


SECTION C

GENERAL GUIDELINES FOR DRAFTING EDUCATION LEGISLATION
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Draft legislation is usually referred to as a bill. Bills go through the normal legislative process and once they have been adopted by Parliament, are called laws or Acts. This law or Act will then form part of statutory law or the body of legislation.

1. INTRODUCTION

It is clear from the discussion of legislation as a source of the law of education, and administrative legislative acts of education, that legislative drafting takes place at all levels of the education structure and is performed by different legislative bodies.

The drafting of legislation, like the interpretation of statutes, is an extensive and independent field of study which cannot be covered in detail here. Although these disciplines involve different fields of study, in reality they cover adjacent areas of application in which overlapping often occurs. In legal circles serious criticism has been levelled against the lack of positive co-operation and co-ordination between legislative drafters and the legislature. The task of the interpreter of legislation would be considerably lighter if the draftsmen were to uphold uniform rules that are generally acknowledged: the intention of the legislative body and the purpose of legislation must be transmitted in a clear and accurate manner to enable the interpreter, through application of the rules of statutory interpretation, to determine the true intention or purpose. Objective criteria must therefore be established for the drafting of legislation as education laws and other subordinate legislative rules on education form part of an extensive legislative network which is linked to central education legislation. The draftsmen must be conscious of the underlying juridical principles or concepts which govern education activities. As is mentioned above, a sound legal basis is essential for effective education administration and the well-informed draftsman can contribute a great deal towards improving legal awareness.
In most cases, in particular where administrative legislative rules are concerned, the specialised task of drafting is performed by education officials who have not had any formal legal training: the principal formulates school policy; the management council of the school and the committee of university principals each draft their own internal rules.

Because the persons concerned lack formal legal training, one cannot expect the use of strict statutory language in, for example, internal legislation and other legislative rules. On the other hand, it must be borne in mind that the principal may be promoted to a senior administrative post where he may become directly involved in the formal drafting of central education legislation. Internal legislative rules on education will, naturally, not bear the same formal characteristics of general education laws. Although this discussion will focus on formal legislative drafting, useful general guidelines for the drafting of education legislation, may be offered.

2. PREPARATION

The draftsman – the legislative body or the specialist body – must have clarity about the purpose or object of the legislation. He must also be acquainted with the subject-matter and status of the enactment in the legal and legislative environment. For instance, the principal must understand the purpose of school policy; he must realise that it forms part of public-education legislation and fills a special place as internal subordinate legislation within the broad education framework.

With regard to the subject-matter of legislation, the draftsman must take cognisance of the legislative network and the case law pertaining to the particular subject. Questions that may arise in this respect are: whether the proposed legislation will cover a new subject, or whether it will merely amend, repeal or co-ordinate existing legislation. Furthermore, it must be ascertained whether the proposed legislation may clash with existing legislation or authoritative case law on the same subject.

The application of the proposed legislation must also be examined. School rules have limited (internal) application within the school; provincial ordinances or proclamations operate within specific geographical areas; the overriding education laws for general affairs have general application. When general education legislation is amended or repealed, its overriding force must be considered; the whole spectrum of education legislation –
central or subordinate, “general” or “own” – may be influenced in this way. It must be established whether other general legal principles which also apply outside the education field, are affected.

The draftsman must also consider specific formal requirements; for example, if the proposed legislation covers more than one topic, an interdisciplinary enquiry and drafting are often required; if certain procedures are prescribed for adoption, the same procedures are followed in drafting amendments and repeals.

3. DRAFTING A LAW

The two main ingredients in the formulation of legislation are substance and form. The substance is the language used to give meaning while the form consists of style, divisions and classification. The accurate and correct application of these requirements ensures sound legislative drafting technique.

- The most important element of substance is the legal language. Language must be concise but comprehensive, clear, accurate, direct and linguistically correct. The draftsman must continually strive to enrich and develop his language skills. Quite appropriately the American source (see bibliography) remarks on 90: “Bill drafting must have the accuracy of engineering, for it is law engineering; it must have the detail and consistency of architecture, for it is law architecture.”

