

# Legislative drafting in Sri Lanka

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*“The words of a Statute speak the intention of the Legislature”*<sup>2</sup>



## Functions of the Legal Draftsman's Department

The Legal Draftsman's Department is the Department the Government Department mandated to draft principal and amending legislation and to draft and revise subsidiary legislation in order to facilitate the successful implementation of the Government's legislative programme. The Department is also called upon to express opinions with respect to draft legislation and subsidiary legislation and has also to co-ordinate with Parliament for the successful enactment of legislation drafted in conformity with the provisions of the Constitution. In the context of today, the Consolidation and Revision of Legislation and the translation of the volume of pre-1972 Laws and the drafting of Statutes for the Provincial Councils (created in 1987) are also part of the functions of the Department.<sup>3</sup>

The Government's legislative programme is structured in such a manner so as to successfully implement the policies of the Government, which are embodied in the decisions of the Cabinet of Ministers. It is therefore the primary duty of the Department of the Legal Draftsman to provide the necessary legal infrastructure required to facilitate such implementation. The Department of the Legal Draftsman is also constitutionally required in the discharge of its functions relating to the drafting of

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<sup>1</sup> Legal Draftsman , Department of the Legal Draftsman , Sri Lanka

<sup>2</sup> Tindal C.J. in *Warburton v. Loveland* (1832)

<sup>3</sup> The Legal Draftsman's Department is one of the Departments assigned to the Minister of Justice in Sri Lanka as are the Attorney – General's Department, the Department of the Law Commission, the Government Analysts Department and a few others. The Ministry is assigned to a Minister and there is a Secretary to the Ministry who is almost always a lawyer and who is the administrative head of the Ministry; the position is the equivalent of a Permanent Secretary. The Legal Draftsman's Department is not a part of the Attorney – General's Department and is an independent Department functioning under the Ministry with separate and distinct functions and a separate budget.

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legislation, in both official languages, i.e. Sinhala and Tamil, as well as in English which is referred to in the constitution as the link language.<sup>4</sup> Sri Lanka maybe the only country in the world where legislation is required to be in three languages. Drafting in two languages is difficult but I can tell you that drafting in three languages can be a veritable nightmare. Further, what is unique in Sri Lanka is that all three texts are required to be faithful translations of each other. The Translators and the drafter concerned have the very arduous task of checking every draft to ensure that the texts are the same.

In carrying out the function of drafting legislation the Department is governed by the provisions of the *1978 Constitution of the Democratic Socialist Republic of Sri Lanka* and the *Administrative Regulations* which have been framed for such purpose and which are embodied in the Establishments Code, which Code is issued under the directions of the Cabinet of Ministers by the Ministry of Public Administration.

Article 75 of the Constitution states that Parliament shall have the power to make laws. Articles 76 to 80 set out the procedure applicable to the exercise of the legislative power of Parliament. The *Establishments Code* in Chapter XXXIII 2:1 to 2: 3 deals with Draft Legislation and it states that—

“a request for a draft of legislation should in all cases be accompanied by a Memorandum containing the fullest possible instructions for the assistance of the Legal Draftsman, in the preparation of the draft” and upon the Cabinet making a determination on the government’s programme of legislation, such conclusion shall be communicated to each Secretary in charge of a Ministry and the Legal Draftsman. In relation to subordinate legislation it is stated that such “subordinate legislation should drafted by the Ministry or Authority which requests the same, and thereafter be forwarded to the Legal Draftsman for revision and be in duplicate and in all three languages”.

## **The legislative process in Sri Lanka**

The three arms of governance in Sri Lanka as recognised in the Constitution are involved in the Legislative Drafting Process in Sri Lanka. They are the *Executive*, the *Legislature* and the *Judiciary*. Each of these three organs of government is required by the constitution to perform distinct functions in this respect.

The initial function in connection with the legislative process, which culminates in the drafting and enacting of legislation, is vested in the Executive. This is the identification of the policy, which makes it necessary to have the laws enacted. Therefore it is correct to say that the Legislative Process in Sri Lanka commences with the Making of the Policy relating to the legislation required. This is done by the relevant Ministry. The policy is framed by them, essentially for the purpose of addressing certain pressing issues in their sector. These can be the necessity to prevent the occurrence of certain activities, the grant of benefits to certain persons, the remedying of certain inequalities and so on. This policy is then prepared in the form of a Cabinet Memorandum. The Memorandum sets out the need for the legislation and the manner in which it is to be provided and it required the Cabinet of Ministers to approve the request and to authorize the Legal Draftsman to draft the proposed Legislation. Thus the

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<sup>4</sup> Article 18 of the *Constitution of the Democratic Socialist Republic of Sri Lanka* 1978.

policy for every law enacted in this country has to be approved and authorised by the Executive arm of the Government, which is the Cabinet of Minister.

From that point we move to the involvement of the legislature. Parliament, which is the Legislative arm of governance, is the body, which is empowered by the constitution to enact or pass all legislation of the country. Thus Parliament makes Laws, which are based on the policy, which is approved by the Cabinet. Parliament ultimately takes ownership for all laws enacted by it.

The involvement of the Judiciary in the legislative process in Sri Lanka is when Bills are challenged in the Supreme Court. The Court pronounces on the legality of legislation and on many an occasion changes have to be made to bring the draft legislation into conformity with the decision of the court.

For Parliament to Enact Laws, there is a process, which has to be followed. This is where the Department of the Legal Draftsman comes into the scene.

### **Role of legislative counsel**

‘Paper, pencil and eraser’ were the traditional tools of a legislative counsel. These together with ‘words, clarity of thought, precision of execution, unambiguous language and a well designed structure’ are the ingredients essential to producing what is “almost” good legislation. Armed with these tools the legislative counsel then proceeds to fashion and shape the necessary laws in keeping with the policy that has been forwarded to him. The creation of an accurate, clear and effective legislative text is demanding and difficult.

