

THE
LEGISLATIVE PROCESS
IN BERMUDA



*Creating Law:
from Policy Development to Implementation*

March 2005

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1.0 INTRODUCTION

What is this guidance note about?

1.1 This guidance note was developed primarily to familiarize civil servants with the legislative process. Meant as a companion piece to the guidance titled *Making Policy Happen*, this guidance is a step-by-step guide through the legislative process, and should serve as a consultative document for the preparation of legislation.

1.2 The Attorney-General's Chambers originally prepared a guidance document in March 2001 titled "The Legislative Process". This guidance note is an expanded and updated version of that original document. The legal terms and phrases expressed within have been written specifically by Parliamentary Counsel in the Attorney-General's Chambers and taken from the original document.

2.0 THE LEGISLATURE

2.1 Section 26 of the Bermuda Constitution Order 1968 (the Constitution) provides for **the Legislature** to be made up of three parts as follows:

Her Majesty the Queen
(represented in Bermuda
by the Governor)

The Senate
(11 appointed Senators)

The House of Assembly
(36 elected MPs)

2.2 The Legislature is empowered by Section 34 of the Constitution to "make laws for the **peace, order and good government** of Bermuda".

2.3 Section 35 of the Constitution provides that the power to make laws "shall be exercised by Bills **passed by both Houses**, either without amendments or with such amendments only as are passed by both Houses, and **assented to** by Her Majesty or **by the Governor** on behalf of Her Majesty." This is the process by which a Bill becomes an Act.

3.0 TYPES OF LEGISLATION

3.1 Legislation (law, Acts or Statutory Instruments) comes in two forms:

- (a) **primary legislation** – Acts, Public Bills, Private Members' Bills and Private Bills;
- (b) **subordinate legislation** which is made in accordance with powers contained in primary legislation ("The Minister may make regulations...") and includes **rules, regulations, orders, rules of court** which are known collectively as **statutory instruments**.

3.2 **Public Bills** have the potential to affect everyone. Almost without exception the Bills you come across will be public Bills promoted by the Government. A **Private Member's Bill** is a **public Bill** promoted by an MP or Senator (e.g. the Prohibited Restaurants Bill). **Private Bills** are presented on behalf of an association or group of individuals (e.g. a business entity, church or school), and in most cases contain legislative provisions for the incorporation of a company.

3.3 Bills may be **free-standing** or **amending**. A free-standing Bill, as its name implies, stands alone and generally speaking will be about a new subject e.g. the Stalking Act 1997, the

Maritime Marriage Act 1999. An amending Bill amends an existing statute, by adding or removing provisions. **Once the amendment has been made, the amending Act will cease to exist on its own and, as such, will not be included in the Revised Laws or on the active database as a separate Act.** However the amendments will be so included as part of the earlier statute. Note that all Acts passed in any given year, whether free-standing or amending, can be found in the annual volumes of legislation.

3.4 **Retrospective legislation**

Most Bills speak only to the future i.e. they do not have effect until they have come into force on commencement. But in certain cases legislation may be **retrospective/retroactive** and affect things which have already happened or rights that have already accrued. Such Bills are generally unattractive for policy reasons¹ and should be avoided, but are sometimes necessary to correct mistakes, particularly where revenue is affected. Such an Act will be deemed to have come into force **before it is enacted**.

3.5 Statutory instruments can only be retrospective if specifically provided for in the enabling power - e.g. section 3 (6) of the Public Service Superannuation Act 1981 which states as follows:

An order made under section 1(1) may be made with retrospective effect and shall be subject to the negative resolution procedure.

4.0 **THE STRUCTURE OF A BILL**

4.1 A **Bill** (note capital B) is made up of **clauses** 1, 2, 3, which is divided into:

- **subsections** (1), (2), (3), which may be further divided into;
- **paragraphs** (a), (b), (c), and possibly even;
- **subparagraphs** (i), (ii) (iii).

4.2 **Schedules** (note capital S) may be attached at the end of a Bill, and are divided into:

- **paragraphs** 1, 2, 3, which may be further divided into;
- **subparagraphs** (1), (2), (3) and;
- **paragraphs** (a), (b), (c).

4.3 Each clause usually deals with a separate idea or part of the narrative. Schedules usually contain details which would interrupt the flow of the narrative clauses or consequential amendments to other Acts. For example:

clause 1	establishment of Pig Licensing Board
clause 2	requirement of license to keep pigs
clause 3	method of making application for pig license
clause 4	fee for pig license
clause 5	offence of keeping pigs without license
Schedule	membership and constitution of Pig Licensing Board

¹ A policy should ideally be developed and approved prior to the drafting and implementation of any legislation. Further guidance on the policy process is contained in "Making Policy Happen in Bermuda, Creating Public Policy: the decision-making process from idea development to implementation" prepared by the Cabinet Office in April 2005.

4.4 Clauses of a Bill become **sections** of an Act, while all other terminology remains the same. It is incorrect to speak of "subclauses" as Bills have clauses divided into **subsections**.

4.5 An **Explanatory Memorandum**² should be attached to the back of every Bill, but not subordinate legislation. It is not part of the Bill and has no legal effect. This memorandum "*should be framed in non-technical language and should contain nothing of an argumentative character*"³. A suggested form of words is usually prepared by the Parliamentary Counsel⁴ as part of the drafting process but it is **the Ministry's responsibility** to check that it accurately represents **your Minister's explanation** of the Bill.

4.6 **Interpretation Act 1951**

The Interpretation Act 1951 defines certain words and concepts for the purposes of all legislation. It is well worth spending time familiarizing yourself with this important Act.

