

THE PREPARATION OF ACTS OF PARLIAMENT

D. A. S. Ward, C.M.G., B.A., LL.B.*

The purpose of this article is to describe how legislation is initiated and prepared. However, as many practising lawyers become involved to some extent in proposed legislation, by being required to advise clients affected by it, appearing before Parliamentary committees, or drafting local or private bills, it may be helpful first to describe briefly the Parliamentary process.

THE PARLIAMENTARY PROCESS

Most people are vaguely familiar with the way in which Parliament enacts a statute. The first step is the introduction of a bill, which is the technical name for a draft of an Act. In debates and in the Parliamentary records it is called a bill at all stages until it is passed and becomes an Act.

For practical purposes, there are three classes of bills—public, local, and private. These can be defined only in general terms, and there is some overlapping. A local bill is one that affects a particular locality only.¹ A private bill is one designed for the particular benefit of a person or body of persons, whether incorporated or not.² A public bill is one that is introduced as a measure of public policy and affects the whole community or some section of it. Practically all public bills are sponsored by the Government, and these are referred to in Parliament as Government bills; but a private member may introduce one, in which case it is called a private member's bill.

The four stages of a bill in Parliament are the introduction and first reading, when it is briefly explained by the Minister or member in charge; the second reading, when the main debate takes place; the committee stage, when the House resolves itself into the Committee of the Whole and the bill is debated clause by clause³ and may be amended; and the third reading, which is usually not debated unless the bill is controversial. The bill then receives the assent of the Governor-General on behalf of Her Majesty, and becomes an Act.

Before or after the second reading, however (nowadays usually before), a public bill may be referred to a select committee of the House for consideration and report, particularly if it is important or technical. A local bill is automatically referred to the Local Bills Committee before the second reading. A private bill is referred to a special committee after the second reading. In any of these cases the committee may make amendments which it recommends to the House for adoption.

Normally, these stages in the life of a bill are taken at well-spaced intervals, and there is usually ample time allowed for its scrutiny and for debates. It is the practice to allow at least three weeks to elapse

* Counsel to the Law Drafting Office and Compiler of Statutes; member of the Law Revision Commission; member of the Public and Administrative Law Reform Committee.

before the third reading, so that if any further defect is discovered the bill may be recommitted for amendment. Even after it has been read a third time the Governor-General has the power, before he assents to it, to send it back to the House with a recommendation for further amendments.⁴ This is a power that he would exercise only on the advice of his New Zealand ministers; and it has rarely been used in modern times.

It is not uncommon for a bill of any importance to be substantially amended during its passage, either in a select committee or in the Committee of the Whole. In almost all cases these amendments result from the acceptance by the Government of suggestions for changes or new ideas, resulting in changes of policy; but occasionally they are made to improve the drafting. It must also be remembered that in drafting the bill the draftsman has to work within the framework of a legislative policy that has already been decided. A bill is carefully constructed with all its pieces interlocking; and a change in substance or wording in any part of it may mean that many consequential amendments have to be made throughout the text. The draftsman in these cases has to work fast, having regard to the time-table of the House or the committee concerned. The practice is to have the amendments printed in the form of a Supplementary Order Paper for the House, or as a "slip" for a select committee.

Towards the end of a Parliamentary session the average man is apt to be misled by newspaper reports to the effect that on a given day the House passed some 20 or more bills. He does not realise that these are third readings that have been allowed to accumulate on the order paper, and that the bills have been before the House and its committees for weeks or months. Nowadays there is little real basis for the old but common cry of "rushed" or "hasty and ill-considered" legislation. It is true that some controversial policy bills may be introduced by the Government late in a session and have to be pressed through against strong opposition from the other side of the House. It does not follow that they have not been given thorough and often lengthy consideration before introduction; or that insufficient time has been allowed in the House for debates.

