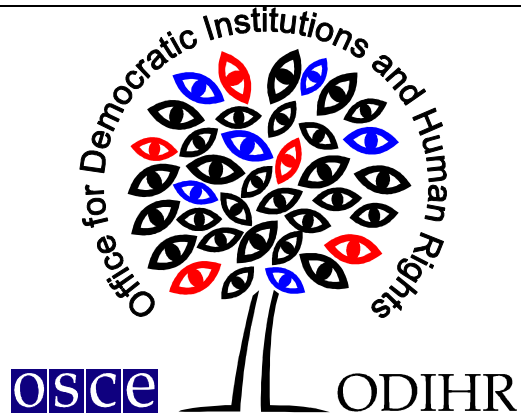


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LAW DRAFTING AND REGULATORY MANAGEMENT IN GEORGIA:

AN ASSESSMENT

November 2005

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1. INTRODUCTION

1.1 Background Information

In August 2004, the OSCE Mission to Georgia was approached by the Ministry of Justice of Georgia, (Deputy Minister Besik Loladze), with a request to conduct two training workshops on law drafting techniques for the staff of the Parliamentary Committee on Legal Affairs, as well as for the Legal Drafting and Expertise Department of the Ministry of Justice. The request was further supported by the Director of the Training Centre within the Ministry of Justice, Mr Sul Khan Gamkrelidze. The workshops were expected to take place in the course of 2005.

In February 2005, the OSCE Mission to Georgia accepted the ODIHR proposal to have the training scheme based on a prior assessment of the legislative process.¹ If a training scheme was to be established it should be tailored to the specific environment in which the beneficiaries are working – that is, the legislative system in place as well as the actual lawmaking practices.

The revised project outline was discussed with the Minister of Justice and the Chairperson of the Parliamentary Committee on Legal Affairs. It was eventually approved in April 2005.

This Assessment is based on the information collected through interviews with senior Government and Parliament officials as well as with other relevant interlocutors during two visits by the ODIHR Assessment Team to Georgia, as well as on the study of the existing legislative framework. The visits by the Assessment Team took place from 23-24 May and from 4-8 July 2005. During the July visit, the ODIHR staff members were accompanied by an international expert.²

1.2 The Assessment Methodology

The purpose of an assessment is to collect, synthesize and analyze information with sufficient objectivity and detail to support credible recommendations for reform in the area in question. Information for the present assessment was collected through semi-structured field interviews with pre-identified interlocutors, as well as through compiling relevant domestic legislation and

¹ For more information concerning the basis upon which the OSCE ODIHR prepares and conducts such assessments, please refer to Appendix 4 to this report.

² Alan Page, Professor of Public Law at the University of Dundee, Honorary Fellow of the Society for Advanced Legal Studies.

regulations.³ The field interviews were preceded by the sending out of questionnaires to the intended interlocutors in order to provide a better overview of the purpose and scope of the visit and to allow time for preparation.⁴ The interviews aimed at gathering information on the procedures and practices in place, as well as on the international assistance efforts in this and related areas.⁵

The information gathered through field interviews and the collection of domestic laws and regulations was then analyzed in the light of generally accepted international standards in relation to legislation. There are two types of standard in particular which are relevant to the current assessment: ‘system standards’, i.e. the standards expected of law making systems, and ‘standards for regulatory instruments’, i.e. the standards expected of individual legislative instruments themselves. The former encompass:

- Coherence, consistency and balance between competing policies;
- Stability and predictability of regulatory requirements;
- Ease of management and oversight, and responsiveness to political direction;
- Transparency and openness to the political level and to the public;
- Consistency, fairness and due process in implementation;
- Adaptation to changing circumstances.

The latter encompass:

- user standards, e.g. clarity, simplicity and accessibility for private citizens;
- design standards, e.g. flexibility and consistency with other rules and international standards;
- legal standards, e.g. structure, orderliness, clear drafting and terminology, and the existence of clear legal authority for action;
- effectiveness standards, e.g. relevance to clearly defined problems and real-world conditions;
- economic and analytical standards, e.g. benefit-cost and cost-effectiveness; measurement of impacts on business, competitiveness and trade;
- implementation standards, e.g. practicability, feasibility, enforceability, public acceptance and availability of necessary resources.

³ The full list of interlocutors is included in Appendix 1 to this Report.

⁴ The questionnaires are included in Appendix 2 to this Report.

⁵ An overview of international assistance is included in Appendix 3 to this Report.

2. EXECUTIVE SUMMARY

This Assessment is a comprehensive study of both the formal procedures and the actual practices in Georgia whereby legislation is prepared, drafted, adopted, published, communicated and evaluated. It identifies the existing concerns and risks as well as ‘target outcomes’ to be achieved for the lawmaking system to function efficiently and to yield legislation of an appropriate quality.

As a result of the Assessment, the following concerns and risks have been identified, which the Georgian authorities may wish to consider addressing:

- Legislative overload arising from the pressure to complete a series of reforms in the shortest possible time, which carries with it the risk of lower quality legislation.
- Little priority given to the effective planning and management of the preparation of legislation, resulting in the risk of the inefficient use of resources, including the time- and effort-consuming major restructuring of legislative instruments during the drafting process.
- Need for a better understanding of the importance of good policymaking to good lawmaking, which suggests a lack of familiarity with modern policymaking techniques. In addition to insufficient consideration being given to the policy that the legislation is to express, there is an overwhelming emphasis on legislation as the principal or even only means of achieving policy goals.
- Lack of specialist drafting resources as well as of professional development opportunities for existing staff.
- insufficient guidance on legislative drafting apart from the very basic minimum standards provided for by the relevant laws.
- insufficient consultation with interests outside government. When it does occur, such consultation occurs almost exclusively after the draft has been introduced in the Parliament.
- A weak sense of law-making as a collective activity binding on the whole government combined with a lack of effective co-ordination between the government and the Parliament.
- An incomplete set of verification procedures. Existing mandatory checks are focused on assessing the conformity with higher ranking norms such as the Constitution; they do not

extend to the operational features of the legislation (such as checking the inclusion of provisions needed to make the scheme operative and enforceable, or choice of modes of expressions that would reduce the likelihood of disputes) or other aspects of legal compliance.

- Limited access to draft legislation for those outside government;
- The need for a system for evaluating the operation and effectiveness of existing laws.

In terms of the ways in which these risks might be addressed, the Assessment's approach has been dictated by two considerations. The first is that any reform should be conceived by the Georgian authorities, rather than being handed down by the international community, and embarked upon only after a full process of consultation; only in this way can there be any confidence that the reforms will fit the specificities of the local legislative and political cultures. The Assessment does not therefore make specific recommendations for reform, but rather identifies areas where progress is needed. The second is that the question of reform needs to be tackled as a comprehensive whole. Many of the issues listed above are closely interrelated; progress in one area may thus be conditional upon progress in another; they need therefore to be tackled as a comprehensive whole.

At the same time, the individual measures that may be pursued as part of any programme of reforms need to be considered not only on their own merits, but also in terms of their relationship with the other elements of the programme. There are indeed several approaches possible to improving legislative procedures and practices, but each approach has its own internal logic and pattern, which needs be followed. Lacunae and inconsistencies often occur where reforms are borrowed from different systems without sufficient thought being given to the manner in which these reforms will work together. What is needed is a comprehensive, balanced and properly integrated programme of reform.

With these considerations in mind, and given the amplitude of the risks identified, the OSCE ODIHR recommends **that a comprehensive and time-phased process of reform be considered.**

As a starting point, the OSCE ODIHR believes that it is essential to develop an awareness of these risks among relevant elected figures and high-ranking civil servants from ministries and the parliamentary administration. Consultations in the form of a high-level roundtable could aim not only at developing such awareness, but also provide a forum for agreeing on a concept of reform, a timeframe for its implementation and on all the relevant modalities for the subsequent stages. Following this 'reflective' stage, the focus would shift to the working level. It is proposed that a

series of workshops be convened, each looking at a specific set of issues identified by this report. The preparatory work required for these workshops would be carried out by a working group comprised of representatives of key government agencies and the legislature, and supported by an international expert.

Among the specific issues the workshops might address are:

- Policy analysis and impact assessment, with particular emphasis on alternatives to legislation as a means of relieving the problem of legislative overload;
- Legislative programming and timetabling;
- Drafting standards;
- Stakeholder consultation;
- Intra-governmental coordination and coordination with the legislature;
- Verifications and scrutiny throughout the legislative process;
- Evaluation of the operation and effectiveness of existing legislation.

There would then be a follow-up stage in which the emphasis would shift to explaining the revised framework and procedures, for example by way of preparation of a nationally drafted, expert-reviewed guide to legislative procedures, and to meeting specific training needs within the revised framework.

