

(a) The Guides to Legislative Drafting

1.0. INTRODUCTION

1.1. Legislative Drafting

Legislative Drafting is the skill of a Legislative Drafter who is a lawyer trained in the discipline of mastering the use of words and knowledge to effectively communicate policies and intentions into simple, clear and intelligible laws, and analyzing the future to produce workable and realistic solutions which will develop society" this is cemented by words of William Butler Yeats "think like a wise man but express yourself like a common people". In other way

Legislative Drafting is the skill of a Legislative Drafter who is a lawyer trained in the discipline of mastering the use of words and knowledge to effectively communicate policies and intentions into simple, clear and intelligible laws, and analyzing the future to produce workable and realistic solutions which will develop society.

Legislative drafting is guided through the legislative process where the Bill is carried forward through all the stages of the legislative process by long chain of standardized motions which must be adopted by the Parliament before the Bill becomes law.

It is these motions, and not the bill, that are the subject of the debates and decisions of the House¹. The stages to which the motions correspond "constitute a simple and logical process in which each stage transcends the one immediately before it, so that although the basic motions that the bill be read a first (second or third) time appear the same, and seem repetitious, they have very different meanings". Moreover, the House does not commit

¹Bosc M &Gagnon A, (2017), House of Commons Procedure and Practice, 3rd Edition, House of Commons chamber des communes, page. 1

itself conclusively to a bill until the final stage, when it takes a decision on whether or not the bill should receive final passage².

1.2. Scope of the question

Question demands the recognized stages to adhere when drafting legislation, which are herein under emphasized exhaustively. Mark Evan Segal, Esquire asked himself in his book, *Legislative Drafting: Principles and Material*³: How can a law be drafted to implement policy objectives and legislative solution? Once policy objectives and legislative solutions are identified, the next step is to make sure that they are codified into implementable laws. Two key factors must be managed: the structure and content of the draft law, this is substantive and technical exercise, and initially the responsibility of legislative drafters and the review and approval of the law, this is a procedural, matter, involving all of the parties who consider, amend, and finally enact the draft law

Both aspects are closely related, and significantly affect each other. However, for analytical purpose, this paper deals only with the first aspect particular on stages for drafting legislation (Codification). In other words, legislative drafter makes sure that the law, as written, will solve the problem, as identified (achieve the intended results). Further, this should be done according to the models and through the mechanisms selected during the policy making process

2.0. MAINBODY

Legislative drafting like any other form of legal drafting is an institutionalized means of communication. The essential distinction is that unlike other forms of legal drafting which may be easily altered or changed, legislative drafting is more of a permanent enactment which stands on its own and speaks for itself without any form of assistance, elucidation or

²John Benjamin Stewart, (1977), *The Canadian House of Commons*, McGill-Queen's University Press edition. Page no. 81

³ (2011), at page no. 16

explanation from the drafter or draftsman.⁴ The process of drafting legislation may be said to begin with the receipt of drafting instructions and end with completion of an agreed draft. But the drafting process needs to be seen in a wider context if it is to be understood fully. It is just one part of the process of Legislation whereby an idea or concept concerning the social framework of society becomes government policy, is transformed to legislative shape by means of the drafting process, and eventually passes through the legislative machine to reach the statute book as law.⁵ The following are the stages or guides of legislative drafting:

2.1. UNDERSTANDING

In order to perform their task, legislative drafters require: a sound understanding of policy objectives, and access to policy makers if clarification are requiring and this can be achieved upon subjected to accurate information about the problem and actual socio-economic condition. From there they might knowledge concerning different approaches to the problem which have already been attempted, particularly in other jurisdiction⁶. This is the first stage in legislative drafting in which the draftsman shall understand the process of drafting a law and the instruction set forth to him. Drafting instructions are the instructions emanating from the authority sponsoring the law to the legislative draftsman who is responsible for reflecting policies in laws or statutes. The instructing authority could be anything from the government, a Parastatal or other agency of government. The legislative draftsman would, invariably, be a lawyer knowledgeable in the art of drafting laws and could be a legal practitioner commissioned to draft the law. But also in this stage it is the duty of the drafter to work hard for him to understand the goal of proposed

⁴Duru, O. W, (2016), Article on Legislative Drafting: Techniques and Practice, page no. 1

⁵Thornton, G C., (2005), Legal Drafting 4th edition, page no. 124

⁶Mark Evan Segal, Esquire.(2011), *Legislative Drafting: Principles and Material*, at page no. 16

legislation. The aim is the same of proceeding uninterruptedly from start to finish, preferably the bursts of acceleration.⁷

