



REPUBLIC OF KENYA

OFFICE OF THE PRIME CABINET SECRETARY

GUIDELINES FOR THE DEVELOPMENT OF NATIONAL GOVERNMENT POLICY AND LEGISLATION

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To: All Cabinet Secretaries
The Secretary to the Cabinet
All Principal Secretaries/Accounting Officers
The Auditor-General
The Controller of Budget
The Secretary, Public Service Commission
The Clerk of the National Assembly The
Clerk of the Senate
The Chief Registrar of the Judiciary
All Chairpersons, Constitutional Commissions
All Chief Executive Officers, State Corporations

**GUIDELINES FOR THE DEVELOPMENT OF NATIONAL GOVERNMENT
POLICY AND LEGISLATION**

1. PRELIMINARY

- 1.1. Save as otherwise provided herein, these instructions contained supersede all previous instructions relating to the development of national government policy and legislation by Ministries, Department and Agencies.
- 1.2. An initiative to develop a national government policy and legislation shall comply with the relevant sections of these Guidelines, the Attorney-General's Circular on the Processing of Proposed Legislation, and the Public Policy Handbook for Kenya.
- 1.3. These Guidelines are also guided by the Government Legislative Agenda.
- 1.4. The development of a national government policy or legislation shall be guided by the principles contained in Article 10 and Article 232 of the Constitution.
- 1.5. The development of a national government policy or legislation shall be done in a collaborative and consultative manner with relevant stakeholders.
- 1.6. The following offices shall carry out their respective mandates relating to the development or co-ordination of development of a national government policy or legislation:
 - (a) the Office of the Prime Cabinet Secretary;
 - (b) the Office of the Attorney-General;
 - (c) the Kenya Law Reform Commission; and

(d) the Kenya Institute for Public Policy Research and Analysis.

- 1.7. Each Ministry, Department or Agency undertaking policy or legislative initiatives shall report on progress to the State Department for Parliamentary Affairs at least once in every three months or at such other times as the State Department may require.
- 1.8. Each Ministry, Department or Agency shall promptly bring any challenge experienced in the development process to the attention of the State Department for Parliamentary Affairs for consideration or escalation to the Steering Committee.

2. DEFINITIONS

In these Guidelines:

“Accounting Officer” has the meaning given by section 2(1)(a) of the Public Finance Management Act, 2012;

“Bill” means the primary form of a legislative proposal for consideration and enactment by Parliament as approved by the Attorney-General;

“Draft Policy” means a draft of a proposed public policy;

“Explanatory Memorandum” has the meaning assigned to it by section 2 of the Statutory Instruments Act, 2013;

“*Gazette*” means the *Kenya Gazette* published by authority of the National Government, or a supplement to the *Kenya Gazette*;

“Government Legislative Agenda” means the schedule of policy and legislative initiatives that the Government intends to pursue or is pursuing as enablers to realize the national development agenda;

“layman’s draft Bill” means a Bill proposed by a Ministry, Department or Agency that is yet to undergo formal drafting by the Office of the Attorney-General;

“Legislative Brief” means a written brief expounding the grounds on which the Ministry, Department or Agency proposes a Bill;

“legislative initiative” means the development of a Bill or review of an Act of Parliament or development or review of a Statutory Instrument;

“Policy” refers to “public policy” which is a statement of intent anchored on a set of principles and decisions, which defines course of actions to which government commits to achieve specific developmental goals;

“policy initiative” means the development or review of policy;

“public participation” for purposes of a legislative initiative means public participation under Article 118(1)(b) of the Constitution;

“Public Policy Handbook” means the Public Policy Handbook for Kenya as issued by the Government of Kenya through the Office of the Prime Cabinet Secretary containing instructions or advice about how to develop public policy;

“Sessional Paper” means a policy document approved by Parliament;

“Statutory Instrument” has the meaning assigned to it by section 2 of the Statutory Instruments Act, 2013;

“stakeholder engagement” means the involvement by a Ministry, Department or Agency of persons that the policy, legislation or statutory instrument may directly or indirectly apply to; and

“Steering Committee” means the Steering Committee on the Government Legislative Agenda and Parliamentary Liaison.

3. POLICIES

The development or review of a policy by a Ministry, Department or Agency shall follow the procedure outlined in these Guidelines.