3. OVERVIEW OF LAWMAKING PROCEDURES AND PRACTICES

3.1 Procedural and Legal Framework

3.1.1 Regulatory Framework for Lawmaking

The regulatory framework governing the making of laws in Georgia is constituted by:

- The Constitution of Georgia, adopted on 24 August 1995. The Constitution is ‘*the supreme law of the state*’ to which all other legal acts must correspond.⁶ Under the Constitution legislative power belongs to the Parliament as the ‘*supreme representative body of the country.*’⁷ The Parliament has the power to adopt constitutional laws, organic laws, laws and

⁶ Constitution of Georgia, Article 6.1.

⁷ *Id.*, Article 48.

resolutions.⁸ The Parliament is also responsible for ratifying international treaties and agreements, including those which require changes to domestic legislation in order to give effect to the obligations assumed.⁹

- The Law on Normative Acts, published in the Gazette of the Parliament of Georgia on November 19, 1996, which defines the types and hierarchy of normative acts, the ranking of international agreements and treaties in the system of normative acts, and the general rules for drafting, adoption, publication, operation, registration and systematization of normative acts.
- The Parliamentary Rules on Procedure.
- Presidential Decree No 326 on the Drafting, Adoption, Publication and Operation of Normative Acts of the Executive Power, which governs the procedures for drafting, adoption, publication and operation of decrees, edicts and orders of the President, and the orders of the Prime Minister, the ministers of Georgia, and the heads of other executive agencies. The Decree also sets out the procedures governing legislative drafting within the ‘executive power’.

3.1.2 Regulatory Instruments

The Law on Normative Acts lists the ‘normative acts’ of Georgia.¹⁰ The ‘legislation of Georgia’ is made up of ‘legislative’ (i.e. laws) and ‘sub-legislative’ (i.e. regulations) normative acts.

‘Legislative’ normative acts comprise:

- the Constitution,
- constitutional laws,
- organic laws,
- laws, and
- decrees of the President, which may be issued only in a state of emergency.¹¹

‘Sub-legislative’ normative acts include:

- edicts of the President, and
- resolutions of the Parliament.¹²

⁸ Law on Normative Acts, Article 9.1.

⁹ Constitution of Georgia, Article 65.

¹⁰ Law on Normative Acts, Article 4.

¹¹ *Id.*, Articles 5.1, 13.

International treaties and agreements are treated as normative acts but not as legislative or sub-legislative normative acts.

3.1.3 The Hierarchy of Normative Acts

There is a strict hierarchy of normative acts:

- the Constitution and constitutional laws,
- international treaties and agreements,¹³
- organic laws,
- laws and decrees of the President, which have the same force as laws,
- edicts of the President, and
- resolutions of the Parliament.¹⁴

Normative acts must conform to the Constitution and higher ranking normative acts.¹⁵ Where there is a conflict between normative acts, the higher ranking act takes precedence; where there is a conflict between acts of the same rank, the most recent act takes precedence.¹⁶

3.2 The Legislative Initiative

Under Article 67 of the Constitution the right of legislative initiative belongs to:

- the President of the Republic, but ‘only in exclusive cases’. The cases that are reserved to presidential initiative are not fully defined;
- the Government, but importantly not individual ministries;
- a member of the Parliament, a parliamentary faction, or a parliamentary committee; and
- the autonomous Republics of Abkhazia and Ajara.

There is also a popular right of initiative, which may be exercised by a minimum of 30,000 voters.

Importantly, the Government also has the exclusive initiative in relation to finance. Laws with

¹² *Id.*, Article 5.2.

¹³ Under the Constitution, the ‘legislation of Georgia’, which term is defined by the Law on the Normative Acts, must correspond to universally recognized principles and rules of international law. Unless they are contrary to the Constitution, treaties or agreements entered into by Georgia take precedence over domestic normative acts (Article 6.2).

¹⁴ Law on Normative Acts, Article 19.1.

¹⁵ *Id.*, Article 24.

¹⁶ *Id.*, Article 25.

financial consequences cannot therefore be adopted without its consent.¹⁷

As regards the exercise of the legislative initiative in practice, most laws appear to be initiated by the ‘executive branch’, meaning either the President or the Government. The claim made by one of our interlocutors and accepted by others was that approximately 80% of laws are initiated by the executive branch. Laws initiated by members of Parliament, parliamentary committees and other non-executive actors with the right of legislative initiative, however, seem to be by no means uncommon. The Parliament’s statistics for laws adopted in 2004 show that of a total of 253 laws adopted, 113 were initiated by the Government and 46 by the President, leaving 94 which were initiated by other actors. The comparable figures for January-July 2005 were 248 laws of which 87 were initiated by the Government and 50 by the President, leaving 111 which were initiated by other actors. Reliable statistics are extremely difficult to obtain, however, making it impossible to be certain about the exercise of the legislative initiative in practice. In what follows we assume, consistent with practice elsewhere and what we were told by our interlocutors, that the legislative initiative in practice is mainly exercised by the executive branch.

3.3 Legislative Planning

The preparation of individual laws by the executive branch takes place within the framework of an annual ‘legislative plan’. The requirement of a plan was first introduced after the Cabinet of Ministers was reconstituted as an executive rather than advisory body by constitutional amendment in 2004. The plan was originally drawn up by the Presidential administration for the approval of the President,¹⁸ but we understand that it is now drawn up by the Cabinet Office in ‘consultation and negotiation’ with the Presidential administration, and formally approved by the Government rather than the President. The plan is based on individual bids from ministries, which must set out the case for the law; the subject responsible for its preparation; information on its current state of preparation, and, if it has already been prepared, the extent to which it has been the subject of consultation with other ministries; together with the date at which it is expected to be ready. The Presidential administration was originally responsible for overseeing implementation of the plan, but this function has also been taken over by the Cabinet Office, which is thus responsible for overseeing the implementation as well as the drawing up of the plan.

Presidential Decree No 326 entrusts responsibility for coordinating and ensuring the preparation of

¹⁷ Constitution of Georgia, Article 93.8.

¹⁸ Presidential Decree No 326, Article 19.2.1.

draft laws to the ‘State Chancellery’ and the Ministry of Justice.¹⁹ As with legislative planning the role of the Presidential administration has now fallen to the Cabinet Office, which oversees the process, including deciding which line ministries should be consulted. The relationship between the Cabinet Office and the Ministry of Justice is not defined in the legislation.

3.4 The Preparation of Laws

This section looks at the preparation of laws within executive branch in greater detail, bearing in mind the importance of legislation to the business of government and the central position which the executive branch tends to play as a result in the legislative process overall. At the outset it should be noted that the single most important factor affecting the preparation of laws at all levels within the executive branch is the ‘pressure to deliver’, with reportedly as many as 100 laws being adopted in the course of a single week.

3.4.1 Policy Formation

A feature of the preparation of legislation in Georgia as in many other countries is that a clear distinction is not drawn between working out the policy the legislation is to express and converting that policy into law. This has a number of possible consequences. One is that insufficient emphasis may be placed on getting the policy right.²⁰ Another is a tendency to treat legislation as the principal or only means of achieving policy goals. The Law on Normative Acts stipulates that a draft normative act must be accompanied by an ‘explanatory note’ setting out among other things the reasons for the adoption of the act.²¹ This is the only explicit recognition of the need for a clearly stated ‘policy goal’ as a prerequisite for initiating a law. However, there are no standards governing the preparation of explanatory notes, so that there is no need, for example, to explain why legislation should be preferred to other means of achieving policy goals, and their preparation is treated as an essentially formal exercise.

Draft laws are in practice prepared either by the relevant ministry or by a commission or working group established for this purpose,²² usually on the basis of a ‘concept paper’ which sketches out in general terms what the law should achieve. The emphasis on legislation as the principal means of achieving policy goals was confirmed by one of our interlocutors who cited the specific example of a

¹⁹ *Id.*, Article 19.3.

²⁰ For a useful overview of the questions that should always be asked at the policy formation stage, see the Recommendation of the OECD Council adopted 9 March 1995 (reprinted at Appendix 5).

²¹ Law on Normative Acts, Article 30. The explanatory note must also specify the main characteristics of the draft act, the estimated financial and economic consequences of its adoption, and the names of its promoters.

²² Presidential Decree No 326, Article 19.5-19.6.

legislative proposal from the Department for Regional Governance for assistance to flood victims when all that it appears was needed was an administrative decision by the relevant local authority. Relatively few of ODIHR's interviewees were aware of the importance of considering alternatives to legislation; for the vast majority legislation was the natural response to any problem.

