

Appendix E

Suggested Approaches to Drafting

Attention is drawn in this Appendix to various practical matters which are of particular relevance to legislative counsel at the start of the actual drafting of a Bill

1. In the first draft, counsel will construct the Bill on the foundations worked out in the legislative scheme which has been prepared (see Chapter 11).
2. In drafting individual provisions, counsel is urged to have regard to the approaches to translation of policy suggested in Appendix D.
3. An interval of time should ideally be allowed to elapse between the completion of the first draft and the start of the revision stage. This interval will allow counsel to bring a fresh and clear mind to the revision and he or she will be able to detect more easily errors, omissions and inconsistencies in the first draft. Sentences can, for example, be restricted or made shorter, without obscuring the intended meaning of the sentence. Once the draft has been revised, it is desirable to ask a colleague or colleagues to read the draft critically.
4. If a colleague, on reading the draft, interprets it in a manner not intended by counsel this will indicate at once that some changes to it are needed. In some jurisdictions, it is the practice for counsel to work in pairs. Where this is not the case the draft should so far as possible be checked by at least one other person before it is sent to the sponsoring Ministry.
5. In most cases counsel will have to prepare a number of drafts before the finalised draft Bill is sent to the sponsoring Ministry. During the drafting process he or she must constantly check the draft with other laws and in particular with the Interpretation Act. A date should be inserted on each of the drafts and the earlier drafts saved. At a later date there may be a need to revert to wording that has been used in an earlier draft.
6. While the use of legislative precedents from other jurisdictions may be useful, it is discouraged as a basis for drafts. This is because precedents apply someone else's thinking to a problem that may not be exactly the same as the one faced by counsel drafting the new provisions, and they can be misleading. If used they should act only as a check or comparison **after** counsel has prepared the necessary draft. Some specific provisions may need to be standardised within a jurisdiction, and to that extent a local precedent may be useful.

7. Even precedents from within the jurisdiction need to be used with care. While they might be useful as examples on how to draft the more formal provisions in a Bill to set up a statutory corporation, great care needs to be exercised to ensure that provisions are not included merely because they have been in the past; each must be clearly understood as having a valid function in the Bill being drafted.
8. However, an exception to the caution against the use of precedents would be the occasional cases where a model Act, such as those published from time to time by the Commonwealth Secretariat, has a direct bearing on the subject matter. Such models always refer to the necessity for adaptation of their provisions within a particular jurisdiction.
9. A careful check should be carried out to see whether any precedent being adapted has been the subject of a judicial decision or subsequent legislative amendment.
10. Where an adaptable precedent is found, counsel should be careful to make a note on the draft of the relevant reference. This may seem to be an obvious precaution to take, but in practice it is sometimes forgotten, with the result that valuable time and frustrating effort may later have to be spent in rediscovering the relevant precedent.
11. Legislation is used to solve a problem. The problem covered by a precedent may not be the precise problem being dealt with, and the policy or context may have changed since the precedent was enacted.
12. Counsel must check the draft carefully and ensure that it reads as a coherent and consistent whole. Words and expressions specifically defined in the interpretation clause of a Bill apply throughout the Bill. One way of ensuring that this is not overlooked is for counsel to underline or insert in bold type these words or expressions every time they are used. This will facilitate the requisite attention for the final revision of the draft.
13. In the first draft, counsel is primarily concerned with the coverage of the basic objectives of the proposed legislation and ensuring that practical difficulties in administering and enforcing it are sufficiently dealt with. At the revision stages, counsel must consider whether an improvement in the wording, style and arrangement can be achieved so that the legislation becomes more readable and intelligible to those persons most likely to be affected by it.

14. A great deal of legislation is by its very nature complicated. Counsel must remember that his or her first duty is to convey the legislative intention **as clearly as possible** to those to be affected. In so doing, he or she will have constant regard to the attributes of effective communication referred to in Chapter 2.
15. It is usual to publish with a Bill an explanatory memorandum which explains its objects and reasons. This is sometimes prepared by counsel and sometimes by the sponsoring Ministry. In the latter case it is obviously desirable that the Ministry consult counsel when preparing the memorandum, so that Parliament and the public are not misled as to the intended effect of the Bill.