2.2. ANALYSIS

This is the second stage in legislative drafting; in this stage Legislative proposals should be subjected to careful analysis in relation to; existing law, special responsibility areas or Potential danger areas, practicality. As it deals with enforcement of legislative enactments; the magic of words is indeed wondrous. It is common to find that sponsors of legislative proposals seem more interested in pushing for rapid legislation without considering the capacity of the proposed legislation to be administered effectively and without difficulty⁸. For instance, if a law is drafted in Mainland Tanzania a non-Islamic state that all the women should use hijab, it would not be practicable.

Therefore, the drafter in this early stage need to study most rigorously the practical aspect of the legislation proposed and be satisfied that the scheme will work, that the machinery proposed is practical and that the legislation will be capable of enforcement⁹.

2.3 DESIGN

There is a certain magic to the process of being able to transform concepts into law. Everyone has a different style of drafting. Conceivably, “if five drafters were set on the same Bill, each might emerge with a different product;” suggesting that “legislative drafting is an art rather than a precise science.”¹⁰ To read through legislation drafted by others in order to develop a sense of what techniques work well.

⁷Thornton, G C., (2005), *Legal Drafting* 4th edition, page no. 129

⁸Duru, O. W, (2016), *Article on Legislative Drafting: Techniques and Practice*. At page no. 10

⁹Thornton, G C., (2005), *Legal Drafting* 4th edition, page no. 138

¹⁰Geoffrey Bowman, (2006), *The Art of Legislative Drafting*, 64 *Amicus Curiae* 2, at page no. 2

This is the third stage in legislative drafting, Onyekachi W. Duru, in his Article on Legislative Drafting: Techniques and Practice, he had a point of view that leads him to prepare a checklist, at this stage; the draftsman is to do the following; Make a precise outline of the objectives and principles to be contained in the legislation; Make a statement of the principal means of attaining the objectives and principles; Design the structure of the draft statute, like the substantive provisions and the administrative provisions of the Bill. Look at existing statutes to see what the structure is in that jurisdiction; Have a pre-prepared checklist to serve as a guide; Know the conventional practice in that area, the socio-political realities in that area and the adequacy or inadequacy of existing laws.

After gaining thorough understanding of the proposals and assessing same in relation to existing law, the draftsman now reaches the design or planning stage. This is the outline or framework prepared by the draftsman that assists him in visualizing the shape or broad content of the enactment¹¹.

In relation to the conflicting needs of legislators and ultimate users of legislation, the Renton Report recommends that 'in principle the interest of the ultimate users should always have priority over those of the legislators: a Bill, which serves a merely temporary purpose, should always be regarded primarily as a future Act, and Should be drafted and arranged with this object in view'

2.4 COMPOSITION AND DEVELOPMENT

The composition stage of drafting process is itself a process of development. Except in simplest bills the composition of the 1st draft marks only the beginning, as the draft is developed and discussed with its sponsors, successive drafts are necessary. During this process of development, the considerable degree of mental displacement is called for. The degree of the

¹¹Duru, O. W, (2016), Article on Legislative Drafting: Techniques and Practice. At page no. 11

mental displace increases rather than decreases as a drafter becomes small experienced because confidence particularly when the drafter is under pressure to complete a bill within a short time tends to seduce him / her from the work habit of patience and care which have been carefully cultivated.

In the production of the first draft and in the earlier stages of developing the draft, the emphasis is on essential matters of substance rather than form and the drafter has foremost in the mind the need to give effect accurately to the drafting instructions. Work at this stage is, of necessity, roughly hewn and is likely to be awkward. The drafter is preoccupied with the choice of words best suited to his or her purposes and so sentence structures are likely to be capable of improvement. The draft does not read well at this stage even if sentences are syntactically acceptable. There are very probably inconsistencies between various provisions of the draft and unsteadiness of language¹².

It is a matter of converting what is comprehensible and clear to the drafter to the shape and form most easily and unequivocally comprehensible to the reader. The process is usually described as polishing the draft but it is much more than that.

