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## HOW LAWS ARE MADE

### I INTRODUCTION

The man who united modern Germany, Otto von Bismarck, (in)famously stated that to retain respect for sausages and laws, one must not watch them in the making.<sup>1</sup>

I wish to offer my perspective — as a parliamentarian of some 17 years and now as Attorney-General — on the nature of lawmaking. Whilst the topic may seem unnecessarily opaque, I choose to ignore Bismarck’s assessment and present my account, if only to allow all persons to more fully understand the process. I imagine a few readers would be rolling their eyes at this point, believing this to be the province of a high-school civics class — a Minister introduces a Bill to Parliament, which passes both Houses in the same format. A good student would add that the Governor needs to give the Bill Royal Assent. That is all true — but it is only half the story.

In addition to the legal considerations behind any Bill, there are parliamentary and bureaucratic dimensions that need to be traversed. I believe how laws are made, from beginning to end, is not widely understood. Certainly, aspects of lawmaking are very well understood by differing persons, and I do not propose to create the authoritative guide here, but a simple overview of Cabinet and parliamentary process.<sup>2</sup>

### II THE ROLE OF CABINET

All Bills introduced by the Government are done by Ministers, which requires Cabinet approval. There are principally two different sorts of Bill: those that come up from the Department, typically matters that are routine or ‘tidy-ups’ to previously

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<sup>1</sup> Although widely attributed to Bismarck, this remark is ‘probably apocryphal’: Elizabeth Knowles (ed), *Oxford Dictionary of Quotations* (Oxford University Press, 8<sup>th</sup> ed, 2014) ‘misquotations’ def 28. It is now more widely attributed to John Godfrey Saxe: see, eg, Fred R Shapiro and Joseph Epstein (eds), *Yale Book of Quotations* (Yale University Press, 2006) 86.

<sup>2</sup> In providing an insider’s account of parliamentary lawmaking, this article complements inside perspectives on the judiciary published in the *Adelaide Law Review*, including: John J Doyle, ‘Judicial Law Making’ (1995) 17(2) *Adelaide Law Review* 161, and Martin Hinton, ‘A Bail Review’ (in this special issue).

passed legislation, and those that enact new policies that typically come from the Government of the day. Usually, there are two Cabinet submissions for any Bill: the first, to draft and consult on a Bill; the second, to introduce to Parliament. This two-step process is in place so that Cabinet members are across the work of other departments from proposal to introduction, as well as ensure that Bills have support in the Cabinet before considerable work is undertaken.

Usually what happens in my Department is that I or one of my staff instruct a solicitor in the Legislative Services Division of the Attorney-General's Department ('AGD') about the approved policy — what its objectives are, scope for enforcement, and the like. In other departments, the relevant officers are not usually solicitors but expert policy officers. The solicitors from the Legislative Services Division are specialists in the interaction between policy and law with respect to legal related matters, and therefore provide strategic legal and policy advice. It is a fallacy that policy expertise, speaking at least for the AGD, has been hollowed out from the public service. These solicitors are responsible for liaising with Parliamentary Counsel about the proposed Bill and/or regulations. These Counsel draft the text of the Bill in close consultation with Legislative Services, and advise on what is legally possible to be drafted. Whether something is desirable from a policy perspective is not within their remit, and Parliamentary Counsel are used by all Members of Parliament to draft Bills and amendments. They are impartial and accessible to all Members.

Once Parliamentary Counsel have returned with a Bill, which has been approved by the relevant solicitor in my Department, or a policy officer when speaking of another Minister's Bill, and internal and external consultation as appropriate has been conducted, a Cabinet submission is drafted. The content of Cabinet submissions varies depending on the subject of the Bill; however, the following are topics are usually considered:

- 1 Synopsis of the proposal;
- 2 Discussion, including background;
- 3 General impact;
- 4 Consultation, communication, and engagement;
- 5 Implementation and accountability; and
- 6 Budget impact.

