



AN APPRAISAL OF THE PRINCIPLES OF DRAFTING LEGISLATIVE PROGRAMME*

1.1 INTRODUCTION

The drafting of any substantive or subsidiary legislation such as Bills, Rules, Orders or Regulations are in most cases, done by Parliamentary Counsel or Legislative Counsel in the various State or Federal Ministries of Justice. Sometimes, Private Consultants are engaged. But experience has shown that, it is better to allow Parliamentary Counsel to draft all legislations.

Usually, Permanent Secretaries in both the Federal and State Ministries prepare the policy proposals in form of drafting instructions. This is made in line with the Government policies affecting any Ministry. It is then forwarded to the legislative counsel for drafting the policies into law. There, the responsible Minister(s) in the Ministry must work in conjunction with the Permanent Secretaries (called the sponsors) of the Bills or subsidiary rules. This is to enable the instructions and consultation with the drafter achieve the desired results of the law.

The purpose of this paper is to examine how these laws are made, created, and drafted from the issuing authority to the presentation in the legislative chamber. The procedures for processing legislation are partly governed by the Constitution and the standing orders of legislature. Administrative steps are usually taken to make these laws through the directions of the new cabinet. It is encouraged that these guiding principles should always be reviewed from time to time so as to meet changing times.

2.2 THE LEGISLATIVE PROGRAMME

2.2.1 Primary Stages

It is the cabinet that initiate the introduction of any Bill into the parliament or legislature. This could be indicated by a speech given by the President at the first opening session of the legislature sitting jointly. The issue of money Bills are to be introduced during the joint session of the legislature which must be determined. This is because, such Bills must be drafted within a specific time as would warrant appropriate Gazettal period. As this state, there should be a closer link between each Ministry and the Attorney General's Chambers.



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The Permanent secretary concerned should obtain legal advice from the Solicitor General as soon as practicable. Those to be affected by the Bill should be made aware of first, so as to enable them contribute where appropriate. Law does not operate in a vacuum. A statute is usually meant to guide and regulate the conduct and affairs of whom it is addressed. It takes cognizance of the cultural, economic, political and social conditions of society within which it is intended to operate.

Hence, a sound knowledge of these conditions are very necessary. Parliamentary or Legislative Counsel must take all these points into account before drafting. In this vain, the sponsor of the Bill: (Minister and his Permanent Secretary), the cabinet, interested members of the public and the drafter (legislative counsel) must work in unison in order to produce a befitting Bill for legislative approval so as to give it the force of law.

2.2.2 The Cabinet Stage

Each Ministry or Parastatal wishing to introduce any Bill must liaise with its Minister in the cabinet who will finally obtain cabinet approval to make the legislation in line with the government policies. In most instances, the preparation of legislation will be controlled by a Committee of the cabinet whose function shall include:-

- a. Preparing government legislative programmes for cabinet's consideration and approval each session.
- b. Keeping legislative Programme under constant review.
- c. Continues detail examination of all draft Bills.

It is usually advisable to have one central authority to harness and prepare all legislations. This will avoid duplicity and conflicts with existing laws. But, where there is one central legislative organ, consistency and uniformity of laws is easily achieved.

Any department, Ministry or Parastatal wishing to introduce a new legislation, that sponsoring department, Ministry or Parastatal must prepare and submit to the cabinet a memorandum stating all the objects and reasons for the proposed legislation. These policy proposals must have direct link with the government policies. In such case, it is necessary to obtain legal



advice from the Solicitor General (at the first instant). Other departments or agencies of government may be consulted if they have any interest.

When submitting the proposal to the cabinet, it may indicate the probable length of the Bill, its degree of urgency and the parliamentary or legislative session in which it is intended to be introduced. (see the format below).

2.2.3 Suggested Format of Cabinet Memorandum by a Sponsoring Department

1. Proposed legislation;
2. Sponsoring department;
3. Objectives of the proposed legislation
4. Main questions of policy involved;
5. Relevant laws affected by the proposal and to what extent?
6. Other departments that are interested or may be affected by the proposal and what consultation had been made with them and the result (attach copies of memorandum etc.);
7. Other relevant points, examples, probable length of bill, urgency, what session it is hope to introduce the bill.