5.0 **CABINET APPROVAL FOR POLICY AND DRAFTING**

5.1 There are many reasons why it is necessary to bring forward legislation. Here are a few examples:

- (a) to give effect to the governing party's **political platform** e.g. the Parliamentary Election Amendment Act 1999 (abolition of annual voter registration);
- (b) **to address social issues**, such as the need for alternative sentencing powers for juvenile offenders;
- (c) the need to raise revenue, leading to new or increased taxes;
- (d) to deal with **technological advances**, such as the Electronic Transactions Act 1999;
- (e) suggestions to assist **international business** e.g. Companies Act amendments;
- (f) departmental policy initiatives e.g. Consumer Protection Act 1999;
- (g) **international conventions** which **require** changes in domestic law, such as the abolition of capital punishment;
- (h) international pressure to effect change, e.g. worldwide efforts to stamp out money laundering; Organization for Economic Co-Operation and Development (OECD) guidelines on financial services regulation;
- (i) correction of mistakes;
- (j) **law reform**.

5.2 However, it is important to bear in mind that **not every policy initiative requires legislation**. For example, the "*Report of the Consumer Protection Task Force*" which made 15 recommendations had only 3 which necessitated legislation.

5.3 Once the policy is settled within the department and agreed by the Minister it is time to draft the Cabinet Memorandum which should give Cabinet enough information to make an informed decision.

² An Explanatory Memorandum is a document, which explains the reasons for the bill and outlines its provisions.

³ Erskine May's Parliamentary Practice.

⁴ A Parliamentary Counsel, or draftsman, is a qualified barrister or solicitor who specialises in drafting legislation, just as others specialise in advocacy or conveyancing. Parliamentary Counsel communicates government policy to the world at large using the English language. They produce drafts on any topic, for any department, whether or not the subject matter was previously familiar to them. It is their responsibility to consider the whole body of law, including the Constitution, and advise how any new proposed law will fit into it.

5.4 Detailed guidance on developing Policy is contained in *“Making Policy Happen in Bermuda – Creating Public Policy: the decision-making process from idea development to implementation”* issued by the Cabinet Office in April of 2005. Additionally guidance on drafting Cabinet Memoranda is given in *“The Preparation of Cabinet Memoranda”* re-issued by the Cabinet Office in March 2005. All guidance documents are available on the Government Portal through the Cabinet Office website.

5.5 The draft Memorandum must be sent to the Attorney-General for consultation to determine if there are any legal impediments to establishing the policy. Any Cabinet Memorandum proposing a change in the law **MUST** include a paragraph saying **“The Attorney-General has been consulted and has no legal objection.”** If the policy initiative has manpower or resource implications (i.e. if it will cost money) the draft Memorandum must be signed by the Minister of Finance. If the policy will impact on other Ministries you should also circulate the Paper accordingly so Ministers are not taken by surprise in Cabinet.

5.6 Usually the Attorney-General will refer the draft Paper to one of the Parliamentary Counsel who will research what is proposed in order to gain a better understanding of what is being asked. This means that you may receive detailed comments on the draft Memo and may have to redraft or rethink the policy.

5.7 Draft the final paragraph of the Memorandum carefully as this will usually form the basis of the Cabinet Conclusion from which the Parliamentary Counsel takes his or her cue. Cabinet needs to be asked to approve the policy and authorize the Minister to issue drafting instructions to the Attorney-General (**see Annex I for example**). If the Conclusion is not wide enough to cover the Bill as drafted you may need to go back to Cabinet for further approval.

5.8 If the Attorney-General (and any other Ministers consulted) has no objections with the content of the draft Memorandum, it will be returned for your Minister’s signature. It will then need to be sent back to the Attorney-General (and any other Ministers) in order for him or her to **initial signifying support for the content of the Memorandum.**

5.9 The original signed copy of the **final Cabinet Memorandum plus 23 copies** of all annexes must be submitted to Cabinet by **noon on the Wednesday preceding the Tuesday meeting when it will be discussed.**

6.0 GUIDELINES FOR THE PREPARATION OF DRAFTING INSTRUCTIONS⁵

6.1 It is not possible to prepare a step by step guide which can be followed in all cases, however these are some general pointers which may fit your particular circumstances and which can be of use to you when charged with preparing instructions.

6.2 In a nutshell, the Attorney-General’s Chambers requires sufficient information about the intended policy objective to prepare the necessary legislation.

6.3 First the ideas, both the general philosophy and the detailed results to be achieved, must be crystallized. The general philosophy will have been stated in the Cabinet Memorandum, which the draftsman will have vetted. Note that in advising how best to achieve the policy

⁵ Parliamentary Counsel, Attorney-General’s Chambers (23rd July 1996 – Revised November 2002).

objectives and how the proposal will sit with other enactments, the Parliamentary Counsel may raise legal questions, which may lead to reconsideration of the policy.

6.4 **MOST IMPORTANTLY** the instructions must be in writing and should be in ordinary language and **not in the form of a legislative draft. This will, in fact, delay the drafting process** while the draftsman tries to ascertain the problem to be addressed.

*A manual⁶ prepared for Government officials in Whitehall expands this point:

"Never draft instructions in the form of a [legislative] draft... or by telling the draftsman to alter an existing provision by deleting some words and adding or substituting others. This may appear to be helpful but in fact is potentially disastrous because:

the existing provision may not do what you think it does;

the suggested new provision may not do what you want;

the draftsman will not know whether it does or does not, since he will not know what you want, only what the suggested new provision does; and

the suggested new provision may not be the best way to do what you want."