- The form (structure) of legislation does not only create visual systemisation but also classification of content. Although the form in itself does not bear any legal meaning, the division of the contents into chapters, sections, subsections and paragraphs enhances the meaning of the text. A chapter, for example, deals with a specific topic of the legislation and is subdivided into sections with separate marginal headings. Each section covers a particular aspect of the topic of which the gist is reflected in the marginal note. If the particular aspect requires more elucidation, subsections are used for further discussion or to list the relevant points. A further division would be into paragraphs and subparagraphs. In many cases a law also consists of a schedule which should be read in conjunction with it. When reference is made to laws, the following citation is normally used: section 12(2)(b)(i) refers to section 12, subsection (2), paragraph (b) and subparagraph (i). (The sections of a bill are called clauses.)
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4. THE CONTENT OF A LAW

The significance of certain formal elements of a law, for example, title, definition clauses, repeal clauses and the short title are not discussed here. The subject-matter (substantial content), does however, require close examination.
Because of the wide-ranging nature and scope of legislation, no general rule can be devised in respect of its substantial content. One rule will, however, always apply, namely, that this part of the content must evolve in a logical and systematic manner: the main principle or rule is followed by its relevant aspects and is arranged around the core in a clear and understandable way.

The substantial content must be seen as the heart or core of a law and reflects the main aim or purpose and the legal principles on which it is based. This part of the enactment comes immediately after the general introductory sections and contains the following particulars:

a. the main principles or objectives which are discussed concisely and clearly in one or more sections;

b. procedural provisions which are dealt with in the following sections;

c. temporary provisions (if any) which are discussed next;

d. sections providing for the institution of an administrative body/organ or instructions to an existing body to administer the enactment. In the following sections particulars regarding service conditions, remuneration, expenses and sundry matters relevant to the administrative body, are discussed;

e. sections dealing with the powers and duties of the administrative body/organ which are discussed fully;

f. provisions regulating the different ways of exercising powers;

g. sections providing for the different ways of control of administrative acts;

h. sections providing for the identification of offences or crimes and the prescribed penalties.

The main principle and main content of the enactment is discussed under (a). If the principle has a direct bearing on individuals or groups of individuals (for example, teachers, pupils), it must be clearly stated to that effect. The topics which are discussed under (b)-(h) form the subordinate principles of this division and must be covered in a logical manner. For example, provisions which have a general application must precede restrictive provisions; provisions regulating the issuing of licences and permits must precede provisions on their refusal or withdrawal; penal provisions must follow after the powers, duties and prohibitions have been discussed.
5. HINTS FOR THE DRAFTSMAN

Emphasis has been placed throughout upon the principles of brevity, preciseness, clarity, simplicity and orderliness. Unreadable, confusing and misleading bills are condemned as fore-runners of bad laws: not only do they discredit the legislators, but also plague the courts and may cause injustice to the individual.

Up to this point the focus has been mainly on the broad principles of legislative drafting rather than the particulars. The following observations of good and bad practices must be borne in mind:

- Each section or subsection must be complete in itself and self-sufficient. It should not serve as a continuation of the preceding section nor as a preface to the succeeding one.

- Exceptions or provisos may cause confusion and should rather be placed either in a subsection or in a separate section.

- Legislation comes into operation at publication or at a specific date of commencement. It should therefore be drafted in the present tense: for example, "the offence is punishable" and not "the offence shall be punishable".

- Legislation usually refers to singular cases, namely, a crime, a penalty, a committee. Furthermore, a reference to the "individual" usually includes the plural, and masculine usually includes feminine. A "person" may include masculine, feminine or either; "teacher" may include a male or female teacher or all teachers; a "pupil" may be male, female or either.

- When technical legislation is drafted, ordinary or familiar technical terms should be used. If unfamiliar technical terms are used they should be explained in the definition clause.

- A law which includes the provisions of another law by reference should be avoided as this could cause confusion. Problems may also arise when the other law is repealed or amended. If a reference to another law is necessary it should be clear and concise: avoid too many particulars that may cause confusion.

- Words bearing imprecise/non-specific meanings or meanings which cannot be measured objectively, should be avoided: for example, knowingly,
serious, ample, due notice, dangerous, necessary, immediate and forth­
with. If a particular meaning must be attached to these words it must be
provided for in the definition clause.

- Avoid superfluous and repetitive words: for example, the full particu-
lars of the school should not be mentioned every time since the school
rules/policy applies to the particular school only; repetitive words, such
as, “instruct and request” may cause confusion. The use of adjectives
and adverbs in legal language must be restricted as it is often regarded
as unnecessary and inappropriate.

- Correct titles must be used. Carelessness in the use of titles of public
bodies, departments and officials discloses sloppiness, is confusing to the
reader and may create complications in litigation.

- In the case of peremptory and directory provisions, the correct choice of
words must be made. “Shall” usually denotes a command or mandatory
provision while “may” has an optional connotation. Other words may
also be used to denote the conferment of a discretion, for example, “in his
view”, “according to his opinion”, “on the advice of” and “in consultation
with”.

