

REFERENCE LAWS & DRAFTING INSTRUCTIONS

Key Reference Laws

The key reference laws for a drafter are-

- the Constitution; and
- the Interpretation Act.

A drafter must be very conversant with these two enactments in order to foster the Rule of Law and consistency of language

The Constitution

- The Constitution is the fundamental law of the land.
- A constitution is the cornerstone of the Rule of law.
- It provides for the Legislature, the Executive and the Judiciary.
- Provides for Constitutional Commissions and Independent Offices
- Legislative authority
 - National
 - County

The Constitution

A Constitution-

- Contains the principles upon which the Government is established.
- Regulates the powers of the various authorities that it establishes;
- Determines the manner in which the powers it confers are to be confined or exercised;
- Confers rights and powers and privileges to individuals and authorities;

The Constitution

- Specifies the limits to which powers are confined in order to protect individual rights and prevent abusive exercise of arbitrary powers;
- Article 24(2)
- Chapters 4, 8, 9, 10, 11, 12.
- Schedules IV, V and VI
- Constitutional interpretation
 - Judicial decisions on legislative matters
 - Article 260

The Interpretation Act

- The Interpretation Act provides the basic rules that courts apply when interpreting the provisions of an Act of Parliament or subsidiary legislation made under an Act.
- It defines certain words and expressions and removes the necessity to repeat the meaning in an Act.

The Interpretation Act

- Apart from definitions and rules of construction, an Interpretation Act includes substantive rules of law such as provisions relating to the effect of repeal of an Act.
- Section 3 of IGPA v Article 260 of the Constitution
- An Interpretation Act therefore;
 - clarifies the rules of construction,
 - avoids repetition, and
 - promotes consistency of language.
- It must be noted however that the meanings in an Interpretation Act can be ousted by a particular definition or provision in an Act.

Interpretation Act

- Basic Questions

- What are the basic terms used to refer to legislation?
 - Standardization of expressions
- When does primary and subsidiary legislation come into force?
- When legislation is amended, how does it affect reference to it in other legislation?
- What are the consequences of repealing legislation

Interpretation Act

- Basic Questions
 - What are the normal incidents of statutory power and duties?
 - How is time interpreted?
 - What general provisions apply to penalties?
 - Expiry of legislation?

Other Key Reference Laws

- Other Reference Laws that are important for a legislative drafter are-
 - County Legislation
 - Public Finance Management Legislation
 - Revision of Laws Act (Cap.1 Laws of Kenya)
 - Parliamentary Standing Orders (National Assembly and the Senate)
- These laws are relevant to the drafter because of their cross-cutting nature and supremacy while dealing with the subject matter of the respective statutes.

What are drafting instructions?

- Drafting instructions are data provided to the legislative drafter by the policy makers as a means of assisting the drafter to draft effective legislation within the parameters detailed by the policy makers of the government.

Drafting instructions cont...

- Legislative Drafter need to know:
 - (a) what the present state of the law is,
 - (b) what the law is to be, and
 - (c) why.
- The "what will be" and "why" are both important elements of legislative drafting instructions. In writing them down, in thinking them through, and in discussions about them, the "what is to be" and "why" help sharpen the issues from different points of view and often help create new ideas for better legislative solutions.

SCOPE OF THE INSTRUCTIONS

- Drafting Instructions should explain the reasons for the proposals – i.e., the problem the proposed legislation is intended to solve, or benefits which it is intended to confer. They should set out the principal objectives of the proposed legislation, and how the objectives are to be achieved by legislation.
- The instructions should mention any public response which has already been obtained in respect of the proposals, including consultation through e.g. the Law Reform Commission. The drafter is not asked to weigh the responses, but it is useful to know what the various views were.

SCOPE OF DRAFTING INSTRUCTIONS

- Instructions should deal with the legal aspects of the proposal. They should tell the drafter what the present state of the law is; what the law is proposed to be; and why.
- Drafting Instructions should deal with any legal issues known to the Ministry and if appropriate cite relevant case law e.g. on income tax liability in the case of a tax statute.

CONTENTS OF THE INSTRUCTIONS

- **Background information**

Instructions should contain sufficient background information to enable the drafter to understand the problem or initiative, how it has arisen, and why it is being proposed. This should include issues the legislation is intended to deal with.

CONTENTS OF THE INSTRUCTIONS

- **Principal objectives**

The principal objects of the legislation should be clearly and fully stated. It is helpful for the drafter to know the purpose of the legislation and for the instructing department to think through its precise purpose, so that the drafter properly understands what it is the legislation is intended to achieve.

CONTENTS OF THE INSTRUCTIONS

- The instructions should include an accurate and comprehensive description, in straightforward language, of how the objectives of the legislation will be achieved;
- Important issues of policy and administrative details should be included in the instructions. For example, if a power to make regulations is envisaged, the instructions should identify the kinds of things that are intended to be dealt with by the regulations.

CONTENT OF DRAFTING INSTRUCTIONS

- If the draft legislation is to be the subject of a consultative process, the instructions should describe the nature of it and the projected timeframes;
- The instructions should include information about the availability of all relevant legal opinions and legal research. Also relevant court decisions or an indication of their availability, and legislation in other jurisdictions that might provide assistance.

CONTENTS OF THE INSTRUCTIONS

- The instructions should mention any Acts or regulations to be repealed. Also any transitional or savings provisions needed to deal with issues arising as a result of the repeal of one law and the enactment of new law.
- The instructions should state the proposed timeframe i.e. the date for coming into force of all or part of the legislation, or information about how the law is to come into force.

CONTENTS OF THE INSTRUCTIONS

- whether other departments and agencies are affected by the proposal.
- The instructions should indicate if there have been consultations and note any outstanding issues.

FORMAT OF DRAFTING INSTRUCTIONS

- Proposed Legislation:
- Sponsoring Department/Ministry:
- Department/Ministry contact officer (Name/Ph/Fax, etc):
- Date of Cabinet approval in principle (Copy to be attached):
- Main objectives of the proposed legislation:

FORMAT OF DRAFTING INSTRUCTIONS

- Practical implications of the proposals:
- Unresolved issues:
- Legal advice received:
- Level of penalties (if any):
- Acts to be amended or repealed:
- Transitional or saving provisions:
- Proposed commencement date:

FORMAT OF DRAFTING INSTRUCTIONS

- Other Departments consulted:
- Other matters (including relevant background information, reports, etc):
- Proposed timetable.

WHAT FORM SHOULD DRAFTING INSTRUCTIONS TAKE?

- Most legislative drafters prefer to receive instructions in a straightforward narrative form. Many offices do not object to instructions in the form of a draft, preferably annotated with explanations.
- Departmental drafts are instructions only and legislative drafters will prepare their own draft based on the instructions. Consequently, departmental officers should avoid committing to any particular form of words or expression, because these may not survive the drafting process. Alternatively, involve legislative counsel early to get their input on proposals.

ETHICAL IMPLICATION FOR DRAFTERS AND DRAFTING IMPLICATIONS

- Drafters should serve as custodians of the Rule of Law to ensure good governance and avoid arbitrary decision-making.
- Protect public interest, loyalty to legislative process and the legislature;
- Competence in translating policies into effectively implementable legislation;
- Must never draft in ways that violate public interest.

ETHICAL MATTERS...

- Drafters should refuse to carry out Ministry/Agency's instructions if—
 - (a) Instructions do not uphold the rule of law
 - (b) Drafting the law will violate the constitution.
- Should a drafter draft a law that violates personal conviction?