other areas to determine people's willingness to pay, technical standards for the salinity of the water, the amount of water required, and whether a rural piped-water project should exist.

⁵⁸ Australian Government (October 2006 at 5): "A policy initiative is more likely to achieve the best possible outcomes when the question of how the policy is to be implemented has been an integral part of policy design. Where this does not receive sufficient and early attention, problems may arise during subsequent implementation."

⁵⁹ See comprehensive discussion on costs and public interest benefits in Australian Federal Government (2003) at 24-25.

⁶⁰ This includes identifying the groups who will be advantaged and disadvantaged. For example if introducing new fishery legislation, isolated traditional coastal communities may not understand proposed controls and not have access to assistance to do so.

adequately dealt with under the existing law, by changing the law or by non-legislative means.⁶¹ If written law (that is the enactment of new or amendment legislation) is an efficient and effective method to achieve the objective⁶², what is the most effective type of legislative instrument to achieve the objective?⁶³

Consideration may also be given to the regional and global context of the proposed policy intervention, international standards and best practices, and comparable regional and international policies, solutions and results. This is so, as policy and legal concepts and ideas from these sources may be useful in developing the policy. This should not be taken to mean transplanting⁶⁴ policies, legal norms or specific law from one nation or jurisdiction to another is a reliable approach, rather, the suggestion is to look for degrees of transferability and, if feasible, borrow and adapt previous policy and legal models to fit in with the local social, political, legal and economic context of the specific problem⁶⁵. Despite increasing global and regional uniformity, any mismatch between local conditions (institutions, policy and legal frameworks) on the one hand, and transplanted policies and law on the other, will generally mean that the resulting policy and implementing legislation will not be effective (and must be avoided).

⁶¹ Non-legislative means include taking no action, education campaigns and public awareness strategies, negotiation, persuasion and voluntary agreement, codes of conduct, voluntary standards, self-regulation, co-regulation, improving implementation and enforcement measures or financial incentives. See Department of Enterprise, Trade and Investment (2004) at 38-41 and Annex 2; NZ Legislation Advisory Committee (2001 at 23-27); SIGMA-OECD, Sigma Papers No. 18 (1997 at 15-16).

⁶² Australian Federal Government (2003 at 3): “Legislation should be viewed as the last resort when all alternatives options are ineffective, inefficient and/or have greater impacts on society”; NZ Legislation Advisory Committee (2001 at 22): “...the development and implementation of new legislation can impose significant costs on the community. Accordingly, other means of achieving the policy objective should be identified, and a decision taken as to whether legislation is the most appropriate means.”

⁶³ These decisions are usually guided by the ex ante assessment process discussed in the next section.

⁶⁴ Transplants are models and precedents that have been successfully implemented in a country or jurisdiction which are borrowed and copied by another to achieve substantially the same objectives as in the country or jurisdiction from which it was borrowed. See J.M.Otto, W.S.R.Stoter, and J.Arnscheidt, *Using legislative theory to improve law and development projects*, chapter 2 in J.Arnscheidt, B.Van Rooij, and J.M.Otto (eds), (2008) at 66-67. See also H.Xanthaki (2012 at 393).

⁶⁵B.Z.Tamanaha, *A Pragmatic to Legislative Theory for Developing Countries*, chapter 9 in Seidman, Seidman and Walder 145 (1999) at 145 and 149. Tamanaha refers to legal transplantation as borrowing and asserts that “borrowing ... borders on the inevitable” and refers to borrowing as “unavoidable” and “an efficient way to proceed.”

However, transplants may work if there is justification for relying on policy or law from elsewhere⁶⁶. Policies and law from other jurisdictions may be of comparative value as an example of the content and effect of a specific policy or legislative provision, especially where more than one country is implementing a regional or international agreement or there is desire on other grounds to attain some degree of uniformity⁶⁷. Reliance however must always be subject to the qualification that adoption is only after careful study of the other jurisdiction's circumstances and differences are identified and taken into account, and the imported policy or law adapted to fit local conditions. This is undoubtedly a lengthier and more troublesome process, but is surely better than producing and enacting incompatible and therefore, unsuccessful legal transplants.

Participatory processes, viz., consultation and feedback processes that enable public and stakeholder participation during policy development, are beneficial and therefore a very important part of this set of processes⁶⁸. By enabling the timely exchange of information between a government and its people about problems and their solutions, local populations and interest groups are given the opportunity to take part in their country's public affairs and contribute to the development of the government policy- and law-creating procedures and, consequently, to exert influence on the decision-making that will affect them and engender in them a sense of ownership of the outcomes. It is therefore also a means for publicising a policy and its implementing legislation and stimulating awareness and support for the legislation. The intention is to improve the content and effectiveness of the policy and resultant law so it will better address local and national needs.⁶⁹ Often these processes are preceded or accompanied by

⁶⁶ H.Xanthaki (2011 at 395) comments that "As long as the transplant can serve the social need to be addressed, the transplant can work well in the new legal ground." This is probably becoming more usual as increasing state global participation builds demand for a global perspective of laws and legal systems.

⁶⁷ For example, an international organisation or regional body might propose model legislation or model provisions. These also should be considered carefully and adapted to national conditions if to be enacted as part of the nation's law.

⁶⁸ U.Karpen (2012) at 155 and 171, states that participation is one of the main challenges producing legislation and is a requirement for increasing the quality of legislation. Note also that stakeholder engagement should take place as early as possible. However, the sensitivity, urgency of the policy initiative, or insufficiency of time or resources, may prevent this from taking place. (Australian Government, 2006 at p 35).

⁶⁹ In enabling the exchange of information between citizens, government and parliament, participatory processes also strengthen accountability and responsible democracy. The OECD, Public Management Policy Brief of 2001, talks about strengthening relations between governments and citizens and depicts the outcomes of participatory processes as follows: "Strengthening relations with citizens is a sound investment in better policy making and a core element of good governance. It allows government to tap new sources of policy-relevant ideas, information and resources when making decisions. Equally important it contributes to building public trust in government, raising the quality of democracy and strengthening civic capacity."

social science research methodologies and analysis which may identify barriers to effective consultation processes with particular groups or to achieving the policy objective.