3.4.2 Drafting

There is no centralised drafting service in Georgia. Instead, the drafting of instruments i.e. the conversion of policy into law, is undertaken by the legal staff of the relevant ministry, who may not always possess the necessary skills - only the Ministry of Justice has a specialised lawmaking /legal drafting section – or be fully informed about the background to and objectives of the law. Although applicants for positions that involve legislative drafting (in the Ministry of Justice and the line ministries alike) must have a university degree in law, previous drafting experience or relevant training is normally not required or listed as an asset. The difficulties faced by those involved in the drafting of legislation are compounded by the absence of any guidance on drafting techniques. Although the Law on Normative Acts lays down rules governing the form, terminology and style of acts,²³ there is no guidance available on legislative drafting. Nor is there any training in drafting techniques. Several of our interlocutors pointed out that no law school in Georgia includes courses on legislative drafting in its curricula or offers any relevant extension courses to those wishing to take them. The Training Centre at the Ministry of Justice is of marginal help in this particular regard, because of its lack of funding and inadequate staffing (in terms both of numbers and qualifications of trainers). The result is that the quality of legislation varies, sometimes quite markedly, from ministry to ministry.

One solution to the problem of variable quality in legislation might be to centralise responsibility for drafting, but the choice between centralised and decentralised drafting systems is a difficult one. Although a centralized drafting system has advantages in terms of ensuring consistency in the application of standards and increased efficiency in the use of limited drafting resources, it also has disadvantages in terms of the limited involvement of drafters at the stage of policy formation and the risk that drafters become a closed cadre of professionals perpetuating outmoded practices. The choice of a particular model should therefore be only made after a thorough weighing of the advantages and disadvantages.

²³ Law on Normative Acts, Articles 31-32 and 39-40.

3.4.3 Consultation

Once a draft has been prepared it must be sent to interested ministries for comment. Among the ministries routinely consulted is the Ministry of Finance, which is responsible for checking the financial implications of draft laws. The Ministry, however, does not have a right of absolute veto over draft laws and political considerations may prevail. As we have seen, a draft law must be accompanied by an explanatory note setting out the estimated financial and economic consequences of its the adoption,²⁴ but the regular practice appears to be to indicate that laws ‘do not have any budgetary implications’ in order to speed up their adoption.

A draft may also be sent to ‘non-state institutions’ whose interests are affected.²⁵ Consultation with affected interests and the public at large, however, is still very limited. The general tendency is to present only less controversial legislation for public debate. There is some, very limited positive dynamic in terms of expanding the scope of external consultation. The Assessment Team was given the example of an initiative by the NGO “Civil Society Institute” which has entered into an agreement with the Parliament under which it provides independent review of selected draft laws within its area of expertise. There is, however, no follow-up monitoring of the actual extent to which the NGO expert opinion is taken into consideration. Moreover, external consultation occurs almost exclusively after a draft is introduced in the Parliament. It is extremely rare for government-initiated drafts to be discussed with stakeholders while still with the drafting agency. It has also been mentioned that public opinion is never requested when deciding on policy options, which may, however, be attributed as much to the failure to treat policymaking as a distinct exercise as to any lack of interest in involving stakeholders early on in the process. Some of our interlocutors were nevertheless opposed to the idea of early public consultation as ‘detrimental to thoughtful elaboration of the draft’.

3.4.4 Finalising the Draft

The draft together with the comments of the ministries and any ‘non-state institutions’ that have been consulted are then submitted to the Ministry of Justice, which prepares a report on the conformity of the draft with the legislative acts of Georgia, after which the ministry or working group responsible prepares another version of the draft law in consultation with the interested ministries.²⁶ Under the terms of Presidential Decree No 326, the draft law is then subject to further consultation within the State Chancellery (i.e. the Presidential administration), and subsequently reviewed by the

²⁴ *Id.*, Article 30.

²⁵ Presidential Decree No 326, Article 20.1.

²⁶ *Id.*, Article 20.2-20.4.

Government, after which a final version is prepared and submitted to the President, who may either submit it to the Parliament or return it to the drafting agency with comments.²⁷ However, the Government itself can now submit draft laws to the Parliament without having to go through the President. It is noteworthy that drafts are not subject to the collective approval of the Government before their submission to the Parliament.

3.5 Law Making

3.5.1 The Parliamentary Stages

Once a draft law has been prepared it is submitted to the Parliament. The Law on Normative Acts provides that a draft law must be accompanied by: an explanatory note setting out the reasons for the adoption of the act, its main features and the estimated financial and economic consequences of its adoption; any amendments to other normative acts to be made as a result of its adoption; and the conclusion of the ‘appropriate state body’, i.e. the Ministry of Justice, on its conformity with the Constitution and higher ranking normative acts.²⁸ Where a draft legislative act has been reviewed by experts their conclusions must also be included.²⁹

Before a draft is considered it undergoes a separate process of verification within the Parliament. The Legal Department examines and reports among other things on the conformity of the draft with the legislation of Georgia.³⁰ Provision is also made for the views of the government to be obtained on draft laws initiated by bodies other than the President or the government itself.³¹

The Parliamentary Bureau is responsible for the handling of parliamentary business, including preparing the agenda for the Parliament’s plenary sessions. Within seven days of the receipt of a draft law the Organizational Department of Parliamentary Staff must submit it to the Parliamentary Bureau for a decision on starting the procedure for its consideration.³²

A draft law goes through three stages or ‘hearings’. The first hearing is devoted to consideration of the basic principles of the draft law and its main provisions, the second hearing to the detailed consideration of its provisions, and the third hearing to the consideration of the draft as amended. At the end of each hearing the Parliament votes to adopt or reject the draft law. Under the Constitution, draft laws require for their adoption the support of a majority of the members of the Parliament,

²⁷ *Id.*, Article 20.5-10,

²⁸ Article 30; see also Rules on Procedure, Article 147.3.

²⁹ Law on Normative Acts, Article 30.

³⁰ Rules on Procedure, Article 149.

³¹ Constitution of Georgia, Article 67.3; Rules on Procedure, Article 148.4.i, 148.8.

³² Parliamentary Rules on Procedure, Article 144; see also Article 148.

which majority must be not less than one third of the total number of members.³³

The hearings take place in plenary but the preparatory work for each hearing is undertaken in committee.³⁴ The Parliamentary Bureau decides which committee(s) should consider draft laws - opinions by some of the committees may be obligatory - and where more than one committee is involved which should act as the lead committee. An unfavourable conclusion by a committee does not prevent the Parliament from considering a draft.³⁵

In accordance with the Parliamentary Rules on Procedure, the lead committee proceeds with the discussion of the draft within three weeks of the date of its receipt.³⁶ Alternative drafts may be submitted for consideration of the lead committee at the first stage – at least three days in advance of the session at which the original draft is to be considered.

Parliamentary committees other than the lead committee may also convene hearings to discuss a draft law. As mentioned, a negative opinion by a committee – including the lead committee – does not bar consideration of the draft at the plenary session.³⁷ If a committee does not present its comments by the specified deadline (two weeks), the draft is presumed to be approved by default.³⁸

After the discussion by individual committees, the draft, accompanied by the conclusions of the committees, is transferred back to the Parliamentary Bureau for inclusion on the agenda for the Parliament's next plenary session for its first reading. A similar procedure is followed with regard to the subsequent readings, with the only noteworthy point being that proposed amendments for the third reading must be of primarily editorial nature and are normally proposed after agreement has been reached on the substance of the draft in the course of the first two readings.

Under the Parliament's original procedures the second reading involved a vote on the each and every provision of a draft law. Following changes to the rules on procedure in 2003, however, votes on individual provisions no longer takes place automatically but only on request. The purpose of this change was to expedite the process, but it has reportedly resulted in less oversight over the legislative process by MPs. Some of our interlocutors also pointed out that it carries with it an increased risk of draft laws being amended in ways which are inconsistent with their principles as approved at the first reading.

³³ Constitution of Georgia, Article 66.1.

³⁴ Rules on Procedure, Article 144.

³⁵ Law on Normative Acts, Article 34.1.

³⁶ Rules on Procedure, Article 144.

³⁷ Law on Normative Acts, Article 34.1.

³⁸ Rules on Procedure, Article 152.

The Parliamentary Rules on Procedure lay down the periods within which consideration by committees must be completed. There is an accelerated procedure whereby consideration of a draft law may take place in the course of a single week.³⁹ The Parliament may also be asked to give priority to the discussion of draft laws submitted by the President.⁴⁰ We were informed that it is not uncommon for MPs to be summoned to extraordinary plenary sessions to discuss draft laws at extremely short notice, for instance on the evening before the planned adoption of a law, which clearly leaves no time for the MPs to prepare for effective scrutiny.

The practice of holding extraordinary plenary sessions at short notice highlights a further difficulty that was mentioned to us, which is that the parliamentary agenda is not widely publicised; this makes it difficult for interest groups and other interested parties to follow the progress of draft bills, so that they may, for example, be prevented from attending relevant sessions despite the absence of any formal bar on their attendance.