Take note that full and detailed instructions are helpful and should be given and supported where relevant by memorandum exchanged. It should be noted that explanatory memorandum must be submitted to the cabinet unless the sponsoring department is in a position to give complete instruction for the drafting of the required Bill immediately cabinet approves. The memorandum should not be in form of a draft Bill; but must provide a clear outline or the substantive amendments or new proposal commended. It must contain an account of the views and comments, if any, of the other interested departments.

An explanatory memorandum is mandatory because it will checkmate departments who single-handedly employ private consultants to draft Bills that has no chance of being accepted by the government. What is more, without this requirements, drafters will be required to spend a great time and energy as well as incurring considerable expenses in futile drafting. It is better to employ them to draft Bills the government wants.

A memorandum ensures speedy advance approval from the cabinet of the broad principles of the proposed measure. But, take note that



memorandum does not substitute the Bill nor does it imply approval of the Bill. Later, the cabinet will examine the Bill in detail.

Upon the approval in principle of the draft Bill by the cabinet, the sponsoring department is notified. At this point in time, the sponsor is expected to give full detail instructions to the legislative counsel to draft the Bill for gazettal and is ready for submission to the cabinet by the responsible Minister. Before proceeding to analyze what will happen once the Bill reaches the cabinet, it is worthwhile to examine what constitute drafting instructions.

3.3 DRAFTING INSTRUCTIONS

These are informations which tell legislative counsel the main policies which government wishes to pass into law. They are the legislative ideas and programmes that directs Legislative Counsel to the purpose and proposed action to be achieved by legislation and how it can be achieved.

Using drafting instructions Legislative counsel metamorphoses government policies into effective legislation. Dr. Elmer Dredger states that drafters must be brought to the point where they are qualified to deal with the subject matter from a legislative point of view.¹

Legislative counsel must therefore know what the present state of law is, what the law is to be and why the law ought to be. These points just mentioned constitute the major tenets in legislative drafting. In writing them down, in thinking them through and in discussing 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 solution.²

To reiterate further, drafting instructions must state precisely the problem, the reason for the problem and how the problem can be solved without actually providing any legislative panacea. The sponsors of the Bills should not imagine themselves as lawyers because they issued the drafting instructions to the legislative counsel. They are to appreciate the final results of their instructions in form of policy made into legislation. Unlike conveyancing, legislative drafting does not encourage the copying of precedents nor polishing what others have drafted.....³ A learned author in legislative drafting, Dredger, have this to say of parliamentary legislative counsel.

If parliamentary counsel receives a draft, he must construe and interpret what may be a statement, and he may



his duties if he assumed that a proper legislative plan had been conceived and that proper provisions had been chosen to carry it out, he cannot be expected to confirm himself merely to a superficial examination of the outward form of the measure....⁴

What this means in essence is that, a drafter should have the sense of originality when actual drafting commences. Ability and skill should be put to use to achieve remarkable results.

4.4 DUTIES OF LEGISLATIVE COUNSEL

Some of the basic duties of a Legislative Counsel are as follows:

1. Maintain an orderly statute book.
2. Notify other departments of legislative proposals that may affect Acts under their administration.
3. Raise questions of principles.
4. Insist that transitional problems are considered.
5. Ask questions relevant to the draft Bill.
6. Identify and resolve charter and legal issues.
7. Refer unusual offence and penalty provisions to the Director for public prosecution for comment.
8. Consider all legislative proposals vis-à-vis any law in existence either revealed or amended.
9. Spot financial and other practical implication on the draft Bill.
10. Draw attention to significant policy changes made to instructions and decide the last word.

