# *Chapter 4*

# The development of new regulations

Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. These include forward planning (the periodic listing of forthcoming regulations), administrative procedures for the management of rule-making, and procedures to secure the legal quality of new regulations (including training and guidance for legal drafting, plain language drafting, and oversight by expert bodies).

*Ex ante* impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the "no regulation" option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. The costs of regulations should not exceed their benefits, and alternatives should also be examined. However, the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (not true – impact assessment is a tool that helps to ensure a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues. However experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule-making process, and helps to raise the quality of assessments.

Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have – or should have – a close link with general consultation processes for the development of new regulations. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

The use of a wide range of mechanisms, not just traditional "command and control" regulation, for meeting policy goals helps to ensure that the most efficient and effective approaches are used. Experience shows that governments must lead strongly on this to overcome inbuilt inertia and risk aversion. The first response to a problem is often still to regulate. The range of alternative approaches is broad, from voluntary agreements, standardisation, conformity assessment, to self regulation in sectors such as corporate governance, financial markets and professional services such as accounting. At the same time care must be taken when deciding to use "soft" approaches such as self regulation, to ensure that regulatory quality is maintained.

An issue that is attracting increasing attention for the development of new regulations is risk management. Regulation is a fundamental tool for managing the risks present in society and the economy, and can help to reduce the incidence of hazardous events and their severity. A few countries have started to explore how rule-making can better reflect the need to assess and manage risks appropriately.

## Assessment and recommendations

### *Trends in the production of new regulations*

**Irish regulatory production needs to be monitored, not least in support of the efforts to simplify the regulatory stock.** A significant number of new primary and secondary regulations come on to the statute book every year. In the Irish context this matters especially, as much of this represents amendments to existing statutes, necessitating a major and ongoing cleaning up of the regulatory stock over time so that it remains legible.

**Recommendation 4.1. Take steps to monitor regulatory production systematically (both primary and secondary regulations), identifying amendments to existing regulations as well as entirely new regulations.**

### *Processes for making new regulations*

**Secondary regulations are not subject to the same processes as primary regulations.** Primary laws are the subject of forward planning published on the Department of the *Taoiseach* website by the Office of the Chief Whip for upcoming parliamentary sessions. This is well in line with international best practice. However, it contrasts with the lack of arrangements for secondary regulations. Planning of secondary regulations rests with the sponsoring department, and is not made publicly available. Checking for the legal quality of secondary regulations is also much less in evidence than for primary legislation (which is implicitly subject to legal quality principles by dint of the fact that it is drafted by the staff in the Office of the Parliamentary Counsel to the government in the Attorney General's Office).

**Recommendation 4.2. Consider whether to set up a system for the forward planning of upcoming secondary regulations, and to publicise this. Consider whether there is a need to bolster the process for assuring the legal quality of secondary regulations.**

### *Ex ante impact assessment of new regulations*

**Ireland was a relative latecomer to Regulatory Impact Analysis but has been catching up.** Deployment of a policy to embed *ex ante* RIA in policy and rule-making has been gathering speed over the last few years. Following a pilot phase and an evaluation, in 2005 the government established RIA as a requirement for all government departments and offices. This was a landmark step forward. Some aspects of the policy reflect the best international practice, including the requirement for an integrated RIA covering all the major issues, and its application to EU directives (at least in principle). The principles and practical guidance and training disseminated by the BRU are among the best.

**The BRU is an active advocate and promoter of RIA, and its activities have been met with some success.** The BRU has been active and creative in the promotion of RIA following the 2005 decision to make it a requirement. The guidance and training is comprehensive, well focused and well developed. A network of Departmental officials orchestrated by the BRU is gradually extending understanding and culture change. RIAs are examined for their quality by the BRU on their way to the cabinet. Most of the necessary support tools for an effective RIA are in place. There is, as a result, progress on the ground, with a significant and documented rise in the number of RIAs carried out.

**But acceptance of RIA as an integral part of policy and rule-making has some way to go, and the gap between the principles of RIA and the practice generally remains wide.** The process continues to operate within a weak institutional framework which does not sufficiently "scare" departments into co-operating for the production of quality RIAs. Thus the OECD peer review team were told that RIAs were often "self-serving", and that RIAs can get lost in "turf battles" between departments. The team were also told that in practice, some draft proposals did proceed without a RIA attached, depending on political will and support. However several stakeholders (including from outside the administration) were supportive and said it was an important process, even while acknowledging that it tended to remain an "add on". The 2001 OECD report had already proposed that disciplines on regulatory quality should be strengthened. Despite progress since then, more is needed to discipline departments into carrying out RIAs of good quality, systematically. How should this be done, in the Irish context? The compulsory nature of the process remains something of a formality unless there are real sanctions, and perhaps a statutory requirement to carry out RIAs. The recent conclusion of some other EU countries where previous "requirements" were largely flouted is that statutory backing for the process may be needed, combined with a watchdog function that enables poor RIAs to be turned back, and that publication of RIAs (and opinions on their quality) is also an important lever. These aspects are considered further below.

**Currently, there is no statutory backing for the RIA process.** The requirement rests on a cabinet decision, integrated into the Cabinet Handbook, so that in principle, all departments have "signed up" to the RIA process. Ireland lacks an administrative procedures law, which exists in some (not all EU countries) to give statutory backing to the processes for development of legislation (and other issues such as appeals).

