



## Transparency in Law Making: Pre-Legislative Scrutiny

### About RTI Briefs

The Right to Information Act (RTI Act) was passed in 2005. The *RTI Briefs* series examines issues relevant to the debate on right to information in India, highlighting international best practices with a view to inform policy debates.

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The fourth brief in this series discusses the importance of pre-legislative scrutiny in law making and highlights the ways in which this process can be strengthened in India.

### Other Briefs in this Volume

No. 1: Proactive Disclosure – Best Practices from Mexico.

No. 2: Information Commissions – Selection and Appointment.

No. 3: RTI – A Tool for CSO Accountability in India.

### Summary

- Pre-legislative scrutiny is a process whereby draft legislation is considered by a select committee or group of MPs before a bill is formally introduced in Parliament. The process acts as an additional stage of scrutiny/examination and provides an opportunity for more detailed and considered analysis of a bill and its contents.
- Pre-legislative scrutiny provides an opportunity for more considered debate and analysis of draft legislation. It provides a legitimate space for the articulation of stakeholder views and perspectives and enables citizens to influence legislation at a formative stage. In the long run, pre-legislative scrutiny can help improve the quality of legislation.

### Recommendations

- **Discussion papers on draft legislation:** Departments may consider publishing exploratory discussion papers or “Green Papers” which spell out the policy objectives of the government on specific issues.
- **Publishing draft legislation:** Making draft bills available for public scrutiny before they are tabled in parliament is another mechanism by which citizens can be invited to participate in the law making process. Departments need to think of innovative ways of reaching out to the public through newspapers, websites and consultations.
- **Operationalising Section 4 of the RTI Act:** Section 4 1(c) of the RTI Act requires government departments to proactively publish all relevant facts when formulating policies. Effective operationalization of this provision is an institutional mechanism through which the legislative process can be made more transparent and participatory.

## Background

Every year, the Indian Parliament and State Legislatures consider and debate a large number of draft bills, rules and legislative amendments. On average, it is estimated, Parliament passes close to 60 bills each year.<sup>1</sup> Of these, a very small number are made available for public debate and discussion. While some ministries have proactively taken steps to consult with the public - either by publishing discussion papers or inviting comments on draft legislation - this is entirely discretionary. In fact there are no laws or statutes in India that compel the central and state governments to consult with the public and seek their comments on proposed legislation. Most often, draft bills are made public only after they have been tabled in Parliament giving civil society groups, the media and other stakeholders limited opportunities to influence the legislative process. In recent months, owing in part to the civil society led agitation for the Lok Pal bill, the demand for greater citizen involvement in law making has gained ground. This brief looks at the importance of pre-legislative scrutiny in the law making process and suggests ways in which pre-legislative scrutiny can be strengthened in India.

## The Law Making Process in India

At present, government departments in India are not obligated to either publish draft bills or elicit public opinion on specific pieces of legislation. At the central and state government levels, laws are drafted by the concerned ministries, often in consultation with one or more ministries. The procedure for the formulation and drafting of legislation is spelled out in the Manual of Parliamentary Procedures. While the Manual advises departments to formulate legislative proposals “in consultation with all the interests and authorities concerned essentially from administrative and financial points of view”, there is no specific reference to consulting the public or seeking their views at a pre-legislative stage.<sup>2</sup> Once a draft bill has been formulated by the concerned ministry it is circulated to other ministries for inputs. The comments received are incorporated and then the draft bill is sent to the Law Ministry for whetting and finally submitted to the Cabinet for approval. After receiving Cabinet approval the bill is finally presented in Parliament (or State Legislature as the case may be).<sup>3</sup>

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<sup>1</sup> PRS Legislative Research, *Legislative Activity in Parliament*, Vital Stats, available at <http://www.prsindia.org/administrator/uploads/general/1241757164~~Legislative%20activity%20in%20Parliament.pdf>, accessed on 18 January 2011.

<sup>2</sup> Government of India, Ministry of Parliamentary Affairs (2004) *Manual of Parliamentary Procedures in the Government of India*, available at [http://mpa.nic.in/Manual/Manual\\_English/Index.htm](http://mpa.nic.in/Manual/Manual_English/Index.htm), accessed on 18 January 2010

<sup>3</sup> Ibid, Chapter 9, para 9.2(a)

In some cases draft bills may be referred for further review to one of 24 Parliamentary Standing Committees (16 under the Lok Sabha and 8 under the Rajya Sabha). During the review process, such Committees typically issue advertisements in newspapers seeking comments from the public. In many instances, stakeholders are invited to give oral and written submissions stating their views. However, the government is not obligated to accept the recommendations made by Standing Committees. There are some exceptions. During the drafting of the Right to Information Act for instance, the Parliamentary Standing Committee reviewing the bill received a number of submissions from civil society groups seeking improvements in the draft RTI law. Many of these suggestions were later incorporated into the final text of the RTI Act 2005.

