

Legislation Checklists

A set of checklists for policy advisers and law makers to assist with the development and review of legislative reform

An extract from Appendix 1 of David Goddard, *Making Laws That Work: How Laws Fail, and How We Can Do Better* (Hart Publishing, 2022)

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The Policy Project

Primary Checklist

1. What is the current position?

- (a) What is the current law (in the field being reviewed, together with background laws where relevant)?
- (b) How does the law operate (or fail to operate) in practice?
 - (i) Describe the current position in relation to all the people who encounter the issue that the law addresses, not just those who come to the attention of officials or appear before a court. It is important to identify what you do not know about the current position, as well as what you do know.
 - (ii) Prepare a decision map showing what decisions are made by each relevant actor (citizens, businesses, government agencies, courts etc), with as much detail as possible about each stage in the process (numbers, time frames, costs etc).

2. What is the legislation aiming to change?

- (a) What is the problem? More specifically, what aspects of the current behaviours described under item 1 are problematic?
- (b) What is the desired outcome? How will the behaviour of relevant actors need to change in order to achieve this outcome?

3. Who are the audiences for the legislation?

- (a) To whom is the proposed legislation addressed? Who (citizens, businesses, officials, agencies, courts etc) needs to understand and act on the legislation in order to achieve the desired outcome?
- (b) How will each of these audiences become aware of what the law requires them to do, or enables them to do?

4. What institutions will the legislation depend on?

- (a) Identify all institutions (officials, agencies, courts etc) that have a role to play in implementing the legislation (this should be apparent from the decision map).
- (b) Will each of those institutions have the capacity and the will to perform their role?
- (c) What steps can be taken to address any concerns about institutional capacity?
- (d) Cross-refer to the institutions checklist.

5. Has this been tried elsewhere?

- (a) Is there a well-established and successful international model that should be used as a starting point for the proposed legislation?
- (b) What precedents are there in comparable societies for the proposed approach adopted in the legislation?
- (c) Was the approach a success in those other societies? How do we know?
- (d) Will success elsewhere translate into your society's social, economic and institutional setting?

6. Is a trial/pilot an option?

- (a) Are there any practical or ethical reasons not to conduct a trial or pilot, to support more informed decision-making?
- (b) Should the legislation be amended to enable a trial/pilot to be conducted, with a subsequent roll-out if it is successful?

7. How will the legislation contribute to changes in behaviour?

- (a) How is the proposed legislation likely to operate in practice?
 - (i) Prepare an amended version of the item 1 decision map to show how the proposed legislation is intended to operate in practice.
 - (ii) What do you expect will change as a result of the legislation, and why? What do you expect will stay the same, and why?
 - (iii) What aspects of the post-legislation scenario are difficult to predict with reasonable confidence?
- (b) Conduct a pre-mortem for the legislation: assume that a few years out it has failed, and ask:
 - (i) What sort of failure is most likely? Is the legislation a damp squib? Did it overshoot? Did it produce nasty surprises, or backfire?
 - (ii) What factors may have caused or contributed to that failure?
 - (iii) Can the risk of failure be reduced by adjusting default settings?
 - (iv) Can the risk of failure be reduced by reducing the complexity of the legislation from the perspective of end-users and other relevant audiences?
- (c) Cross-refer to the benefits checklist.
- (d) Cross-refer to the compliance checklist.

8. Can the legislation adapt to take account of new information and/or changed circumstances?

- (a) What are the areas of greatest uncertainty? (The current position? Future social and economic change? The nature and extent of the changes in behaviour that will result from the legislation?).
- (b) What mechanisms will there be for gathering relevant information in key areas of uncertainty? In particular, what mechanisms will there be for gathering information about how the legislation is operating in practice, and assessing that information against the legislation's goals?

- (c) How can the law be structured to enable it to adapt to reflect new information about how it is working in practice, and changes in circumstances? ie, how can we make this adaptive legislation? Is it appropriate to use any of the following techniques:
 - (i) Delegated rulemaking?
 - (ii) Legislating principles/standards coupled with (adaptable) default rules?
 - (iii) Safe harbours?
 - (iv) Provision of guidance by agencies?
 - (v) Prior ruling regimes?
- (d) Is the legislation framed in a way that enables it to adapt to changing technologies?
- (e) Should there be express provision for reviews?

9. Does the legislation take cross-border issues into account?

- (a) What cross-border issues are likely to arise in this context?
 - (i) Are relevant actors outside the jurisdiction?
 - (ii) Is relevant property outside the jurisdiction?
 - (iii) Is relevant information outside the jurisdiction?
 - (iv) Is there a risk that the laws of more than one country will apply to some activities, giving rise to conflicting obligations or complexity or unnecessary duplication? Conversely, is there a risk of a regulatory gap (ie, no country's law applies and is practically effective in relation to certain actors or activities)?
 - (v) Is there scope for unilateral or mutual recognition of outcomes in other countries?
 - (vi) Will enforcement need to take place abroad?
 - (vii) Is there a need for cross-border regulatory cooperation in order for the law to be effective? With which other countries?
- (b) What are the appropriate connecting factors for the legislation to apply?
- (c) How will the legislation be enforced in practice, where relevant actors (or their assets) are outside the jurisdiction?

10. Telling the story: The narrative explaining the reasons for the reform.

- (a) Develop a narrative that explains what the proposed legislation is intended to achieve, and how it will do this. Key elements in the narrative include:
 - (i) The problem: what is happening now (item 1), and why is it undesirable (item 2)?
 - (ii) The desired outcome: what is the legislation intended to change (item 2)?
 - (iii) The solution: how will the proposed legislation help to bring about the desired outcome (item 7)?

