

**CIVIL SERVICE LEGISLATION:  
CHECKLIST ON SECONDARY  
LEGISLATION (AND OTHER  
REGULATORY INSTRUMENTS)**

***SIGMA PAPERS: No.14***

## THE SIGMA PROGRAMME

SIGMA -- Support for Improvement in Governance and Management in Central and Eastern European Countries -- is a joint initiative of the OECD Centre for Co-operation with the Economies in Transition and the European Union's Phare Programme. The initiative supports public administration reform efforts in thirteen countries in transition, and is financed mostly by Phare.

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- assist beneficiary countries in their search for good governance to improve administrative efficiency and promote adherence of public sector staff to democratic values, ethics and respect of the rule of law;
- help build up indigenous capacities at the central governmental level to face the challenges of internationalisation and of European Union integration plans; and
- support initiatives of the European Union and other donors to assist beneficiary countries in public administration reform and contribute to co-ordination of donor activities.

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**Views expressed in this publication do not represent official views of the European Commission, OECD Member countries, or the central and eastern European countries participating in the programme.**

## Introduction

This checklist is intended to supplement the *Civil Service Legislation Contents Checklist*, (Sigma Papers: No.5 OCDE/GD(96)21, February 1996). The previous checklist was principally concerned with matters that could usefully be considered when a civil service bill (i.e. the draft of primary legislation governing the civil service) was in preparation in a central and eastern European country.

The present checklist deals with matters that can usefully be considered in connection with the secondary instruments that may be needed to implement the Civil Service Act enacted by the Parliament. It begins with a narrative section describing the types of instruments that are typically used for this purpose in OECD Member countries and factors that are widely taken into account when such instruments are being prepared and drafted. This is followed by a checklist of questions which law drafters in particular may find useful in the drafting process. These questions concern the general approach to secondary regulation rather than the substantive contents of instruments dealing with particular topics. Such contents are necessarily dictated by the contents and details of the primary legislation and are likely to vary considerably from one country to another.

This checklist, as for the primary legislation checklist, is not intended as directions for approaching these matters but rather as guidance to best practice. Final choices must reflect local circumstances.

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## TABLE OF CONTENTS

A. FRAMEWORK FOR SECONDARY LEGISLATION (AND OTHER REGULATORY INSTRUMENTS) .....	1
1. Instruments used for secondary regulation .....	1
1.1. Background.....	1
1.2. Secondary legislation.....	1
1.3. Administrative directions .....	3
2. Contents of regulatory instruments .....	4
2.1. Avoiding detailed prescriptions as to behaviour .....	4
2.2. Striking a balance between uniformity and flexibility .....	4
2.3. Code of conduct for civil servants.....	5
3. Process of making regulatory instruments .....	5
3.1. Power to make secondary regulations .....	5
3.2. Central coordination .....	6
3.3. Consultation.....	7
3.4. Quality checks .....	7
3.5. Publication and distribution.....	7
B. CHECKLIST ON SECONDARY LEGISLATION (AND OTHER REGULATORY INSTRUMENTS)	8
1. General checks .....	8
2. Contents of secondary legislation (and other regulatory instruments) .....	9
3. Drafting secondary legislation (and other regulatory instruments) .....	9
4. Process of making secondary legislation ( and other regulatory instruments) .....	10
5. Internal publication and distribution of secondary legislation (and other regulatory instruments).....	11
ANNEX: GLOSSARY OF TERMS USED IN THE CHECKLIST .....	12

## **A. FRAMEWORK FOR SECONDARY LEGISLATION (AND OTHER REGULATORY INSTRUMENTS)**

### **1. Instruments used for secondary regulation**

#### ***1.1. Background***

Regulatory instruments are invariably required to implement primary legislation relating to the civil service. They are typically made by governmental bodies which, under the terms of the Civil Service Act, either administer the civil service legislation, or some part of it, or are given management responsibilities in relation to the civil service. These instruments may be of two general kinds:

- *secondary legislation*, which sets out normative legal rules that are enforceable as law
- *administrative directions*, which are more informal rules relating to the activities or behaviour of civil servants that do not need to be directly enforced by legal processes

Secondary legislation is used extensively for the detailed implementation of Civil Service Acts. But in OECD Member countries many such matters are satisfactorily dealt with by administrative directions. In a number of respects *legislation* is no more needed to regulate the internal running of the civil service than in a large private sector enterprise. Administrative instructions of the kind that managers in any enterprise expect to issue can direct the ways in which particular processes are to be conducted, the procedures that are generally to be followed, and the standards of performance or behaviour to be expected of employees. They are enforceable by the exercise of hierarchical authority within the employment relationship and ultimately through internal disciplinary procedures if serious misconduct is involved.