3.1. Policy initiation

3.1.1. Policy development or review can be initiated by Cabinet or by an MDA.

3.1.2. Where:

- (a) Cabinet has directed the development or review of a policy, the MDA shall obtain evidence of the Cabinet decision; and
- (b) the MDA has identified the need to develop or review a policy, the concerned Accounting Officer shall cause to be prepared a Concept Note and seek approval from the respective Cabinet Secretary.

3.2. Constitution of technical teams

Where Cabinet has directed or once an MDA has approved the development or review of a policy, the Cabinet Secretary shall constitute a technical team with clear terms of reference.

3.3. Policy drafting process

The technical team shall commence the policy initiative with the following key steps:

- (a) review the current status of the policy issues to be resolved and identify the existing gaps;
- (b) examine existing policies, legal and institutional frameworks (at global, regional and national level), guiding the policy issues and determine their sufficiency in addressing the policy issues at hand;
- (c) conduct stakeholder mapping to determine the stakeholders to be involved in the policy development or review;
- (d) hold consultative forums with identified stakeholders to gather information on policy issues that need to be addressed and their alternative solutions;
- (e) undertake analysis of the alternative solutions to the policy issues to identify the best strategy to resolve the policy issues;
- (f) prepare a draft policy in line with the Public Policy Handbook;
- (g) determine whether the policy is self-executing, or it will require a law for implementation; if requires a law for implementation, the team shall recommend to the Cabinet Secretary to consider approving the relevant legislative initiative;

- (h) determine whether the policy shall need to be approved by Parliament as a Sessional Paper; and
- (i) submit the draft policy to the relevant Accounting Officer and Cabinet Secretary for review and approval. In reviewing the draft policy, the Cabinet Secretary shall submit it to the Office of the Prime Cabinet Secretary for advice.

3.4. *Public participation*

3.4.1. Upon approval of the draft policy by the Cabinet Secretary, the Ministry, Department or Agency shall:

- (a) conduct public participation on the draft policy;
- (b) consider feedback from the public for the purpose of enriching the draft policy;
- (c) undertake validation of the draft policy; and
- (d) prepare the revised draft policy and draft Cabinet Memorandum.

3.4.2. The Cabinet Memorandum shall, among other things, advise whether the policy shall require adoption by Parliament as a Sessional Paper.

3.5. *Approval by the Cabinet Secretary*

After validation of the draft policy, the technical team shall submit a copy of the revised draft policy and draft Cabinet Memorandum to the relevant Accounting Officer for review and submission to the Cabinet Secretary for approval.

3.6. *Cabinet consideration and approval*

3.6.1. Upon approving the draft policy, the Cabinet Secretary shall:

- (a) cause the Cabinet Memorandum to be countersigned by the Attorney-General;
- (b) where the policy has a financial implication, cause the Cabinet Memorandum to be countersigned by the Cabinet Secretary for the National Treasury; and
- (c) where the policy cuts across more than one Ministry, cause the Cabinet Memorandum to be countersigned by the respective Cabinet Secretaries.

3.6.2. The Cabinet Secretary shall thereafter submit the draft policy together with the Cabinet Memorandum to Cabinet for consideration and approval.

3.6.3. Where Cabinet has approved a policy and authorized its transmission to Parliament, the Cabinet Secretary shall submit the approved policy to the relevant House of Parliament for approval as a Sessional Paper.

3.7. *Publication*

3.7.1. Upon approval by Cabinet, and where the policy is not being submitted to Parliament for approval as a Sessional Paper, the Cabinet Secretary shall submit the policy to the Attorney-General who shall thereafter instruct the Government Printer to publish it in the *Gazette*.

3.7.2. Where a policy has been submitted to Parliament for approval as a Sessional Paper and Parliament has approved it as such, the Cabinet Secretary shall request the Attorney-General to instruct the Government Printer to publish the Policy in the *Gazette* as a Sessional Paper.

- 3.7.3. Once a policy has been gazetted, the Cabinet Secretary shall submit a copy of the gazetted policy in both hard and soft format to the Office of the Prime Cabinet Secretary.

3.8. Policy implementation, monitoring and evaluation

The Ministry, Department or Agency shall monitor and evaluate implementation of the policy in line with the Public Policy Handbook. Specifically, the Accounting Officer shall:

- (a) ensure effective communication of the policy to internal and external stakeholders;
- (b) track the implementation of the policy and prepare annual progress reports; and
- (c) submit annual progress report on the implementation of the policy to the Office of the Prime Cabinet Secretary.