5.5 CABINET SUB-COMMITTEE STAGE

The cabinet sub-committee will scrutinize the Bill to ensure that the draft Bill reflects the policy proposal as approved by cabinet. The chairperson to the committee will recommend that the Bill be presented to cabinet or refer the Bill back to the Ministry if there are problems with it. But if there are no problems with the Bill, the Bill is passed to the cabinet who will make a final decision whether it should be presented to the legislature or parliament not.



6.6 GAZETAL OF BILL

If the cabinet approves the Bill for introduction into the legislature or parliament, the Bill is then Gazetted. Amendment to the Bill can still be proposed after Gazettal and before the third Reading in the House of Representatives. The Bill may also be sent to the Solicitor General after vetting of the amendment by the legislative counsel.

7.7 PROCESS IN PARLIAMENT (LEGISLATURE)

The legislative process involves:⁵

- a. First Reading: At this stage the Bill is formally introduced into Parliament by the Minister.
- b. Second Reading: Under this stage, the Minister introduces the Bill (from his Ministry) makes a speech and open the floor for full debate on the Bill.
- c. If parliament or the legislature resolves, the Bill is referred to the relevant sector committee for additional scrutiny.

8.8 SECTOR COMMITTEE STAGE

After a detail consideration of the Bill, clause by clause, it is undertaken by the Sector Committee of the house. Any proposed amendment is also studied by the committee.

Upon completion of their scrutiny, the Committee will report to the legislature their findings and submissions. This is referred to as the Report Stage.

9.9 REPORT STAGES, THIRD READING AND VOTING

After the Sector Committee report their findings, the Bill is subjected to voting. It is either passed or defeated. If the Bill is passed in the House of Representatives, it is referred to the Senate for similar debate and voting. If the Senate proposes and approves any amendments to the Bill, it is referred back to the House of Representatives which may agree or reject the amendment.⁶

Where the House of Representatives passes the Bill in two successive sessions and an interval of six months elapses between its passage on each occasion and the senate rejects the amendment or passes an amendment to



which the House of Representatives does not agree, the Bill is then referred to the President for assent.

But where there is no problem with the Bill at both Houses (Senate and House Representative) the Bill is directly sent to the President for assent from the Senate. Finally, the Bill is Gazetted as law and comes into force on Gazettal or on a date appointed by the relevant Minister.⁷

10.10 SUBSIDIARY LEGISLATION (REGULATIONS, ORDER AND RULES ETC.)

Subsidiary legislation does not require any cabinet approval in principle. It is only the final approval to publish that requires cabinet approval. The 'sponsor' either draft the subsidiary legislation or send drafting instructions to the legislative counsel through the Solicitor General. The requirement for the drafting instructions are the same as for Bills.

Where subsidiary legislations are made by or subject to the approval of a Minister, cabinet approval is required before the subsidiary legislation is published in the Gazette.

11.11 CONCLUSION

It can be seen from the above that at any stage of legislative drafting, the "sponsor" (issuing authority), must cooperate not only with the Solicitor General and the Legislative Counsel for advise and other legal matter, but those to be affected by the legislation must also be communicated to achieve better result. It was also observed that the giving of instructions on any law, the role of drafter particularly in relation to proper consultation with the relevant sector of the Bill is significant indeed. The President merely rubber stamp the final Bill after the House of Representatives and Senate complete their assignment.



END NOTES AND REFERENCES

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1. Driedger: "The Composition of Legislation" 2nd Ed., Published, 1976, p.8. xii - xix.

2. See David C. Elliot: "How to Prepare Drafting Instructions for Legislation (Canadian Style)" a News Letter of Common Wealth the "Loophole" by the Common Wealth Association of Legislative Counsel, (Annexure 1) p.8

3. V. Crabbe: "Legislative Drafting" Pub. In Great Britain London, 1993, p.14

4. Driedger Op. Cit. P. xix-xx.

5. See Standing Orders of the Senate of Federal Republic of Nigeria, 1999.

6. Ibid.

7. The coming into force of any law depends upon what the Interpretation Acts States.

See the Nigerian Interpretation Act Cap. 61 (as Amended), or any other Interpretation Law