Appropriate participatory processes include: holding discussions, open dialogue participation, consultations, workshops, and seminars with input from government officials and agencies, parliamentarians, NGOs, international advisers, independent specialists, private sector, academics, communities and members of the public. The processes should commence at an early stage of the policy development and continue as the process develops, moving progressively from considering broad policy choices to weighing more specific issues related to the detailed design of the policy proposal and objective.⁷⁰ They can be planned to occur at different stages and involve different interest groups. They complement social science research and ex ante assessment processes, enable people to be informed of the relevant facts, use local knowledge, expertise and experience to identify and address local needs and implementation issues, and inform the policy makers of the needs and priorities of the people who will use or be affected by the proposed law⁷¹.

⁷⁰ The processes may continue until completion of the draft law to assist refinement of the legislative provisions. Key participatory processes for legislative reform are: (a) giving timely public notice of proposed policies and resultant legislation; (b) making copies of policy documents and draft legislation that is clear and comprehensive publicly available; (c) giving community members the opportunity to comment (whether by oral or written submission) with well notified and fair timeframes for doing so; (d) conducting training workshops and other capacity building activities to ensure leaders and other community members have the competencies to participate; (e) forming focus groups; (f) conducting interviews with key stakeholders; (g) conducting public consultations, including by electronic consultation processes; (h) carefully analysing submissions and responses received and making available written feedback of the results of consultations, with reasons for decisions taken; (i) an effective parliamentary committee system; and (j) rigorous parliamentary oversight and debate of bills.

These processes need resources and need to be managed well otherwise they might be subject to constraints that reduce their effectiveness. Stakeholder interests must be identified so that most appropriate means to consult with them can be arranged. Stakeholders and community members must understand why the consultation processes are being held and be able to access the information or public consultations targeting them, the information must effect good communication of policies and proposed laws (including overcoming language barriers by translations), the location, manner and form of public comment must be such that all persons of all levels of education and skills are able to participate and there must be sufficient time for effective participation and follow up. It is also important that stakeholders and community members are given a realistic expectation about their capacity to influence the policy development processes.

See AARHUS Convention (Articles 6-8), NZ Legislation Advisory Committee (2001 at 27-30); OECD 2001 and OECD July 2001.

⁷¹ SIGMA-OECD, Sigma Papers No. 18 (1997) at 19 describes the following possible benefits of consultation: facilitating the collection of data and broadening the range of policy alternatives, giving rise to better understanding about the activities that are to be controlled and enabling government to be more responsive to the needs and interests of affected persons, broadening the range of policy alternatives and resulting in a more informed choice as to preferred policy and appropriate mechanisms to give effect to the policy that are more likely to encourage compliance, making policy and lawmaking processes more transparent and understandable to affected groups.

The desired outcome of this second function is a fully researched, country specific policy, presented to the responsible decision-maker in written form that outlines the problem and objective, a series of options for achieving the objective (that is, the preferred and alternative solutions and the mechanisms for their implementation), with costs and benefits compared for the intended and unintended results⁷². The key decision making at this stage concerns which of the possible policy options is preferred, whether the option should be realised through legislation or non-legislative means, which government authority should be responsible for implementing the legislation and what legal and administrative mechanisms will be necessary to make the policy implementable (and, if implementing by legislation, ensuring the legislation is workable). These decisions are usually guided by the ex ante assessment processes of the third function of government discussed in the next section.

Third function: ex ante assessment⁷³

This function involves analysing, assessing and testing the likely effects, consequences and impact of a proposal for government action to overcome an identified problem⁷⁴, and is intended to help “narrow the gap between the expected results and actual outcomes”⁷⁵ of taking the action. It is a predictive⁷⁶ or preparatory⁷⁷ process that informs policy decisions and facilitates evidence based policy-making by establishing the case for taking action to deal with an identified problem and highlighting the actions to take in so doing. The problem and the objective for solving the problem that has given rise to the need to take government action are also analysed. The next

⁷² The form and content of the policy documentation will be determined by government administrative practices and, in some jurisdictions, will be taken to be evidence of the intention of any resultant legislation in legislative debates and investigations and judicial interpretation.

⁷³ U.Karpen (2012 at 180) comments that ex ante assessment of a draft law can take place prior to adoption (that is during policy development and also during the writing stage) and as part of the parliamentary deliberations of a proposed law (which is the responsibility of parliamentary institutions). SIGMA-OECD, Sigma Papers No 18 (1997 at 19) and M.Mousmouti (2012 at 199) also comment that in testing the effects of proposed interventions, there may also be ex ante assessment of the draft legislation that is expected to give effect to the policy. In this paper assessment of any proposed legislative text is treated as part of the fourth function of designing and writing the implementing legislation – see discussion of the processes for checking and verifying draft legislation.

⁷⁴ The processes are also referred to as checking, appraising, verifying or evaluating the impact of a future government action (European Commission 2001) or regulatory impact assessment (SIGMA-OECD 1997, Australian Federal Government 2003 and M.Mousmouti 2012).

⁷⁵ K.Van Aeken (2011 at 41).

⁷⁶ L.Mader (2001 at 128-131): the purpose of an ex ante evaluation is to have better insight into possible or potential effects of a proposed policy and the mechanism planned to give it effect. U.Karpen (2004 and 2012) and M.Mousmouti (2012) describe the process as prospective and Gestel and Menting (2011) describes it as future oriented.

⁷⁷ European Commission (2001).

steps involve identifying alternative options for action to solve the problem that are within the resources and capability of the government, making prospective estimations of the implementation and enforcement requirements, other potential effects (including counter-effects) and costs, benefits and risks of the each option, deducing the likely adequacy of each option to achieve the objective (and by so doing testing whether it is likely to be an effective and efficient option) and recommending the option that is likely to be the most effective and efficient means for solving the problem. This information is presented to the policy decision-maker in a clear and well structured way to assist and guide the government in deciding which action is most likely to be the most appropriate to resolve the problem in a manner that minimises costs and administrative burdens on government and society, and is suitable for national economic, social and political realities.⁷⁸

In order to adequately assess a proposed policy objective and the means to effect it, the set of processes should commence as early as possible after identification of the problem, when the options for action are still opened. The process continues, the possible options are considered and stakeholders and interest groups are identified. It continues throughout the policy development stage after the preferred option is determined. In this way, these assessment processes can be carried out concurrently with, or as part of the policy determination processes. They can also provide information and results, for the preparation of the policy proposal.⁷⁹

There is no uniform method of ex ante assessment.⁸⁰ It may be an established institutionalised process or an ad hoc requirement for particular legislative proposals. Further, it is advisedly undertaken by appropriately trained experts working in the ministries, other institutions that initiate the policy, or in an appropriate independent authority. The nature of the evaluation undertaken will be shaped by factors such as: national constitutional and legal standards, government evaluation policy and evaluative standards, the characteristics of the problem, the proposed nature of the regulatory scheme, actual time, and financial and personnel resources available to undertake the assessment. Examples of the range of evaluative methods that may be used are: benefit/cost analysis, cost effectiveness (or cost output) analysis, compliance cost

⁷⁸ Australian Federal Government (2010 at pp 3-4).