Coordination between the Government and the Parliament exists but on a rather formal level. A Deputy Minister within each Ministry is responsible for liaison with the Parliament. Working-level consultation in the form for example of the participation of law drafters in parliamentary sessions almost never occurs in practice.

3.5.2 The Presidential ‘Veto’

Once a finalized draft is adopted by the Parliament at the third reading, it is submitted to the President for ‘signature and promulgation’⁴¹ The Constitution accords the President a partial right of veto. Rather than sign a law, the President may return it to the Parliament with amendments, which the Parliament may either adopt, by the same majority as is required for the adoption of the draft itself, or reject, in which case the Parliament may only adopt the law by a special majority.⁴² A special majority is thus required to adopt a law in the face of Presidential opposition. The President’s position is further strengthened by the fact that the Parliament cannot pick and choose among the amendments proposed by the President.⁴³ The Parliament may thus find itself faced with a choice between approving the law as amended by the President, or rejecting the law altogether, which it may be reluctant to do.

3.6 Verification of Draft Laws

³⁹ *Id.*, Article 160.

⁴⁰ Constitution of Georgia, Article 67.2.

⁴¹ Constitution of Georgia, Article 68.2.

⁴² *Id.*, Articles 68.3, 68.4; see also Article 38 of the Law on Normative Acts.

⁴³ Law on Normative Acts, Article 34.4.

As mentioned above under 3.4.4, initial checks on the conformity of the draft with domestic legislation are undertaken by the Ministry of Justice. Once a draft is submitted to the Parliament a further check is undertaken by the Legal Department of the Parliament. A negative opinion by the Legal Department, however, does not prevent consideration of the draft by the Parliament.

Overall, it is noteworthy that the existing mandatory checks are focused on assessing the conformity with higher ranking norms; they do not extend to the operational features of the legislation (such as checking the inclusion of provisions needed to make the scheme operative and enforceable, or choice of modes of expressions that would reduce the likelihood of disputes) or other aspects of legal compliance.

As regards compliance with international law, the lack of official Georgian translations of international instruments was mentioned to the Assessment Team as a particular problem.

3.7 Publication and Dissemination of Legislation

The applicability of normative acts normally depends on official publication, which takes place, in the case of acts adopted by the Parliament, when the act is published in the Gazette of the Parliament, or, in the case of other acts, in the Legislative Herald of Georgia.⁴⁴ A legislative act takes effect on the fifteenth day after its official publication unless the act itself stipulates otherwise; a legislative act that defines or aggravates legal liability cannot take effect earlier than the fifteenth day after its publication.⁴⁵ Any legislative act, other than an act that defines or aggravates legal liability, may have retroactive effect, but only where the act expressly so provides.⁴⁶

There is a system of registration of normative acts,⁴⁷ whereby all adopted laws and regulations are entered into the State Register maintained by the Ministry of Justice. According to the Law on Normative Acts, the law or regulation must be submitted for registration ‘within ten days from the day on which the authorized official signed the act.’⁴⁸ The Ministry of Justice registers the law within two days of its submission.⁴⁹

Note that the Law on Normative Acts includes a provision stipulating one final, post-adoption mandatory check of the law by the Ministry of Justice, and allowing the Ministry to refuse registration where it finds that the law in question contradicts existing legislation other than ‘the

⁴⁴ *Id.*, Article 38.5.

⁴⁵ *Id.*, Articles 42.1, 45.1.

⁴⁶ *Id.*, Article 47.

⁴⁷ *Id.*, Chapter IV.

⁴⁸ *Id.*, Article 54.1.

⁴⁹ *Id.*, Article 54.2.

normative acts of local self-government bodies (officials)'.⁵⁰ The Law, however, is silent on the implications of a negative conclusion by the Ministry of Justice for the act in question, including whether or not such conclusion is a bar to implementation of law.

In addition to the official registry of laws, there exists a nationwide electronic legislative database (CODEX), which includes all legislation and regulations with the exception of acts issued by local self-government bodies.

3.8 Evaluation of Existing Laws

The interviewees consistently referred to 'difficulties encountered in practice' as the only criterion used to evaluate the effectiveness of existing legislation. However, none of them was able to identify a specific procedure whereby these difficulties are identified or a specific agency/focal point where these difficulties are reported. The interviewees, however, made it clear that, as a rule, amendments to existing legislation are drafted and initiated in response to such difficulties. At the same time, there exists no requirement of regular amendment or updating of the existing legislation.

4. ANALYSIS OF THE CURRENT SITUATION

The analysis of the data collected through this assessment suggests there are a number of concerns and risks that need to be addressed for the lawmaking system to function efficiently and smoothly and yield legislation of an appropriate quality. These concerns and risks are discussed below in detail.

In terms of the preparation of individual proposals, insufficient consideration appears to be given to the policy the legislation is to express. There appears to be **insufficient understanding of the importance of good policymaking** to good lawmaking, which in turn suggests a lack of familiarity with modern policymaking techniques. Policy analysis and impact assessment do not feature among the techniques employed as a preliminary to the decision to legislate. Although a draft law must be accompanied by a written justification in the form of an explanatory note indicating, among other things, the budgetary implications of the proposed law, the general consensus among ODIHR's interlocutors was that explanatory notes are of highly formalistic character and rarely, if ever, offer a detailed assessment of the anticipated impact.

There are serious problems of **legislative overload**, arising from the pressure to complete a series of reforms in the shortest possible time. This results in insufficient time being allowed for the thorough

⁵⁰ *Id.*, Article 54.3.

preparation and drafting of legislative proposals.⁵¹ There is a high likelihood that the speed with which legislation is prepared is at the expense of the elaboration of the policy to which the legislation is to give effect, consultation with affected interests and the public at large, and effective parliamentary scrutiny. The need above all is for a legislative culture to take root in which it is acknowledged and accepted that sound and worthwhile legislation takes time to prepare, to draft and to pass.

The **system for legislative planning** has been in existence for only a relatively short time, and is in need of further improvement. It is one thing to have an annual legislative programme; it is quite another to undertake the planning of that programme so that the appropriate amount of time is allocated to each legislative project. In general, little, if any, priority is given to effective legislative planning before the preparation of legislative instruments is begun.

A particular concern is that short-term political considerations often prevail when deciding on a particular law, which in its turn leaves no space for comprehensive planning or thoughtful policy formation. Ultimately, lack of careful planning creates the risk of inefficiency, including the time- and effort-consuming major restructuring changes – up to a complete overhaul of the draft (also possibly due to changes in political considerations) – during the drafting process.

Although the ground rules for the planning and management of legislative projects are included in the existing legislative framework, these are primarily minimum standards rather than useful guidelines, and mainly concern the later stages of the legislative process. Even so these minimum standards are not always followed; the higher the priority attached to a draft law the greater the risk of the standards being disregarded.

Moreover, it is noteworthy that while the lawmaking activity of subjects other than the executive branch (i.e. individual MPs, parliamentary factions, parliamentary committees, and the autonomous republics) is in principle subject to the same disciplines as apply to the preparation of laws by the executive bodies, the rather general character of the Law on Normative Acts leaves open the possibility of significant variations in the interpretation and implementation of the existing procedures in practice.

The absence of effective policymaking is combined with a **lack of specialist drafting resources** as well as an almost complete lack of professional development opportunities for drafters. The Training

⁵¹ This is reflected for instance in the frequency of amendments to the Criminal Procedure Code, which has been amended more than 1000 times since its adoption in 1998. This pattern seems not to be uncommon in Georgia.

Centre at the Ministry of Justice is of only marginal help due to persistent lack of funding as well as inadequate staffing (both in terms of numbers and qualifications). There needs to be an understanding that drafting is a skill that is acquired through experience and not simply by participating in a short course. Until that expertise exists across Government and the Parliament, there is a case for establishing a single cadre of government drafters along with a single cadre of parliamentary drafters that would bring together those who have proved their competence by their legislative work.

There is also little in the way of **official instructions or guidance on drafting**. There is, for example, no manual or style guide for law drafters, demonstrating how to set about the task or ways of dealing with the kinds of difficulties that may arise.⁵² The result is a system in which the quality of legislation varies, sometimes quite markedly, from ministry to ministry and from the government to the Parliament.

With regard to the criteria governing the quality of legislative texts, the Law on Normative Acts lays down only minimum standards for the form and structure of draft laws. There is no guidance as to the terminology and style in which laws are to be drafted. The unavailability of a drafting manual further exacerbates the problem, which cannot be adequately addressed through legislative provisions alone. Little, if any, effort is invested in making legislation clear, unambiguous and its language accessible for the lay person.