While standing committees do provide an opportunity for citizens to voice their opinions, this form of consultation has several limitations. First, draft bills are referred to Standing Committees after their introduction in Parliament. This limits the scope of citizen influence. Moreover, committees are not obligated to take on board the suggestions and inputs they receive. Second, the proceedings of Parliamentary Standing Committees are closed and the media are barred from reporting the details of consultation. Thus, public debate on the bills is limited. Last, there is little transparency as such committees rarely (if ever) publish details of the comments and suggestions received by them.

The lack of transparency and public consultation in the drafting of legislation has, in recent times, been a subject of intense criticism. For instance, amidst controversy the Civil Liability for Nuclear Damage Bill, a noted journalist criticized the government for trying to push through a “complex legislation with the potential to affect the lives of tens of millions of people” with “stealth, subterfuge and the barest minimum of consultation”.<sup>4</sup> Similarly, bills such as the Prevention of Torture Bill, the Communal Violence Bill and Biotechnology Regulatory Authority Bill have been critiqued for their poor drafting, weak provisions and their failure to address the concerns of civil society groups and other stakeholders.<sup>5</sup> In recognition of this, civil society has begun to push for greater transparency and public participation in the law making process particularly at a pre-legislative phase. Internationally, in many countries, pre-legislative scrutiny is an established process through which citizens are encouraged to give their comments and feedback on proposed legislation.

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<sup>4</sup> Siddhartha Vardharajan (2010) “This is No Way to Write A Law”, *The Hindu*, 24 August, available at <http://www.thehindu.com/opinion/lead/article592116.ece?homepage=true&css=print>, accessed on 17 January 2011.

<sup>5</sup> Tarunabh Khaitan (2010) “A Bill Designed to Fail”, *The Hindu*, 19 May, available at <http://www.thehindu.com/opinion/op-ed/article433182.ece>, accessed on 17 January 2011.

## Pre-legislative Scrutiny – International Examples

In many countries, notably the UK, New Zealand, Scotland and Australia, pre-legislative scrutiny is increasingly becoming an established practice. How does pre-legislative scrutiny work and how can it make the law making process more open?

In the UK, at the beginning of every Parliamentary session, the government publishes a list of bills that will be the subject of pre-legislative scrutiny.<sup>6</sup> Draft bills are published as “Command Papers” and submitted for scrutiny. The draft bills may be scrutinized by either i) the concerned departmental select committees, ii) other committees of either House of Parliament, iii) ad-hoc select committees of either House of Parliament or the iv) joint committees of both Houses.<sup>7</sup> In considering draft bills, select committees call upon external experts to give written and oral evidence. To assist committees in undertaking pre-legislative scrutiny, a special Scrutiny Unit has been established in the UK Parliament. The Scrutiny Unit “provides specialist expertise to select committees, especially (but not exclusively) on financial matters and on draft bills.”<sup>8</sup> It is worth noting that the observations of select committees are merely advisory and the government may choose to accept or reject the proposals that emerge from such a process.<sup>9</sup>

### Advantages of Pre-Legislative Scrutiny

In 2006, the Select Committee on Modernisation of the House of Commons (UK) observed, that: *“Parliamentary scrutiny at the pre-legislative stage can play an important role in improving the law, even where there has already been lengthy and extensive external consultation by government. Whatever its impact on the passage of legislation, the purpose of pre-legislative scrutiny is not to secure an easy ride for the government’s legislative program, it is to make better laws by improving the scrutiny of bills and drawing the wider public more effectively into the parliamentary process.”* Some of the key advantages of pre-legislative scrutiny are as follows:

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<sup>6</sup> While there is no formal requirement for legislation to be published for pre-legislative scrutiny, each year a small number of bills are subjected to pre-legislative scrutiny.

<sup>7</sup> Hansard Society (2004) Pre-Legislative Scrutiny, Issues in Law Making, *Hansard Society Briefing Paper*, July, available at <http://www.hansardsociety.org.uk/blogs/downloads/archive/2007/07/28/issues-in-law-making-5-pre-legislative-scrutiny.aspx> accessed on 17 January 2011.

