The Wavering Line between Policy Development and Legislative Drafting

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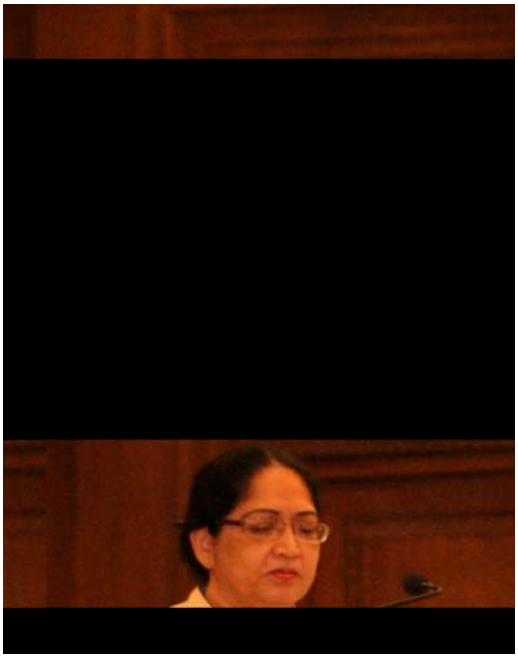

Abstract:

This article looks at the role of legislative counsel in terms of the centralized legislative drafting model used most widely in Commonwealth countries, particularly in Sri Lanka. This model is premised on a distinction between policy development and legislative drafting. This article accordingly considers the benefits of this model and the challenges of maintaining it as well as the related questions of what are good drafting instructions, how can policy officials be instructed on preparing them and should the legislative counsel sit in with the policy makers or should they act as a third party facilitator of the people's will through the legislature?

Introduction

I am grateful the hon. Gentleman for the tribute that he has paid to Parliamentary Counsel. The Government -- and, in that sense, the House -- gets an absolutely first class service from these people, who are a somewhat insufficiently sung part of the legislative and the governmental process.[2]

Since it is the legislative counsel who is responsible for drafting legislation, and since it is this same legislative counsel who is subject to the many constraints of the present day in carrying out this job effectively and efficiently, I thought this quotation would be apt to

[1] President's Counsel, Legal Draftsman, Department of the Legal Draftsman, Sri Lanka.

[2] Leader of the Government in the House of Commons (Mr. Newton), *House of Commons (UK) Debates*, July 11, 1996, column 635.

make all of us smile broadly and remember that there are people who do recognise and pay tribute to legislative counsel and their very complex job of drafting of legislation, and more so when the policy behind modern day legislation is obscure and the finished product (Act) may very well reflect the policy as understood or interpreted by the legislative counsel and not that intended by the Executive!

In order to be able to understand the *nuance* involved in the topic that is before us today, we must firstly delve into the history of 'what is policy', 'why policy is important' and 'whose policy is it that we are talking about'. As a legislative counsel with over 36 years of experience in the field of legislative drafting, to me policy, which is the basis of all legislation of a country, is the engine which powers the job of a legislative counsel.

Policy

Policy can be explained as the manifestation of an objective. The use of the word "policy" by a legislative counsel is therefore intended to mean the objectives of the governing party of a State in relation to each distinct legislative proposal enunciated by it. These objectives are described as the policy for which the executive gives its approval and which is then required to be transformed into law in order that the governing party may then implement such laws and thereby prove to the general public, which is its electorate, the soundness of the policies expressed in its election manifesto. Indeed there are religious policies, social policies, political policies, economic policies, education policies and so on, which are born out of election manifestos and which are paraded by the would-be parliamentarians to convince the voting population of a country into voting for a particular political party at a forthcoming election. As such, policy is a tool and even at times a weapon in the hands of politicians, administrators and governments the world over.

It is therefore correct to say that the primary function of a legislative counsel is to transform governmental policy into understandable and implementable laws: to be responsible for the preparation of primary legislation. Thus in relation to a Government in a parliamentary state, the onus of making policy and manifesting such policy rests with the Executive arm of the Government.