All draft Cabinet submissions in the AGD are considered by a Ministerial Adviser for comment. There are occasions when the content needs to be edited for its audience — and political staff usually have a different perspective of the concerns or details that other Cabinet Ministers would want to see (aside from their respective departments). After approval has been given and the draft Cabinet submission has been returned to the solicitor, it is required to be circulated to Treasury for a costing comment and

to Cabinet Office for a policy comment.<sup>3</sup> Rules instituted by our Government mean that any costing above a certain threshold need to be referred to the Budget Cabinet Committee, which has its own rules in place and is the bane of many a Minister with brilliant — but expensive — ideas.<sup>4</sup> The return of an adverse comment of these agencies can, at times, be frustrating. However, the comments made can identify defects in either the proposal or how the submission or Bill is worded — requiring the submission to be revised prior to its final consideration by Cabinet, or the item being left off the Cabinet agenda.

The deadlines for a submission to be considered by Cabinet are immutable.<sup>5</sup> They need to be submitted by Thursday for consideration by Cabinet 10 days later — but there is a formalised ‘late’ submission process, where they need to be submitted by the Tuesday of the following week if Cabinet Office accepts your excuse. Even if that excuse is accepted, its status as ‘late’ is recorded in big red capitals on the Cabinet agenda. The papers for Cabinet are distributed the Friday before consideration. During this time, Cabinet Office circulates these papers to agencies with an interest in the matter.

A subsequent submission is usually done for the Bill’s introduction, which, depending on several factors, may be introduced in the next sitting week or deferred. Whilst the above summary sounds relatively simple, it is usually the result of many months of hard work, and of significant consultation with external stakeholders and one’s own party colleagues before even arriving in the Parliament!

### III THE ROLE OF PARLIAMENT

With respect to the parliamentary dimensions behind any Bill, I propose to illuminate some of these factors with respect to a Bill that recently passed. The Statutes Amendment (Liquor Licensing) Bill 2019 (‘Liquor Licensing Bill’) is an example of a ‘tidy-up’ Bill. It was designed to clean up and modernise liquor licensing classes by removing obsolete conditions from liquor licenses — such as a requirement to limit noise or collect refuse, which are the province of local government. From an administrative standpoint, the Liquor and Gambling Commissioner had no power to enforce such provisions and retaining them on a liquor licence for a business may have only served to confuse individual licensees about their own obligations — especially

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<sup>3</sup> Government of South Australia, Department of the Premier and Cabinet, *Cabinet Office Comments and DTF Costing Comments* (Web Page, January 2019) <<https://dpc.sa.gov.au/responsibilities/cabinet-and-executive-council/cabinet/writing-a-cabinet-paper/cabinet-office-comments-and-dtf-costing-comments>>.

<sup>4</sup> Government of South Australia, Department of the Premier and Cabinet, *Budget Cabinet Committee* (Web Page, January 2019) <<https://dpc.sa.gov.au/responsibilities/cabinet-and-executive-council/cabinet-committees/budget-cabinet-committee>>.

<sup>5</sup> Government of South Australia, Department of the Premier and Cabinet, *Cabinet Document Process* (Web Page, January 2019) <[https://www.dpc.sa.gov.au/\\_\\_data/assets/pdf\\_file/0009/39258/Cabinet-Document-Process.pdf](https://www.dpc.sa.gov.au/__data/assets/pdf_file/0009/39258/Cabinet-Document-Process.pdf)>.

when these conditions may have been retained for a former business located at the same premises!

After I introduce the Bill, my office offers briefings to all Members of Parliament on the content and implications of the Bill. Usually, it is only the Opposition Shadow who takes up this offer and perhaps one or two diligent Members, but this depends on how controversial the Bill is. With respect to the Liquor Licensing Bill, and, unusually for a technical Bill, there were several speakers in debate — principally from Government. Whilst the Second Reading of the Bill is supposed to provide a speaker with 20 minutes to debate the merits of the Bill or elucidate its practical implications for an industry or one's community, in this case Members of Parliament used the Bill to promote and praise hotels in their own electorate.<sup>6</sup>

I am sure many Members learnt a great deal about the varied food and beverage options all across South Australia. Whilst there is an upward trend, I think, of irrelevant contributions made in debate, it only serves to highlight that the Parliament is a political forum first and foremost — and opportunities arise that may yield a political benefit. Grievance debates, following Question Time for instance, are used to officially highlight the wonderful work of community groups — transcripts or videos of which are later sent to members of the same. I do believe that ill-informed, off-topic contributions on significant legislation does the Parliament a disservice, and overlooks the fact that Second Reading speeches are an interpretive tool and guide to the judiciary. I also note, without offering a view in this particular case, that the lead speaker for the Opposition considered the multiple contributions on the Liquor Licensing Bill as a vehicle for occupying the time allotted for Government business.