4. BILLS

4.1. General

- 4.1.1. The development of a Bill or review of an Act of Parliament by a Ministry shall follow the procedure as outlined in these Guidelines.
- 4.1.2. State Departments and Agencies cannot give instructions to the Attorney General for the development of Bills. Such instructions can only be given by Ministries.
- 4.1.3. The formal instructions to the Attorney-General to draft a Bill are transmitted by the Principal Secretary on behalf of the Cabinet Secretary.

4.2. Inception of legislative proposals

A legislative proposal shall be initiated where the following has been done:

- (a) a policy underpinning the proposed legislative initiative exists or has been prepared for that purpose;
- (b) a Concept Note for the legislative proposal is developed setting out the intended purpose of the legislation, the reason for its development, the persons it is likely to affect, the approximate cost associated with the legislative proposal, and the constitutional and legal implications of the legislative proposal, for consideration and approval by the Cabinet Secretary; and
- (c) there is a subsequent approval for the legislative proposal by the Cabinet Secretary.

4.3. Constitution of technical teams

Once an approval of the legislative proposal has been granted, the Cabinet Secretary shall constitute a technical team with clear terms of reference.

4.4. Legislative drafting process

- 4.4.1. On appointment, the technical team shall commence the legislative initiative with the following key steps:
 - (a) prepare the drafting instructions;
 - (b) develop the layman's draft Bill;

- (c) subject the layman's draft Bill to the Ministry's internal stakeholders for feedback; and
- (d) submit the layman's draft Bill to the relevant Accounting Officer and Cabinet Secretary for approval.

4.4.2. Where the layman's draft Bill consist of minor amendments to statute law that do not require the formulation of a separate Bill, upon approval by the Cabinet Secretary, it shall be forwarded to the Office of the Attorney-General for review, drafting and inclusion in the next scheduled Statute Law (Miscellaneous Amendments) Bill.

4.5. *Stakeholder engagement*

After approval of the layman's draft Bill by the Cabinet Secretary, the Ministry shall:

- (a) undertake stakeholder mapping to determine the stakeholders likely to be affected by the proposed legislation;
- (b) conduct stakeholder engagement on the layman's draft Bill;
- (c) consider feedback from the stakeholders for purposes of enriching the layman's draft Bill;
- (d) undertake a validation of the layman's draft Bill; and
- (e) prepare a draft Cabinet Memorandum and a Legislative Brief.

4.6. *Approval by the Cabinet Secretary*

4.6.1. After stakeholder engagement the technical team shall submit the drafting instructions, the layman's draft Bill, the draft Cabinet Memorandum, the Legislative Brief and requisite supporting documents to the relevant Accounting Officer for review and submission to the Cabinet Secretary for approval.

4.7. *Formal drafting by the Attorney-General* After approval of the layman's draft Bill, the draft Cabinet Memorandum and the requisite supporting documents, the Cabinet Secretary shall transmit them to the Office of the Attorney-General for formal drafting of the Bill.

4.8. *Cabinet consideration and approval*

4.8.1. After formal drafting by the Attorney-General, the Cabinet Secretary shall:

- (a) cause the Cabinet Memorandum to be countersigned by the Attorney-General and the Cabinet Secretary for the National Treasury; and
- (b) where the Bill's proposals cut across more than one Ministry, cause the Cabinet Memorandum to be countersigned by the respective Cabinet Secretaries.

4.8.2. The Cabinet Secretary shall subsequently submit the Bill and the Cabinet Memorandum to Cabinet for consideration and approval.

4.9. *Transmittal to Parliament*

4.9.1. Upon Cabinet approval of a Bill, the Attorney-General shall transmit it and a copy of the Cabinet approval to Parliament.

4.9.2. It is important to note that public participation shall be conducted by Parliament pursuant to Article 118(1)(b) of the Constitution of Kenya.