Here I digress for a brief moment to recall the Doctrine of the Separation of Powers, which is the backbone of the Westminster system of Government and which is also applicable to Sri Lanka. The main feature of this system is the compartmentalisation of the three main arms of governance or the holy trinity of good governance: Parliament, the Executive and the Judiciary. The function of the Executive is to conceive/make policy and manifest such policy; the function of Parliament is to enact legislation giving effect to such policies; the function of the Judiciary is to interpret the legislation enacted by Parliament on the basis of the policies conceived/made and manifested by the Executive.

Thus the policy relating to any subject which needs the attention of the legislature will, once approved by the Cabinet of Ministers on the basis of the Cabinet memorandum and

the accompanying explanatory notes prepared by the relevant Ministry, be forwarded to the Office of Legislative Counsel for the commencement of the process of drafting the required legislation. Here the Executive is playing its role in the legislative process by identifying and approving the policy underlying the proposed legislation. The legislative counsel is then required to prepare the draft legislation in accordance with the approved policy in order that the Legislature may proceed to enact it as an Act of Parliament and make it implementable. Thus we see very clearly that modern day legislative drafting in most parliamentary jurisdictions the world over is expected to be premised on a clear distinction between policy development and legislative drafting.

Drafting

Now that I have explained the position that "policy" enjoys within the scope of the functions of a drafter, I will proceed to discuss the importance of this "thing" which is labelled "POLICY". The process of drafting begins with the arrival of the Cabinet decision in respect of a particular subject at the Office of the Legislative/Parliamentary Counsel. This is accompanied by the relevant Cabinet memorandum, which is what is called the policy document and any other documents which are relevant to that particular subject. These documents then are the starting point of the drafting process, which has to be carried out in terms of the provisions of the Constitution of the country and any other administrative rules or regulations which may be issued in that regard by the Cabinet.

A careful study of the Cabinet memorandum is then made by the particular drafter who by this process, prior to putting pen to paper to start drafting, ought to have been able to understand/identify –

(1) the new concept in respect of which legislation is sought to be introduced;

(2) if not a new concept, then, the scope of the amendment needed to introduce a new concept into the law, the wrong sought to be rectified, the actions done without legal sanction to be validated, the immunities to be granted and so on;

(3) the manner of setting about writing the required legislation in order to best address the requirements of the Cabinet memorandum.

If the drafter has attempted and done what I have enumerated above, then it can be said that the drafter has understood the scope of the policy of the memorandum and is now in a position to write the required legislation in order to address the concerns of the particular Ministry.

But sadly today, the process of understanding a present day Cabinet memorandum and embarking on the drafting process is not so straightforward as it was a decade ago. The drafter is very often placed in a very difficult position in trying to ascertain the policy underlying a particular piece of legislation which he or she is required to write in pursuance of the Cabinet memorandum.

There are many reasons for this difficulty and this is the point at which we see the distinction between the wavering line between policy development and legislative drafting becoming more and more indistinguishable and then becoming almost non-existent in certain cases.

Most present day Cabinet memorandums and related policy papers are not well done, the main reason being that the writers of these documents (at least in Sri Lanka) are more often than not persons who are not lawyers. They lack the understanding of the concept sought to be introduced and therefore cannot explain it properly. Whereas Cabinet memorandums of yesteryear were masterpieces, today's are pale imitations. The writers of these policy documents are administrative officers in most cases who are rotated among the Ministries since they belong to a transferable service. They do not stay long enough in one place to understand the subject assigned to that Ministry and are therefore totally incapable of addressing the issues coherently. At times even if the writers are legal officers we find that they try to see the problem in a different light and therefore do not articulate themselves well in the policy papers in order to be of any assistance to the hapless drafter. In this situation, we see very clearly that the drafter is subject to a number of constraints that can result in the drafting of provisions of the law being less satisfactory than both he or she and the reader of the legislation would like.

What does the harassed drafter do in such a situation, even after several efforts to communicate with the officials and sieve out the main requirements of the policy paper in a sequential and coherent form have proved to be fruitless? The drafter sits down, conceives what he or she thinks are the requirements of the Ministry and then proceeds to write the legislation based on the jigsaw-puzzle-like pieces of the policy which stare out like an unfinished symphony. The drafter then proceeds to fill in the gaps as best as he or she can, and then invites the officials of the relevant Ministry to come for a discussion in order to see whether the draft meets the policy objectives they were seeking. More often than not, the officials are delighted since the draft looks very good and contains much more detail than they had envisaged. This means that they are more than satisfied with the legislative drafter for having stepped into their shoes and extracted the policy for them and for writing the legislation on the basis of such policy.