6.5 If a Ministry finds a statute from another jurisdiction to be attractive, it is important to note that it is not practical or helpful to send a copy of that law to the Attorney-General's Chambers and ask them to incorporate it into Bermuda law. The Attorney-General's Chambers will need to be sure that the policy makers understand exactly what the foreign law means and its possible implications for Bermuda, so an accompanying commentary giving reasons why the foreign law is thought to be necessary and appropriate for Bermuda is essential.

6.6 It is not possible to give specific guidance as to how detailed the information sent to the Attorney-General's Chambers should be as this depends on the nature and complexity of the proposed legislation. Parliamentary Counsel do not have technical knowledge in all the areas about which they are required to draft and sometimes they will need technical assistance before they can start drafting, but in most cases the name and telephone number of the Ministry expert whom they can contact if necessary is sufficient. Thus Ministries should not get bogged down in technical details at the outset.

6.7 Parliamentary Counsel need to understand exactly how a proposal is supposed to operate in practice. Ministries should not assume too much prior knowledge on the part of the draftsman and must remember that subjects which are dealt with every day by officials in a particular Ministry may be new to the draftsman. Examples of how the proposed legislation will affect persons in various categories may be helpful (especially in relation to financial provisions).

⁶Manual on the Preparation and Making of Statutory Instruments prepared by the Department of Health (December 1995) at paragraph 56.

6.8 Note that **it is never acceptable to send vast quantities of information prepared for other purposes** and expect the Attorney-General's Chambers to wade through it looking for relevant information. **This will, in fact, delay the drafting process.** If you wish to send the Attorney-General's Chambers a report, it must be accompanied by an analysis prepared especially for the drafting process indicating, for example, which parts of such a report are germane and where in the report they can find extra background information.

6.9 It is helpful if the instructions are in the form of numbered paragraphs so that the Attorney-General's Chambers can refer to them easily in subsequent correspondence. **Annex II** is attached as an example for Ministries of a memo to the Attorney-General's Chambers requesting drafting of a Bill.

7.0 THE DRAFTING PROCESS

7.1 In order for the drafting process to be successful, the Ministry must remain in constant dialogue with the Parliamentary Counsel. This **process** may be very **lengthy**, as the Parliamentary Counsel might have questions about the drafting instructions. The answers to those questions will be reflected in the second draft Bill, and so on until a final version has been agreed. This necessary and lengthy process helps to ensure that both parties are clear on the issues that the Bill is expected to address. Additionally, it may be necessary and expedient for the Ministry to discuss the instructions and drafts with the Parliamentary Counsel in more than one meeting.

7.2 When the draftsman sends you a Bill for comments, he or she is not primarily asking you to look for spelling errors (though if you see them please point them out). What he or she needs is your **careful consideration as to whether the Bill gives effect to your policy**. Sometimes, as a result of points raised by the draftsman, it becomes obvious that aspects of the policy will need modification.

7.3 Most Bills need the refinement of several drafts before they are finalised, and some complex Bills run to many drafts.

7.4 When the Ministry is content with the text of a draft Bill, it may be appropriate to circulate it for consultation purposes. Depending on the subject matter and "profile" of the Bill this may be an in-house circulation between other departments, or a wider sweep of the private sector. It is imperative to allow sufficient time:

- for those consulted to read and digest the Bill and submit comments in writing;
- to process those comments before sending them to the Parliamentary Counsel, i.e. filter out the irrelevant comments and give instructions as to how the Bill should be modified in the light of good points which have been raised; and
- for redrafting the Bill.

7.5 **Remember to factor in the length of the drafting process and consultation period(s) before making promises that a Bill will be ready by a particular date. If it really must be enacted by a set date (e.g. if international obligations require compliance by a deadline) make this clear to the Parliamentary Counsel at the beginning of the process.**

7.6 It is important to note that more mistakes are made as a result of rushing the drafting process than for any other reason.

8.0 A GOOD PRACTICE MODEL FOR DRAFTING INSTRUCTIONS

8.1 The Issue

Describe **the issue** to be addressed by the proposed legislation in sufficient detail to give Parliamentary Counsel the background to the policy underpinning the proposals. Inform the Parliamentary Counsel about and enclose copies of **any previous advice** that has been given by the Attorney-General's Chambers or anybody else on the provision in question, and any relevant decided cases.

8.2 The Objectives

Describe **exactly what is to be achieved** by the proposed legislation. Set out all of the reasons for the changes. Explain, preferably section by section, where the existing legislation, if any, falls short, goes wrong, or no longer accords with the Ministry's policy objectives.

8.3 The Means

Describe **how (i.e. by what means)** the issue will be addressed. Chambers need to understand **exactly how the proposed legislation will operate in practice**. Explain the policy requirements in some detail setting out exactly what the Ministry's objectives are and how they will be achieved. It may be helpful to explain the current policy as this will highlight the changes.

8.4 Transitional Matters & Commencement

Explain the **impact** of the proposed changes **on circumstances** that presently exist (i.e. how will cases/persons currently within the existing law be affected?). Alert Chambers to other statutory provisions which will be affected or need attention because of the changes. Let them know whether **commencement** will be delayed.

8.5 Timetable

Advise Chambers about the proposed timetable for introducing the legislation in the Legislature.

9.0 LEGISLATION COMMITTEE REVIEW OF DRAFT BILL

9.1 Cabinet Conclusion No. 2(03)6 dated 12 August 2003 enabled the creation of the Legislation Committee whose sole purpose is to make a critical and detailed review of all legislation prior to such legislation being submitted to Cabinet for approval and subsequent introduction in the House of Assembly. This process will provide proper scrutiny of the legislation prior to introduction and consequently reduce the number of mistakes discovered on the floor of the House.