Although a Civil Service Act may stipulate that specific matters are to be dealt with by secondary legislation, not all aspects of those matters have to be provided for in that way. Even when regulation is required, e.g. to ensure consistency in treatment, some of the necessary rules may not be intended to be directly enforced through legal procedures, or will have to be drafted too imprecisely to be capable of legal enforcement. Informal directions can be used in those kinds of cases to complement the rules that must be made through secondary legislation.

#### ***1.2. Secondary legislation***

However, in certain circumstances, regulation must take the form of secondary *legislation*. The following are cases (with examples) where provision will usually be made by secondary legislation (if not already specified in the Civil Service Act):

- *provisions that confer legally enforceable rights* or elaborate an aspect of a legally enforceable right conferred by the Civil Service Act

e.g. categories of civil servants to whom, and the circumstances and conditions under which, housing allowances are to be payable;

the details of the annual leave entitlement created by the Civil Service Act

- *provisions that impose legally enforceable duties* or elaborate an aspect of a legally enforceable duty imposed by the Civil Service Act

e.g. the circumstances in which a statutory restriction on civil servants entering into economic transactions is to apply

- *provisions prescribing circumstances in which civil servants are excluded or exempted from a right or duty* created by the Civil Service Act

e.g. cases in which civil servants may be exempted from a statutory duty to repay loans made to them for educational purposes

- *provisions creating essential elements of the civil service structure* not provided for in the Civil Service Act

e.g. designation of the categories and numbers of posts within the civil service

- *provisions having financial implications for the central budget*, not provided for in the Civil Service Act

e.g. remuneration and allowances for non-Government persons when performing functions as members of an official body concerned with civil service matters

- *provisions that confer additional functions upon persons* who otherwise would have no authority to perform them

e.g. conferment on a Minister of authority to delegate to a senior Ministry official his power to appoint particular levels of civil servants (in the absence of that authority in the Civil Service Act)

- *procedures setting out the essential steps that guarantee due process* in cases where civil servants' statutory rights may be terminated or adversely affected

e.g. procedures setting out the way in which disciplinary proceedings are to be conducted

- *procedures that are intended to be mandatory and legally enforceable*

e.g. procedures regulating appeals or grievance applications by civil servants to an official authority

- *provisions that stipulate penalties or remedies* where a provision of civil service legislation is not complied with, if not provided for in the Civil Service Act

e.g. power to withhold part of the salary of a civil servant to pay for damage caused to official property.

### 1.3. Administrative directions

The following are types of administrative directions (with examples) that may not require being made in the form of secondary legislation<sup>1</sup>:

- *procedural rules*, determining the steps that civil servants are expected to follow in relation to particular administrative processes

e.g. procedures for claiming allowances or entitlements, or applying for benefits, authorised by the legislation

- *instructions*, indicating by whom or how particular powers are to be exercised, typically to ensure consistency in decision-making and to allow decisions to be taken at a particular level in the administration without recourse to a higher level of direction

e.g. instructions allocating the responsibility for drawing up job descriptions and laying down how these are to be formulated

- *interpretative guidance*, indicating to persons affected how they may expect particular powers or discretions to be used, in particular the matters that will be taken into account and the criteria that will be applied

e.g. guidance as to how performance appraisal will be conducted and the factors that will be taken into consideration in making appraisals

- *prescriptive rules*, indicating the behaviour that persons affected are expected to adopt in order to comply with statutory requirements that are legally enforceable

e.g. rules as to the beginning and ending of working hours and rest breaks in government service

- *recommendations*, providing advisory guidance as to expected actions or behaviour in order to achieve specific objectives

e.g. advice as to conduct in order to ensure safety at work and fire prevention in government offices

- *codes of conduct*, setting guidelines or generalised standards for action or behaviour in certain contexts

e.g. code of conduct of civil servants as to, e.g. external financial activities and employment, or political activities

- *rules of practice*, rules laying down the practices that will be followed in order to make statutory rules operative or effective

e.g. rules as to practices to be followed in order to ensure equal opportunities for promotion of civil servants, thereby giving effect to a general legal prohibition of discrimination.