⁷⁹ Department of Enterprise, Trade and Investment (2004); European Commission (2001 at 27).

⁸⁰ U.Karpen (2012 at 180)

analysis, business or small business impact analysis, fiscal or budgetary analysis, risk assessment and risk-risk analysis.⁸¹ In addition, the results of the assessment should be available to inform both the subject and future policy processes.⁸² Ex ante assessment also increases the opportunity for information about government regulatory decisions to become publicly available and subject to comment. It enhances the important values of open and accountable government and public involvement in government policy development and ensures that both the government and the affected groups understand the problem and policy objective, the alternative options to address the problem, potential administrative and compliance mechanisms and associated benefits, costs and risks.⁸³

Fourth function: designing and writing legislative provisions to effect the policy

The fourth function is undertaking the set of processes that involve the design and writing of the detailed legislative provisions that translate a policy into legislative form. As the step that bridges the gap between deciding a policy and implementing the policy⁸⁴, the important task of

Checklist for policy development

1. What is the problem to be addressed, how is it caused and why is it necessary for government to take action to address it?
2. What is the present factual, legal, social, economic, political and global and regional position relevant to the problem?
3. What is the policy objective to be achieved in overcoming the problem?
4. Have sufficient legal and social research and assessment procedures been undertaken to ascertain the facts and define the problem and objective?

⁸¹ L.Mader (2001 at 128) also specifies practical tests, demonstration programmes, modelling, simulations, forecasting and scenario building as techniques for ex ante evaluations.

⁸² See generally: Australian Federal Government (2010); Ministry of Economic Development (2007), Department of Enterprise, Trade and Investment (2004). OECD (1997).

⁸³ Australian Federal Government (2010); Department of Enterprise, Trade and Investment (2004).

⁸⁴ A.Seidman and R.B.Seidman (2008 at 289) refer to “legislative drafters, who design and write proposed laws, and thus purport to fill the policy-implementation gap.”; and to “the key role that legislative drafters must play in designing the substantive details of a bill to bridge the gap between a policy’s broad objectives and the detailed behaviours of those who seek to implement that policy.”.

5. Has there been sufficient consultation with and participation by stakeholders and other interested persons?
6. What are the alternative options for action to address the problem and achieve the objective? In indentifying the possible options, has consideration been given to the following:
 - is government action necessary and at what level of government?
 - is immediate action necessary?
 - does that action , and at what level or levels?
 - who will be most directly affected by each option and are they likely to take advantage of opportunities or comply with the requirements of each option?
 - what are the mechanisms for implementing, enforcing, and achieving compliance with each option?
 - what are the anticipated costs, benefits, risks, implementation difficulties and outcomes of each option, and is there an acceptable cost-benefit relationship between the costs of implementation and enforcement of each option and the likely results achieved?
 - is implementation and enforcement of each option practicable and within financial, human resources and technological capacity?
 - what are the likely intended and unintended effects of implementing each option?
7. What is the preferred option and why? Do the benefits of that option justify the costs, risks and difficulties predicted? Does this option comply with the constitution and is it consistent with the existing law and legal system?
8. What are the proposed mechanisms for monitoring implementation and conducting ex post evaluation?
9. Has ex ante assessment been undertaken to explain and understand the policy objective, identify and ascertain the likely effects, costs, benefits, risks, consequences and impacts of each possible option for implementing the policy and to inform the process for determining the preferred option and develop the policy?

this function is communication and involves, both the communication of the determined operative content of the policy, and the form and words by which to communicate that content.⁸⁵ The aim is to do so in such a way that the resultant law is interpreted, implemented and enforced so that it is probable that the policy objectives will be realised⁸⁶. In this way, there will be no need for such law to be frequently changed, either by amendment or repeal (which will enable

⁸⁵ A.Seidman, R.B.Seidman and N.Abeyesekere (2001 at 25-26).

⁸⁶ A.Seidman and R.B.Seidman (2008 at p 296): “How well a drafter designs a bill’s detailed provisions determines whether the bill, enacted into law, works.”

people to organise their affairs with certainty).⁸⁷ The outcome of these processes is production of draft legislation that will be delivered to the lawmaker.⁸⁸

There are 2 main approaches to organising the performance of the function of writing legislation.⁸⁹ The first approach is to produce legislation by a group or working party of officials from the responsible ministry who will be tasked to do the policy development and write the legislative provisions in consultation with other interested ministries, experts in the subject matter, representatives of the stakeholders and other interest groups. The person or persons who write the legislative provisions may be legally trained ministry officials who have developed special expertise in law drafting. Otherwise, an academic or lawyer from outside the public service may be contracted to write the legislative provisions. In some jurisdictions that adopt this approach, for example, France⁹⁰, the draft legislation produced by a ministry's working group, is forwarded to a central advisory office whose function it is, to scrutinise the policy, legality. That advisory office is also empowered to draft the legislation, which may include rejecting or re-writing a part or the whole of the draft legislation, and then report its opinion of the proposed legislation, with reasons for supporting or altering the draft legislation to the government and lawmaker.

Under the second approach, policy development and legislative drafting - are separated. A single centralised government unit or agency that is staffed by specialist lawyers is responsible for writing draft legislation. Officials in the ministries and agencies are responsible for researching and determining the policy. They inform the central drafting agency of the determined policy, outlining the problem, solution and objectives of the proposed law in the form of instructions to

⁸⁷ S.Laws (2011 at 16) refers to the “task of translating the language of policy into the language of the law”. He continues: “The task of the drafter is to do the analysis and balance the risks to get as close as possible to a draft that is compatible both with legal theory and with communicating the policy objectives of the policy maker. This requires not only sound analysis but also potentially some comprises; and it always comes down to the technical ability to identify, and to set out as clearly as possible, the underlying intentions of the legislators.”