LOCAL AND PRIVATE BILLS

Local bills are prepared by the solicitors to the local authorities that promote them. Here Part XXIII of the Standing Orders (as amended in 1967) must be complied with, including the requirements of public notice and the depositing of copies in the local Magistrate's Court and at the public office of the local authority. The Law Drafting Office will be glad to give advice and make suggestions if a preliminary draft is submitted to it in good time before the advertising and depositing is done. This frequently facilitates the passage of the bill in the House. One of the statutory functions of the Office is to examine all local bills after their introduction and to report (in practice to the Local Bills Committee) whether and to what extent they affect the rights of the Crown or of the public or the provisions of any public Act, and generally as to their form and effect. At that stage the Office must recommend amendments that might have been avoided if a preliminary draft had been submitted before the bill took its final form. It is also

advisable for the solicitor to the local body to consult beforehand with the Government departments that may be concerned with the subject-matter of the bill, as it is their duty also to report to the Local Bills Committee.

Any lawyer may be asked by a client to draft a private bill. Here there is a special procedure by way of petition and public notice, and the Standing Orders of the House relating to Private Bills must be strictly complied with. Those who are not familiar with the procedure should apply to the Clerk of the House of Representatives, Parliament Buildings. He will supply a copy of the standing orders on private bills and a form of petition, and give any necessary information. So far as the actual drafting is concerned, the bill must contain a provision declaring it to be a private Act. It must also have a preamble setting out the facts on which it is founded and the circumstances that make it necessary. If the objects of the bill could be attained otherwise than by legislation, the preamble must state why legislation is preferred. The allegations in the preamble have to be proved to the satisfaction of the committee appointed to consider the bill. In other respects the drafting should follow as closely as possible the style of public Acts. Here also the Law Drafting Office, although it cannot undertake the drafting, will always be glad to give any advice in the preliminary stages, so long as this is asked for in good time before the required public notices are given.

In addition to its statutory functions in relation to local bills, the Law Drafting Office may be directed by the Prime Minister or the Attorney-General to report on the form and effect of any bill introduced by a private member, including a private bill.

THE INITIATION OF GOVERNMENT BILLS

In any session there are some bills that have their origin in a policy decision made by Cabinet in the first instance. Also, after an election the Government instructs the departments concerned to give effect to its pre-election platform. Some bills arise from the adoption by the Government of recommendations from a Royal Commission or a special committee set up to consider particular problems, or recommendations made by the Law Revision Commission or any one of its four standing committees.⁵ The majority of bills however originate with Government departments, who in their work of administering legislation find it necessary to recommend amendments to the law or new legislation on the many matters that the State now concerns itself with.

At the end of every session the Cabinet Office sends to every department a circular requiring it to set out briefly its proposals for legislation for the next session. These are required by a specified date, early in the new year. The departments' proposals are collated by the Cabinet Office under the names of the Ministers concerned, and in this way the proposed legislative programme for the next session is put together. This programme is submitted to the Cabinet Committee on Legislation, which holds a series of meetings to consider it. As each Minister's programme comes up on the agenda he attends the meeting with the Permanent Head or some other senior officer of his department. The Law Draftsman and his assistants attend all meetings. The committee considers each item and allots a drafting priority to each proposed bill.

Occasionally, where a question of major policy arises, the committee will refer the question to Cabinet for a policy decision; and some items are deferred for further information and consideration. Those bills that are considered to be essential for the coming session are given a first priority. A second priority is given to those which are not so urgent but will be done if time permits. In a third class are those which can wait for a further year.

This settling of the legislative programme is usually completed before the end of February or early in March, and the departments are then required to give full instructions to the Law Drafting Office as soon as possible, particularly for those bills that have been given a first priority.

In many cases, with Ministerial or Cabinet approval, consultation with organisations outside the public service takes place before the proposals reach their final form. The extent to which this is done depends on the nature of the proposals and on questions of policy and public interest.