Today in our jurisdiction it has become a common phenomenon for the relevant line Ministries to obtain the services of lawyers who are not trained drafters and prepare a draft of the proposed legislation in the way that they think it ought to be drafted. These drafts more often than not tend to make it more difficult for the drafter as the relevant officials always say to us, "but we have it stated differently in the draft"! This is a practise which we discourage in every possible manner by insisting that the translation of policy into legislative form is the sole purview of the drafter and the erosion of this function is not tenable. But it is easier said than done, most often because the officials of the relevant Ministry have some concern in the subject of the legislation or have been otherwise convinced by the persons who are "affected" by the proposed legislation.

For most part, the process of drafting of legislation is conducted on instructions of departmental officials/lawyers who are following the instructions of their Ministers, but how accurately they are understand and translate these instruction is yet another matter. The draft legislation is also sent back and forth many a time until each one in turn thinks it is exactly what they want. Then the draft legislation is forwarded to the Ministry concerned, after obtaining the observations of the Attorney General on the constitutionality of the draft legislation, so that the procedure for the enactment of the draft as law can be followed.

Today the question is also asked as to whether the legislative counsel ought to sit in with the policy-makers and assist in the conceptualisation of the policy of legislation, or whether the legislative drafter should act as a third party facilitator of the people's will through the legislature by waiting till the policy (good or bad) is formulated by the relevant officials and then play the role of the devil's advocate and write the draft on the bare skeleton of policy available to him, and then write in words filling in the gaps in the policy and make the skeleton acceptable. To aptly summarize the above I quote the words of Justice VCRAC Crabbe,

> Parliamentary Counsel must have a strong interest in substantive policy. Yet the classic theory is that Parliamentary Counsel do not initiate policy. They are only technicians whose function it is to translate policy into law. But, like the architect or the engineer, they must be brought into the particular problem long before the actual stage of drafting of a Bill. ....They must not seek to initiate policy. Policy issues are the preserves of others. But how does one translate policy without understanding that policy? Herein lies the inevitability of Parliamentary Counsel getting involves in policy considerations. The training given to Parliamentary Counsel, their vast knowledge of the existing law, their experience of the probable consequences of a piece of legislation, all these matters place them on a pedestal from which they have to be consulted on policy issues and from which they need to advise and warn. … Parliamentary Counsel do not usurp the role of the policy maker … they must appreciate their own limitations, learn to submerge their own feelings and thereby act with scrupulous objectivity and integrity. They should not seek to dictate policy … but as seasoned legal advisors they should help to shape policy … a Parliamentary Counsel who is 'deferential, decently reticent, candid and diplomatic can make much policy as a public servant.' [3]

The facts discussed above would have given you a very clear picture of the realities of the present day. That is where the legislative counsel leaves aside the traditional role of a drafter and gets involved in the identification/evolution of policy. In the context of today, I think the question is not whether it is proper or not. It is more correct to say that it is

[3] Ethics of Legislative Drafting, Commonwealth Law Bulletin Vol. 36, No 1, March 2010.

becoming more a matter of necessity and therefore *appears* to justify the fusion of the roles of the policy maker and the drafter in the process of drafting of legislation.

While the traditional debate in legal academia has revolved around the role of the judiciary in developing policy when interpreting statutes of the legislature, considerably less scrutiny has been focused in the direction of the very drafters of the words which are the subject of interpretation and the manner in which a legislative counsel can, by getting involved in the evolution of the policy behind legislation, fashion legislation which would reflect not only policy as articulated by the policy maker and understood by the legislative counsel in that light, but would go further and reflect policy extracted by the legislative counel.

Regulatory Impact Assessment

I wish to briefly highlight what is called Regulatory Impact Assessment" (RIA) and which has been introduced by the United Kingdom and many other countries, which is a process of analysis of their proposed legislation. The nature and purpose of Regulatory Impact Assessment (RIA) is that it is a tool which informs policy decisions. In relation to draft legislation, it is an assessment of the impact of the policy option in terms of the costs, benefit and the risks of a proposal.