**The process lacks sanctions and a strong challenger that would force departments to pay attention.** The BRU does not have a statutory gatekeeper role with regard to RIAs (it does not have formal authority to turn poor RIAs back), nor does it have a formal mandate to assess the quality of RIAs or to report on the outcomes of its monitoring work on RIA. There is no strong challenge function. Many stakeholders said that the training was good but the process lacked quality control. "Too many carrots and not enough sticks", said one, and another "BRU is not a gate, as it should be". The OECD peer review team also heard that a stronger approach is needed at the beginning of the process. The scrutiny by the BRU of RIAs attached to heads of bill, before they are circulated for approval by government is an important part of their work, and they have used this channel to promote higher quality IAs. But could this input start sooner?

**Systematic public consultation and publication, which would also help departments to co-operate by exposing RIAs to public scrutiny, is often inadequate or not done.** The formal integration of public consultation as part of the RIA process is a positive development, as is the requirement in principle that RIAs be published (a least for primary legislation and when the bill is published etc). However, neither of these practices appear yet to be fully embedded. There is concern that there are still low rates of publication. The OECD peer review team heard that there is considerable resistance to publication. It also heard that publication would be a significant lever to promote change. Name and shame is not (as yet) a strong tradition within the administration and this is likely to be an effective way of applying pressure.

**Recommendation 4.3. Check Irish arrangements against those of relevant EU countries to see what might be done to strengthen the RIA requirements so as to strengthen their quality. For example, consider how the BRU could be formally equipped with the power to turn back inadequate RIAs so that draft proposals cannot be tabled before cabinet unless there is a RIA attached of adequate quality, and how publication might be made a statutory requirement. Enhance accountability for results by regular publication of (and publicity for) RIA statistics-how many done as a proportion of proposals, how many assessed to be reasonable quality, by department.**

**The analytical framework and quantitative support for RIAs remain relatively weak**. The BRU now focuses on its action on improving the quality of IAs, where a lot is still needed. A key weakness is quantification by departments. The OECD peer review team heard that there is a need to "legitimise quantitative approaches". Beyond the economic and business related impacts, methodologies remain relatively undeveloped. Whilst it is important to strike an appropriate quality/quantitative balance, the latter needs a further boost, including further capacity building among departments. It was suggested that there is a need for a more effective allocation of appropriate resources (economic, legal) within departments to areas conducting a lot of RIAs. Departments appear to make little use of the service of the economic expert, which is not a good sign. These points suggest that capacities may exist but are not fully used. Is there an underlying issue of the perceived relevance of RIAs for some departments? The current process, whilst broad, tends to emphasise in practice the economic dimension, and sustainability, for example, is not so clearly covered.

**Recommendation 4.4. Consider how to further boost methodological support and buy in from departments for a quantitative approach. Among the approaches that could be envisaged are the further development of online user friendly tools for departments, linked to the training which is already provided, the establishment of "peer review" groups in departments for mutual support, linked to departments' economists or economic units, and encouragement to departments to systematise the use of their economic staff for support and review of the work done by non specialist officials.**

**Significant statutory instruments (secondary regulations) may be slipping through the net.** The requirement to prepare a RIA applies to "significant" secondary regulation, but there is no clear definition of what "significant" means. This is left in the hands of departments. The OECD peer review team were told that many significant secondary regulations were in fact slipping through the net. There is a similar issue for RIAs on EU regulations, which are required in principle but also often not done (see also Chapter 7). Secondary regulations are important as these are often the vehicle for amendment of existing laws, adding to the complexity of the regulatory stock and lack of readability of the law.

**Recommendation 4.5. Consider how to ensure that significant secondary regulations are picked up by the RIA process, linking this to the issue of amendments that undermine the clarity of the law. A panel of relevant officials working on simplification, together with the BRU could be organised to review RIAs on primary legislation in order to identify expected significant secondary regulations.**

**Regular evaluations of the overall process are important for sustaining pressure and for securing any necessary improvements.** Evaluation is valuable for moving the process forward and refining mechanisms for maximum effectiveness, as evidenced by the 2005 report and subsequent review. The next evaluation might be structured around an impact analysis on the RIA process itself, in other words, consider the costs and the benefits of the system in order to pinpoint what needs to change.

**Recommendation 4.6. Ensure that the RIA process continues to be evaluated by an objective external entity or entities at regular intervals, taking account of resources for this. Consider who is best placed for this task.**

**Effective communication is critical in order to make clear the importance of RIA for meeting high-level public policy goals.** The BRU has articulated the strategic value of RIA as a means of improving the quality of governance, improving economic efficiency and the effectiveness of the public service, and to improve competitiveness. How can RIA be further promoted as a tool for enhancing effective policy debate, both internally and externally? Supportive external stakeholders could be encouraged to contribute to the communication of why RIA is important. Internally, the OECD peer review team were not clear whether buy in had been achieved within the Department of the *Taoiseach* itself, for example by the Cabinet Secretariat. There appears to be a need to strengthen communication, both internally and externally.