THE DRAFTING PROCESS

Few people know much about the Law Drafting Office. Many of those who have heard of its existence think that it has little to do between Parliamentary sessions. The assumption seems to be that all the drafting is done after the session begins. This causes much wry amusement among the staff of the Office, who each year produce two bulky volumes of statutes and two almost equally bulky volumes of statutory regulations. The truth is that, although at the beginning of each year the instructions for new bills do not come into the Office as quickly as we would like, there are always instructions in hand that could not, for lack of time, be turned into bills during the previous year, and large consolidating and amending bills on which most of the work of drafting is done during the recess. Bill drafting goes on throughout the year.

The Law Drafting Office is a separate office of Parliament established by statute.⁶ It is not part of the public service proper (i.e., it is not under the control of the State Services Commission). It is under the control of the Attorney-General or, if there is no Attorney-General, the Prime Minister. It consists of two departments—the bill drafting department headed by the Law Draftsman, and the compilation department headed by the Compiler of Statutes. The Law Draftsman and his assistants, and the Compiler of Statutes, are appointed by the Governor-General and hold office during pleasure. Nowadays the compilation department (which consists of the Compiler and an Assistant Compiler) concerns itself only with the reprinting of Acts and regulations with their amendments incorporated, a function which is beyond the scope of this article. The bill drafting department is at present under the joint control of the Counsel to the Law Drafting Office and the Law Draftsman, both of whom are actively engaged in bill drafting. There are two Senior Assistant Law Draftsmen and three Assistant Law Draftsmen. The bill drafting is shared between these seven men. This is a very small number for the amount of legislation produced. It is less than half the number in the Parliamentary Counsel Office in London, whose annual production of Acts is no larger, and frequently smaller, than ours. Moreover, that office is not responsible for the drafting of regulations, as ours is.

When a department's instructions for a bill are sent to the Law Drafting Office the bill is allocated to one of the draftsmen, who then

becomes responsible for it at all stages until it becomes an Act. This is the beginning of a period of collaboration, sometimes lasting many months, between the draftsman and officers of the sponsoring department.

The draftsman must first acquire a sufficient understanding of the subject-matter, however technical it may be, and of how the objectives can be achieved in a practical way. He will critically analyse the instructions. He will have a series of conferences with the departmental officers concerned. Because of his experience and training he is often able to suggest modifications and improvements in the proposals. He does not decide policy, but he may raise a number of subsidiary questions of policy which can be settled between him and the department or, if necessary, the Minister in charge. At the same time he must master the legal background and relate the proposals to the existing statutes and general law. He will usually have to provide legal sanctions and procedures for enforcing the proposals and safeguarding the rights of persons affected. If the proposals substantially affect the activities of another department, he will require the sponsoring department to discuss them with it.

The draftsman then works out an arrangement of his bill and prepares a first draft. In this process, because form and substance are inextricably mixed, more questions will arise for settlement and more discussions may be held. Finally the draft is finished to his satisfaction, is typed, and is sent to the Government Printer. Copies of the printed bill are sent to the sponsoring department and to every other department that has an interest in any part of the subject-matter. Their comments are collected, and further conferences may be held. The draftsman will have to reconcile the conflicting views of the departments; or if a question of major importance is unresolved, he will require that it be submitted to Cabinet for decision. The draft is revised from time to time, and a complicated bill may have as many as a dozen or more "revises".

When all concerned are satisfied with the bill, and the Minister in charge has approved it, copies are sent to the Cabinet Office and circulated by that Office to the members of the Cabinet Committee on Legislation, which meets to consider it and such other bills as are ready. The meeting is attended by the minister in charge of the bill, the draftsman, and the departmental officers. The bill is explained to the Committee, which may require amendments to be made before it is referred to Cabinet. The Cabinet Office then circulates copies to all members of Cabinet for study before the next weekly Cabinet meeting. When Cabinet has approved the bill, it is explained in a meeting of the Government caucus by the Minister in charge. A complicated or important bill may be referred to a caucus committee for study. When the Government is finally satisfied with the bill, it is introduced.