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<sup>1</sup> This is adapted from the classification used by R Baldwin, *Rules and Government*, Clarendon Press, Oxford (1995), pp.81-85

## **2. Contents of regulatory instruments**

### ***2.1. Avoiding detailed prescriptions as to behaviour***

In many countries past practice has been to use secondary legislation to prescribe in some detail behaviour that must or must not be practised by civil servants in carrying out their functions. Such an approach today is widely seen as not conducive to effective human resource management. Instead, *normative principles* as to expected behaviour and *standards* required in the performance of assigned functions are preferred. These are accompanied by directions as to appropriate procedures, which when followed ensure that those principles and standards are applied to particular activities. Since those procedures must reflect the circumstances of the particular Ministry, those in charge of its direction ("directors") must be given the necessary discretionary powers to develop and institute the processes and practices that contribute to the fulfilment of the principles and standards in that context.

Secondary legislation can be used to set the principles and standards in common terms applicable to all civil servants (although they are often found in the Civil Service Act itself). But the procedures need not; indeed they often cannot be laid down with the precision expected of legal rules. They can usually best be prescribed more informally, by administrative directions. These can be used to indicate to the directors how they are expected to exercise their discretionary powers and, when made by the directors themselves, to give guidance as to the way in which the principles and standards are to be applied by the civil servants in the particular department.

### ***2.2. Striking a balance between uniformity and flexibility***

Secondary legislation is necessary in cases where specific duties or rights are to be applied to civil servants, as terms or conditions of their service, or existing terms or conditions amplified or restricted, as these alter the legal relationship of the civil servant with his or her employer created by the Civil Service Act.

In some countries, it has been the practice to provide a set of largely uniform or standard conditions of service applicable to all civil servants, although particular rules may not apply to some because the circumstances in which the rules operate do not arise in a particular Ministry or department. This secondary legislation was drafted on the premise that, as all civil servants belong to the same profession, standardised requirements are appropriate.

But differences in functions may justify different terms of service. This may lead to a tension between the need to provide for common standards throughout the public service and the need to respond to the particular circumstances of civil servants in individual departments. Attempts to meet both needs in the same set of regulations are likely to result in a lengthy, complex and detailed document, some provisions of which will be of no relevance to some departments.

An alternative approach is to provide, by secondary legislation made by a central authority, a uniform framework of principles to govern conditions of service for all civil servants. At the same time, directors of individual Ministries are authorised, also by secondary legislation, to develop for their civil servants terms and conditions to give effect to these principles, by following central guidelines also provided in the framework instrument. In this way, responsibility for defining the employer-employee relationship is placed at the departmental level, within the boundaries of the common standards set by the legislation.

This enables the terms and conditions for particular civil servants to be contained, not in a common set of detailed legislative rules, but in individual departmental staff handbooks. Those handbooks can also contain administrative guidelines concerning the way in which the conditions of service may be interpreted or applied in particular circumstances, e.g. of controversy or difficulty. (These two types of matters should be clearly differentiated as conditions of service are intended to be legally enforceable; guidelines are unlikely to be treated as giving rise to enforceable legal rights).

### ***2.3. Code of conduct for civil servants***

Legislation prescribing the functions of civil servants is not a very effective vehicle for conveying to civil servants themselves or to the public the basic professional values to be expected of an independent public service when performing those functions. A code of conduct can be instituted explicitly for this purpose. Although legislation can be used, administrative directions may be more suitable. Legislative prescriptions tend to set no more than the *minimum* standards to be achieved (since they prohibit, or prescribe what must be done, or give particularised powers to act, in specified circumstances).

A code of practice of this kind does not lay down fixed requirements, or hard and fast rules, which must be applied when specified circumstances arise. Typically, it contains principles and standards with guidance about the most appropriate ways for achieving them. It will generally leave considerable room for individual solutions adapted to the individual circumstances and, where necessary, for departure from its provisions if other considerations demand.

A code of conduct is typically written in less formal terms than legislative text, uses the language of expectation and exhortation and includes explanations, advice, suggestions and guidance. In this form it is likely to be too imprecise to enforce by direct legal proceedings, although its required standards will be relevant in disciplinary proceedings to establish whether particular behaviour amounts to punishable misconduct.