**The integration of *ex post* evaluation in the RIA process reflects best international practice.** *Ex post* review is now also a mandatory element of the impact assessment process, reflecting best international practice. As one stakeholder put it, "if we can't stop draft legislation, we can look at it afterwards". Although it is of course preferable to catch issues before they become law, several EU countries are aware of the fact that in a context where effective RIAs may pose a challenge, *ex post* review is another opportunity to take stock. However, the most important reason for having a process that uses both *ex ante* and *ex post* evaluation is that this should generate a virtuous circle, in which the *ex post* evaluation can help to strengthen understanding how draft regulations can be more robustly constructed, for example in terms of securing compliance, and avoiding "unintended consequences", as well as discouraging the production of poor RIAs in the first place, if evaluations are publicised.

**More broadly, there is a need to envision the development of the RIA process in the wider context of regulatory governance aimed at joining up stock and flow initiatives.** RIAs are only part of the processes that need to be deployed for effective regulatory governance. They can be seen as part of a support chain for broader efforts to secure an effective and efficient legal framework. As well being a tool to evaluate each draft regulation individually, they should also serve to provide an overall view of the way in which regulation is evolving, with reference for example to different sectors of the economy or different types of company. For example, a review of RIAs may show that one sector has been particularly affected by (too much) regulatory activity. Joining up the RIA process with the initiatives for simplification may also suggest issues for debate and further action in terms of managing regulatory output, improving the quality of the law, and evaluating the effects of regulatory output on specific actors and sectors of the economy.

### Box 4.1. Recommendation from the 2001 OECD Report

**Strengthen disciplines on regulatory quality in the departments and offices by reinforcing the central review unit and refining and integrating tools for regulatory impact analysis, based on a benefit-cost principle, increasing the use of alternatives to regulation, integrating these tools into public consultation processes and training public servants in how to use them.**

The Regulatory Quality Checklist that accompanies memoranda for a proposed law is a crucial step forward in the modernisation of the Irish regulatory management system. However, important weaknesses and gaps exist. Particularly important is the need, on one hand, to clearly differentiate between the mandatory Checklist and the "proofing" of impacts as, *inter alia*, employment, women, persons in poverty, and on the other hand, the need to consolidate in an extended RIA key-assessments such as the impacts on industry and small business costs. As the central principle, a universal benefit-cost test should be adopted, with step by step strategies to gradually improve the quantification of regulatory impacts for the most important regulations, while making qualitative assessments more consistent and reliable. These tools should not only be well-designed but well-used, that is, incorporated into day to day administrative practices.

Five steps are needed to improve effectiveness:

- **Reinforce the Central Unit in the Department of the Prime Minister.** Concrete steps could be to provide it with: (i) statutory authority to make recommendations on the quality of checklist responses to the high-level regulatory committee as recommended; (ii) adequate capacities to collect information and co-ordinate the reform programme throughout the public administration; and (iii) enough resources and analytical expertise to provide an independent opinion on regulatory matters.

- **Develop effective ways to apply the *Reducing Red Tape* programme to sub-ordinate regulations**. Parliamentary and judicial review are the only quality check on this kind of regulation (not including the non-mandatory legal review undertaken by the Attorney General Office). However, these mechanisms are in many ways either theoretical, too rigid or politically, too late in the process, or too expensive to assure that lower level rules comply with criteria of high quality. Hence, an important improvement would be to apply and enforce the *Reducing Red Tape* disciplines on subordinate regulations (*i.e.* the preparation and external review of the checklist, mandatory public consultation, centralised publication, etc.). A delicate but vital element to be considered concerns the need to develop a mechanism that should permit third-party review of the quality of sectoral regulators' rules without impinging on the independence of these bodies. A first step could be to require them to implement a "notice and comment" procedure for an expanded RIA for their draft regulations.

- **Increase methodological rigour in the answers to the Checklist by providing training, written guidance, and minimum analytical standards**, including for the benefit-cost tests, to departments and agencies. The practical and conceptual difficulties of a formal benefit-cost analysis suggest that a step-by-step approach is needed in Ireland, in which the RIA programme is gradually improved, integrating both qualitative and quantitative elements of the analysis, so that over time it better supports application of the benefit-cost principle.

- **Incorporate detailed consideration for alternatives to be analysed and compared with the regulatory proposal**. Because Ireland has been slow in incorporating regulatory and non-regulatory alternatives that can increase policy effectiveness at lower cost, regulators must be motivated through results-oriented management. This requires strong encouragement from the centre of government, supported by training, guidelines and expert assistance where necessary. Where rigid laws and legal culture inhibit use of more effective alternatives, broader legal reforms to allow more innovation and experimentation may be necessary.

- **Integrate RIA with public consultation processes**. Publication of RIA through a procedure that required regulators to respond to comments from affected parties would enable consultation to function more effectively as a means of cost-effective information gathering, and thereby improve the information needed for good RIA. Public exposure of RIAs would also be a mighty incentive for departments to raise rapidly the quality of their answers to the checklist.

Access to RIA would also improve the quality of consultation by permitting the public to react to more concrete information. Such integration should, however, be carefully designed so that additional delays to the policy process are not introduced.

### *Alternatives to regulations*

**As in many other countries, further emphasis seems to be needed on considering alternatives to regulation at an early stage of the process.** The OECD peer review team was not able to consider this aspect in any depth. Ireland has various strong examples of the use of alternatives. However, as one stakeholder put it, "the government may be stuck with a policy decision, but can still work on how it is implemented". This is an area where sustained pressure is needed over time to encourage the consideration of alternatives. The evidence from other EU countries is that it is not enough to include this consideration in the guidance on development of regulations, and leave it at that.