The draftsman's work is still not finished. He must attend all meetings of a select committee to which his bill may have been referred. He must sit in the "officials' seat" beside the Speaker's chair while the House is debating the bill in Committee of the Whole, ready to advise the Minister on questions raised in the debate. He must be ready to draft amendments required by a select committee or by the Minister.

This account may give the impression that the preparation of a bill is a leisurely process, but that is not so. In a normal session, lasting about six months, more than a hundred bills are passed, and more

are drafted but fall by the wayside. The exigencies of the Parliamentary programme, and the varying periods occupied in the preparation of bills according to their size and complexity, often require that the process of discussion and revision be ended as quickly as possible in order to maintain a steady flow of legislation at the right times. It is a common feature of all legislative drafting offices that the draftsmen work under continuous pressure. As one draftsman in England has said, "the time allowed for the drafting of a bill is in inverse ratio to the square of its importance and difficulty". Much of the draftsman's time is spent in attending committee meetings and conferences; and between drafting bills he still has to produce his share of the ever-present regulations.

Coping with this volume of work is only possible because the time taken in the actual drafting of a bill is usually very much less than the time taken by the departments in considering it. As soon as one draft bill has been sent to the printer for setting in type, the draftsman takes up another set of instructions and starts on the whole process of preparing another bill. He soon has at least five or six draft bills at various stages of revision at any one time.

THE LANGUAGE OF STATUTES

Many people ask why Acts of Parliament cannot be drafted in simple terms that the man in the street can understand. The answer is that if they were, most of them would not work. Much of our legislation today is complicated because it deals with complicated and technical subjects. Apart from this, however, the dilemma of the draftsman is neatly summed up by Sir Ernest Gowers.⁷ He points out that certainty of meaning must be the paramount aim, and that if anyone is to be held irrevocably to meaning what he says, he must be very careful to say what he means. Quoting the statement of Glanville Williams that "words have a penumbra of uncertainty", he says that the English language is an imperfect instrument for attaining precision, and that drafting lies in the province of mathematics rather than of literature. The draftsman's duty is to imagine every possible combination of circumstances to which his words might apply, and to take precautions against every conceivable misinterpretation of them. He must use more words to limit those that have a dangerously wide meaning, and amplify those whose meaning may be restricted. He must be careful with his syntax and avoid every possible ambiguity, bearing in mind that the Courts may pick out any one of the mass of contradictory canons of construction available to them.

In the following quotation, Gowers compares Acts of Parliament with the products of conveyancers:

The only difference between the language of Acts of Parliament and that of private legal documents is that in the skilled and experienced hands of Parliamentary Counsel its inevitable peculiarities are less obtrusive and ungraceful than they are in the hands of the ordinary private practitioner. Such as they are, they are caused by the necessity of being unambiguous. That is by no means the same as being readily intelligible; on the contrary, the nearer you get to the one the further you are likely to get from the other.⁸

One cannot of course resist quoting this rare example of a complimentary reference to legislative draftsmen. It should be added that the

specimen given by Gowers at the end of the same chapter (designed to redress the balance) was drafted in a Government department, but not in the Parliamentary Counsel Office.⁹

After spending 26 years in the Law Drafting Office, and many years before that as a conveyancer in practice, I think I can fairly say that Gowers is correct in his comparison between the legislative draftsman and the conveyancer. Within the limits imposed by complexities of subject-matter and the need for precision, we should both be aiming at the greatest possible clarity. The words used must be general enough to be flexible, and specific enough to cover every aspect of the subject-matter; but unnecessary words should never be used, and propositions should be stated as simply and as clearly as possible.