⁸⁸ There are various texts and guides on the drafting process and the skills, techniques and matters to be considered for writing legislation, see for example G.C.Thornton, *Legislative Drafting*, (1996), F.Bennion, *Bennion on Statute Law* (1990), SIGMA-OECD, Sigma Papers No. 18 (1997), Seidman, Seidman and Abeyesekere, *Legislative Drafting for Democratic Social Change (A Manual for Drafters)* (2001).

⁸⁹ Sir W.Dale (1997); SIGMA-OECD Papers No. 18 (1997 at 13); C.Steanou, *Drafters, Drafting and the Policy Process*, chapter 20 in C.Stefanou and H.Xanthaki (eds) 2008 287 at 325-327; J.Massot (2001); S.Lortie (2010).

⁹⁰ J.Massot (2001). At page 19, Massot specifies that other countries, such as Italy, the Netherlands, Lebanon, Egypt, Thailand and Columbia, follow a similar process.

those lawyers. The lawyers produce draft legislation on the basis of those instructions and additional policy inputs as they require.

Nevertheless, whichever system is used, the function of designing and writing the legislative provisions should be undertaken by the persons who are responsible for drafting the legislation, in collaboration with the persons who are responsible for developing and deciding the policy (and who will also be responsible for checking that the draft legislation reflects the policy⁹¹). Ideally government officers, experts in the subject matter, stakeholder and interest group representatives and a person who has expertise to write legislation⁹², work progressively through consultations to formulate the legislative measures that are likely to deliver the intended policy outcome, and produce draft legislations for presentation to the legislator. The aim of their collaborative effort is to have the operational content of the policy expressed as a quality law.

It is essential however, to ensure that before the writing begins, some policies have been developed, so that the person or persons writing the legislative provisions are provided with sufficient information to know the problem and objective, policy solutions and proposed implementation strategies⁹³. This will enable the writers to have a vision of what the problem and solution are, how the proposed legislation is to operate, and thus, understand what he, she or

⁹¹ In the writer's experience, the process of writing legislative provisions enables the writer to test and refine the proposed policy. As drafts are produced they are checked and scrutinised by the persons responsible for developing the policy to ensure its practical operation.

⁹² In the writer's view, key expertise suitable for drafting legislation is knowledge in constitutional law, administrative law, statutory interpretation and government and parliamentary procedures, as well as experience and skill in writing legislative provisions. See also comments in SIGMA-OECD, Sigma Papers No. 18 (1997 at 17-18): "The actual drafting of legislation ... is somewhat more expert work than is generally recognised. It cannot be assumed that it can be undertaken by every lawyer Law drafting is a type of specialist legal practice ... which demands special skills and relevant experience." S.Lortie (2010 at 6) comments that "(l)egislative drafting is a specialised type of legal practice that demands particular skills and relevant experience.", and at 11-12 that "(w)riting legislation is a complex task that requires extensive knowledge of the law and an understanding of the law adoption processes together with mastery of language, intellectual rigour and an organised mind." S.Laws (2011 at 16) draws out the necessity for legal expertise when he makes the pertinent remark that it is important not to forget that it is also about a policy proposition being reduced to something that can satisfactorily be decided by an impartial adjudicator, usually a court or tribunal.

⁹³ This does not preclude the persons writing the legislation having a role in the policy development process. Depending on the jurisdiction, the writers may have a role in determining whether effecting the policy objective will require legislative intervention, the level of legislative intervention and whether that legislation is new or amending legislation. They may also propose a possible legislative scheme and advise on possible implementation mechanisms. See also C.Stefanou, *Drafters, Drafting and the Policy Process*, chapter 20 in C.Stefanou and H.Xanthaki (eds), (2008) 287 at 321-333.

they, have to write.⁹⁴ It is also the basis on which the writers will review the policy documents, conduct constitutional and other legal research (including carrying out a comparative study of legislation of other jurisdictions⁹⁵ and standards and recommendations of national, regional and international organisations) to ensure that the legislative provisions they craft: give effect to the policy; are generally aligned with government activities and policies; are legally sound, fit-in with the country's law⁹⁶, legal and political systems, society and culture; and accord with regional and international obligations, trends and events.

In envisaging the operation of the proposed legislative provisions, the drafters are able to devise a legislative scheme of primary and secondary legislation⁹⁷, and decide the matters that will be dealt with by appropriate levels of legislation⁹⁸. They are also able to define the groups of people who will be affected by the legislation and their opportunities, benefits, obligations and duties under the legislation, review the practicability of the proposed mechanisms for implementation

⁹⁴ K.Staronova and K.Mathernova (2002 at 5-6). The writer considers that this has a further 2-fold effect: (a) it reduces the extent of the influence of those writing the legislation on the legislation's substance based on personal experience, opinions and knowledge (which could include transplanting legislative precedents from other countries without considering if suitable for local conditions); and (b) it enables the persons who developed the policy to check and critique draft provisions to ensure that they appropriately express and communicate the policy, and provide feedback and comments. See also SIGMA-OECD, Sigma Papers No. 18 (1997at 13: (The result is) "a tendency to concentrate on producing a legislative draft with insufficient prior consideration of the policy it should reflect. Such an approach can lead to the completion of the draft that e.g. incorporates the policy choices of some expert lawyer (sometimes from outside the public service) which are conditioned by his own knowledge or experience rather than upon a thorough appraisal of the true problem and of local needs and circumstances."; and at 29-30: "Perhaps the most useful step in improving the quality of legislation would be the recognition that policy development is an essential precursor to law drafting But in reality (this is often) not sufficiently carried out to a sufficient depth to produce the policy guidance the law drafters need. Indeed the drafters may have little choice but to make their own policy judgements in the course of drafting with little information to guide them."

⁹⁵ See discussion about transplanting policy and legislation at pp 20-21.