4.10. *Presidential assent*

Once the Bill is passed by Parliament:

- (a) the Clerk of the relevant House ordinarily presents an advance vellum of the Bills as passed by Parliament together with the parliamentary record (Hansard, Votes and Proceedings, and Order Paper) to the Attorney-General with a request for review;
- (b) the Attorney-General shall share the advance vellum of the Bill and the parliamentary record thereon with the relevant Ministry, with a request for policy guidance on propriety of presidential assent for the Bill;
- (c) on the policy guidance of the Ministry, the Attorney-General, shall advise the President whether or not to assent to the Bill; (d) if there is no objection to the Bill:
 - (i) the President assents the Bill into law; and
 - (ii) the Attorney-General transmits a copy of the assented law to the Government Printer for publication in the *Gazette*; and
- (e) if, on the policy guidance of the Ministry, the President elects not to sign the Bill, the Attorney-General shall prepare a Memorandum of Refusal to Assent in consultation with the Ministry, and the President shall refer the Bill back to Parliament together with the Memorandum of Refusal of Assent.

4.11. *Commencement of Acts of Parliament*

4.11.1. The Act of Parliament:

- (a) comes into force on the fourteenth day after its publication in the *Gazette*, if no commencement date is stipulated in the Act; and
- (b) if it stipulates that it shall come into force on such a date as the Cabinet Secretary may prescribe by Notice in the *Gazette*, then the Act shall commence on the date the Cabinet Secretary prescribes in the Notice.

4.11.2. It is important to note that the Notice for the commencement of an Act of Parliament is processed by the Attorney-General in the same manner as other statutory instruments.

5. STATUTORY INSTRUMENTS

5.1. *General*

- 5.1.1. Save as may otherwise be specified, the development or review of a Statutory Instrument by a Ministry, Department or Agency shall follow the procedure as outlined in these Guidelines.
- 5.1.2. Kindly note that Ministries and Agencies may give instructions for the development of a statutory instrument. When the instructions come from a Ministry, they may be transmitted by the Principal Secretary or Cabinet Secretary.

- 5.1.3. Some Agencies are regulation making authorities, and in such a case, they may give instructions for the development of a statutory instrument. In such case, instructions shall be given by the Secretary or Chief Executive Office of the Agency.
- 5.1.4. Where the Agency is not a regulation making authority, the instructions shall be given through the Principal Secretary or, in exceptional cases, through the Cabinet Secretary.
- 5.1.5. When the statutory instrument is made in exercise of the power conferred on the Cabinet Secretary, the final draft of the instrument shall be signed by the Cabinet Secretary.
- 5.1.6. When the statutory instrument is made in exercise of the power conferred on a regulation making authority, the final draft of the instrument shall be signed by the Chairperson of the governing body of the regulation making authority, except in exceptional circumstances where it is required to be signed by both the Chairperson and the Secretary or Chief Executive Officer.

5.2. Initiation of a statutory instrument

An MDA that seeks to develop or review a Statutory Instrument shall ensure that:

- (a) the regulation making power exists in an express provision of the relevant statute;
- (b) a Concept Note for the proposed Statutory Instrument is developed for consideration and approval by the Cabinet Secretary, or in the case of a regulation-making authority, by the governing body of the authority; and
- (c) there is a subsequent approval for the legislative initiative by the Cabinet Secretary, or in the case of a regulation-making authority, by the governing body of the authority.

5.3. Constitution of technical teams

Once an approval of the legislative initiative has been granted, the Cabinet Secretary shall constitute a technical team with clear terms of reference.

5.4. Statutory instrument drafting process

On appointment, the technical team shall commence the legislative initiative with the following steps:

- (a) develop the drafting instructions;
- (b) determine whether a Regulatory Impact Statement is necessary pursuant to Part III of the Statutory Instruments Act, 2013;
- (c) develop a Regulatory Impact Statement if one is necessary.
- (d) develop the draft Statutory Instrument;
- (e) subject the draft Statutory Instrument to the Ministry or Agency's internal stakeholders for feedback; and
- (f) submit the proposed Statutory Instrument and Regulatory Impact Statement (where applicable) to the relevant Accounting Officer and the Cabinet Secretary for review.

5.5. Regulatory impact assessment

- 5.5.1. Where a regulatory impact assessment is required in respect of a statutory instrument, the regulation-making authority may obtain the services of a technical expert to undertake the study if it lacks capacity.
- 5.5.2. Where the regulatory impact study is undertaken, the regulation making authority, on receipt of the study, shall certify in writing that:
- (a) the requirements relating to Regulatory Impact Statements in the Statutory Instruments Act have been complied with; and
 - (b) in the Cabinet Secretary's opinion, the Regulatory Impact Statement adequately assesses the likely impact of the proposed Statutory Instrument.

