

# Theory and Practice of Legislative Drafting

# Brown, George MACKay (1921 – 1996)

- *“We who deal in words must strive to keep language pure and wholesome; and it is hard work, as hard almost as digging a stony field with a blunt spade”*
- *[Time in a Red Coat (1984)]*

# Role of the Drafter

- Catalyst for Social Development and Change
- Word Mechanic
- Scientist
- Artist
- Contribute to achieving justice and welfare for society

# Role of the Drafter

- Analysis and understanding what the policy makers require
- Effective communication of the policy makers

# Constraints on Legislative Counsel

- The Constitution
- Existing laws
- Judicial approaches to legislation
- Drafting instructions
- Local drafting style
- Available parliamentary time

# Duties of a Drafter

- Identify constitutional issues that may arise
- Inform policy makers on the above
- Ensure as far as possible legislation will not be open to constitutional challenge
- Ensure compliance with formal and procedural matters
  - Money and Financial Bills; Bills on Devolution etc
- Offer alternatives where proposed provisions are unconstitutional

# Constitutional Issues that may Arise

- Separation of powers
  - Eg. County and National Roles
- Rule of law
  - E.g. discretionary powers
- Delegated legislative powers
- Curtailment of fundamental rights and freedoms
  - Art. 24

# The Drafting Process in Your Jurisdiction

- What is the unique jurisdictional process.
  - Time
  - Cabinet/ Responsible Ministry
  - Policy
  - Parliament
  - Debate
  - Readings
  - Public Consultations
  - Parliamentary Select Committee



# Who are the drafters?

- Technical Persons
- Persons within existing Ministries
- Attorney General's Chambers
- Consultants

# Law Revision in Your Jurisdiction

- When last were laws revised and updated?
- Constitution 2010

# Sources of National Laws

- Constitution as supreme Law
- Framework Legislation
- Sector Specific Laws
- Incidental Laws
- International Law (Art 2(5))

# Bismark, Otto von (1815 – 1898)

“Laws are like sausages. It’s better not to see them being made”

# Drafting Stages and Steps

- Suggested 5 Stages
  - Understanding Stage
  - The Analysis Stage
  - The design and planning Stage
  - The Composition Stage
  - The Scrutiny Stage

# Understanding Stage

- Instructions and Intent of the intended draft.
  - Written instructions – background information, national strategies, policies and action plans
  - Thorough understanding of the purpose of the draft instructed.
  - **Clearly stated** objectives in simple language
  - Clear lines of communication
  - Mechanisms for clarification and feedback

# The Analysis Stage

- Understanding the Current Law.
- The Constitution as the Supreme Law.
- Interpretation and General Clauses Act.
- What are the provision in various interlinking-pre-existing laws.
- Other Legal research.
- Practicality of the measure.
- Financial implications.

# The design and planning Stage

- Choosing the approach – A New Act or Amendment to Existing Laws, Regulations under and Existing Act.
- Establishing a broad and outlined framework
- Implementation mechanisms – enactment by **Re-enactment or by reference.**



# The Composition Stage

- Determining the text of the Bill
- Flexibility – No standard form, national style.
- Establishing a framework of sections and table of contents.
- Determining the structure of various provisions. –
- Remember rules of Statutory Interpretation.

# The Composition Stage (cont)

- Sources
- Comparative examples
- Comparative Approaches – Laws have been implemented in other jurisdictions. Common history and systems
- Electronic Research Tools
- Model Laws

# Suggested Arrangement

- PART I- PRELIMINARY PROVISIONS
- (a) Long title
- (b) Enacting formula/ Enacting clause
- (c) Short title
- (e) Purpose provisions/ Objectives
- (f) Definitions/ Interpretation

# Suggested Arrangement (Cont)

## **PART II- PRINCIPAL PROVISIONS**

- This part includes the substantive and administrative provisions. These are the heart of the Act. They create rights and duties and lay down the machinery of implementing the law, etc.

## **PART III-MISCELLANEOUS**

- provisions creating offences
- supplementary provisions i.e service of notices, powers of search and entry, power to make regulations, etc

## **PART IV- FINAL PROVISIONS**

- savings and transitional
- repeals
- schedules

# The Scrutiny Stage

- Revision work, carried out both by the draftsmen themselves and those who instruct them. There is consultation with sponsors, and various amendments to the draft from time to time, such that by the time the draft is in final shape.
- Finally, a draftsman colleague, who comes fresh to the exercise, should be asked to scrutinize the draft.

## *Checklist for Developing National Legislation*

- Set out Convention requirements for national action (legal or others);
- Closely examine each of the requirements;
- Consult relevant secretariat documents and precedents, including model legislation where available;
- Allocate time for each element of the legislation needed at national level;
- Legislative elements:
  - Definitions
  - Objectives
  - Principles
  - Operational provisions
  - Enforcement
  - Liability (where appropriate)