⁹⁶ J.M.Otto, W.S.R.Stoter, and J.Arnscheidt, *Using legislative theory to improve law and development projects*, chapter 2 in J.Arnscheidt, B.VanRooy, and J.M.Otto (eds), (2008) 53 at 55 indicate the difficulties that may be associated with this: "The pluralistic and fragmented laws of developing countries reflect their history: they may typically contain some or all the following elements: local and tribal customs, religions mores, colonial law, socialist law, new national law, international law – including human rights – and a variety of foreign laws. It is indeed a daunting task to harmonise, co-ordinate and integrate the various elements into a coherent whole."

⁹⁷ This is also known as delegated legislation, subordinate legislation and subsidiary legislation.

⁹⁸ Primary legislation (acts, statutes or laws) should contain the principal substantive rules that will give effect to the policy and settle important features such as individual rights and obligations, imposition and payment of imposts, establishment of new institutions, creation of new powers and functions, specification of key enforcement mechanisms and sanctions for non-compliance, provision for the authority to make secondary legislation and a description of the purpose and content of such secondary legislation, and inclusion of amendment and repeals of existing legislation. Secondary legislation (regulations, rules, declarations, notices, directives) deal with matters of technical detail and administration to supplement the primary legislation, and is often more reliant on relevant expert knowledge. The legislative scheme may identify a role for codes of conduct, guidelines, non-prescriptive rules and standards and other self-regulation activities of groups to which the legislation applies to allow greater flexibility to react to constant technological and other change.

and enforcement, and consider if it is necessary to create and establish new institutions, powers and functions by the legislation, or rely on existing structures and roles, to provide the means to give effect to the policy objective. Other considerations include whether to adopt a persuasive approach to secure compliance or to create offences and impose sanctions for violations. Further, whether to include a complaints or other review mechanism or feedback or consultation procedures. Likewise, consideration is made as to whether to require regular data collection and record keeping, inspections, auditing and public reporting about the operation of the legislation and to monitor and measure compliance. Other issues include: (i) whether to include a provision requiring the review of the legislation after it has been in place for a certain length of time, to ascertain whether it remains appropriate for effecting its objective; (ii) How should State action be limited to minimise the opportunity for public officials to engage in corrupt conduct and malfeasance; (iii) what mechanisms to include that promote fair, transparent and accountable administration of the legislation; and (iv) what commencement, expiration and transitional arrangements to provide in the legislation.⁹⁹

Throughout the course of this relationship between policy and writing, there is continual development and refinement of the policy and draft legislative provisions, as successive drafts are produced, scrutinised and assessed to ensure that they give effect to the policy. The iterative process also ensures that the provisions are integrated and consistent with the constitution and other laws. They should generally be legally effective, practicably implementable and written in plain language that is clear, concise and unambiguous¹⁰⁰. As draft legislation is also a valuable consultative document. It requires consultation with other ministries, external stakeholders and other interested persons - on proposed drafts, from as early a stage as possible, to harness their views on the contents of the proposed law¹⁰¹. The outcome of these processes is the production of draft legislation that is likely to be implementable and effective in achieving policy objectives.

⁹⁹ See generally Legislative Advisory Committee (2001) and IMPEL (2006).

¹⁰⁰ See IMPEL (2006 at 27-30); and SIGMA-OECD, Sigma Papers: No. 15 (1997 at 22-25). This process could be undertaken as an ex ante assessment.

¹⁰¹ This consultation needs to be handled with care as it may be difficult to make fundamental policy changes at this stage. Importantly however, is that draft provisions that are not understood are identified and resultant textual changes should ensure better communication. See SIGMA-OECD, Sigma Papers: No. 18 (1997) at 19.

Checklist for designing and writing legislative provisions

1. Have all government processes for determining and approving the policy been complied with?
2. Is legislation necessary?
3. Is the legislative instrument at the appropriate level?
4. Has the policy been communicated to the persons writing the legislative provisions?
3. Was sufficient research and review undertaken before commencing writing the legislative provisions to determine whether the policy proposal is implementable by legislation and can be translated into a fair, equitable and effective law?
4. Is the legislative scheme outlined by the draft legislation practicable? Does it sufficiently provide for its implementation and enforcement? Does it include appropriate powers to make secondary legislation?
5. Are the legislative provisions legally sound (are they authorised by a higher level legislative instrument and consistent with the existing law and legal system); and Do they fit in with the national law and policy framework? Do they comply with international obligations and standards relevant to the subject matter?
6. Do the language and form of the legislative provisions comply with requirements of clarity, simplicity and unambiguity? Are they sufficiently intelligible so that the people who will be affected by them are aware of the actions that must be taken to comply with them, and the consequences of those actions and of non-compliance? Can the courts adjudicate issues arising from the application of the provisions?
7. Do the legislative provisions engender sufficient precision and stability so that they will not need to be frequently changed either by amendment or repealing? Do they allow people to organise their affairs with certainty?
8. Is there provision for ex post evaluation of the effectiveness of the legislation?
9. Was stakeholder and public consultation undertaken about the draft legislative provisions and the results of the consultation taken into account?
10. Has there been sufficient scrutiny and assessment of the draft legislation to ensure that it is generally suitable to effect the policy?

Fifth function: implementation

One of the key responsibilities of a government is to implement and deliver its policy initiatives “on time, within budget and in accordance with expectations as to outcomes”¹⁰². An important aspect of this is the processes and activities by which a government implements legislation it intends will effect its policy objectives. The processes, mechanisms, resources and time for doing so would have been anticipated, assessed and planned at the policy development and ex ante assessment processes, and provided for in the designing and writing stage, as afore-outlined¹⁰³.

However another important aspect is the process of monitoring and periodic review of the implementation. Supervising implementation in this way should be commenced as soon as practicable after implementation processes begin, to enable regular checks that adequate resources continue to be available and are appropriately used. Such supervision is also necessary to: (i) measure the progress or lack thereof in implementing the legislation; (ii) measure compliance with its terms; (iii) identify and address problems or possible risks; and (iv) take corrective action in a timely manner. This on-going assessment enables government and other stakeholders to assess the efficiency and effectiveness of the implementation process and to monitor the use of allocated financial and personnel resources for so doing.¹⁰⁴ Monitoring implementation also provides lessons about what works and what risks are likely, enabling

¹⁰² Australian Government (2006 at 1).