9.2 The Legislation Committee is **not** required to review draft Budget Legislation.

9.3 The Legislation Committee has no authority to revisit policy decisions underlying a Bill. If it thinks that changes to the policy already approved by Cabinet are desirable, the matter must be taken back to Cabinet for consideration and additional approval.

9.4 Draft legislation is not to be submitted for final Cabinet approval until the Legislation Committee has approved it.

9.5 The Legislation Committee will only provide a review after the legislation has been through several drafts and signed-off by the Ministry. It is during this drafting phase that the responsible Ministry must maintain an open and continuous dialogue with the Attorney-

General's Chambers. Once a final draft is agreed, the responsible Ministry will arrange to meet with the Legislation Committee in order to commence the review.

9.6 The Legislation Committee consists of:

- the Attorney-General;
- the Minister responsible for the legislation (and technical officers);
- the Minister (and technical officers) from any other Ministry which will be impacted;
- the Assistant Cabinet Secretary (Legislative Affairs);
- the Chief Parliamentary Counsel; and
- the Parliamentary Counsel responsible for the preparation of the Legislation.

9.7 Once the Legislation Committee has vetted the final draft of the legislation and made any amendments, the Committee will give approval for the responsible Minister to seek Cabinet's approval to table the legislation in the House of Assembly.

9.8 The final draft of the legislation is sent to Cabinet by the responsible Minister for approval and introduction into the House of Assembly via the Cabinet Memorandum process. An example of a Cabinet Memorandum requesting Cabinet's approval of draft legislation is attached as **Annex III**.

10.0 CABINET APPROVAL TO INTRODUCE TO THE LEGISLATURE

10.1 After the Attorney-General's Chambers has drafted the legislation, a copy is sent to the Cabinet Office, accompanied by a "*For Decision Cabinet Memorandum*" indicating that the Legislation Committee has vetted the legislation and requesting Cabinet approval and authorization for the legislation to be tabled in the Legislature. The Memorandum must also indicate that the Legislation Committee has vetted and approved the legislation.

10.2 Following Cabinet approval, the Cabinet Office will notify the responsible Ministry (the Permanent Secretary/Head of Department) that the legislation can be tabled. The Ministry will then inform the Clerk to the Legislature in writing that the legislation will be tabled on the approved date. This correspondence should also be copied to the Cabinet Office because the Clerk will not allow legislation to be introduced into the Legislature without the prior approval of the Secretary to the Cabinet authorizing him or her to do so. Please note that where subordinate legislation is involved, the note to the Secretary to the Cabinet should indicate whether it is subject to the **affirmative or negative resolution procedures** (see further detail in Chapter 14.0).

10.3 Additionally, the responsible Ministry must notify the Attorney-General's Chambers that the legislation will be tabled and request that the Attorney-General's Chambers prepare the required 80 copies of the legislation (**see Annex IV for example**). The responsible Ministry will hand deliver the 80 copies to the Clerk to the Legislature by **no later than 3:00 pm on the Thursday prior to the Friday** that the legislation will be tabled in the House of Assembly.

10.4 Once Cabinet approves the legislation, the Permanent Secretary or the Head of Department is required to take a proactive approach in ensuring that the legislation moves through the next stages, which include both Houses of the Legislature (see section 11). As a result, the Permanent Secretary or the Head of the Department will be responsible for preparing a

second reading speech and a clause by clause detailed brief for the Minister and the Junior Minister. Additionally, it is expected that the required number of Bills (see Annex V) are delivered to the Clerk to the Legislature.

10.5 Further details on the procedures in the House can be found in “Procedures for the House of Assembly – Tabling procedures, Parliamentary questions and Ministerial statements” prepared by the Cabinet Office in March 2004 (see Annex V).

11.0 STAGES OF A BILL

In the House of Assembly

11.1 Introduction and First Reading

The Bill is read by its title.

Rule 32(3) of the Rules of the House of Assembly requires a period of “not less than four days” between the First and Second Reading (unless this rule is suspended). Although four days is the rule, there has been a customary practice to wait for two weeks or two sittings of the House to give MPs a chance to read the Bill.

11.2 Second Reading

This involves general debate on the principles of the Bill. The Minister will need a Second Reading Speech. The Minister’s Speech should cover “the principle and general merits of the Bill” [rule 34(1) of the Rules of the House of Assembly]. The speech should not mention specific clauses of the Bill. The Second Reading and the remaining stages are usually taken in one sitting. In rare instances, a Bill has passed through all three stages in one sitting.

11.3 Committee

This is the stage where debate on the Bill takes place by a Committee (usually of the whole House). A Chairperson, other than the Speaker, chairs this stage of the legislative process. **The Minister will need a detailed brief**, clause by clause, for the Committee stage. Rule 38(1) of the Rules of the House of Assembly forbids discussion of the principle of the Bill. The Committee discussion is confined to the Bill’s “details”. Amendments may be made during the Committee stage. Amendments are made by a notice of motion that is generally drafted by a Parliamentary Counsel.

11.4 Report

The Committee reports the results of the Committee stage to the whole House of Assembly. The Speaker chairs this stage.

11.5 Third Reading

The Bill is read by its title. The Bill is generally passed, signed by the Speaker and delivered to the Senate.

11.6 Further Proceedings

Further proceedings will occur only if the Senate amends the Bill.

In the Senate

- 11.7 a) Introduction & First Reading
b) Second Reading

Bill read by its title.
General debate on "principle" of Bill.

c) Committee	Debate on each clause by Committee, amendments may be made.
d) Report	Report by Committee to Senate.
e) Third Reading	Usually a formality.
f) Bill passed	Signed by the Senate President and forwarded to the Governor for his assent.