## Background

### *General context*

#### *The structure of regulations in Ireland*

As in other countries, there is a hierarchy of regulations, starting with the Constitution.

**Box 4.2. The structure of regulations in Ireland**

**Primary regulation**

Primary regulation consists of acts enacted by the *Oireachtas* (parliament). There are three types of acts of the *Oireachtas*:

- Acts to provide for the amendment of the Constitution, following approval by the people of the proposed amendment in a referendum.
- Public general acts, which create law for the public at large.
- Private acts, which create law for particular individuals or groups of individuals, such as companies or local authorities.

**Secondary regulation**

Secondary regulation, in the form of statutory instruments, is governed by the Statutory Instruments Act 1947. The main types of statutory instrument are: orders, regulations, rules, and bye-laws. They are made by ministers and other bodies under a power conferred by an act. Specified government ministers and other agencies and bodies are authorised to make statutory instruments. For limited purposes, specified by the legislation, a limited number of bodies, such as the Law Society and the sectoral regulators, may prepare and issue regulations.

Statutory Instruments have a wide variety of functions. They are not enacted by the *Oireachtas* but allow persons or bodies to whom legislative power has been delegated by statute to legislate in relation to detailed day-to-day matters arising from the operation of the relevant primary legislation. Statutory instruments are used, for example, to implement European Council Directives, designate the days on which particular District Courts sit and delegate the powers of Ministers.

Secondary legislation can be annulled by a motion passed in *Dáil* or *Seanad Éireann* within one year (which in practice is very rarely used).

**Other forms of "regulation"**

In addition, and as can be found in most other European countries, departments and offices produce a significant number of administrative circulars (such as schemes, standards, licences and formalities) which are not recognised by the courts as binding law even though they may generate administrative burdens and be perceived as regulations.

### *Trends in the production of new regulations*

Ireland enacts in the region of 40-50 acts and some 500-600 regulations in any one year. In addition, a significant number of circulars and other non binding instruments are produced by departments. In the Irish context, there are some cases where the constant production of regulations matters especially, because much of this represents amendments piling up on the original statute, necessitating a major and ongoing cleaning up of the regulatory stock to ensure that it remains legible (Chapter 5).

## *Procedures for making new regulations*

### *The law making process*

There are two main steps in the preparation of draft primary regulations. In the first step the initiating Department officials prepare a draft memorandum and outline of the bill ("the heads of bill") along with a draft Regulatory Impact Assessment. Once approval is given by government, bills are drafted by a team of specialist lawyers of the Office of the Parliamentary Counsel to the government, which provides drafting services for the preparation of primary legislation. Upon request of departments, and consistent with resources, the OPC will also draft secondary regulations (which may include statutory instruments transposing EU legislation into domestic legislation). Some departments have dedicated legislation units which will draft statutory instruments. Equally, departments may, on occasion retain external expertise to assist with drafting. It should be noted that the nature of statutory instruments varies significantly, some being relatively straightforward, others more difficult.

The Constitution sets the principle of collective Government responsibility. Article 28.4 provides that: "the government shall be collectively responsible for the departments of state administered by the members of the government". This requires that ministers should inform their colleagues of proposals they intend to announce. Government approval is required for significant new or revised policies and strategies, and no bill can be drafted without prior formal approval of the cabinet.

**Box 4.3. The law-making process in Ireland**

**Primary legislation**

There are essentially three stages in the law making process, detailed in the Cabinet Handbook:

- **Decision in principle to proceed with the development of a new bill.** The ministry prepares the draft "heads of bill" and draft RIA which, together with a draft memorandum to government, must be circulated to all departments and the Office of the Attorney General for comments at least two weeks prior to their formal submission to government.

- **Draft legislation on the basis of the approved general scheme.** Once the heads are approved by the government, the proponent department sends a complete file to the Office of the Parliamentary Counsel to the Government (OPC), part of the Office of the Attorney General, for the bill to be drafted. The OPC has a continuous dialogue with the policy division of

the department to ensure that the final legal text reflects the intention of the proposed legislation. The evolution of a draft from idea to law is very much an iterative process. The draft, together with an updated RIA and memorandum, is circulated again to all departments for comments at least two weeks prior to their formal submission to government.

- **Approval of text and publication.** The proponent department draws up the final memorandum setting out the proposal for legislation and the background with a clear statement of the problem to be solved and appends this to the draft bill. Since November 1999, the memorandum must also state whether or not the department has completed the regulatory quality checklist, which appears as Appendix VI of to the Cabinet Handbook. Lastly the draft bill and memorandum and appendices are presented and approved at cabinet level.

After approval by the cabinet, a bill is submitted to each house of parliament (*Oireachtas*) for a five-stage process that leads to its eventual enactment. The second and third stages are considered the most important as they offer the fullest opportunities to parliament members to discuss and amend the contents of the bill. The government may present amendments at this stage (and uses this possibility).

Once a bill has been passed by both houses, the *Taoiseach* presents a vellum copy of the bill, prepared in the Office of the Houses of the *Oireachtas*, to the President for signature and promulgation as a law. The signed text is then enrolled for record in the Office of the Registrar of the Supreme Court.

Notice of adopted regulations is published in the Irish *Oifigiúil* (Official Journal) and in many cases notice is also published on the website of the proponent department, and in national newspapers.