¹⁰³ Refer pp 16-33. In addition, the question of whether legislation is good legislation is not able to separated from the legislation’s implementation (and therefore its enforceability). Legislation that is practicably implementable and enforceable in accordance with the tenor of its provisions indicates that it is workable and likely to achieve its intended policy objective. That means if legislation is appropriately designed so it effectively communicates the intended benefits, opportunities, prohibitions, obligations and duties to the target groups on whom obligations are imposed or for whom benefits are provided by the legislation, and those entities and individuals who have a role in administering and enforcing the legislation, the legislation is likely to induce those groups, entities and individuals to conduct themselves in accordance with its terms and effect its intended objective. See A.Seidman and R.B.Seidman, *Between Policy and Implementation: Legislative Drafting for Development*, chapter 19 in C.Stefanou and H.Xanthaki (eds) (2008) 287 at 294-296, M.Mousmouti (2012).

¹⁰⁴ The monitoring process undertaken will generally reviewing the implementation methods and resources used to implement the legislation, the quality of the performance of implementing authorities, the effectiveness of the enforcement regime including the extent of compliance and non-compliance by affected persons, identifying unintended consequences, problems and possible risks, reporting the information collected and results of the review and making recommendations for possible corrective measures and improvements. The sources of information for the review include data recorded by government officials in conducting duties on compliance, operational reports made by government officials, data collected by quantitative and qualitative survey and interview methodology and observations.

governments to adjust expectations as to outcomes and adopt new approaches for future implementation activities.¹⁰⁵

Sixth function: ex post evaluation

The final function of government is analysing and evaluating the effects of legislation after it has been in operation, to ascertain the real impact of the legislation and whether it has achieved its objective and desired consequences¹⁰⁶. The purpose of doing this is to learn whether the legislation is working, and if not, why. This is a descriptive function as it describes what has happened since the legislation commenced, in an attempt to discover the effect of the legislation.¹⁰⁷ It is a research methodology¹⁰⁸ for evaluating the quality or efficacy of legislation, and its constituent public policy. It is also used for testing legislative-effectiveness by elucidating any gap between the legislative intention and the results actually achieved¹⁰⁹.

Ex ante evaluation investigates whether legislation induces its prescribed conduct, resolves the problem that gave rise to the need for the legislation, and achieves its intended policy objectives. It also investigates whether the legislation produces any unintended economic, legal or social consequences. Other considerations are: whether all provisions of the legislation have been useful, effective and enforceable; whether there was interpretative difficulties that cause uncertainty about its effect; and whether (and if so, why) there have been any amendments to the legislation. This raises further questions: Is it necessary to improve the legislation's operation and effectiveness, and if so, how? Were the implementation and enforcement mechanisms

¹⁰⁵ See generally: Australian Government (October 2006 at 49-53, 67, 68, 73 and 74).

¹⁰⁶ L.Mader (2001 at 123 and 124). K.Van Aeken, *Legal Instrumentalism Revisited*, chapter 4 in L.J.Wintgens (ed) (2005) 67. However, be aware that the ultimate effect of policy and legislative action is likely not to be known for many years after the implementing legislation commences. K.Van Aeken (ibid) at 82 comments that it must be recognised that a law has only a probability of reaching its goal. A.Seidman and R.B.Seidman, *Using Reason and Experience to Draft Country-Specific Laws*, chapter 13 in A.Seidman, R.B.Seidman and T.W.Walde (1999) 249 at 272 state: "No law ever works as exactly as anticipated. Pressures to pass legislation quickly frequently precludes adequate research. Constantly changing circumstances inevitably accompany transformation."

¹⁰⁷ H.Schaffer (2001) describes this function as subsequent examination and analysis of the actual consequences and achievements of legislation. M.Mousmouti (2012 at 199) talks about retrospective evaluation of the eventual effects and changes attributable to the legislation to discover the real effect of the legislation and determine how well it has done or is doing to achieve its objective and whether the situation has improved or deteriorated.

¹⁰⁸ L.Mader (2001 at 128): "The best and most reliable (ex post) evaluations use the different qualitative and quantitative methods and techniques familiar in the field of social sciences, for example interviews, observation, text analysis, synchronic and diachronic statistical comparisons between target populations and populations not exposed to the change."

¹⁰⁹ L.Mader (2001 at 131); M.Mousmouti (2012 at 200)

appropriate? Is the legislation no longer needed (and should therefore be repealed) because the legislation has fulfilled its objective or circumstances have changed to such an extent, that the legislation is no longer appropriate?¹¹⁰ Is a different action required to achieve the objective, necessitating an amendment, new legislation or its replacement?¹¹¹ In addition, the evaluation process is likely to provide general insights into, and increase the knowledge and understanding about the effects of policy decision-making, ex ante assessment and legislative action. These “Know-Hows” can be fed back into the policy and ex ante assessment processes and be used for improving the quality of subsequent regulatory policies and legislations.¹¹²

The evaluation involves comparing the expected results with achieved results, and achieved results with pre-legislation conditions. It is reliant on data collection and social science research methodologies¹¹³ to undertake a systematic and analytical study to decide whether the legislation successfully meets its policy objective¹¹⁴. The process should be carefully undertaken to ensure worthwhile scrutiny of legislation with the maximum transparency and accountability. It should enable analysis as to how the legislation is used in practice, and how the courts have interpreted the legislative provisions. Likewise, the process should be based on the input of all groups that use or are affected by the legislation or can otherwise provide insight into its operation and effect, on the basis of their knowledge and experience.

A pertinent question is what is an appropriate mechanism to conduct ex post evaluation. Provision could be made requiring ex post evaluation in each piece of legislation, under legislation of general application or as a requirement of jurisdictional procedures.¹¹⁵ As

¹¹⁰ The Law Commission (2006). If government’s policy objectives are achieved it means that the considerable resources used in doing so have been put to good use. In addition, timely scrutiny can have the effect of reducing unintended consequences by addressing them before they become problematic.

¹¹¹ The Law Commission (2006). By identifying defective legislation, the statute book can generally be kept up to date by rectifying defective provisions and removing legislation that has served its purpose.