5.6. Public participation and Stakeholder engagement

Upon approval of the draft Statutory Instrument by the Cabinet Secretary, the MDA shall:

- (a) undertake stakeholder mapping to determine the stakeholders relevant to the proposed legislation;
- (b) where applicable, notify the general public of the preparation of the Regulatory Impact Statement, through a notification in the *Gazette* and in a newspaper likely to be read by people particularly affected by the proposed legislation;
- (c) allow at least fourteen days from publication of the notice for the making of comments;
- (d) avail a copy of Regulatory Impact Statement on its website or physical offices and determine whether its access shall be free or at a fee;
- (e) conduct consultations with persons who are likely to be affected by the statutory instrument on the proposed statutory instrument in accordance with section 5 of the Statutory Instruments Act, 2013;
- (f) consider feedback from stakeholders and the public for purposes of enriching the Statutory Instrument;
- (g) undertake a validation of the Statutory Instrument; and
- (h) prepare a draft Explanatory Memorandum pursuant to section 5A of the Statutory Instruments Act, 2013.

5.7. Approval by Cabinet Secretary

After public participation, the technical team shall submit the drafting instructions, the proposed Statutory Instrument, the Explanatory Memorandum and the requisite supporting documents to the relevant Accounting Officer for review and submission to the Cabinet Secretary for approval.

5.8. Formal drafting by the Attorney-General

Upon approving the proposed Statutory Instrument, the draft Explanatory Memorandum and requisite supporting documents, the Cabinet Secretary shall transmit them to the Office of the Attorney-General for formal drafting of the Statutory Instrument.

5.9. Publication of the statutory instruments

5.9.1. Upon approval by the Attorney-General, the Cabinet Secretary shall sign the statutory instrument and return it to the Attorney-General who shall thereafter instruct the Government Printer to publish it in the *Gazette*.

5.9.2. No MDA shall be permitted to submit a statutory instrument to the Government Printer for publication without the written authorization of the AttorneyGeneral.

5.10. Laying of the Statutory Instrument before Parliament

The Cabinet Secretary shall, within seven (7) sitting days after the publication of a Statutory Instrument ensure its transmittal to the responsible Clerk for tabling before the relevant House of Parliament. The transmittal letter shall be accompanied by the Statutory Instrument's Explanatory Memorandum, the Regulatory Impact Statement (where applicable), the Cabinet Secretary's Compliance Certificate (where applicable) and other requisite documents.

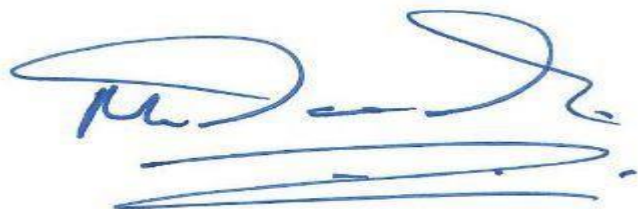
6. BILLS, POLICIES AND STATUTORY INSTRUMENTS GENERALLY

6.1. Attention is drawn to the Circular of the Attorney-General issued on the 7th November, 2023 (Ref. AG/LDD/C/2022) which sets out the procedure for accessing the drafting services of the Attorney-General. The Circular shall apply in every instance when a Ministry, Department or Agency submits draft legislative proposals or draft statutory instruments to the Attorney-General for formal drafting.

6.2. All requests, communications, instructions or similar matters relating to Bills and statutory instruments shall be in writing under the hand of the Cabinet Secretary, Principal Secretary or Secretary or Chief Executive Officer of an Agency, as the case may be.

6.3. Sufficient time must be afforded for any request to be properly considered and advice rendered or any other action taken. Urgent requests must be made in writing and signed by the Cabinet Secretary in respect of a Ministry, and the Chief Executive, in case of an Agency, setting out the reasons for the request.

6.4. In the event of substantive challenges arising in the cause of the review or development of a policy, Bill or statutory instrument, the Cabinet Secretary shall notify the Office of the Prime Cabinet Secretary with the intention of having the challenge addressed by the Steering Committee of the Government Legislative Agenda and Parliamentary Liaison.



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