<sup>8</sup> Official website of the Parliament of the United Kingdom, Scrutiny Unit, <http://www.parliament.uk/mps-lords-and-offices/offices/commons/scrutinyunit/>, accessed on 17 January 2011.

<sup>9</sup> *Ibid*, pp.4

- ***Improves Legislation:*** Pre-legislative scrutiny provides an opportunity for more considered debate and analysis of draft legislation. Specifically, it enables “measured consideration of a bill’s principles, questioning of new policy initiatives contained within it and consideration of any practical and technical issues which might arise from the proposed provisions.”<sup>10</sup> Importantly, it gives MPs an opportunity to better acquaint themselves with the provisions of draft legislation. It has been observed that it is much easier for the Parliament to introduce amendments in draft bills at the pre-legislative stage rather than when bills have been formally tabled.<sup>11</sup> In the long run, pre-legislative scrutiny can help improve the quality of legislation.
- ***Facilitates greater public participation and consultation:*** It provides a legitimate space for the articulation of stakeholder views and perspectives and enables citizens to influence legislation at a formative stage. Pre-legislative scrutiny can stimulate debate and create greater public awareness on draft bills. Such debate provides the government with the opportunity of incorporating alternative perspectives, drawing out differences in opinion and in some cases achieving a broad consensus amongst stakeholders. Thus, pre-legislative scrutiny can be an important mechanism through which law making can be opened up to the public.
- ***Strengthens Parliament:*** Pre-legislative scrutiny also helps to inform MPs about the provisions of a bill in much greater detail and gives them the opportunity to hear expert views and perspectives on a particular issue. Moreover, involving citizens in the legislative process not only helps Parliament ascertain public sentiment on a particular issue but also helps strengthen the relationship between the public and parliament.
- ***Enables the smooth passage of legislation:*** Addressing issues and concerns before a bill is formally introduced in Parliament can assist in the passage of the bill when it is finally introduced in Parliament. Pre-legislative scrutiny can also help in building consensus around a particular bill which can facilitate its smooth passage through Parliament later. As a consequence in some cases, pre-legislative scrutiny might actually reduce the time spent in passing legislation.<sup>12</sup>

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<sup>10</sup> Hansard Society (2004) Pre-Legislative Scrutiny, Issues in Law Making, *Hansard Society Briefing Paper*, July, available at <http://www.hansardsociety.org.uk/blogs/downloads/archive/2007/07/28/issues-in-law-making-5-pre-legislative-scrutiny.aspx> accessed on 17 January 2011, pp. 1

<sup>11</sup> Ibid.

<sup>12</sup> Modernisation Committee (2006) *The Legislative Process*

## Scope for Pre-Legislative Scrutiny in India

Despite the lack of formal channels for pre-legislative scrutiny in India, there are number of ways in which the legislative process can be made more open and participatory.

- **Public consultation on 'discussion' and 'approach' papers:** In many countries, government departments formulate exploratory 'green papers' or discussion papers that spell out the policy objectives of the government on a specific issue. These papers are intended to stimulate public debate and discussion. "Green Papers" are usually followed by "White Papers" which set out the concrete steps necessary to translate ideas into action. In India, a growing number of ministries have begun to formulate discussion papers that seek public input on specific policy issues. For example, in October 2010, the Department of Personnel and Training released a discussion paper on a data protection and privacy law in India for public comment. The discussion paper was drafted following a series of meetings between government officials, civil society organizations and other stakeholders.<sup>13</sup> More recently, the Planning Commission has sought inputs from the public in drafting the Approach Paper to the Twelfth Five Year Plan.<sup>14</sup> The Approach Paper spells out the major priorities and targets for the government, key challenges in achieving them and the broad policy approach of the government. Another good example of a ministry taking the lead in consulting with the public is the Department of Industrial Policy and Promotion. Over the last year, the department has released a series of discussion papers on its website seeking views and suggestions on whether foreign direct investment should be allowed into professional service firms. Through these papers the department "hopes to generate informed discussion on the subject, so as to enable the Government to take an appropriate policy decision at an appropriate time."<sup>15</sup> In what is clearly best practice, the Department has also taken the proactive step of publishing scanned copies of submissions received from the public on its website.
- **Publishing Draft Legislation:** In some cases, ministries have also begun to publish draft bills and amendments to rules and regulations before these are tabled in Parliament. This enables citizens to send in their comments at an early stage in the legislative process and by association allows the government to take on broad

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<sup>13</sup> Government of India, Department of Personnel and Training (2010) Approach Paper for a Legislation on Privacy", available at [http://persmin.gov.in/WriteReadData/RTI/approach\\_paper.pdf](http://persmin.gov.in/WriteReadData/RTI/approach_paper.pdf), accessed on 19 January 2011.