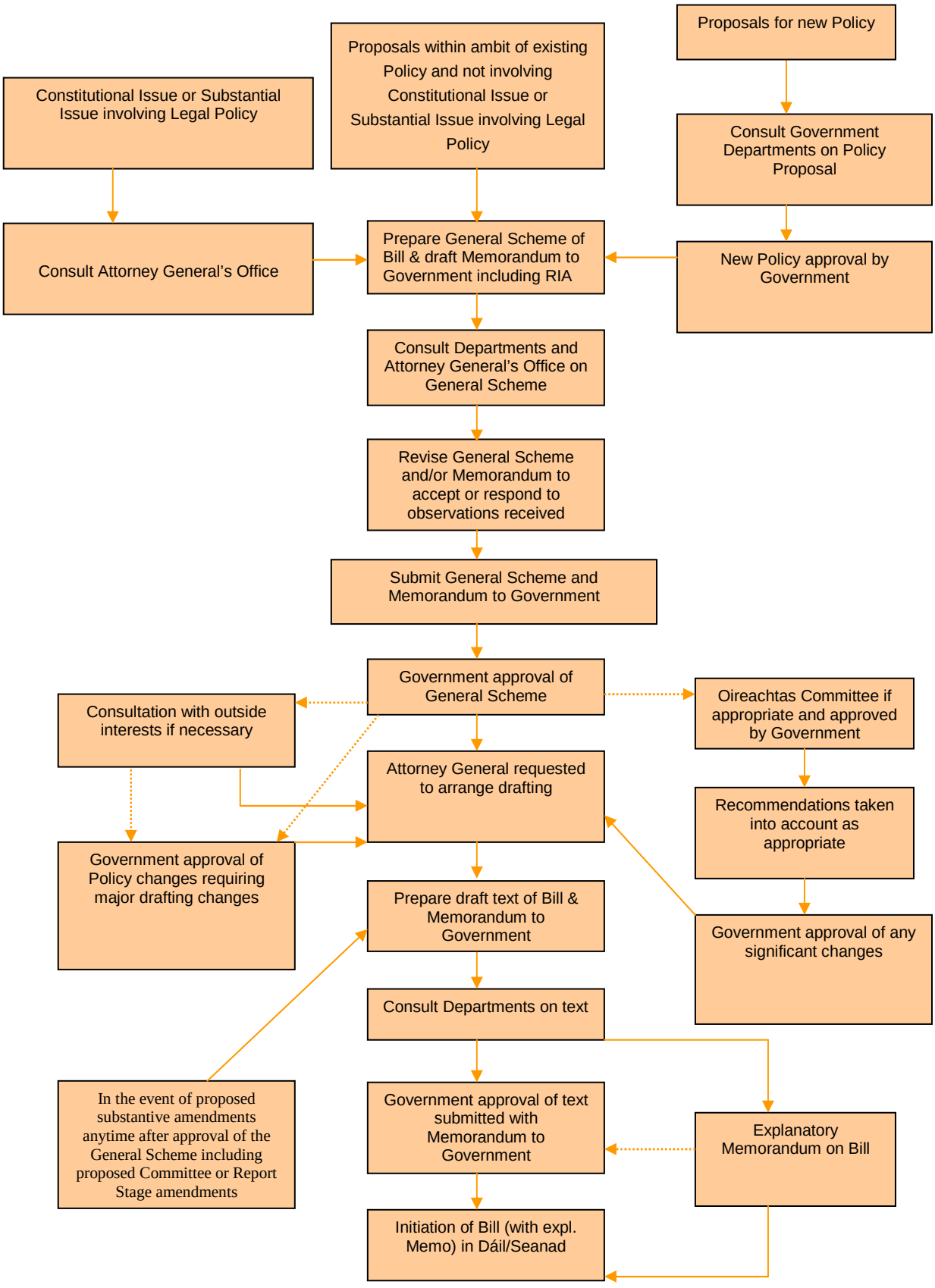
Parliament may initiate its own legislation (Private Members' Bills). Although a number are proposed, very few are adopted, with none adopted over the last few years.

**Secondary regulations**

The preparation of secondary regulations follows the same principles laid down in the Cabinet Handbook. The process is one of custom and follows no set-rules, though. A minister has full responsibility to prepare secondary regulation according to the parent act. A majority of departments tend to involve the OPC. For limited purposes, specified by the legislation, a limited number of bodies, such as the Law Society and the sectoral regulators, may also prepare and issue regulations. When published they are usually laid before the parliament.

Most primary legislation which enables the making of regulations will provide for the relevant regulation to be laid before the Houses of the *Oireachtas*. It will usually provide that either House of the *Oireachtas* may pass a resolution annulling the regulation within 21 days, although without prejudice to the validity of anything done pursuant to regulation prior to the resolution being passed.

**Figure 4.1. Preparation of Legislation**



The Office of the Chief Whip[1] prepares the government legislative programme for primary legislation for the upcoming parliamentary session. It publishes the programme on the website of the Department of *Taoiseach* before each parliamentary session, along with a press release. The Government Legislation Committee (GLC), chaired by the Government Chief Whip, oversees the implementation of the programme in close co-operation with the Office of the Parliamentary Counsel to the Government (OPC). It makes recommendations to the government in relation to the level of priority that should be accorded to the drafting of each bill, anticipates blockages that might occur in the process, and recommends actions to avoid any delays in the drafting process. The members of the GLC include the Chief Whip, the Attorney General, the Chief Parliamentary Council, the programme managers of the main parties in government, the leader of the upper house of the parliament and representatives of the Department of the *Taoiseach* and the OPC.