11.8 Like the Minister, the Junior Minister will need a Second Reading speech (on principles - Rule 26) and **detailed brief** for Committee.

11.9 If the Bill is amended by the Senate it must return to the House of Assembly for further proceedings, so that both Houses have agreed to the same text.

11.10 Where a Bill is rejected in two successive sessions by the Senate, section 38(2) of the Constitution provides that it may in any case be presented to the Governor for assent. The Senate does not have the power of veto in relation to a Bill which has been passed by the House of Assembly, just the **power to delay the Bill for a period of one year**. This is what happened in the case of the Prohibited Restaurants Bill.

11.11 Note that Bills may start in the Senate and then be considered by the House of Assembly, but this is unusual.

Governor's Assent

11.12 The Governor receives the Bill signed by the Premier, the President of the Senate and the Speaker of the House of Assembly. The Bill will be accompanied by the Attorney-General's certificate that the Governor's assent "**may properly be given**".

11.13 Section 35(2) of the Constitution provides that the Governor shall signify either:

- a) that he assents;
- b) that he withholds assent; or
- c) that he reserves the Bill for the signification of Her Majesty's pleasure.

11.14 Bills which appear to the Governor, acting in his discretion, to fall within certain categories listed in section 35(2) of the Constitution are required under the Constitution to be reserved for the signification of Her Majesty's pleasure (i.e. sent to Whitehall for approval of Her Majesty's Government). Note that these include Bills which relate to the **reserved powers** in section 62 of the Constitution (i.e. external affairs, defense, internal security and police) and also Bills which relate to **currency or banking**.

Enactment

11.15 Once a Bill has been signed by the Governor it will be **enacted** and is deemed to have been so **from the beginning of the day on which the Governor signed it unless otherwise stated**.

11.16 Notice of the enactment (just the short title) is published in the Gazette.

11.17 The Bill will be reprinted as an Act with the Bermuda crest and without the explanatory memorandum. Free-standing Bills will be assigned a **title and item number** in the Attorney-General's Chambers so that they can be found as part of the Revised Laws in the printed volumes and on the database maintained in the Chambers.

Commencement

11.18 On enactment.

If the Bill is silent as to commencement, it will be in force from the date of enactment, that is to say, the date when the Governor signs it.

11.19 **Delayed Commencement**

For administrative convenience, commencement is postponed either:

- a) to a date specified in the Act; or
- b) to “such date as the Minister may appoint by notice”.

11.20 **Appointed day provision**

It is important to instruct Parliamentary Counsel to prepare an appointed day notice which specifies the day of commencement. Care needs to be taken to ensure that the notice is signed by the Minister and gazetted **before** the date specified in the notice. An example of this request is attached in **Annex VI**.

12.0 PREPARATION OF THE MINISTERIAL BRIEF

12.1 **Introduction into the House of Assembly**

At this stage, the draft legislation is complete, has been approved by Cabinet and is about to be introduced into the House of Assembly. Your Minister will lead the debate on the legislation in the House (as will the Junior Minister in the Senate). It is your responsibility to guide the Minister through the process and ensure that he or she has an instructive brief and is prepared for questions.

12.2 Legislation varies - some is straightforward and uncontroversial, while some is technically complex, and/or politically contentious. You must tailor your brief to fit the circumstances. Do not leave its preparation until the last minute, even on a simple Bill.

12.3 **Second Reading Debate**

For the second reading debate, your Minister will need to speak to the general principles of the Bill (i.e. the background, why legislation is necessary) but must not mention clauses by number, quote from the Bill or go into detail about what the Bill is to achieve. You should be able to draw the policy background from the original Cabinet Memorandum.

12.4 **Committee Stage**

During Committee stage, the Bill is considered line by line and there can be a vote on each clause. You need to prepare a detailed brief which does at least the following for each clause—

Summary: describes in a sentence or two what the clause does (you will get some help from the explanatory memorandum, but simply reading that out for each clause is not sufficient detail);

Explanation: explains anything which warrants explanation;

If asked: alerts the Minister to possible difficult questions and gives the answers.

12.5 Your Minister will probably find it helpful if you produce a folder with a version of the Bill cut into separate clauses pasted to one side of the page, with the explanation opposite. This way he or she will only have to handle one document.

12.6 Some Ministers choose to share their briefing with the Opposition Party, especially on a very technical Bill. **Remember to edit out the "if asked" section**, otherwise you will be handing politically sensitive information to the Opposition.

12.7 Draftsmen do not, as a rule, attend the House unless legal difficulties are expected and the Minister makes a special request. It is not their role to assist with explaining the policy behind legislation. But you will certainly need to attend the debates. Take all relevant papers so that you can research questions instantly. And remember to take a small notepad and pen for jotting down and forwarding replies to the Minister.

13.0 POWER TO MAKE SUBORDINATE LEGISLATION (Statutory Instruments)

13.1 One fundamental difference between a Bill and subordinate legislation is what can be included.

The Legislature has power to make whatever legislation it wants, so the subject-matter of a Bill is almost without limit (subject to the Constitution), but it has delegated to a Minister power to make subordinate legislation within specific parameters and if the subordinate legislation goes beyond those parameters, they will be ultra vires and may be struck down by a court.

13.2 It follows that the powers must be very carefully crafted. Parliamentary Counsel need **clear instructions as to what matters you intend to include in subordinate legislation at the time he or she is drafting the power**, so he or she can ensure that the power is wide enough. Certain matters must be specifically mentioned in the regulation-making power, e.g. the power to charge fees or create criminal offences.