In days gone by the job of a legislative counsel was often in jest referred to, as “a scissor and paste job.” This is a very unfair reference and disparaging view which in no way reflects the hard work and the effort that the legislative counsel contributes to the process of drafting legislation. Very early in his career, a legislative counsel realises that in no way can the previously used draft be adopted and fashioned for the next. What has been previously done will always be a very useful guide, but each legislative proposal needs to be drafted separately. The role of the legislative counsel therefore can be said to lie somewhere between two extreme positions, i.e. the view that a legislative counsel merely chooses the words of a previous draft and puts it in a semblance of order to suit the present need; the other being that the legislative counsel is expected to develop and produce a complete draft from incomplete proposals received.

The above situation bears out the position in Sri Lanka too: but neither of two extremes represents the reality of the situation prevailing today. The draftsman is not and never should be responsible for the development of policy although it is advisable in certain instances for the legislative counsel to be associated with the development of policy in order that he may better understand the need for the legislation, which is required at the end of such exercise. The proper role of the legislative counsel could therefore said to be to convert a ‘fully developed legislative policy’ into ‘legislative shape’. In reality a legislative counsel should never be called upon to develop policy in the process of drafting, by filling the gaps in an incomplete policy document, which has been forwarded to him.

A legislative counsel is expected to possess and use “skills and knowledge” which are not generally possessed by *the policy makers*. He is in effect an architect whose vision and design must seek to provide a solid but versatile structure in the form of a composite draft by which the policy is

transformed into the perfect implementing tool. Much injustice is done to a legislative counsel and the profession of legislative drafting if the policy maker and the target audience of the end product do not recognize the expertise, analytical skills and knowledge and experience of the legal framework with which the legislative counsel is possessed.

In the world over legislative counsel are having to face up to the fact that the most difficult part of the drafting process is in finding out what the policy maker really wants by disseminating what little information is made available to him. In Sri Lanka too incoherent or incomplete proposals on policy are the greatest drawback that faces the Legal Draftsman's Department. The legislative counsel therefore is required to embark on a voyage of search and discover prior to commencing the drafting process. Once this is done finding the words to express the policy is a relatively easy task for a skilled legislative counsel.

A legislative counsel is always given inadequate time for the writing of laws. There often is a deadline which the policy maker has indicated. Drafting instructions often arrive late, the policy may be incomplete and in most cases it may be that the need for the legislation is an unexpected problem, which needs to be urgently set right. This ensures that the legislative counsel is always short of time.

Free expression of ideas is another problem that faces the legislative counsel. Complex concepts and ideas are often incapable of being written in simple and clear language. This does not in any way mean to say that the legislative counsel needs to be verbose and complex to the extreme. Our Statute books are full of this type of legislation. It is part of our colonial inheritance. We have a classic example of section 2 of the *Wills Ordinance*, which is one sentence and which runs into more than a page. This is a style, which is to be avoided. Legislation is written for the target audience and the policy maker and has to be easily understood by them. Obscurity of principles in a law is not advocated. The law must be clear and simple and be capable of communicating the principles of law enunciated in the proposal.

In Sri Lanka and in other jurisdictions there has been much criticism on the way the legislative sentences are constructed. Most of these criticisms highlight the obscure language, long sentences, and the indiscriminate use of the verbs "shall" and "may". The presence of long sentences, at least in old statutes, is undeniable: but a conscious effort is being made to simplify the language used in statutes. We are now trying to write statutes in plain words so that everybody can understand them. I quote here a comment of Professor Elmer Driedger, which is very apt in this context:

"Statutes are laws. They are supposed to settle the rights and liabilities of the people, and they are enforced by the courts. They must be so far we can make them, precise. They are serious documents. Like all other serious works of literature, they must be read and studied with care and concentration. Every word in a statute is intended to have a definite purpose and unnecessary words are not intentionally used. Of course, the ordinary reader will not be able to grasp its full implications and he will have difficulty in applying the statute to an actual case. But that situation he must accept. Statutes cannot be written that no dispute or difficulty in construction could ever arise".<sup>5</sup>

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<sup>5</sup> E.A. Driedger, *The Composition of Legislation*, (2 ed.). See also E.A. Driedger, *Legislative Forms and Precedents* (2nd ed.)

The legislative counsel cannot make a complete and abrupt change in the language used in legislative drafting. It has to be a carefully planned gradual process of change, which will permit the present laws and the future laws to stand side-by-side without incongruity. The target audience should gradually be introduced to simplified language in laws. Having to draft legislation with the provisions of the Interpretation Ordinance guiding you, keeping in mind the fact that the Constitutional provisions must be strictly adhered to in order to prevent the law that you are writing from being observed by the Attorney-General as being unconstitutional, or that the courts could strike down the entire law as being unconstitutional greatly inhibits a legislative counsel. The Constitution of Sri Lanka does not provide for the review of legislation by the courts after a Bill has been enacted. However, the Constitution does provide that once a Bill has been placed on the Order Paper of Parliament it can be challenged within one week of its being so placed<sup>6</sup>. This power is vested in the Supreme Court and is an exercise by such court of its jurisdiction in respect of constitutional matters.<sup>7</sup>

Despite all the problems and challenges enumerated above the job of a legislative counsel is very rewarding. He has created something out of the mass of information placed before him. Not all will agree that the end product is something good. Despite this drawback the job of a legislative counsel is very satisfying and I cannot think of any other legal position which provides so much variety nor the opportunity to deal with a vast range of areas of the law. Thus the legislative counsel is placed in a somewhat privileged position.

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<sup>6</sup> Article 121 of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka

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