There is an **insufficient level of consultation with interests outside government**. Despite certain recent positive dynamic, consultation within affected interests and the public at large is still the exception rather than the rule. It is also the general tendency to present for public debate only the less controversial legislation. Moreover, external consultation occurs almost exclusively after the draft is introduced in the Parliament. It is extremely rare for (government-initiated) drafts to be discussed with stakeholders while still with the drafting agency. Public opinion is never requested when deciding on a policy option, which may be attributed as much to the failure to treat policymaking as a distinct exercise as to any lack of interest in involving stakeholders early on in the process.

Consultation within government is an established feature of the preparation of legislative proposals, but how well the system of interagency consultation works is unclear. There is a weak sense of law-making as a collective activity binding on the whole government.

⁵² Several initiatives supported from outside the country have taken place in recent years (for more details, see Appendix 3). There is limited value however in developing for example a set of legislative drafting principles unless these are accepted and complied with by all bodies engaged in law drafting.

As far as the **legislature-executive coordination** is concerned, it exists on a rather formal level. At the working level, consultation in the form for example of the participation of actual bill drafters in parliamentary sessions almost never occurs, according to ODIHR's interlocutors.

There is only a **partial** — rather than complete – **set of verification procedures**. Those that do exist (such as mandatory checks by the Ministry of Justice or by the Legal Department of the Parliament) are focused on assessing conformity with higher ranking norms; they do not extend to the operational features of the legislation (such as inclusion of all provisions necessary to make the scheme operative and enforceable, or choice of terminology that would reduce the likelihood of disputes) or other aspects of legal compliance.

While there are general problems with access to legislation, it should be noted that limited access to primary legislation is attributable not to formal restrictions but to socio-economic considerations. It is mandatory for all Georgian laws to be published as a condition of their coming into force, and there is no evidence that this rule has ever been breached. Moreover, there is a nationwide subscription-based database of legislation (CODEX). However, due to the largely commercial nature of the database (there are no subscription fee waivers for any professional groups nor for the indigent population) as well as to the generally poor computer access in areas outside Tbilisi, the database can hardly be considered an effective solution to the problem of access. At the same time, **access to draft laws** is a major problem. As already mentioned, it is only the less controversial legislation that becomes available for public discussion or otherwise accessible at the preparatory stage. Problems over access to the parliamentary stages of the law-making process also exist, although to a lesser extent. One particular issue is lack of information about the timing of parliamentary business, which makes it difficult for the interest groups to attend relevant sessions despite the absence of any formal bar on their attendance.

As regards the accessibility of legislation in terms of its clarity and 'user-friendliness', the above-noted lack of guidance on the style and language of the law is a serious concern.

There is **no system for evaluating the operation and effectiveness of existing laws**; nor is there an expectation of the regular amendment or updating of existing legislation. While amendments are typically initiated in response to implementation problems, in the current circumstances there is a risk that only the more serious implementation problems (up to a complete failure) or problems deemed serious by the drafter of the amendments (including for subjective considerations) will ever be noticed and acted upon.

5. RECOMMENDATION: DEVISING A PROGRAMME FOR REFORM

Given the amplitude of the risks and gaps identified in Section 4, the OSCE ODIHR recommends that a comprehensive, properly integrated, home-grown and time-phased programme of reform be considered by the Georgian authorities.

This recommendation is guided by the following considerations.

Many of the issues pointed out above are closely interrelated and progress in one area may be conditional upon progress in another. Therefore, the question of reform needs to be tackled as a comprehensive whole.

At the same time, the individual measures that may be pursued as part of any programme of reforms need to be considered not only on their own merits, but also in terms of their relationship with the other elements of the programme. While it may be useful to identify levers for improvements, one cannot overestimate the importance of promoting a properly integrated approach to reform.

Furthermore, any reform should and can only be conceived by the Georgian authorities, rather than being handed down by the international community, and embarked upon only after a full process of consultations. Only in this way can there be any confidence that the reform will fit the specificities of the local legislative and political cultures and will yield tangible results.

Yet, progress cannot be achieved without a clear understanding and recognition of the risks and gaps identified among those involved in the legislative process along with a genuine will to tackle them in a consistent and systematic manner. At the moment there is a sense that there is either no awareness of these risks or that they are recognized but are being overlooked in the headlong rush to reform. As a starting point, the OSCE ODIHR believes that it is essential to develop an awareness of these risks and to discuss ways in which these risks may be countered.

The OSCE ODIHR would be ready to support a process of consultations on these matters among those holding senior administrative and political office in ministries and the parliamentary administration. The emphasis would not only be on creating awareness of the risks identified, but also on promoting a concept of reform and gauging support for its implementation. A highly desirable outcome of such consultations – and indeed a key prerequisite for the success of any further efforts – would be the development of a ‘reform roadmap’ that would include an indicative timeframe and the conceptual framework of the process. It is of central importance that such a roadmap reflects a firm commitment to reform. Serious consideration should be given to the organization of a roundtable, which would enable all parties to be involved in the reform process to discuss and agree

on a concept of reform, a timeframe and all the relevant modalities for the subsequent stages.

Subsequent phases would obviously depend on the outcome of the ‘reflective’ phase. At least two approaches seem possible. One approach would be to convene a series of joint workshops for the working level staff of the relevant ministries and the legislature, each looking at a specific set of issues as identified by this report. The preparatory work required for these workshops would be carried out and coordinated by a working group of no more than three or four representatives of the relevant ministries and the legislature. An international expert (or possibly experts) would be attached to the working group in an advisory capacity.

Alternatively, there may be two parallel streams of workshops – one targeting government officials, and the other targeting parliamentary officials as well as MPs. The preparatory work and oversight of the process would be carried out by a working group comprised of representatives of the relevant ministries and the legislature. The streams would be merged at a later stage, after the groundwork for a managed and regulated legislative system has been developed by the workshop participants in parallel.

The thematic content of the workshops – irrespective of which of the above approaches is adopted – would be directly linked – and meant as a response – to the catalogue of concerns and risks discussed in Section 4. Among the thematic issues the workshops could address are:

- Policy analysis and impact assessment, with particular emphasis on alternatives to legislation as a means of relieving the problem of legislative overload;
- Legislative programming and timetabling;
- Drafting standards;
- Stakeholder consultation;
- Intra-governmental coordination and coordination with the legislature;
- Verifications and scrutiny throughout the legislative process;
- Evaluation of the operation and effectiveness of the existing legislation.

The workshops’ agendas could merge some of these issues so as to keep the discussions as focused as possible and enable participants to look at the links between causes and effects. Too narrow an agenda carries with it the risk of sterile discussion, which would eventually place the burden of and responsibility for reconciling all aspects of the discussions at the level of the working group.

There would then be a follow-up stage in which the emphasis would shift to explaining the revised framework and procedures, for example by way of the preparation of a nationally drafted, expert-reviewed guide to legislative procedures, and on meeting specific training needs within the revised framework.

The OSCE ODIHR would be ready to assist at all stages described above. Its contribution would primarily consist of the provision of expertise with a view to enhancing exposure to knowledge and good practices from other OSCE countries.

* * *

LIST OF INTERLOCUTORS MET BY THE ASSESSMENT TEAM

Presidential Administration

Mr. Levan Dolidze, Head of Lawmaking and Expertise Unit of President's administration

Government

Mr. Dimitri Dzagnidze, Deputy Minister of Justice

Mr. Sul Khan Sisauri, Acting Head of Lawmaking Department, Ministry of Justice

Mr. Zurab Dekanoidze, Head of Department for Expertise, Ministry of Justice

Mr. Sul Khan Gamkrelidze, Director of the Training Center, Ministry of Justice

Mr. Davit Kereselidze, Head of Legal Department of Government's Administration

Mr. Gia Khuroshvili, Parliamentary Secretary of the Government

Mr. Onise Metreveli, Head of Legal Unit of the Ministry of Interior, Secretary Parliamentary of the Minister

Mr. Nikoloz Pruidze, Deputy Minister of Health, Labour and Social Protection

Mr. Giorgi Godabrelidze, Deputy Minister of Finances

Parliament

Mr. Aleko Tabatadze, Head of Legal Department, Parliament

Mr. Davit Todradze, Deputy Head of Procedural Issues Committee, Parliament

Ms. Eteri Svianaidze, Head of Organizational Committee, Parliament

Ms. Elene Tevdoradze, Head of Human Rights and Civil Integration Committee, Parliament

Mr. Davit Bakradze, Head of Committee on European Integration, Parliament

Mr. Levan Bezhashvili, Legal Issues Committee, Parliament

International agencies and organizations

Mr. Thomas Legge, European Commission Delegation

Mr. Igor Gaon, Council of Europe

Mr. Nodar Khaduri, UNDP

Mr. Michael Kelleher, NDI Tbilisi Office Director

Ms. Khatuna Khvichia, NDI Parliamentary Program Advisor

Domestic Non-governmental Organizations and independent experts

Ms. Ana Dolidze, Chairperson of the Georgian Young Lawyers Association

Mr. Jaba Devdariani, Program Director, UN Association of Georgia

Ms. Maia Meskhi, Rule of Law Programme Coordinator, Civil Society Institute

Professor George Khubua, Director of the Institute of State and Law, Georgia Academy of Science

Mr. David Usupashvili, independent expert (at the time of the ODIHR's visits), now Secretary General of the Republican Party

Mr. Vakhtang Khmaladze, President of Development Association, former MP

Appendix 2

QUESTIONNAIRES ON LEGISLATIVE PROCESS

These questionnaires were prepared in view of the interviews with senior level Government and Parliament officials. All interlocutors in both the Government and the Parliament received the questionnaire shortly prior to the meetings.