13.3 Sometimes Parliamentary Counsel are instructed to draft Statutory Instruments under an existing power which is not wide enough to cover the new policy. In such circumstances the only option is to amend the power. For example the Bermuda Monetary Authority Amendment Act 1997 inserted a new provision in a regulation-making power to deal specifically with the regulation of mutual funds, so that the Bermuda Monetary Authority (Classification of Collective Investment Scheme) Regulations 1998 could be made under that power.

14.0 PROCEDURE FOR STATUTORY INSTRUMENTS (Regulations, Rules, Orders, Notices)

14.1 Affirmative Resolution Procedure ("laid *then* made")

Regulations, rules, orders, etc. subject to the affirmative resolution procedure are **laid in draft** in the House of Assembly and Senate and cannot be made until "a resolution approving the draft has been passed by both Houses and communicated to the Governor by message" (see section 7 of the Statutory Instruments Act 1977). They are **THEN made by signing** and must be **published** in the Gazette (whole text) before they can come into force.

14.2 Negative Resolution Procedure ("made *then* laid")

Regulations, etc. subject to the negative resolution procedure are **made** by a Minister by his **signing** them. They cannot come into force before being **published** in the Gazette (whole text).

The regulations, etc. must **THEN** be **laid** "as soon as practicable after making" before both Houses and **may be annulled** in whole or part by resolution of either House within the period of **"21 days... or the third sitting day... whichever is the later"**. If this happens the maker must gazette notice of the annulment of the statutory instrument or part, but this does not affect anything already done under the instrument (see section 8 of the Statutory Instruments Act 1977).

14.3 Some types of subordinate legislation are **not subject to Parliamentary scrutiny** and are simply made and gazetted, e.g. rules of court; commencement day notices (see section 6(3) of Statutory Instruments Act 1977).

14.4 In any case, commencement can be either on date of gazetting or on a later date specified in the instrument.

14.5 **Which procedure to use?**

The regulation-making power in the Act will normally specify which procedure is to be used. If it is silent, section 6(2) of the Statutory Instruments Act 1977 applies the **affirmative** procedure. Apart from the fact that the **affirmative procedure** is invariably used **whenever a fee is to be imposed**, there is no hard and fast rule about which procedure should be used. Generally speaking, the negative resolution procedure is appropriate for procedural/technical details and the affirmative resolution procedure should be used for anything more significant. Ministers prefer the convenience of the negative resolution procedure since such Statutory Instruments may be made at any time, and not just when the House is sitting. However, since such Statutory Instruments are not automatically debated, Government may be open to criticism that the subject matter has not been sufficiently debated.

15.0 CONCLUSION

15.1 The Legislative Process is the process by which the Government's policy ideas become a part of the legal infrastructure of Bermuda. As senior technical officers in your Ministry or Department, you play a critical role in the legislative process at every stage:

- a) **Before legislation is introduced in the Legislature, you are charged with formulating the Cabinet Memorandum, providing drafting instructions to Parliamentary Counsel and reviewing drafts and commenting on them;**
- b) **During its passage through the Legislature, you provide Ministerial Briefing, answer queries during debates and instruct Parliamentary Counsel about amendments to legislation on the floor of the House; and**
- c) **After legislation has been enacted, you are charged with instructing Parliamentary Counsel about commencement and Regulations.**

15.2 It is essential for the timely and efficient production of legislation that officers in Ministries who are charged with responsibility for legislation understand the Legislative Process and their responsibilities.. It is hoped that this document will serve as a useful reference source.

15.3 Additional advice and guidance for preparing Cabinet Memoranda (as needed during parts of the legislative process) can be found in “*The Preparation of Cabinet Memoranda*” re-issued by the Cabinet Office in March 2005 and available on the CPU website www.cpu.gov.bm. Detailed guidance on developing Policy is contained in “*Making Policy Happen in Bermuda – Creating Public Policy: the decision-making process from idea development to implementation*” issued by the Cabinet Office in April 2005. All guidance documents are available on the Cabinet Office Website within the Government Portal.

ANNEX I

This document is the property of the Government of Bermuda

Copy No. _____

FOR DECISION

Cabinet Memorandum
No.

WEARING OF SEAT BELTS BY CHILDREN

Memorandum by the Minister of Transport

The purpose of this Memorandum is to seek Cabinet's approval to require the wearing of seat belts by children.

2. The Minister of Transport has been advised by the Road Safety Council that large numbers of children are being carried as passengers in cars without the use of seat belts or any other restraining devices such as infant car seats. Ministers will probably have seen for themselves small children standing up in cars and even poking their heads through the sun-roof "popemobile" style. This is obviously a very dangerous practice.

3. Annex I sets out some statistics of the numbers of children injured in car accidents from 1990 to 1999 who were not wearing seat belts. So far no death has occurred on Bermuda's roads for this reason but the Council advises that it is now time to legislate for the protection of our children.

4. Although many countries require both adults and children to wear seat belts, at this stage the proposal is limited to children under the age of fourteen travelling in cars which are fitted with seat belts. It is felt that it would be onerous if owners of older vehicles were obliged to fit seat belts. In order to enforce the requirement for children to wear seat belts, it is proposed that the driver of a vehicle in which a child not wearing a seat belt is a passenger will commit a criminal offence subject to a recommended penalty of a maximum \$5000 fine.

5. The Attorney-General has been consulted and has no legal objection to the proposal.

6. Accordingly, Cabinet is invited to:

- (1) approve the proposal to require children under fourteen to wear seat belts in cars fitted with seat belts;
- (2) approve the creation of an offence of driving a car with an unrestrained child passenger contrary to that requirement; and
- (3) authorise the Minister of Transport to instruct the Attorney-General to draft the necessary legislation.