Benefits Checklist

- B1 Who is the legislation intended to benefit? What benefits are those beneficiaries intended to obtain?**
- (a) Identify the groups that the legislation is intended to benefit.
 - (b) Identify the benefits that each of those groups is intended to obtain.
 - (c) What trade-offs are there between these different groups/benefits?
- B2 What criteria do the beneficiaries need to meet to qualify for those benefits?**
- (a) Identify the criteria that a person must meet to qualify for the benefits provided under the legislation.
 - (b) What are the implications of those criteria for the complexity of the legislation, for the predictability of its operation, for ease of access to those benefits for the intended beneficiaries, and for the cost of implementing the regime?
- B3 How will those beneficiaries become aware of the availability of those benefits, and how to obtain them?**
- (a) How will beneficiaries become aware of the availability of those benefits?
 - (b) How will beneficiaries become aware of what they need to do to obtain those benefits?
 - (c) When will beneficiaries need this information? What steps can be taken to ensure it is available and understood at this time? Should the law provide for 'signposts', or other methods of providing information as and when it is relevant?
- B4 Can receipt of those benefits be made a default setting that does not require any specific action from beneficiaries?**
- (a) Is it appropriate for the benefit to be universal?
 - (b) Can existing information be used to identify qualifying beneficiaries?
 - (c) Can an agency be given a proactive role in identifying beneficiaries?
- B5 If beneficiaries are required to make an active decision, or take active steps, what can be done to make this as simple and easy as possible?**
- a) Identify in detail each step that a person will be required to take to qualify for the benefit.
 - b) Review whether each of these steps is necessary.
 - c) Review the overall process – is it workable and realistic for beneficiaries?
 - d) Consider what can be done to make access to benefits for intended beneficiaries simpler and easier, for example by reducing the number of steps required, not requiring information to be provided if an agency already holds it, allowing beneficiaries to authorise the use of information held by other agencies, so they do not have to provide it again, providing support/assistance for applicants.

Compliance Checklist

- C1 Who is required to take steps to comply with the legislation? What is each relevant compliance group required to do?**
- (a) Who will need to change their behaviour to comply with requirements imposed by that legislation?
 - (b) What will each 'compliance group' be required to do, and in what circumstances?
- C2 Can some compliance obligations be reduced or eliminated?**
- (a) Can some compliance obligations be eliminated, without compromising the effectiveness of the law?
 - (b) Is it possible to reduce the frequency with which people are required to take positive steps to comply with the law?
 - (c) Is it possible to reduce the scope of any of the compliance obligations (for example, by not requiring information to be provided which is already held by the agency or by another agency)?
- C3 How will each compliance group be made aware of their obligations?**
- (a) How will each compliance group become aware that they have obligations under the legislation?
 - (b) How will the members of each group obtain the necessary information to know what practical steps they must take in order to comply?
 - (c) Should the law provide for 'signposts' or other methods of providing information as and when it is relevant?
 - (d) What status will any detailed information provided by an agency have?
 - (e) What other forms of assistance are available, whether proactively or on request, to enable a person to understand what they need to do in order to comply?
- C4 What can be done to make compliance as simple and easy as possible?**
- (a) Can compliance be made the default outcome, to remove the need for active steps to be taken?
 - (b) Can complexity be reduced to facilitate compliance?
 - (c) Can the practical steps required to comply with the law be made less burdensome – less costly or less time-consuming?
- C5 What can be done to encourage compliance?**
- (a) What are the costs of compliance?
 - (b) What other barriers are there to compliance (for example, established social practices/attitudes)?
 - (c) What can be done to remind people of their obligations as and when those obligations are relevant?
 - (d) What are the practical consequences of non-compliance? Is non-compliance attractive as a result of low/ineffective enforcement, inadequate sanctions etc?
 - (e) Can the legislation provide for more effective and proportionate sanctions/deterrents?
 - (f) Can the legislation or institutional arrangements be modified to address concerns about effective enforcement?

Institutions Checklist

- 11 What institutions will play a role in implementing the legislation? What decisions and actions will they be required to take?**
- (a) What institutions will play a role in implementing the legislation?
 - (b) What decisions/actions will each relevant institution be required to take?
 - (c) How often will they need to act?
 - (d) Within what time frames?
 - (e) How complex are those decisions?
 - (f) Will a single person or body make all of the decisions, or will there be multiple decision-makers?
- 12 Will each of those institutions have the capacity and will to perform its role?**
- (a) Describe in detail the capacity of each relevant institution, and (if it is an existing institution) its performance to date.
 - (b) Is the capacity of each institution likely to be adequate to perform its identified functions?
 - (c) What are the likely consequences of errors in making decisions?
 - (d) Are some types of error more likely than others?
 - (e) Are some types of error more problematic than others?
 - (f) What mechanisms exist to identify and correct errors?
 - (g) Is there a risk of inconsistency in outcomes, and if so, how much of a concern is that?
 - (h) What are the likely consequences of delay in making decisions, beyond the intended time frames?
- 13 How can any concerns about institutional capacity be addressed?**
- (a) Can default rules be modified to reduce dependence on the institution?
 - (b) Can the complexity of decisions that the institution is required to make be reduced?
 - (c) Can responsibility for a function be transferred to another institution (existing or new) that is more likely to have the capacity and will to perform that function?
 - (d) Can the institution be strengthened/established in a way that ensures it will have the necessary capacity within a reasonable time frame?
 - (e) If none of these is workable, reconsider the proposed legislation in light of the high risk of failure due to institutional factors.