Individual departments are responsible for the co-ordination of secondary legislation and arrangements vary across departments. Planning of secondary regulation usually rests with the policy section responsible for drafting the regulation. Some departments (for example the Department of Agriculture, Fisheries and Food) have a central co-ordination unit or legal division that oversees the process within the department. Information regarding planning of secondary regulation is not made publicly available.

The Government Legislation Committee meets regularly to monitor progress towards publication of the bills on the "A" list (*i.e.* those promised for publication during the current parliamentary session) of the government's published legislation programme. It has no role in reviewing the quality of the bills, nor on setting priorities.

### *Administrative procedures*

There is no administrative procedures act, as exists in some other European countries to give a legal framework to regulatory proceedings. The Cabinet Handbook[2] lays down procedures for making new regulations. This includes provision for a Regulatory Impact Analysis (RIA) to be initiated at the beginning of the process, as a draft RIA must be attached to heads of bills. The handbook also contains the Quality Regulation Checklist. The latest edition of the handbook was prepared by the Department of the *Taoiseach* and approved by the government in late 2006. All ministers and departments have to comply with the handbook. The Cabinet Secretariat in the Department of the *Taoiseach* has responsibility for ensuring compliance with the handbook and with cabinet procedures. An e Cabinet template has been introduced to make the process of preparing proposals for cabinet more efficient.

### *Legal quality*

The legal quality of bills is mainly ensured by the fact that these are drafted by a team of specialist lawyers at the Office of the Parliamentary Counsel to the government, which provides drafting services for the preparation of all primary regulations. Upon request of departments the OPC will also draft secondary regulations (in particular statutory instruments transposing EU legislation into domestic legislation). The Cabinet Handbook encourages drafters to avoid jargon and technical language when possible (Rule 6, Appendix 2). The OPC has its own drafting manual. Guidelines were published in 2008 to support drafting of secondary regulations.[3] The Law Reform Commission report "Statutory Drafting: Plain Language and the Law"[4] published in December 2000 made a number of recommendations with regard to statutory interpretation and plain language, some of which were adopted in the Interpretation Act 2005.[5]

## *Ex ante impact assessment of new regulations*

### *Policy on regulatory impact assessment*

Ireland was a relative latecomer to regulatory impact assessment. A working group developed a draft RIA model for Ireland in the wake of the 2001 OECD report, and the 2004 White Paper "Regulating Better" committed to the piloting of this model and its subsequent introduction across departments and offices. This was given full effect in 2005, when the Irish government introduced a requirement, through formal guidelines which were integrated into the Cabinet Handbook and procedures for the development of regulations, to make an *ex ante* Regulatory Impact Analysis (RIA) for new regulations. The objective was also to integrate the various dimensions and potentially affected groups into a single analytical framework.

The guidelines were revised in June 2009 following a review of the RIA process, which made a number of recommendations (Box 4.4).[6] This included the removal of the formal division between screening and full RIAs as screening RIAs were often shaped by a desire to prove that the threshold for a full RIA was not met, rather than a proper evaluation of impacts. Other issues included the need for stronger guidance and training, and the importance of public consultation and publication.

**Box 4.4. Review of the Operation of Regulatory Impact Analysis: Recommendations**

The report noted that good progress had been made in establishing the use of RIAs in all Government Departments. However lack of visibility, issues with consultation, and issues of timing were found to be issues. Quality of RIAs was variable.

The report made a range of recommendations to strengthen the RIA process, including:

- Strengthen the high level support for RIA.
- Embed RIA thinking earlier in the policy development process, with oversight by senior management.
- Remove distinction between full and screening RIAs, but identify proportionate level of analysis.
- Strengthen guidelines and provide further support and advice.
- Consider additional training on EU legislation.
- Require annual reports to show what legislative proposals have been accompanied by a RIA, and where they have been published.
- Strengthen planning for RIA within Departments and maximise use of trained resources.
- Conduct quality assessments of a sample of RIAs.

Strategically, RIA is seen by the Department of the *Taoiseach* sponsors as a means of improving the quality of governance, increasing economic efficiency and the effectiveness of the public service, and to improve competitiveness. The economic dimension is especially stressed. The aim is to assess the likely effects of a proposed regulation including all related costs, benefits and impacts in a structured and transparent way. The 2005 reform also took the important step of establishing an integrated RIA which includes all impacts. The integrated RIA in particular looks at the effects on national competitiveness, socially

excluded and vulnerable groups, the environment, whether there is a significant policy change in an economic market, including consumer and competition impacts, rights of citizens, compliance burdens and North-South and East-West Relations. The RIA is based on the proportionality principle (adjusting the level of analysis to the significance of the measure on a case-by-case basis). It is considered to be a process, not a single snapshot, meaning that it should be undertaken at a very early stage and continuously modified.

### RIA scope

Since June 2005, RIA has been a requirement for all government departments and offices. It applies to[7]:

- Proposals for primary legislation involving changes to the regulatory framework.
- Significant statutory instruments.
- Proposals for EU Directives and significant EU Regulations when they are published by the European Commission.
- Policy review groups bringing forward proposals for legislation.