## **3. Process of making regulatory instruments**

### ***3.1. Power to make secondary regulations***

The power to make secondary legislation may be conferred directly by the Civil Service Act. This may indicate which bodies have this power and what matters may be regulated under it, and it may prescribe specific limits within which the power must be exercised. In some countries, however, Government and Ministries enjoy a general power under the Constitution to make secondary legislation to implement any primary legislation which they are responsible for administering. In some cases, the Ministries' power comes from an act of delegation by the Government. But such powers may be subject to an overriding restriction that it must not be used to provide for rights and obligations of individuals.

The power may also be derived from other primary legislation. For example, the Labour Code, in dealing with some employment issue not provided for by the Civil Service Act, may authorise the making of secondary legislation to supplement the Code's provisions - so that regulations on that matter could be made for particular application to civil servants.

The power to issue administrative directions of various types may be expressly conferred by the Constitution or other constitutional laws upon the Government or upon designated State officials. But on internal matters it generally derives from the management functions conferred upon senior officials in Ministries responsible for its direction, and requires no particular legal authorisation.

It is of prime importance that those preparing secondary legislation of whatever form establish beyond doubt that legal authority exists to make secondary legislation for the matter in hand, and that the correct power and type of instrument is being used. Excess of authority typically opens the exercise of the power to legal challenge and invalidation by a court.

### ***3.2. Central coordination***

Government has an interest in the content and effective implementation of regulatory instruments concerned with the civil service. One way in which this may be secured is to confer the power to make them on a single central authority. This enables common requirements to be made operative throughout the service, a factor of particular importance if they have financial implications or constitute standard conditions of service.

But if the trend towards subsidiarity is followed in this field, the Ministry most closely concerned with particular civil service activities may be empowered to provide the rules appropriate to govern their conduct, since these may need to differ from one context to another. For example, a department which deals directly and frequently with the public may need to be managed, and its civil servants may need to discharge their functions, rather differently from a department principally concerned with policy and planning. Although certain common values would be expected of all those working in both categories, greater emphasis has to be placed in the first on such matters as efficiency, promptness, politeness and honesty in dealing with the public. Instead of relying on a common body of prescriptions about the conduct of all civil servants, the directors in particular Ministries can be authorised to regulate the standards that are appropriate for those in that Ministry and to lay down procedures that are best suited to give effect to those standards.

However, such an approach makes more important the provision of a central authority:

- to put in place centrally-defined standards where those are needed
- to provide guidelines on how those standards are to be given effect at departmental level
- to check that rules for a specific body are fully consistent with both the general standards and broader governmental interests
- to monitor that implementation of the rules is adequately secured and is producing the intended results
- to ensure that the rules are regularly reviewed and updated.

Powers of these kinds can be conferred upon an autonomous body such as a Civil Service Commission or upon a Government body that has responsibility for government administration.

### ***3.3. Consultation***

Instruments giving effect to civil service legislation materially affect the working lives and the careers of members of the service, particularly since they contain detailed requirements that touch much of what they do. Consultation on the content of these instruments with the civil service, in particular through their representatives or trade union, is widely practised in OECD Member countries. Even if not explicitly required in the Civil Service Act, the practice could be routinely adopted. Its value lies in:

- reassuring those affected that their interests have been taken into account
- ensuring that the regulators draw on the experience and practical awareness of those who will have to put the requirements into effect.

The most effective mode of consultation is to provide as full a set of proposals as possible (preferably in the form of the draft instrument) in sufficient time to enable careful and systematic consideration to be given to them and well-formulated comments to be put forward. Consultation on the outline proposals and the policy options underlying them may not be practicable for the first sets of instruments, since there may be a degree of urgency to make them operational. But in relation to amendments or replacements, there is usually more time. In this field, a constant process of evaluation of existing regulatory instruments is called for, as experience indicates desirable modifications.

### ***3.4. Quality checks***

Regulatory instruments should be checked for quality standards, whether they comprise legislation or merely administrative directions. As part of the process of making them, formal checks should be made to ensure that efficient and easy-to-use rules are formulated. Examination from a legal standpoint by an experienced public service lawyer is important, even for administrative directions, to ensure compatibility with statutory requirements and to prevent inconsistency and uncertainty of effect.

### ***3.5. Publication and distribution***

Regulatory instruments relating to the civil service are of concern principally to government, the directors in particular Ministries and members of the service. Although general publication is often unnecessary, especially for administrative directions, internal publication addressed to, and readily accessible by, the civil servants directly affected is important. This is particularly the case for instruments that prescribe terms or conditions of service or regulate the procedures by which civil servants can pursue their entitlements or grievances. OECD Member countries commonly provide a full set of the relevant documents, often with explanatory material, to each civil servant and ensure that each Ministry maintains a complete collection of current regulatory instruments.