The contents of a partial/full/final RIA are –

1. Identification of the objectives of the proposal.
2. Identification and quantification of the risks that the proposal is addressing.
3. Explanation on how each option would fit in with existing requirements and a description of the key risks associated with the options and how these could be mitigated.
4. Identification of the sectors affected.
5. Identification of any issues of equity and fairness.
6. Comparison of the benefits and the costs for each option considered in the partial RIA.
7. Positive and negative benefits of the proposed legislation.

Does this mechanism help to preserve the traditional role of the legislative drafter as purely the writer of the legislation or does it perceive a new role for the legislative counjsel? To me it appears that it is a combination of roles and it is left to be seen whether it is something that we as legislative counsel can emulate is our own jurisdictions.

Conclusion

Here are some concluding thoughts on the role of the legislative counsel in preserving the line between policy making and the drafting of legislation.

1. What are good drafting instructions and how can policy officials be instructed on preparing them?

This means that the office of the legislative counsel needs to get involved to a greater extent in the identification of the objectives of legislation and the formulation of the policy based thereon. To avoid this, drafting offices ought to be able to explain/demonstrate to the officials who write policy the importance of writing clear, unambiguous and coherent instructions.

2. What are the benefits of this model and the challenges of maintaining it?

There are pro's and con's in maintaining the line between policy-making and legislative drafting. But the exigencies of modern drafting would sometimes require a legislative counsel to deviate from the traditional role in order to discharge these functions more effectively/efficiently.

3. What are good drafting instructions?

Good drafting instructions mean clear policy papers, setting out clear objectives which are formulated on the basis of a consultative process which involves all the primary stakeholders. You need good government officials to achieve this. But remember that for most of these officials this would most often be their first legislative experience.

4. Whither the doctrine of the "Separation of Powers"?

Dicey and the "theoretical framework" of the separation of powers and the (unseen) role of the legislative counsel in facilitating checks and balances on each organ of State may have to be observed in the breach wherever there is a need to produce a coherent piece of legislation based on inadequately expressed policy.

5. What is a centralised legislative drafting model and what are its benefits?

Most development organizations today have a tendency to draft model legislation on complex areas of law in order to help countries draft legislation in these areas. Donor agencies try to 'convince' the executive of a country that it is far better to adopt the model as the base for the intended legislation. The use of these models tends to make legislation totally different to the pattern adopted by the particular drafting office and also forces the legislative counsel to include standards and concepts which may not be acceptable. The disadvantages of these models could be said to be forgetting/ignoring drafting precedents and the adoption of *ad hoc* provisions.

I would finally refer to the Renton Report of 1975 of the United Kingdom, which states

> In the end the legislative counsel must effect a sensible compromise, so that the legislation deals clearly and concisely with the Government's policy, addressing all such cases as are thought reasonably likely to arise, without confusing the issue by attempting to deal with the improbable or far-fetched. The legislative counsel must bear in mind always the importance of sparing the citizen from litigation that could

> have been avoided *(had the drafting instructions / policy paper been accurately drafted – these words are mine)* by the inclusion of a few additional words, but at the same time he must bear in mind that it will be impossible to formulate cogent policy in relation to matters that are unlikely to arise … the degree to which a compromise can sensibly be achieved *(between a good draft and the lack of instructions – these words are mine)* depends to a considerable extent on the circumstances under which, and the constraints within which, the legislative counsel has to operate.[4]

Therefore, always remember that though it is not the function of legislative counsel to determine legislative policy, the legislative counsel has to make a substantial contribution in rounding out the policy and filling in the details in a proposed legislative draft as there are additional policy matters that may not be known or foreseen until the drafting process is well under the way.

Concluding, I would echo the words of Eamonn Moran: "legislative drafting is still the best legal job going" and "there are many matters which make drafting such an attractive career".[5]

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[4] *The Preparation of Legislation*, Cmnd 6053, May 1975.

[5] Eamonn Moran, PSM QC, JP, Commonwealth Law Bulletin Vol. 36 No 1. March 2010.