The coverage of EU directives is in line with best European practice, at least in principle, assuming it is followed through (see Chapter 7). Whilst the requirement to prepare a RIA applies to "significant" secondary regulation, there is no clear definition of what "significant" means. This is left to departments to decide, with the BRU acting as an "adviser" in that respect. The OECD peer review team were told that many significant statutory instruments (SIs) tend to "slip through the net".

RIA does not formally cover regulatory agencies or local authorities, which however are encouraged to conduct RIA where appropriate. As might be expected, since RIA is not compulsory for government agencies (and may not be appropriate in all cases, especially as agencies' regulatory powers are limited), the agency approach is not systematic. However, there appears to be considerable interest and some agencies have well developed RIA policies of their own. An example is the Commission for Communications Regulation, which published its own RIA guidelines in 2007, based on the government guidelines. It would appear that some agencies may have some good practice as well as useful information (such as on compliance and enforcement) to share with departments.

The RIA policy covers the executive, and as in other countries, the issue arises of how to encourage the legislature to take an interest, both as regards the Private Members' Bills which it may initiate, and the drafts sent to it by the executive, which are likely to be amended, with consequences for the original RIA.

#### *Institutional framework*

As in most other OECD countries, the departments which initiate draft legislation are responsible for preparing the RIA, which they are required to do at an early stage in the development of a law (preparation of heads of bills). They are also responsible for promulgating RIA in the regulatory bodies that come within their aegis. There has been some investment in economic expertise in recent years, particularly through the Masters in Policy Analysis (Economics) which was developed for the Civil Service in partnership with the Irish Institute for Public Administration and increased recruitment of individuals with economic expertise.

The BRU in the Department of the *Taoiseach* plays a central and critical role in the development of the RIA process and encouraging departments through the following:

- **Advice and information.** It provides advice directly to officials conducting RIAs. This is known as the "RIA Helpdesk". The BRU has also engaged an economic consultant to advise and assist departments and offices in carrying out RIAs. The BRU's Better Regulation website, *www.betterregulation.ie*, is updated regularly and is also used to provide advice on RIA (as well as other Better Regulation processes and developments).

- **Guidelines and RIA template.** Guidelines for RIA were originally produced in 2005 by the BRU when the requirement to conduct RIAs was formally introduced. The Guidelines were revised following the independent report on the review of the operation of RIA in 2008. They were approved by the government, and then disseminated to heads of department and through the RIA network. The revised RIA Guidelines as well as a template for conducting RIA are published on the Better Regulation website.

- **Training.** In conjunction with the Civil Service Training and Development Centre (CSTDC), it runs a two day RIA training course, modules on certain other related training courses, as well as tailored information sessions for departments (see Chapter 2).

- **RIA network.** This had its first meeting in January 2007. Each department, together with the Office of the Attorney General and the Office of the Revenue Commissioners, has a representative in the RIA network orchestrated by the BRU, and set up to promote best practice across departments and offices. The network meets several times a year.

- **Quality control.** While the Cabinet Secretariat oversees compliance with the general procedures for preparing regulations (set out in the Cabinet Handbook), the BRU separately examines the RIAs. The BRU does not have the formal power to block a draft if a RIA is low quality. However, it is in contact with departments either to remind them of the obligation of making a RIA and/or to provide advice and recommendations if the RIA is considered "insufficient".

- **Online tool for "Introduction to RIA"**. The Civil Service Training and Development Centre in conjunction with the Department of the *Taoiseach* have developed an online information tool to include an "Introduction to RIA" which went live in January 2010.

The compulsory nature of the process (or not) and the issue of quality control are central to any RIA process. The cabinet procedures and RIA guidelines (approved collectively by formal government decision) establish that a draft proposal cannot in theory proceed without a RIA attached (of the appropriate quality). However, there is no statutory requirement, and no Administrative Procedures Act to which such a requirement might be attached. The OECD peer review team were told that in practice, some draft proposals did proceed without a RIA attached, depending on political will and support for the proposal. The BRU control of the situation is far from complete. Part of the way forward might be to see whether the link between the BRU and the Cabinet Secretariat – responsible for cabinet procedures, and compliance with the Cabinet Handbook, could be used to ensure that proposals with a poor RIA are not ratified until the RIA is improved.

*Methodology and process*

The revised guidelines (Box 4.5) state that the RIA process should be started as early as possible in the regulatory proposal development process and used as the basis for consultation, where possible. Specifically, a RIA must be attached to the draft memorandum and outline of the bill ("the heads of bill") on its way to cabinet for approval prior to the stage of drafting the bill itself. It is stressed that the RIA is a living document subject to continuous change and there can be numerous drafts before the final version of the RIA is complete.

**Box 4.5. Revised RIA guidelines: Key points**

The revised guidelines and associated training materials cover the following key points:

- Stronger emphasis on compliance costs, including administrative costs.
- Specific guidance on calculating public service implementation costs.
- Details on how RIAs should be integrated into the EU policy making process.
- Extended discussion of methodologies (especially multi criteria analysis).
- Clarification of proportionality, and exceptions to RIA.
- More practical examples.
- Requirement to publish.
- Summary sheet.

Ireland does not subscribe to the UK approach which is considered to be biased towards costs. "Benefits should outweigh the costs of regulation". Rather, it prefers a framework of "here are the benefits; here are the costs" as support for decision-making. An effective RIA should also "flush out the unintended consequences of proposed regulation".

To ensure that RIA is proportionate and does not become overly burdensome, a proportionate level of analysis should be conducted for RIA on case-by-case basis, having regard to the significance of the measure.