## **B. CHECKLIST ON SECONDARY LEGISLATION (AND OTHER REGULATORY INSTRUMENTS)**

The following questions are designed to facilitate the drafting of secondary legislation and other regulatory instruments with sound legal and textual qualities and which, together with the Civil Service Act, will constitute a body of Civil Service legislation that is institutionally complete, provides for all necessary procedures and is legally coherent.

### **1. General checks**

- 1.1. Has a systematic analysis been undertaken of the Civil Service Act to determine:
  - (a) the topics in respect of which regulatory instruments are likely to be needed?
  - (b) the bodies that are to be responsible for making and preparing those instruments?
- 1.2. In relation to a particular topic, does the Civil Service Act specifically require that secondary legislation is to be used to regulate that matter?
- 1.3. Do all the aspects of the topic call for normative rules, or can any be better dealt with informally by administrative directions?
- 1.4. If normative rules are needed, is there clear legal authority to make the secondary legislation and to cover all the matters requiring such rules?
- 1.5. If both types of rules are used, are they dealt with in separate instruments and is the legal status of each type made evident in the instruments themselves?
- 1.6. In particular, is it always made clear when particular rules are intended to be mandatory (i.e. enforceable either through legal processes or by disciplinary action)?
- 1.7. At each stage in the preparation, are regulatory instruments subjected to a legal check to ensure their consistency with the law governing the civil service?
- 1.8. In particular, if both secondary legislation and administrative directions are used to deal with aspects of the same topic, have they both been made subject to a specific legal check to ensure that both are consistent with each other as well as with the Civil Service Act?
- 1.9. Are checks made to ensure that all regulatory instruments:
  - (a) together with the Civil Service Act, provide a coherent body of law and practice with respect to the civil service?

- (b) are easy to use and understand?
- (c) cover all the essential issues on the topics they deal with?
- (d) provide clear and practicable directions?
- (e) are likely to produce the desired results?
- (f) are capable of being complied with?

## **2. Contents of secondary legislation (and other regulatory instruments)**

- 2.1. Have general principles been developed for the making of regulatory instruments designed to achieve a balance between uniform standards for the civil service as a whole and flexible implementation that is responsive to the needs of particular departments?
- 2.2. If the Civil Service Act does not provide the answer, is there an agreed policy as to which matters are to be governed by uniform provisions? Has this been communicated to all bodies with power to make regulatory instruments?
- 2.3. Are directors of Ministries (or departments within Ministries) given power to issue administrative directions as to the way in which statutory requirements and standards are to be achieved by their officials?
- 2.4. Are there common guidelines to these directors as to their exercise of these powers, to ensure consistency of approach?
- 2.5. Is a check carried out to ensure that matters that define terms and conditions of service are dealt with by secondary legislation?
- 2.6. Are those instruments that define terms and conditions of service clearly differentiated from any that advise or instruct as to how these are to be fulfilled?
- 2.7. Is consideration given to whether expected behaviour of civil servants should be regulated by setting normative principles and standards and managerial discretion, supplemented by administrative guidelines, rather than by detailed statements of specific duties?
- 2.8. Has consideration been given to the formulation of a code of conduct that provides guidance and procedures for civil servants so that the standards imposed on them by legislation and the underlying values may be achieved?

## **3. Drafting secondary legislation (and other regulatory instruments)**

- 3.1. Is there power (e.g. under the Civil Service Act) to deal with the topic in hand by secondary legislation?
- 3.2. Are all the proposed contents within the scope of the power to make secondary legislation?

- 3.3. Do all the items need to be dealt with by this secondary legislation? Are any already covered by other legislation? Can any matters be left to be dealt with by administrative directions?
- 3.4. Is the correct type of legislative instrument being prepared?
- 3.5. Does the instrument identify the correct body that has the legislative power to deal with this topic?
- 3.6. Does the instrument follow the form and format conventionally used for secondary legislation of this kind? In particular, does it include the correct authorising formula and signatures?
- 3.7. Does the instrument identify the correct statutory source of the legislative power to make it?
- 3.8. Is the instrument drafted with sufficient precision, using necessary legal terminology, so as to constitute binding rules that are capable of legal enforcement?
- 3.9. Are legal concepts and legal expressions used in the instrument consistent with those in the Civil Service Act and with other secondary instruments implementing that Act?
- 3.10. Have all mandatory legal requirements as to the procedure for making the instrument (e.g. as to bodies that must be consulted) been followed?
- 3.11. Does the instrument make clear the categories of cases or persons to which it applies and when it comes into force?
- 3.12. Has the instrument been given some unique identification (e.g. name and number) that facilitates referencing, archiving and search?
- 3.13. Have all the formal requirements as to publication of the instrument (e.g. in the *Official Journal*) been followed