EXECUTIVE BRANCH

1. We know that the Law on Normative Acts sets out the general principles of law drafting. Is the law supplemented by any government regulations or non-binding instruments such as guidelines that would detail the drafting standards? Do you think it would be helpful to have such additional guidance?
2. Does your ministry have its own specialist unit of law drafters? If not, who undertakes law drafting? If it is the Ministry legal officers, do their job descriptions mention this task? Is experience with drafting an asset for applicants to these positions?
3. Have you outsourced consultants for law drafting projects? If so, where did they mostly come from? (e.g. international consultants/donor agencies, academia, NGOs) Whose budget has borne the costs?
4. Is it common for more than one law drafter to be involved in the drafting of particular legislation? Does a law drafter engaged on primary legislation work as a member of a team of ministry officers that includes policymakers?
5. How is the quality of law drafting monitored? (e.g. by supervisors)
6. Who undertakes the drafting of secondary legislation? Is it the same staff who draft primary legislation?
7. How are annual legislative plans drawn? Who coordinates the submission of ministry inputs to the presidential apparatus?
8. How are decisions to initiate a new legislative project taken? Does this happen at the ministry level or at the Cabinet level?
9. How does the government collectively determine its priorities with respect to the proposed new legislative projects?
10. Are timetables set for the preparation of each bill? Who and how monitors them?

11. Does each bill, before it is introduced to the Parliament, have to undergo approval by the Government (apart from the Ministry of Justice checks)?
12. Is the compliance of policy proposals or policy options with the requirements of the Constitution verified during the policymaking stages? If so, how?
13. Is the compliance of policy proposals or policy options with the requirements of the extant law verified during the policymaking stages? If so, how?
14. Is a check carried out whether new legislation is required at all, as the matter may already be dealt with under the existing law or through an alternative instrument (e.g. administrative action, public awareness raising, etc.)? In what instances a decision may be taken that the issue in question can be addressed by an alternative instrument? How is the decision taken? What factors are taken into consideration?
15. Are outside advisers used in the policymaking? If so, in what instances?
16. Do you think stakeholder consultation can be employed in policymaking?
17. Are policymaking and law drafting undertaken as distinct exercises? Are they undertaken by different units or the same team? If by different units, at what stage does the law drafter step in? How is the policy communicated to the drafter?
18. How is the process of law drafting carried out? What are the usual steps that the law drafter follows? In your view, is there room for improvement? If so, what should be done?
19. How is the compliance of draft legislation with the requirements of the Constitution verified during the law drafting stages? In your view, is there room for improvement? If so, what should be done?
20. How is the compliance of draft legislation with the requirements of the extant law verified during the law drafting stages? In your view, is there room for improvement? If so, what should be done?
21. How is the cost assessment done? Does the assessment focus solely on the impact on the central Government's budget or the impact on other governmental authorities' (e.g. local governments, autonomous units) budgets is assessed as well? Are these authorities made part of the consultations? In your view, is there room for improvement? If so, what should be done?
22. Does it happen that a team of officers from more than 1 ministry drafts a particular law? How is the process coordinated? Who and how monitors the progress of law drafting?

23. Are stakeholders consulted in the law drafting process? If so, in what instances?
24. How is consultation organized? In your view, is there room for improvement? If so, what should be done?
25. When do the law drafter's responsibilities in connection with a bill end? Is the law drafter responsible for proofreading all version of the bill?
26. What formal steps have to be followed when secondary legislation is being made? Do these differ according to the type of secondary legislation?
27. Who decides that secondary legislation has to be prepared for the purpose of giving effect to particular primary legislation? Do any matters require the collective consent of the government before this is undertaken?
28. Is secondary legislation ever prepared in the course of the same drafting process as the primary legislation with which it is concerned?
29. Who undertakes the policymaking with respect to secondary legislation? Are they the same unit that developed the policy for primary legislation?
30. Are stakeholders consulted?
31. To what extent can the original law drafters be involved in drafting amendments put forward in the Parliament?
32. What does a rapporteur presentation at the committee discussion of the bill typically consist of? Who is normally nominated to present the bill? Is it one of the actual drafters?
33. Do official of the drafting ministry follow the progress of the bill in the Parliament? How is it done?
34. If the Government concludes that a bill currently being considered by the Parliament needs to be altered, can the drafting ministry itself draft the necessary amendments and put them before the Parliament? If so, how is this arranged?
35. Which Unit in the Ministry maintains the central registry of legislation? Is the central registry computerized?
36. What is the status of the CODEX database? Does the Ministry have a liaison officer working with CODEX?

37. Does your Ministry have ready access to all legislation that is likely to concern it? Do the staff who undertake law drafting in your Ministry have access to a full set of legislation?
38. Are any groups eligible to receive free copies of legislation (e.g. judges, bar associations, etc.)?
39. In what instances can a draft law be published before official legislation? Who decides that a draft law should be published?

Continued: QUESTIONNAIRES ON LEGISLATIVE PROCESS

PARLIAMENT

1. We know that the Law on Normative Acts sets out the general principles of law drafting. Is the law supplemented by any government regulations or non-binding instruments such as guidelines that would detail the drafting standards? Do you think it would be helpful to have such additional guidance?
2. How are the parliamentary legislative agendas compiled?
3. How are the committee session agendas prepared? Are they communicated to external actors? Who can be present at the sessions?
4. How is the process of law drafting carried out? What are the usual steps that the law drafter follows? In your view, is there room for improvement? If so, what should be done?
5. How is the compliance of draft legislation with the requirements of the Constitution verified during the law drafting stages? In your view, is there room for improvement? If so, what should be done?
6. How is the compliance of draft legislation with the requirements of the extant law verified during the law drafting stages? In your view, is there room for improvement? If so, what should be done?
7. How is the cost assessment done? Does the assessment focus solely on the impact on the central Government's budget or the impact on other governmental authorities' (e.g. local governments, autonomous units) budgets is assessed as well? Are these authorities made part of the consultations? In your view, is there room for improvement? If so, so what should be done?
8. Are stakeholders consulted in the law drafting process? If so, in what instances? How is consultation organized? In your view, is there room for improvement? If so, what should be done?
9. When do the law drafter's responsibilities in connection with a bill end? Is the law drafter responsible for proofreading all version of the bill?
10. Who drafts amendments put forward in the Parliament? To what extent can the original law drafters be involved?
11. What does a rapporteur presentation at the committee discussion of the bill typically consist of? Who is normally nominated to present the bill? Is it one of the actual drafters?

12. Do officials of the drafting ministry follow the progress of the bill in the Parliament? How is it done?
13. If the Government concludes that a bill currently being considered by the Parliament needs to be altered, can the drafting ministry itself draft the necessary amendments and put them before the Parliament? If so, how is this arranged?
14. In what instances does the Parliament take evidence from officials, experts or members of public when considering a bill? How often does this happen?

Appendix 3

INTERNATIONAL ASSISTANCE TO LEGISLATIVE STRENGTHENING AND REGULATORY REFORM IN GEORGIA

This Appendix describes the donor landscape and programmatic activities in relevant areas implemented by other international actors.

Generally speaking, insufficient coordination between the various international agencies providing assistance on law drafting issues to governments and Parliaments in so-called transition countries is a matter of concern. This observation led the Assessment Team to include in its terms of reference an overview of past and ongoing initiatives by all international agencies active in Georgia. This overview is intended as a contribution to the coordination efforts of all those carrying out such activities or potentially interested in engaging in this field of activity.

The international assistance scene in Georgia is currently dominated – both in terms of the number of projects and the absolute amounts of funding – by agencies working with the legislature (UNDP, EU/EC, USAID – the latter primarily through its contractor NDI). It is noteworthy that this pattern is in no way specific to Georgia. The cause lies in the fact that international agencies' agendas and mandates are geared towards providing this type of assistance. The rationale stems from the association of democracy with parliament.