¹¹² H.Schaffer (2001 at 132-133) comments that evaluation of legislation is based on the idea that the results and effects of legislation can be studied and used to correct and improve legislation. See also Office of the First Minister and Deputy First Minister (2001 at 67): “To be effective, policy-making must be a learning process which involves finding out from experience what works and what does not and making sure that others can learn from it too.”

¹¹³ K.Van Aeken, *Legal Instrumentalism Revisited*, chapter 4 in L.J.Wintgens (ed) 67 (2005). M.Mousmouti (2012 at 200) refers to systematic and strenuous data collection and analysis, including assessment reports, statistical data, complaints based data and perception data.

¹¹⁴ Office of the First Minister and Deputy First Minister (2001).

¹¹⁵ M.Mousmouti (2012 at 199-200) refers to introducing techniques such as sunset clauses, providing for reporting obligations and conducting ex post evaluations at specified periods of time into legislation.

conducting the process places demands on available government time and resources, it is clearly important to maintain a flexible approach, and perhaps recognise that it may be preferable to have effective review and evaluation of just some pieces of legislation. This is preferred to actually, perfunctory review of all legislations that are identified as particularly significant during the policy development when commitment for its evaluation is made and then specified in its provisions. In addition, decisions to review other pieces of legislation could be made ad hoc when it is known that resources are available to do so, or in instances where operational issue or public demand triggers the necessity for conducting the evaluation. The time for evaluation would depend on the particular legislation.¹¹⁶ Other issues are: the policy objectives of the legislation must be known and the collection of relevant data provided for. The manner to achieve the objective is that all drafted legislations must specify these requirements and their purpose and objective(s) be recorded in the parliamentary debates. The process could be undertaken by the responsible ministry, an independent government authority so authorised, or parliamentary committees. The outcome should be a public report (it may be required that the report be laid before the legislature), setting out the information gathered, conclusions drawn and recommendations.¹¹⁷

These processes question and measure the outcomes and impact of legislation, indicate the capability of legislation to achieve its desired purpose and, by so doing, establish legislative quality by assessing the efficacy of legislation. In assessing the efficacy of legislation, legislative effectiveness and efficiency, or the substantive and operational quality of legislation, are assessed.¹¹⁸ Legislation's effectiveness is established by the extent to which it is implemented and consequently, whether there are changes in the attitudes and behaviours of the target population that correspond to the conduct prescribed by the legislation. The efficiency of a law is represented by the proportional relationship between the costs of the efforts to implement the law and realise its goals and the extent to which realisation of the goals achieve the intended social impact. Both rely on the quality of the legislative form and intelligibility, to communicate its

¹¹⁶ The Law Commission (2006 at 35-36): reported that "... 3 years was not too short a time frame but represented 'sufficient time in which to identify any serious, unanticipated issues or operational problems'." Otherwise it was warned that there would often be considerable delay before effective post-legislative scrutiny could take place.

¹¹⁷ See The Law Commission (2006) for general discussion.

¹¹⁸ K. Van Aeken (2011 at 54-56) describes the principles of effective and efficient legislation as research questions for evaluating legislation. L. Mader (2001 at 125-127) describes effectiveness, efficacy and efficiency as the three evaluation criteria. See also discussion at pp 4-12 regarding the characteristics of quality legislation.

meaning with clarity, certainty and unambiguity. These are conditions of the overall extent to which the legislation achieves its policy objective, and are indicative of the the quality of the legislation.

4. A strategy for guiding effective development through policy and legislative processes in developing countries?

For this writer, effective development means providing development assistance that is as effective as possible, in achieving its stated objectives and outcomes. It also gradually improves living standards and quality of life. This envisages context-specific assistance initiatives that are efficient, accountable and achieve quantifiable and qualifiable results, and outcomes that are sustainable. It also incorporates the themes of national ownership, identification of needs and priorities through national policies and strategies, donor-recipient partnerships and harmonised donor efforts for performance and result-based assistance programmes. The measure of effective development is the progress that is made towards improving the quality of life of all of the persons living in recipient countries.¹¹⁹

Since law (and therefore legislation) has a recognised role in development¹²⁰, the focus of this paper is to promote a better understanding of the processes for achieving quality legislation that can be used to contribute to building a framework that enables a developing country's society and economy to develop in a manner that is in step with a country's knowledge, capacity and resources. Such development progressively improves living conditions and delivers good governance and the rule of law. A foundational element in achieving effective development is

¹¹⁹ See J.M.Otto, W.S.R.Stoter, and J.Arnscheidt, *Using legislative theory to improve law and development projects*, chapter 2 in J.Arnscheidt, B.Van Rooij, and J.M.Otto (eds) 2008) 53 at 54: "Esman has described the core meaning of development as 'steady progress toward improvement in the human condition' (1991)." In addition, this aligns with international agreements and principles and best practices for effective development endorsed in the Millennium Development Goals (2000), the Monterrey Consensus on Financing for Development (2002), the Paris Declaration on Aid Effectiveness (2005), the Accra Agenda for Action (2008) and the Busan Partnership for Effective Development Co-operation (2011). Most recently, the participants at Busan committed to the principles of country ownership, focus on results, inclusive development partnerships, transparency and accountability to each other.

¹²⁰ "For development to be truly sustained, however, it has to be a comprehensive process in which all disciplines and professions fully participate. Law, in particular, as the formal instrument of orderly change in society, plays a pivotal role, even though this role has not always been readily recognized.", I.F.I.Shihata, *Preface Good Governance and the Role of Law in Economic Development*, in A.Seidman, RB.Seidman and T.W.Walde (eds) (1999) xvii.

therefore supporting the government of a developing country to make sound policy choices and to formulate and implement those policies in a meaningful way, including by developing appropriate legislation. However, there is a need for guidance as to the nature of the processes to develop policies and to create and implement quality legislation. Likewise, there is a need to understand how to put those processes into practice. This is a practical issue, as government processes for creating and implementing quality legislation need to be done well, and in a manner that uses resources responsibly.