#### **4. Process of making secondary legislation ( and other regulatory instruments)**

- 4.1. Is there a central body within the civil service system that is responsible for coordinating the development and issue of regulatory instruments that are to implement the Civil Service Act?
- 4.2. Does this body have power to set general standards that are to be followed when regulatory instruments are made within the civil service?
- 4.3. Does this body have power to monitor whether these standards are being followed and whether they are achieving their intended objectives?
- 4.4. Is there any procedure whereby individual instruments must not be formally made unless they are accompanied by a formal notification from this body (e.g. through a certificate of compliance) that the proper standards have been followed?
- 4.5. Are there clear guidelines as to the way in which those responsible for direction of individual Ministries or sections of a Ministry are to exercise their powers to issue regulatory instruments?

4.6. Are there standard procedures requiring consultation (e.g. with civil service representatives or trade unions) with respect to the making of those regulatory instruments that directly affect the interests or working practices of civil servants?

4.7. Do these procedures ensure that the consultation is effective, and in particular do they extend to evaluation of existing regulations as well as to proposals for their updating or amendment?

4.8. Does non-compliance with the consultation procedures constitute grounds for invalidation by a court or grounds for refusing a compliance certificate, so that the instrument may not be formally made?

4.9. Are there standard formal arrangements to ensure that regulatory instruments are evaluated and revised at regular intervals?

## **5. Internal publication and distribution of secondary legislation (and other regulatory instruments)**

5.1. Have all regulatory instruments implementing the Civil Service Act been published for internal civil service use?

5.2. Are copies of all the instruments directly affecting particular civil servants (notably those concerned with terms or conditions of service) available for each of them?

5.3. Are there established procedures for ensuring that civil servants receive all updates and amendments to the regulatory instruments that directly affect them?

5.4. Is there a central, official archive of all such regulatory instruments, and does each Ministry maintain an archive of all those that concern civil servants in that Ministry? In particular, is a computerised database used or under development for these purposes?

5.5. Is a guide or index to these regulatory instruments centrally maintained and distributed?

5.6. Is there a code of practice governing access by civil servants (including their trade union or professional association) to the archive of instruments?

5.7. Has consideration been given to the production (and regular updating), for use by the Ministry directors responsible for the line management of officials, of a management code that brings together all relevant regulatory instruments in a systematic and accessible form?

5.8. Has consideration been given to the production, for use by civil servants, of a staff handbook that restates the contents of relevant regulatory instruments with explanatory matter and in a user friendly form?

## ANNEX: GLOSSARY OF TERMS USED IN THE CHECKLIST

*administrative directions:* non-law-making regulations that cannot be directly enforced by legal processes, which are typically made by an executive body.

*Bill:* a draft of primary legislation in the form that will be considered by Parliament

*Civil Service Act:* the piece of primary legislation, enacted by the Parliament, to regulate the civil service

*Civil Service Commission:* a public, politically-neutral body (usually largely independent of Government direction) set up to have oversight of civil service matters, such as recruitment and personnel management

*Civil Service legislation:* the body of legislation of both primary and secondary legislation regulating the civil service

*law drafter:* a person (whether a Government official or a contracted consultant) engaged in producing the text of new legislation

*law drafting:* the process of converting new policy into legal rules in legislation, in the appropriate legal form and style, prior to the act of law-making

*legislation:* written law made by the Parliament or by the Government or some other body vested with power (by the Constitution or by a primary law) to issue law-making instruments

*primary legislation:* legislation made by the Parliament (i.e. the body vested with the principal law-making function of the State)

*regulations:* any of the range of instruments that may be made by Parliament or the Government or the public administration to influence behaviour (i.e. law-making instruments, such as primary and secondary legislation, and non-law-making instruments, such as circulars, directions, guidance or instructions - "administrative directions")

*secondary legislation:* legislation made by the Government or another executive body that is vested with power to issue law-making instruments (e.g. decrees, directives, regulations, rules, orders)

*secondary regulation:* the mode and process of making secondary legislation and administrative directions.