The assistance to the executive branch as an aspect of promoting regulatory reform is not only extremely limited but also fragmentary. Thus, the few agencies (mostly USAID contractors such as Development Alternatives International) which have worked with the executive have focused on selected thematic areas (e.g. energy and water management) depending of the profile of the assisting agency. No agency has addressed regulatory reform as a whole, let alone the interaction of the executive and legislative branches.

United National Development Programme (UNDP)⁵³

UNDP works from the perspective of promoting sustainable human development, hence the focus of long-term funding-intensive technical assistance projects. UNDP has proceeded from the premise that Georgia lacks the human and institutional capacity to rapidly adapt and absorb new policy frameworks to enhance democratic governance and citizen participation in development processes, and therefore has prioritized institutional capacity building in its parliamentary assistance projects.

⁵³ UNDP is the UN organization dedicated to development issues.

The overall objective of the UNDP parliamentary assistance activities (partially implemented in cooperation with EU/EC) is to increase the capacity of the parliamentary bodies to exercise accountable and efficient public management. This overall objective is being achieved through better alignment of executive and legislative branches of power, ensuring the transparency of decision-making, policy dialogue and better public accountability. Advanced methodology and e-tools are prioritized by the project methodology. This includes creation of nets and provision of modern hardware and software, as well as training for public servants. Individual activities have included strengthening the lawmaking process; improving the internal organization of the Parliament; strengthening public management skills and capabilities; improving the document management procedures; implementing the corporate Management Information System; training the MPs and staff on issues related to their roles and responsibilities as well as professional skills development; providing "train the trainers" programs; enhancing transparency and responsiveness of the parliamentary processes; providing public institutions (not limited to the Parliament) with tools both in terms of transfer of technology and transfer of knowledge in order to improve accountability; creating new participatory mechanisms and developing tools for facilitating wider access to public information and networking by citizens and promoting public awareness of government services and information available online; ensuring the record of citizen complaints/requests and to track progress through extended net-points and public access terminals at the Parliament, Prime Minister's Office and Georgian National Library; establishing overall e-links between the Parliament, the Administration of the President, the Prime Minister's Office, the Ministry of Justice and the Georgian National Library via Metropolitan Area Network (Tbilisi MAN) facilities; their provision with computer hardware, peripheral, office, media, net and special equipment; providing the Parliament with Internet service and to enhance its website.

European Union (EU)

The EU assistance strategy⁵⁴ in Georgia is premised on a strategic long-term interest in the success of transition to democracy and market economy in Georgia, particularly in light of post-enlargement, which has brought the South Caucasus closer to the EU, making the transition challenge even more important. Hence, the adopted focus on the approximation of legislation in the rule of law and governance assistance program.

⁵⁴ The full text version of the Country Strategy Paper 2003-2006 is available at http://europa.eu.int/comm/external_relations/georgia/csp/georgia_csp_6.pdf (last visited on October 26, 2005).

The EU is supporting the reform of the Georgian Parliament through the European Commission's so-called Rapid Reaction Mechanism (RRM) and TACIS. The current assistance projects were developed on the basis of a 2004 EU-commissioned assessment, which identified 5 priority areas, namely (a) improving the professionalism and the working conditions of the Parliament; (b) improving the role of the Parliament in oversight of the executive; (c) supporting the Parliament's capacities in terms of EU integration policies and legislation; (d) improving the relations between the Parliament, civil society and interest groups; (e) establishing a fruitful relationship between the Georgian Parliament, Parliaments from the EU member states and the European Parliament. The assessment made a number of recommendations for future assistance in the parliament in listed five areas.

One of the projects is a joint EU-UNDP initiative (with UNDP being the contractor/implementing party) which aims to provide technical assistance to strengthen the efficiency and transparency of the legislature through (a) mainstreaming and simplifying internal and lawmaking processes within the parliament, (b) enhancing the MP's and staff skills in modern methodology and ICT tools, as well as (c) making MPs and staff more effective and proactive in all areas of responsibility of the parliament, i.e. oversight, lawmaking and representation of citizens. The 560,000 Euro project has prioritized 4 key areas: (a) developing better infrastructure with focus on ICT tools; (b) enhancing internal structures and processes, including refurbishment of the parliamentary training center; (c) promoting more efficient lawmaking process through clarification of roles, rationalizing document flows and improving MPs' and staff understanding of the system, as well as enhancing Internet-based public discussions on draft bills, using media to distributing the information regarding new legislative drafts, and development of modern ICT-based system of the lawmaking activities; (d) development of public relations and constituency outreach. The infrastructure development activities have included provision and installation of computer hardware, peripheral, media, office, network and special equipment, operational systems, office, antiviral and other standard software packages for the above mentioned beneficiaries of the public offices, as well as upgrade of the unified Local Area Network (LAN) for the Parliament, improvement of the Internet services in the Parliament; finalization of the design and development of the new website, and promoting the application of modern ICT tools to modernize the law drafting and preliminary consideration of draft legislation. Activities to enhance internal structures and processes have centered on the refurbishment of the Parliament's training center and using the upgraded training center as a venue for building operational knowledge and capacities of MPs and parliamentary committee staff in terms of their representative, lawmaking and oversight roles. In addition, process analysis has been conducted and new process flows have been

devised, as well as work has been done to rationalize the organizational structure. Activities aimed at the modernization of lawmaking process have primarily attempted to improve lawmaking process through clarification of roles, rationalizing document flows and improving MPs' and staff understanding of the system; enhancing public debate and dialogue on draft bills through the Internet including the introduction of institutionalized opportunities for provision of feedback by citizens, civil society organizations and experts; using media to distributing the information regarding new legislative drafts; as well as development of modern ICT-based system of the lawmaking activities. Finally, a number of activities have focused on the development of Public Relations through improvement of the visitors' entrance to the Parliament; increased performance of Parliament's PR activities, the level of involvement of civil society in the law-making process and the transparency of relevant procedures; organization of production by staff of leaflets and booklets explaining the structures and processes of the Parliament; increase in professional skills of the staff responsible for the functions of public and mass media relations, establishment of modern methods, tools and work ethic; and development of the concept of a pilot model Parliamentary Regional Office/Bureau in Western Georgia (the city of Kutaisi).

Another EU project (worth 196,229 Euro; completed in May 2005; implemented by the contractor B&S Europe) aimed to contribute to the development and consolidation of an effective and professional Parliament in Georgia through promoting better understanding of EU decision-making processes and law by Georgian MPs, as well as improving the oversight and lawmaking capacity of Georgian Parliament with respect to an effective and efficient EU law approximation process. Specific activities included (a) organizational audit and reform plan in view of developing a methodology for effective monitoring of EU legislation by parliamentary staff, including research staff, and by MP's in view of effective oversight and law making; (b) organization of a conference on the legislative process, and specifically on European law approximation within the remit of legislative and oversight work more generally; (c) development of clear rules and procedures for the screening process at all stages and codification in a handbook; (d) training of trainers on legal drafting, with special reference to EC legislation, including the development of a lexicon of key terms; and (e) development of methods of expedited, consolidated or delegated legislation where possible.

In addition, the European Commission (EC) has funded a Latvian-Georgian parliamentary twinning project. The main thrust of the project, which came with a price tag of 149,170 Euro, was on support to democratic transition through better networking and exchange of experience. More specifically, the project aimed to establish an exchange of experience and relations with a national EU parliament with similar historical experiences to support the process of EC law approximation in Georgia,

through a focus on capacity building and the transmission of information from the Latvian experience of transition from a former Soviet republic to EU membership. Specific activities included a meeting of team leaders with interested parties within the European Commission (February 2005); preparatory visits by team leader to Latvia and Georgia (February 2005); organization of study tours and a workshop on Latvia's lessons learned as regards the EU approximation/integration process including case studies locally engaged staff in Latvia and Georgia to organize study tours and workshop (February-June 2005); exposure visit of Georgian stakeholders (the Speaker of Parliament, two MPs, two members of Parliamentary staff, local expert) to Latvian Parliament including workshop (March or April 2005); return visit to Georgia by Latvian stakeholders (two experts, Chair of Parliament, Chair of European Affairs Committee, one further MP) (May 2005); debriefing with Georgian and Latvian stakeholders, academics, civil society, the EC delegations, other donors, etc. (June 2005); report writing and preparation of a short, practical manual on issues related to EU approximation by Georgian stakeholders, and the finalization of the report by the team leader including recommendations on how to take the partnership between the two parliaments forward (June 2005). Furthermore, in the framework of its parliamentary assistance program and in cooperation with NDI, the EC has developed a handbook "7 principles of legislative drafting."