The average conveyancer tends to be wedded to his precedents and to use sacred forms of words rather unthinkingly. He introduces a proviso with the words "Provided however", or "Provided however and it is hereby agreed and declared" (either two or nine words where one would do). At the risk of ambiguity, he eschews punctuation. He tends to be long-winded and repetitive. He avoids pronouns as if they were the plague. He uses a good deal of jargon. His client does not usually understand the document he is asked to sign; but in most cases this does not matter, as it affects only two or three parties who usually take their lawyers' advice on what it means.

Simplicity of course can be bought at too high a cost. Sir Noel Hutton, Chief Parliamentary Counsel in the United Kingdom, recently quoted the following reply once given in the House of Commons by Mr Harold Macmillan¹⁰ to the question why legislation cannot be drafted in simple terms:

Let us take this sentence: "When John met his uncle in the street he took off his hat." That is a clear sentence, but it is capable of at least six different meanings.¹¹

THE QUALIFICATIONS AND TRAINING REQUIRED

The basic requirements for a legislative draftsman are that he should be legally qualified, preferably as a barrister and solicitor, with a sound knowledge of law, initiative, and the ability to express legal propositions clearly and precisely. It is also desirable that he should have had some experience in practice, so that he has a practical approach to problems. He must be able to make decisions and give advice quickly, and have confidence in his own judgment and the strength to oppose, if necessary, proposals that are wrong in principle. He must be able to make friends and get along well with people, and have the personality required to command the respect of Ministers, Parliamentary committees, Heads of Departments, his fellow lawyers, and others. He must be a model of tact and integrity, and be prepared to serve loyally, and respect the confidences of, his clients, namely the Government in power. In addition, he will be expected to work very hard without regard for normal office hours, and at high pressure, and at the same time be quick and thorough.

It may be said that these qualifications are simply those of a good lawyer who will be successful in private practice. Unfortunately, few men with these qualities are prepared, even allowing for the super-annuation benefits available, to give up the rewards and attractions of

practice to make a career of legislative drafting. Also, a man may be a very good lawyer, but not have the flair required for a good draftsman, who must at all times be "sensitive to the nuances of text and context".¹² The best man for this work is one who, although he may not be practising in the Courts, has the kind of mind that goes to make a good *banc*o advocate. Even then, he will need some years of training and experience in bill drafting, which can only be acquired in the Law Drafting Office, before he can become a skilled and competent draftsman.

The legislative draftsman in fact must be a dedicated man. In return, he will experience satisfactions that, in the opinion of those of us who have worked on both sides of the fence, are greater (though not financially) than those derived from ordinary practice. The work is full of challenge and variety, and is tremendously interesting. The responsibility for the form of our statute law, to say nothing of a good deal of its substance, is a heavy one; but it is more than balanced by the creative nature of the work, the satisfaction of wielding a considerable influence in shaping our social and administrative institutions, and the knowledge that one is making a real contribution to society. I have never yet met a legislative draftsman who regrets that he is one, or is unhappy, or has ulcers.

1 Standing Orders of the House of Representatives Relating to Public Business, S.O. 257.

2 Standing Orders of the House of Representatives Relating to Private Bills, S.O. 3(1).

3 "Clause" and "subclause" are the terms used to refer to what ultimately become a section and a subsection of an Act; but in the actual text of the bill the terms "section" and "subsection" are used.

4 The New Zealand Constitution Act 1852, s.56.

5 The Public and Administrative Law Reform Committee, the Contracts and Commercial Law Reform Committee, the Torts and General Law Reform Committee, the Property Law and Equity Reform Committee.

6 The Statutes Drafting and Compilation Act 1920.

7 Gowers, *The Complete Plain Words*, (1958), ch. II, 8.

8 *ibid.*

9 Sir Noel Hutton, "The Preparation of Acts of Parliament" (June 1967) *The Law Society's Gazette*.

10 4 July 1963.

11 See note 9.

12 Dickerson, "The Diseases of Legislative Language" (1964) *Harvard Journal on Legislation*, Vol. 1, 14.