XYZ

Date:

File: SB/01

ANNEX II

Ministry of Transport MEMORANDUM

To Parliamentary Counsel, Attorney-General's Chambers
From Permanent Secretary
Date ...
Re **WEARING OF SEAT BELTS BY CHILDREN**
Our Ref SB/01

1. Further to Cabinet Conclusion 5(02)6, I now write with instructions to draft a Bill to require children to wear seat belts in cars, provided that the car is already fitted with seat belts. The Cabinet Memorandum, which you saw in draft, sets out the policy background. This is part of a wider safety initiative; it is intended that the importation of cars which do not have seat belts for both front and rear seats will be phased out. At this stage it has been decided not to make the wearing of seat belts by adults compulsory, though that may follow in due course.
2. I enclose a copy of the Motor Vehicles (Wearing of Rear Seat Belts by Children) Act 1988. This is what has inspired the Ministry's new policy, but the Bill should require children under fourteen sitting in either the front or the back of a car to be appropriately restrained.
3. We think that subsections (4) and (5) of the new section 33C inserted by the UK 1988 Act is an unnecessary complication and do not want that as part of the Bermuda law.
4. It is to be a criminal offence for a person to drive a car if a child is not wearing a seat belt. Such an offence should be tried in the magistrates' court and the penalty should be a maximum fine of \$5000.
5. The Minister hopes that the Bill will be ready for introduction as soon as possible. Please contact the undersigned (extension x1234) if you have any questions or need further information.

Permanent Secretary

ANNEX III

This document is the property of the Government of Bermuda

Copy No. _____

FOR DECISION

Cabinet Memorandum
No.

WEARING OF SEAT BELTS BY CHILDREN

Memorandum by the Minister of Transport

The purpose of this Memorandum is to seek Cabinet's approval to introduce the Motor Car Amendment Act 2002 which was drafted pursuant to Cabinet Conclusion 5(00)6 of(date).

2. The draft Bill is attached as Annex I.
3. Accordingly, Cabinet is invited to:
 - (1) approve the Motor Car Amendment Bill 2002; and
 - (2) authorize the Minister of Transport to introduce the Bill into the House of Assembly.

XYZ

Date:
File: SB/01

ANNEX IV

Ministry of Transport

MEMORANDUM

To Parliamentary Counsel, Attorney-General's Chambers
From Permanent Secretary
Date
Re **WEARING OF SEAT BELTS BY CHILDREN**
Our Ref SB/01

Further to Cabinet Conclusion 14(02)7 which approved the Motor Car Amendment Bill 2002 for introduction into the House of Assembly, I confirm that the Ministry is content with the Second Draft and would ask you to please produce the necessary 80 copies of the Bill for the House.

Thank you for your assistance with this matter.

Permanent Secretary

ANNEX V

PROCEDURES FOR THE HOUSE OF ASSEMBLY Tabling procedures, Parliamentary questions and Ministerial statements

1.0 TABLING PROCEDURES

1.1 Provisions are made for tabling legislation⁷, reports, and financial statements in the *Order of Business (Rules of the House of Assembly)*⁸ under the following sections:

Table 1

Tabled Item	Order of Business (House Order Paper) Section
Legislation	Introduction of Bills
Reports	Papers and Other Communications to the House
Financial Statements	Papers and Other Communications to the House

1.2

The following procedures must be observed when tabling the above items:

Leases, Reports and Financial Statements

1.3 After a **statutory lease, report, and/or financial statement** has been completed, a copy is to be sent to the Cabinet Office, accompanied by a ***For Information Cabinet Memorandum*** advising Cabinet of the Minister's intention to table it in the legislature.

1.4 After a **non-statutory lease, report, and/or financial statement** has been completed, a copy is to be sent to the Cabinet Office, accompanied by a ***For Decision Cabinet Memorandum*** requesting authorization for it to be tabled in the Legislature.

1.5 Following Cabinet approval, the **responsible Ministry will notify the Clerk to the Legislature in writing** that the lease, report, and/or financial statement will be tabled on the approved date. All correspondence must also be copied to **the Cabinet Office**.

Legislation

1.6 After the **Attorney-General's Chambers has drafted the legislation**, a copy must be sent to the Cabinet Office, accompanied by a ***For Decision Cabinet Memorandum*** requesting Cabinet approval and authorization to have the Bill tabled in the Legislature. The Memorandum must also indicate that the **Legislation Committee has vetted the legislation**.

1.7 Following Cabinet approval, **the Cabinet Office will notify the responsible Ministry that the legislation can be tabled**. The **responsible Ministry will then inform the Clerk to the Legislature** in writing and copied to the Cabinet Office that the legislation will be tabled on the approved date. Where subordinate legislation is involved, the note should indicate whether it is subject to the affirmative or negative resolution procedures. Additionally, the responsible Ministry must **notify the Attorney-General's Chambers** that the legislation will be tabled and

⁷ Legislation includes primary legislation (Public Bills, Private Members' Bills and Private Bills) and/or subordinate legislation/statutory instruments (i.e. Rules, Orders, Regulations, or Notices).

⁸ Order of Business/House Order Papers — sets out the agenda for the House of Assembly.

request that the Attorney-General's Chambers prepare the required number of printed copies of the legislation (see table 2).

1.8 **The responsible Ministry will deliver the required number of copies** (see table 2) to the Clerk to the Legislature by **no later than 3:00 pm on the Thursday prior to the Friday that the legislation will be tabled** in the House of Assembly.