National Democratic Institute (NDI)⁵⁵

NDI's assistance program is based on the nature of NDI as a political party institute, focusing primarily on the consolidation of new democracies through assistance to legislatures, multiparty democracy and civil society strengthening. NDI does not have the mandate to work with the executive bodies. Although the NDI Country Office representatives interviewed do recognize the importance of reform in all branches of power, they still consider parliamentary assistance a worthwhile future investment, despite the parliament's current *de facto* secondary role.

NDI's legislative strengthening program includes a number of activities such as parliamentary internship program (new university graduates with degrees in public administration or law are eligible) which will expand to provide interns to factions as well; improving intra-parliamentary communication and communication between the central Parliament of Georgia and the Ajara Supreme Council; improving public outreach (e.g. funds trips by parliamentary committees to rural areas) and constituency relations; various types of training for MPs and staff (e.g. training on regulatory impact analysis for MPs, legislative drafting training for the staff); as well as has

⁵⁵ The National Democratic Institute for International Affairs (NDI) is a United States nonprofit organization working to strengthen and expand democracy worldwide.

cooperation with the EC to develop a handbook “7 principles of legislative drafting.” Although international community meetings are regularly held in the capital gathering the main development actors, the participating agencies are mostly represented by country directors rather than working-level staff, which puts into question the suitability of these meetings as a forum for actual coordination of programmatic activities.

THE BASIS FOR OSCE ODIHR’S LAWMAKING REFORM ASSISTANCE ACTIVITIES

In the transition countries,⁵⁶ efforts to improve the quality and the effectiveness of their legislation have been assisted in a sporadic and fragmentary manner with a variety of understandings of the notions involved, and a wide typology of activities associated with these notions. Little work was done in terms of methods for supporting these efforts, whilst considerable resources have been devoted to the building or strengthening of institutions involved in law-making. The most comprehensive attempt to take stock of law drafting practices in selected countries and to point out crucial issues to be considered when creating or reviewing regulations on law drafting was conducted under the SIGMA programme⁵⁷, a joint initiative of the European Union and the Organization for Economic Co-operation and Development⁵⁸. Created in 1992 with a focus on EU candidate countries⁵⁹, this programme has provided support to decision-makers and public administrations in their efforts to modernize “public governance systems.” Within this overall framework, a project aimed at helping the countries to improve their law drafting methodology and techniques was launched in 1996⁶⁰. Efforts to improve the quality and the effectiveness of legislation have also been supported, though on a lesser scale, by the Council of Europe’s Law-making Project⁶¹.

For long, the primary focus of the OSCE ODIHR’s assistance was on providing *ad hoc* legal advice on individual pieces of legislation, when the process of their drafting and consideration was ongoing. While doing so, the ODIHR recurrently noted that some of the shortcomings identified in the texts found their cause in the manner in which the legislative process was managed or regulated. Therefore, specific recommendations related to procedural matters, including mechanisms for making the process more transparent and more inclusive or for monitoring the implementation of legislation,

⁵⁶ The term “transition country” broadly refers here to countries undergoing a comprehensive process of political and/or economical transformation.

⁵⁷ SIGMA – Support for Improvement in Governance and Management in Central and Eastern Europe.

⁵⁸ For more information on this programme, refer to:

https://www.oecd.org/pages/0,2966,en_33638100_33638151_1_1_1_1_1,00.html (last visited 15 March 2006)

⁵⁹ Ten of the countries with which SIGMA has been working on law drafting and regulatory management issues since 1996 are now EU Member States. Since 2001 the Programme has been assisting countries of the Western Balkans in building their public institutions and systems in the framework of the Stabilisation and Association Process (SAP) agreed with the EU.

⁶⁰ SIGMA Paper No 18, *Law Drafting and Regulatory Management in Central and Eastern Europe* (1997) - OECD.

⁶¹ For more information on this project, refer to: http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Law_making/ (last visited 15 March 2006)

have been made to the legislators with varying degree of success. Experience has shown that the most effective laws are the result of a legislative process, which is managed in its entirety, operates on the basis of a set of comprehensive, uniform and coherent rules, and allows for consultations with those to be affected by the legislation or responsible for its proper enforcement. There was an obvious need to look beyond individual pieces of legislation and interview those involved in the process with a view to getting an overall picture of a particular country's entire legislative process, including the structure and interaction of the institutions involved. In this endeavour, particular attention was to be given to the concept of 'legislative transparency', which is specifically referred to in two key OSCE documents⁶², and to take into consideration recommendations or special interests manifested in discussions that took place in OSCE Human Dimension Implementation Meetings in 2002, 2003 and 2004 as well as at the 2004 Human Dimension Seminar on Democratic Governance. Among these recommendations, it is worth recalling the following⁶³:

- a. Access to laws and legislative documents, including primary and secondary legislation, court rulings, draft laws and legislative agendas, should be ensured.
- b. Legislative proceedings should be open to the public.
- c. Legislative transparency should be fostered at all levels of governance, including local self-governance.
- d. Public consultation should be an indispensable element of legislative process. Both legislatures and the executive branch should encourage public consultation.
- e. Parliamentary proceedings, including committees meetings, should be open to the public.
- f. Minutes and records should be entirely available to the public. Reading rooms and internet could be used to this end.
- g. The ODIHR's legislative assistance work should pay greater attention to the underlying attitudes and factors that affect the way laws are prepared and drafted and should place more emphasis on promoting citizen participation in the political process besides elections.

⁶² "Among those elements of justice that are essential to the full expression of the inherent dignity and of the equal and inalienable rights of human beings are (...) legislation, adopted at the end of a public procedure, and regulations that will be published, that being the conditions of their applicability. Those texts will be accessible to everyone;" (paragraph 5.8, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990). "Legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives" (paragraph 18.1, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 1991).

⁶³ These recommendations are extracted from the original documents.

- h. The OSCE's work with legislatures should be expanded. An inventory of standards related to structures, procedures and practices of democratic parliaments should be developed.
- i. To promote strengthening of democratic practices within parliaments of the participating States, the OSCE should assist with the development of rules of procedure and legal frameworks.
- j. The ODIHR should provide assistance to participating States with regard to law drafting in a decentralized state structure, with focus on specifics of enforceability issues at the local level.

OECD REFERENCE CHECKLIST FOR REGULATORY DECISION-MAKING

Recommendation of the Council of the OECD, adopted 9 March 1995

The following ten questions about regulatory decisions reflect principles of good decision-making that are in use in OECD countries to improve the effectiveness and efficiency of government regulation by upgrading the legal and factual basis for regulations, clarifying options, assisting officials in reaching better decisions, establishing more orderly and predictable decision processes, identifying existing regulations that are outdated or unnecessary, and making government actions more transparent. But they have to be applied within a broader regulatory management system that includes elements such as information collection and analysis, consultation processes, and systematic evaluation of existing regulations.

1. Is the problem correctly defined?

The problem to be solved should be precisely stated, giving clear evidence of its magnitude, and explaining why it has arisen (identifying the incentives of affected entities).

2. Is government action justified?

Government intervention should be based on clear evidence that government action is justified, given the nature of the problem, the likely benefits and costs of action (based on a realistic assessment of government effectiveness), and alternative mechanisms for addressing the problem.

3. Is regulation the best form of government action?

Regulators should carry out, early in the regulatory process, an informed comparison of a variety of regulatory and non-regulatory policy instruments, considering relevant issues such as costs, benefits, distributional effects, and administrative requirements.

4. Is there a legal basis for regulation?

Regulatory processes should be structured so that all regulatory decisions rigorously respect the "rule of law"; that is, responsibility should be explicit for ensuring that all regulations are authorized by higher-level regulations and consistent with treaty obligations and comply with relevant legal principles such as certainty, proportionality, and applicable procedural requirements.

5. What is the appropriate level (or levels) of government for this action?

Regulators should choose the most appropriate level of government to take action, or, if multiple levels are involved, should design effective systems of co-ordination between levels of government.

6. Do the benefits of regulation justify the costs?

Regulators should estimate the total expected costs and benefits of each regulatory proposal and of feasible alternatives, and should make the estimates available in accessible format to decision-makers. The costs of government action should be justified by its benefits before action is taken.

7. Is the distribution of effects across society transparent?

To the extent that distributive and equity values are affected by government intervention, regulators should make transparent the distribution of regulatory costs and benefits across social groups.

8. Is the regulation clear, consistent, comprehensible, and accessible to users?

Regulators should assess whether rules will be understood by likely users, and to that end should take steps to ensure that the text and structure of rules are as clear as possible.

9. Have all interested parties had the opportunity to present their views?

Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties, such as affected businesses and trade unions, other interest groups, or other levels of government.

10. How will compliance be achieved?

Regulators should assess the incentives and institutions through which the regulation will take effect, and should design responsive implementation strategies that make the best use of them.

[end of text]