The following eight steps are conducted in the RIA process:

1. Summary of RIA.
2. Statement of policy problem and objective.
3. Identification and description of options.
4. Analysis of costs, benefits and other impacts for each option.
5. Consultation.
6. Enforcement and compliance.
7. Review.
8. Publication.

Detailed guidance on the relevant analytical techniques (multi-criteria analysis and cost-benefit analysis) is also provided. The economic adviser hired by the BRU helps with the development of methodology.

*Ex post* review is now also a mandatory element of the impact analysis process. Sunset clauses may be used. A recent example is an interim scheme of a health insurance levy and age-related tax credits, which includes a sunset clause which will come into effect after three years. This interim scheme is in place pending the introduction of a new scheme of risk equalisation.

### Link with administrative burden reduction and support for SMEs

The guidelines include a specific appendix on the measurement of administrative burdens in the *ex ante* context. The methodology outlined reflects that used to measure administrative burdens arising from existing legislation which was developed by the Department of Enterprise, Trade and Innovation. The majority of Irish companies would be considered SMEs (approximately 98% or 800 000 firms). As part of the assessment of compliance costs, officials are advised to assess the potential administrative and compliance burdens for all businesses and the importance of understanding the impact of compliance on small business is stressed. Nevertheless, the OECD peer review team heard that SMEs were still being "damaged" by excessive and further burdens.

#### *Public consultation and communication*

Effective public consultation and communication are also a central part of an effective RIA process. Since the 2005 reform, public consultation is expected to be an integral part of RIA. The RIA guidelines recommend that officials engage consultation as early possible in the policy development process along with their work on the RIA. RIAs must contain information on the consultation conducted by departments in the preparation of regulations. The quality of this reporting is mixed.

The revised guidelines state that all RIAs relating to primary legislation should be published on departmental websites as soon as the bill is published. They should be accessible and easy to find. If a departmental website has a legislation page, the RIA should be published on that page. If there is no legislation page, it is expected that a dedicated RIA page will be created. This requirement being relatively new, a number of departments are currently adapting their websites. Departments are also expected to report on the RIAs which they have conducted in their annual reports, in order that levels of compliance with RIA requirements can be monitored.

#### *Evaluation of progress*

As in many other EU countries, the design and implementation of RIA has been a long and often difficult road, which is starting to show results. The 2008 evaluation, the Review of the Operation of RIA, indicates that between the introduction of RIA in June 2005 and the end of February 2008, 74 RIAs were produced across departments and offices and of these, 31 RIAs had been published (42%). The Better Regulation Unit estimates that, since the review, another 69 RIAs have been produced with 29 of these being published (42%). Whilst RIAs are now being (more or less) routinely conducted for primary legislation, fewer are being conducted for secondary regulations.

A key concern at this stage are to improve the rate of publication, and to address the problems of a relative lack of RIAs for secondary regulations and EU legislation. The OECD peer review team heard a number of comments to the effect that RIAs were often

not yet taken very seriously, and could be "self-serving" to reflect political wishes (a situation that is not unique to Ireland). The lack of real challenge is perceived to be a major issue, RIAs are not always produced and not all RIAs are published.

### *Alternatives to regulation*

The RIA guidelines require officials to consider alternatives forms of regulation as well as alternatives to regulation for a given policy issue, including the "no action" option. No particular approach is emphasised although practical examples are given. As with all elements of the RIA process, officials are asked to consider alternatives as early as possible and certainly before the decision to regulate is made. The RIA training course also emphasises this. The use of alternatives to regulation is most developed in the environment area and the regulation of professions. The OECD peer review team were told that the government should be "encouraged to think beyond the rules" and that "the government may be stuck with a policy decision, but can still work on how it is implemented".

### *Risk-based approaches*

Although there is no specific requirement to consider risk-based approaches (other than risk in relation to enforcement) in the development of regulations, some departments and agencies have taken initiatives in this direction. For example, risk assessment, risk management and risk communications tools are used in the development of regulations for agricultural sector, and the Department of Agriculture, Fisheries and Food has a corps of veterinary practitioners who are available to provide technical advice.

## Notes

1. The Government Chief Whip is a Minister of State (minister attached to the Department of *Taoiseach*). He attends government meetings, and is also assigned the functions relating to the Central Statistics Office. The role of the Whip is primarily that of disciplinarian for all government parties *i.e.* to ensure that all parliamentarians, including ministers, attend for *Dáil* business and follow the government line on all issues.

2. See: *www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2007/Cabinet _Handbook.html* (accessed January 6, 2010).

3. "Statutory Instruments: Drafting checklist and guidelines", 2nd edition, 2008, prepared by Jack Hazlett of the Office of the Parliamentary Counsel for use by Departments of State. The overall aim is to draft in accordance with the terms of the primary legislation governing it. The policy merit of the instrument is another matter considered separately.

4. Report available at: *www.lawreform.ie/publications/data/lrc110/lrc_110.html.*

5. Interpretation Act 2005 is available at: *www.irishstatutebook.ie/2005/en/act/pub/0023/index.html.*

6. Revised RIA guidelines - How to conduct a Regulatory Impact Analysis (Department of the Taoiseach, June 2009).
7. With some limited and specific exceptions: the Finance Bill, some emergency, criminal and security legislation, and some tax legislation and regulations.