Table 2

Tabled Item	Number of Copies Required
Public Bills Statutory Instruments	80
Reports	60
Financial Statements Supplementary Estimates	70
Leases	70
Parliamentary Questions	10
Ministerial Statements	15

2.0

RESPONDING TO PARLIAMENTARY QUESTIONS

2.1 Ministers may be asked questions relating to the public affairs for which they are responsible. Ministers' responses to Parliamentary Questions can either be oral or written depending on the requirements of the Member of Parliament posing the question. Provisions are made for oral responses in the *Order of Business* under Oral Replies to Questions. The following procedures should be observed whether responding to questions orally or in writing:

- a) The Clerk to the Legislature **prepares the questions along with a set of instructions** (outlining the response format), which are forwarded to the **responsible Ministry and to the Cabinet Office**.
- b) The responsible **Minister must share his or her responses with Cabinet** on the Tuesday prior to the Friday that he/she intends to respond in the House of Assembly.
- c) The responsible Ministry must submit **10 copies** of the response to the Clerk to the Legislature and **copied to the Cabinet Office by no later than 3:00pm on the Thursday prior to the intended day of the response**. This will allow the Clerk to the Legislature sufficient time to prepare the *Order of Business* paper for the Speaker of the House of Assembly.

2.2 It should be noted that whether a response is provided orally or written, it **must be submitted in writing** to the Clerk to the Legislature.

3.0 MINISTERIAL STATEMENTS

3.1 A Ministerial Statement can only be made during the Statements by Ministers in the *Order of Business*. The following procedures should be observed when delivering a Ministerial Statement:

- a) The responsible Ministry must inform the Clerk to the Legislature **by no later than 3:00 pm on the Thursday before the Friday that the statement is to be made in**

- the House of Assembly. This will allow the Clerk to the Legislature sufficient time to prepare the *Order of Business* paper for the Speaker of the House of Assembly.
- b) The responsible Ministry must ensure that **15 copies** of the Ministerial Statement are delivered to the Clerk to the Legislature while **1 copy is to be sent to the Cabinet Office by no later than 3:00 pm on the Thursday before the Friday that the Statement is to be made** in the House of Assembly.
 - c) The heading of the Ministerial Statement **must include the following**:
 - Name and title of the Minister
 - Date (upon which it is to be made in the House of Assembly)
 - A brief description/title of the subject matter of the document
 - d) It should be noted that a **Ministerial Statement must**:
 - State facts
 - Describe policy and/or matters of public affairs
 - Announce a national or international event or crisis
 - Not be lengthy (5 pages maximum)
 - Not contain any personal attacks

4.0 FURTHER GUIDANCE

4.1 Additional advice and guidance for key stages in Government's public policy development process can be found in the following documents which are also available on CPU website at www.cpu.gov.bm:

- i. Detailed guidance on developing policy is contained in "*Making Good Policy Happen in Bermuda – Creating public policy from idea development to implementation*" issued by the Cabinet Office in January 2005.

ANNEX VI

Ministry of Transport

MEMORANDUM

To Parliamentary Counsel, Attorney-General's Chambers
From Permanent Secretary
Date ...
Re **Commencement of Motor Car Amendment Bill**
Our Ref SB/01

The Minister of Transport has advised that the Motor Car Amendment Bill 2002 will come into operation on(date). Please prepare a Commencement Day Notice for the signature of the Minister.

Thank you for your assistance with this matter.

Permanent Secretary

ANNEX VIII

THE LEGISLATIVE PROCESS FOR SUBORDINATE LEGISLATION

(Statutory Instruments - Regulations, Rules, Orders, Notices)

<u>STEPS IN PROCESS</u>	<u>RESPONSIBILITY</u>
1. Formulation of Policy Proposals Requiring Legislation & Submission to Minister	Permanent Secretary
<ul style="list-style-type: none">▪ Preparation of Draft Cabinet Memorandum▪ Circulation of Draft Cabinet Memorandum for consultation on policy —<ul style="list-style-type: none">• To Attorney-General → For Legal Impediments;• To Minister of Finance → For Resource Implications;• To Other Relevant Ministers.▪ Signature by responsible Minister once satisfied with all consultations▪ Circulation of Draft Cabinet Memorandum for signatures —<ul style="list-style-type: none">• To Attorney-General;• To Minister of Finance;• To Other Relevant Ministers.▪ 23 copies of Cabinet Memorandum to Cabinet for Approval	
3. Preparation & Issue of drafting instructions to Attorney-General	Permanent Secretary
4. Drafting Process	Parliamentary Counsel
5. Review & Approval of draft Legislation	Permanent Secretary
6. Legislation Committee review and approval	Permanent Secretary
7. Second Cabinet Memorandum annexing final draft for Cabinet Approval	Permanent Secretary
8. Information to Attorney-General about Cabinet Approval of final draft	Permanent Secretary
9. Preparation of Ministerial Brief (Affirmative Resolution)	Permanent Secretary
10. Affirmative Resolution Procedure Request for 80 Copies for Minister/ Junior Minister to lay without Signing → Debate & Approval → Minister Signs Copy → Copy to Cabinet Office for Publication	Permanent Secretary
Negative Resolution Procedure Request for 2 Copies → Minister Signs Copy → Copy to Cabinet Office for Publication → Ministry makes 80 copies which are laid in House of Assembly, then Senate → Debate (Subject to Annulment)	Permanent Secretary
No Parliamentary Scrutiny Request for 2 Copies Minister Signs Copy → Copy to Cabinet Office For Publication	Permanent Secretary

NB – No Amendments Possible in Legislature!