It is fair to say, however, that the length, nature, and number of contributions on any given business in the Chamber is also governed by other factors: whether there is sufficient time left in the day; whether the Bill is time sensitive; or whether it supports a theme the Government is aiming to get up that week in the media (e.g. supporting regional South Australia). Perhaps unusually, this Bill attracted several questions in Committee following the Second Reading in the House of Assembly (wherein the Government controls a majority) but very few in the Legislative Council, where more forensic scrutiny of a Bill usually takes place. Standing orders in the Lower House also allow for only three questions per clause in a Bill, whereas in the Council there are no such restrictions. This perhaps contributes to why Legislative Councilors never feel the need to rush their deliberations, despite usually commencing their parliamentary day at 2:15pm.

During the Committee stage in the Assembly, questions were asked — most of which had been answered in the previous briefings. It was not that the Members had not done their homework (but that does happen). Rather, it is a forum for either getting their concerns on the public record (even if they do eventually vote in favour), assuaging the interests of an affected group, or as a means of tying the Government's colours

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<sup>6</sup> South Australia, *Parliamentary Debates*, House of Assembly, 20 March 2019.

to the mast. Clarification of a particular clause is not usually the motive for asking questions. Briefings are also offered to the Opposition and independent Members prior to its consideration by the Council. It is usually when the Bill is before the Council that the Government may agree to amendments to secure its final passage, which, if not controversial, are usually at first instance the subject of negotiation between political advisers and Members, prior to Ministers meeting. Beyond what one would expect, most negotiation occurs off the floor of Parliament.

Working with the Legislative Council to pass one's own Bill is often an experience. One can be allies with respect to some matters — for example, Tammy Franks from the Greens and I have worked closely together on abortion law reform and decriminalisation of sex work — but can be vehemently opposed when it comes to the Government's proposal, in extreme cases, for a family to make an application to the Youth Court for mandatory drug treatment for children addicted to illicit drugs. The value of the Legislative Council is that members of the Crossbench — and their staff — are quite good at picking up the inadvertent consequences of a Bill's drafting and file amendments to rectify this, resulting in a better Bill. Frustratingly, at times, they obstruct — or, as happened previously, change their position on a Bill whilst on their feet!

Should, for whatever reason, the Legislative Council pass amendments to a Bill that the Assembly has passed, which are then rejected, a Deadlock Conference between the Houses is organised — with representatives from each House. This is often a useful mechanism to thrash out a compromise on subject matters where broad agreement usually applies. It remains a quaint, albeit farcical tradition, however, that representatives from each Chamber, irrespective of political party, make submissions in alignment with those of their own Chamber! It is quite disconcerting to watch one's colleague advance Opposition arguments from across the table.

#### IV POST-PARLIAMENT

Once a Bill has finally passed both Houses in the same format, several formalities need to take place. A 'fresh' copy of the Bill is created by Parliamentary Counsel, which needs to be signed by the presiding officers in the Chamber where the Bill originated (eg, the Speaker and the Clerk), and they forward me a memorandum assuring me, insofar as they are aware, of its legal validity. As Attorney-General, I am also required to sign a letter to the Premier for the purposes of advising the Governor stating that, in my opinion, there is no legal impediment to the Bill being passed.

At Executive Council, the Governor must sign the Bill already signed by the presiding officers, as well as grant Royal Assent. This requires his own signature and that of two other members of Executive Council. It is also worth noting in every Act the date of commencement. If the Bill reads at a date to be fixed at proclamation, it remains technically possible for a Bill to pass and be assented to, with the Government never having any intention of proclaiming it for whatever reason — which is problematic for obvious reasons.

## V CONCLUSION

From my experience, the best laws are thoroughly researched and considered. Bills prepared and progressed in haste frequently fail to comprehensively remedy the defect. I am certain that a lengthy tome could be written on both the model practice of developing Cabinet submissions, in addition to the tips and tricks of navigating arcane parliamentary process and procedure — as well as some of the deficiencies and inefficiencies. However, I have chosen to leave a more thorough examination of this to someone else's Masters thesis. I hope that readers understand slightly more about the Cabinet process and work behind the scenes in Parliament and how it pertains to lawmaking and lawmakers — and disregard the misguided ramblings of the Iron Chancellor.