<sup>14</sup> See the official website of the Planning Commission, Government of India, available at <http://planningcommission.nic.in/plans/comments/inter.htm> accessed on 19 January 2011.

<sup>15</sup> See the official website of the Department of Industrial Policy and Promotion, Government of India, available at <http://dipp.nic.in/>, accessed on 19 January 2011.

different views and perspective. A fine example of this has been the extensive consultation around the draft Direct Taxes Code. In 2009, the Ministry of Finance launched a public consultation on the draft Direct Tax Code (scheduled to replace the Income Tax Act). As part of the consultation process, the Ministry released a draft of the bill and a discussion paper for public comment. On the basis of submissions received the Ministry then released a revised discussion paper.<sup>16</sup> The RTI Act 2005 is another example where the government has taken the proactive step of seeking public inputs on proposed legislation. In December 2010, the Department of Personnel and Training announced its proposal to amend the rules governing the RTI Act 2005. The department published the proposed amendments on its website and invited the public to send in comments by a specific date.<sup>17</sup>

- **Operationalising Section 4 of the RTI Act:** The Right to Information Act 2005 in addition to placing a legal obligation on the government to provide information, for the first time places an obligation on government departments to proactively publish information when formulating policies. Specifically, Section 4(1) (c) of the RTI Act requires every public authority to “publish all relevant facts while formulating important policies or announcing the decisions which affect public”.<sup>18</sup> In this way the Act for the first time places a legal obligation on departments to publish draft policies. This has been confirmed by the Central Information Commission which recently ruled that “Section 4(1) (c) of the RTI Act requires proactive disclosure of proposed laws/policies and amendments thereto or to existing/laws/policies to enable citizens to debate in an informed manner and provide useful feedback to the government, which may be taken into account before finalizing such laws/policies. The CIC’s decision follows from a complaint filed by Venkatesh Nayak against the non-disclosure of the draft Delhi Police (Amendment) Bill, 2010 by the Delhi Government. In another decision relating to the non-disclosure of the draft text of the Whistleblower’s Bill, the CIC has recommended that the Cabinet Secretariat amend its administrative rules to allow for greater public consultation on draft legislation.<sup>19</sup> The CIC’s progressive interpretation of

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<sup>16</sup> Government of India, Ministry of Finance (2010) “Revised Discussion Paper on the Direct Taxes Code”, available at [http://www.incometaxindia.gov.in/archive/BreakingNews\\_RevisedDiscussionPaper\\_06152010.pdf](http://www.incometaxindia.gov.in/archive/BreakingNews_RevisedDiscussionPaper_06152010.pdf), accessed on 19 January 2011.

<sup>17</sup> Government of India, Ministry of Personnel Public Grievances and Pensions, Department of Personnel and Training (2010) “Amendment to RTI Rules”, Office Memorandum File No. 113512008-IR, available at [http://persmin.gov.in/WriteReadData/RTI/RTI\\_rules\\_01122010-1.pdf](http://persmin.gov.in/WriteReadData/RTI/RTI_rules_01122010-1.pdf), accessed on 19 January 2011.

<sup>18</sup> Right to Information Act 2005, No. 22 of 2005, <http://righttoinformation.gov.in/rti-act.pdf>

<sup>19</sup> V. Venkatesan (2010) “Open to Scrutiny”, *The Frontline*, Volume 27 - Issue 21, Oct. 09-22, available <http://www.frontline.in/fl2721/stories/20101022272108200.htm>, accessed on 19 January 2011.

Section 4 sets an important precedent and if implemented sincerely by departments, may go a long way in bringing crucial aspects of government functioning under public scrutiny.

To conclude, there is clearly a growing demand for greater transparency in the formulation and drafting of laws. In response, a number of Ministries are now proactively taking steps to engage with the public and seek comments and inputs on draft laws. While there is no formal requirement for pre-legislative scrutiny within the legislative process, there are ways in which the law making process can be made more participatory and open. Exploratory “green” or “discussion papers” enable government departments to frame key policy issues and concerns and put these out for public debate and comment. Proactive disclosure of draft bills on government websites for public comment is another way in which the public can be informed about the government’s proposals. Finally, the RTI Act provides a legal framework for the disclosure of information related to government policies and programs. Specifically, Section 4(1) (c) of the RTI Act requires government departments to proactively publish all facts when formulating policies or announcing decisions”.

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