The draft and successive developments of the draft will be submitted to the instructing officer for study and comments. Each draft is likely to be accompanied by a list of queries and comments that will call for a response from the instructing officer. As the experience and skills of the drafter disclose weaknesses or problems in the proposals or matters that have not been but should be dealt with. The development of a close and positive link between the drafter and the instructing officer is an important necessity if the inadequacies and ambiguities of both the drafting instructing and the draft are to be detected and remedied

¹²Thornton, G C., (2005), Legal Drafting 4th edition, page no. 144

2.5 SCRUTINY AND TESTING

This is the last stage of legislative drafting that requires a great deal of self-discipline. It is far from easy but the drafter must somehow take a critical and objective look at the finished product. First, the drafter should read the draft and consider it as a whole. These questions are to be considered, as does the draft achieve all those objects that the drafter believes to be the intended objects of the proposal?, does the draft fit harmoniously into the general body of the law?, does the law comply with basic principles of the legal and constitutional system?, does the draft form a coherent well-structured whole and does the material flow in logical sequence?, are the content and the language of the draft as clear and comprehensible as the drafter can make them?¹³

Then comes the tedious necessity to check all matters of detail including; Consistency of language (Is the same word always used with the same meaning? Are different words used for the same meaning?), References to other legislation (.Are they up to date and accurate?), Internal cross-references (Are they necessary and if so are they accurate?), Capital letters (Are they all necessary?), Consistency of penal sanctions (Is the level appropriate and does the draft provide a sanction in every case where it should?), Arrangement of provisions within the appropriate Parts or Divisions (Assuming the structure is satisfactory, is every provision correctly located?¹⁴)

Therefore, a drafting colleague who comes fresh to the exercise should be inveigled into scrutinizing the draft and offering comments.

(b) Briefly explain the process for enacting the law in Tanzania

¹³Thornton, G C., (2005), Legal Drafting 4th edition, page no. 173

¹⁴ Thornton, G C., (2005), Legal Drafting 4th edition, page no. 174

Just in a nutshell, the legislative powers are vested under the Parliament and thus it is the Parliament which has the enacting power. Under Article 97 of the **Constitution of the United Republic of Tanzania**¹⁵ it is required that the national assembly shall exercise its legislative power i.e. power to make law through two processes, debating process and passing bills.

Thus, the process of enacting the law in Tanzania has the following areas of consideration.

Administration of Consultation papers /green papers

Consultation or discussion on the new law is staged with interested parties such as professional bodies, voluntary organizations and pressure groups. Green papers set out government proposals that are still taking shape and seek comments from the public.

Administration of White papers

Proposals for legislative changes may be contained in government White Papers. There is no requirement for White or Green Papers to be introduced before a Bill is introduced into Parliament.

Pre legislative scrutiny by way of Draft bill

A Draft Bill is a Bill that is published to enable consultation and pre-legislative scrutiny before a Bill is formally introduced into the parliament. A Draft Bill may be considered by a select committee of the parliament in order to allow Members of Parliament to have early influence on the Bill. This process is known as pre-legislative scrutiny.

The Bill

Then a bill for the new law is introduced into the parliament ready for discussion through the whole Parliament debate. A Bill is a proposal for a

¹⁵ The Constitution of the United Republic of Tanzania of 1977 as amended time-to-time

new law, or a proposal to change an existing law that is presented for debate before Parliament.

Debating the bill

Bills are introduced in the parliament for examination, discussion and amendment. Here a bill must be supported by at least 2/3 of all members of the parliament. See article 98 of the URT.

Passing the bill; When the parliament approves the content of a Bill it is then presented to the president for approval. Once Assent is given a Bill becomes an Act of Parliament and is law.

CONCLUSION

Hence the above discussion based on the stages or guides as required in the question as well as the process of making the law herein under is on Principles to achieve the main purpose of drafting, that is to say the drafter must be sequential in arrangement so that the reader can understand the legislation but also as it meant to be understood drafter should use good sentence structure and for easy catch up has to apply paragraphing techniques. Moreover is of paramount to understand that the process of making the law till its consumption is never as simple as one could pass his letter for recommendations.

REFERENCES

The Constitution of the United Republic of Tanzania of 1977 as amended time-to-time

Bosc M &Gagnon A, (2017), House of Commons Procedure and Practice, 3rd Edition, House of Commons chamber des communes

Duru, O. W, (2016), Article on Legislative Drafting: Techniques and Practice

Geoffrey Bowman, (2006), *the Art of Legislative Drafting*, 64 Amicus Curiae 2

John Benjamin Stewart, (1977), The Canadian House of Commons, McGill-Queen's University Press edition

Mark Evan Segal, Esquire (2011), *Legislative Drafting: Principles and Material*,