- Avoid the use of “and/or” as this causes confusion and tends to conceal
rather than disclose the legislator’s intention. Where there is more than
one requirement and the legislative intent is that all requirements
should be met, the conjunctive “and” should be used. If compliance with
only one requirement suffices, the conjunctive “or” is used. Where diffe-
rent standards have to be met, itemisation of the standards is the best
practice.

- The same thing should always be expressed by identical words: for
example, if “ship” is meant, do not refer to “vessel”; do not refer to “con-
tributions” elsewhere as “payments”; “prescribed” is not “provided”.
Words and phrases employed carelessly must be avoided, for example,
“responsible” and “liable” have specific legal meanings and must be used
in that context. The concept that the deputy principal is the “right hand”
of the principal, is vague and requires a better description. Further-
more, the wide-ranging meanings which could apply to concepts such
as, “management”, “guidance” and “planning” functions, must be
examined and clarified. Generally speaking if a word or phrase means
but one thing and is interpreted accordingly, the opportunities for mis-
interpretation or misconstruction on the part of the courts, adminis-
trators or other individuals are reduced to a minimum.
Correct words must be used. For instance, meetings other than regular meetings are "special" but not "extra"; interest is "at the rate of six per cent" and not "at six per cent". In beginning a sentence to state a case or condition "In the event of" is preferred to "If". "One thousand five hundred rand" is preferred to "fifteen hundred rand". The "date" on which the Act takes effect is better than the "time" at which it takes effect. When fixing minimum amounts or numbers say "not less than" rather than "at least".

The use of formulas is recommended where complicated calculations are made: for example, in the calculation of salary scales of teachers in relation to their years of service, a formula should be used which is explained in the definition clause. Other calculations such as playground duty at school and media centre duty by the pupils, may also be formulated.

Bear in mind that practical consequences result from the application of the written language. Consequently the purpose of the legislation (intention of the legislator) must be clearly reflected in the text. Avoid words or phrases which are conducive to different deductions; apart from the fact that it signifies bad drafting techniques, it may also lead to legal uncertainty.

6. REVISION BY THE DRAFTSMAN

However skillfully and accurately the work may have been done, one must assume that it is capable of improvement and therefore, revision. Once the labour of the original composition is finished, more attention may be devoted during revision to defects or shortcomings in the law. Inconsistencies are rectified during the process of revision; illogical arguments eliminated and awkward expressions replaced.

In conclusion, a quotation from the American source (see bibliography) at 112 may serve as a final remark: "The goal of the true draftsman is to achieve perfection as nearly as possible, and the price of that goal is indeed patient toil. But it cannot be said that the goal is not worth the price, for the bill which is the object of so great and earnest effort may become a law that will endure for ages, to the credit of the statesman conceiving it, the reputation of the legislature enacting it, the advantage and enjoyment of mankind, and the satisfaction of the draftsman. The careful draftsman will not leave a bill until he has revised it, and revised it again, and again, and again."
Résumé

Although the discussion has focused mainly on formal legislative drafting, this does not mean that the principal may disregard these guidelines in drafting school policy and rules. Education does not operate in an area which is not subject to the law and, after all, internal legislative rules form part of the broad network of education legislation. The principal must be conscious of the juridical nature of school policy and rules and must observe drafting and interpretation against the background of a legal milieu.

In reality the education department provides general guidelines for the drafting of school policy. The principal and his senior personnel must define and implement school policy through the drafting of school rules. For example, the education department will provide general guidelines regarding the safety of pupils. The principal's task is to examine and analyse this particular area of interest and compile suitable rules: for example, safety at the swimming pool, playgrounds, corridors and staircases and safety measures regarding the use of gymnastic and sports apparatus.

School rules must be drafted in a clear, logical and systematic manner in order to enable pupils and teachers to understand them. The principal must endeavour to graft the purpose or object of school policy onto the particular school rules. It must be understood that, in accordance with the discussion on interpretation of statutes, the object or purpose of legislation is not necessarily found in the literal meaning of words or sentences.

School rules must be introduced to the personnel and pupils, preferably in writing so as to provide certainty on their existence and application. School rules must not "over-regulate" and must cover only the main demarcated areas in a clear and concise manner. In this respect the purpose and object of the school rules will always be the decisive factor.

There is a dearth of research in this sphere of education at present. This state of affairs causes uncertainty and shortcomings in this particular field of education. Until such time as sufficient research has been done, principals and other local legislative education bodies are called upon to comply with the proposed guidelines in order to make a positive contribution towards the ultimate achievement of uniform and objective standards.

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This publication, one of the first of its kind, focuses not only on the position of the education manager, but also on that of all teachers in the public-education system. Its emphasis on the role of law in administration and management, constitutes an important contribution to legal awareness within the teaching profession.