Taking John Griffith's description of theory as "generalised insight resulting from experience and useful for guiding intelligent action"¹²¹, this paper has made an attempt to analyse the characteristics of quality legislation and the functional elements of law-creating and-implementing processes, in order to provide general insights and to build on knowledge and experience, for guiding the activities being undertaken by governments of developing countries, in an attempt to produce good workable legislations. In providing that guidance, the analysis and insight outlines a general strategy for enabling effective development, through policy and legislative processes in developing countries, including by guiding the design, negotiation and implementation of international development programs for providing technical assistance that supports and assists those governments to produce quality legislation. It is hoped the guidance given will lead to a clearer understanding about the relationship between policy design and legislative content. Likewise, that it will improve the skills and processes of the recipient country. It is also hoped to provoke administrative efficiency in procedures for identifying, justifying, prioritising and co-ordinating policy and legislative programs in a manner that complements the country's resources and is consistent with the country's development needs. Diagram 3 on page 37, proposes in precise form, the methodological activities for producing good legislation (including through the provision of international assistance)¹²².

However, it is necessary to conduct empirical investigations to test the universal value of the legislative qualities and elements of law-creating and-implementing processes described in this paper. Likewise, the applicability of the proposed strategy for producing effective legislation

¹²¹ J.Griffiths (2003 at 4).

¹²² These steps are summaries of the functional elements discussed at 11-36.

must be tested, against the realities in developing countries, particularly, to determine whether it works to enable delivery of the desired results and effective development. That in turn, will facilitate drawing conclusions about what are the essential elements of the processes for producing effective legislation, and on which to propose a legislative methodology that is sufficiently flexible, for general application (regardless of country specific resource constraints¹²³, intricacies and peculiarities), and that will promote consistency in the design and delivery of development programs. This must be thoroughly done, as the implementation and effectiveness of legislation are often difficult to judge, because intended societal and institutional changes can be time-consuming.

In conducting those investigations, there will be various questions to be considered. Are the functions discussed in this paper relevant for producing legislation in a developing country?¹²⁴ Do the processes undertaken correlate with those functions or at least, enable the recipient country to build its capacity to perform those functions at an adequate level, and do the produced laws exhibit the characteristics of quality laws? What resources were available and how did the availability of resources impact on the processes undertaken and the legislation produced? Was the assistance program designed in accordance with the nature of the political, legal and administration systems of a country? What was the role, competencies and qualities of the international advisers who provided technical assistance? Further, what was the relationship between the processes for policy development and writing legislations?

¹²³ Office of the First Minister and Deputy Prime Minister (2001 Foreword): "...policy development is an increasingly resource-intensive process." The availability of resources and the nature of those resources impact on the content of processes actually undertaken and therefore the quality of the legislation produced. Legislative methodology must reflect this and be capable of operating in circumstances of limited resources.

¹²⁴ The functions of developing a policy and designing and writing the legislation are undoubtedly the key, and most widely recognised, of the functions described in this paper. It will be interesting to learn more about how those 2 functions are undertaken and the extent to which developing countries and international assistance programs undertake the remaining functions.

Diagram 3: Suggested methodological activities to achieve legislative quality

1. **Identification of a problem.** The problem may be identified by the government of a developing country whether as part of its general policy processes or national development strategy, and may give rise to a request for development assistance. It may also be that the problem is identified through a diagnostic study and needs assessment process undertaken by an international organisation which informs negotiations between the organisation and government for assisting the government implement a reform package for meeting its development goals in a manner that is compatible with the national context, interests and priorities. The components of the program must align with the nature of the country's legal system and the government's administrative processes and arrangements, and at the same time incorporate activities for performing the functional elements of the law-creating and-implementing processes summarised at points 2-5, as appropriate for the country's needs and resources. The program must address any lack of resources and capabilities for performing the law-creating and-implementing functions and provide technical assistance for each of the different competencies required to perform those functions in a manner that is sufficient, to ensure that the resulting legislation is of an appropriate quality for facilitating effective development. The nature of the technical assistance must also enable capacity building opportunities for acquisition of knowledge, skills and understanding about the functions by nationals.
2. **Development of the policy to be translated into legislation.** The problem is analysed and explained (process would include evaluation of the existing law and institutions and an explanation of their failure) and a solution is proposed for regulating the targeted circumstance. This is an evidence based research process, usually reliant upon such ex ante assessment processes, social science research methods and stakeholder and public consultation as the subject matter requires, and culminates in producing the preferred solution to the problem. Consideration is given to the local, national, regional and global context, and relevant international and regional instruments and international standards, and comparable policies and laws of other jurisdictions may be taken into account.
3. **Designing and writing of the legislation.** Suitably qualified lawyers formulate legislative measures to implement the policy. The writing of the law is critical to achieving the law's purpose and to promoting accountable and transparent processes. This stage also involves participatory processes for scrutinising and commenting on the draft legislation and making final changes to it before delivering it to the lawmaker.
4. **Implementation of the legislation.** As a law, its effectiveness and its implementation are inseparable. The implementation of legislation must not be overlooked. Part of this is periodic review of the implementation, commenced as soon as practicable after implementation begins, to enable regular checks that adequate resources continue to be available and are appropriately used, and to indicate the progress or lack of progress in implementing the legislation and compliance with its terms.
5. **Ex post evaluation processes.** This final stage researches the operation and impact of the legislation and provides information to determine whether the legislation has effected the objective change, whether to effect any adjustment to the legislation so it achieves its purpose or whether the legislation has become unnecessary and to repeal it.

It is acknowledged that lawmaking is difficult, complex and unpredictable. Draft legislation can be subject to policy compromise that relates to political survival and implementation measures that are hampered by budgetary and personnel deficiencies. Thus, oftentimes, the content and effect of a new law differ from the draft presented to the legislature. In other instances, the legislation is not given its intended effect and the initial policy objective is not achieved.¹²⁵ Nevertheless, it is hoped that the outlined strategies will offer practical assistance to government officials of developing countries, who undertake policy and law reform. So too is the hope that, the strategies will be useful to international advisers who assist them in analysing and strengthening the law-creating and-implementing processes of the country. Employing the strategies may improve understanding of their roles in those processes, and facilitate their production of policies and draft legislations, which are likely to be implemented in a way to effect their objectives.

¹²⁵ See description of shortcomings and difficulties experienced in developing countries in S.Lortie (2010 at 1-2) and J.M.Otto, W.R.Stoter, and J.Anscheidt, *Using legislative theory to improve law and development projects*, chapter 2 in J.Anscheidt, B.Van Rooij, and J.M. Otto (eds) (2008) 53 at 56.

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