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Editor's Notes

The CALC Conference in Hyderabad, India from February 9-11, 2011 was, by any measure, highly successful in its organization, the number of participants it attracted and its programme content. The conference theme was *Legislative Drafting: A Developing Discipline*. It evoked both the evolving nature of legislative drafting as well as its significance in building social structures, notably in the developing world.

This issue of the *Loophole* and the subsequent ones for 2011 contain articles based on the presentations made at the conference. We begin with Roger Rose's paper on drafting techniques rooted in the use of ordinary language and the need for conciseness and consistency. His paper was delivered as part of the opening session of the conference, which considered the nature of legislative drafting: is it an art, science of discipline? There was a striking divergence of views among the panellists as well as the audience members who commented on this question. I leave it to our readers to discern Roger's position. Papers from the other panellists in this session will be published in a subsequent issue.

The next two papers in this issue tackle legislative drafting in developing countries. Sir Victor Glover provides an overview of the transition from colonial government to an independent state in Mauritius and how legislative drafting arrangements have developed along the way. Elizabeth Bakibinga casts her net more widely looking at how the role of legislative counsel in fulfilled not only in the governments of developing countries, principally those in Africa, but also in development agencies of the UN and other international organizations.

The next series of papers examines a critical dimension of legislative drafting: its relationship to policy development. Each contributor looks at this topic from a different perspective. For Paul Salembier, it involves a sense of practicality that legislative counsel should bring to their work. Elizabeth Grant frames her consideration in terms of the interplay between policy-making and legal advice. Therese Perera considers the functions and nature of policy and the increasing tendency of legislative counsel to become more involved in making it. Finally, Daniel Lovric takes legislative counsel into the world of human rights, suggesting a role based on considerations that range in strength from constitutional imperatives in some countries to interpretive guides in others.

This issue presents approximately the first third of the 2011 conference. It provides a good sense of how things began and should whet your appetite for more.

John Mark Keyes,

Ottawa, August 2011

Upcoming conferences

CALC 2011 Asian Region Conference

Drafting in the Asian Century: Challenges and Possibilities

Colombo, Sri Lanka – 28 to 30 September 2011

This is CALC's first ever Asian Region Conference. The conference is receiving generous support from the Sri Lankan Government.

The focus of the conference will be very much on Asia, its legislation, the challenges faced by its drafting offices and their use of new technology in preparing and publishing legislation. Other sessions will feature statutory interpretation from an Asian perspective, the challenges of drafting in small jurisdictions, the use of editorial revision powers, the training of drafters and the role of CALC and the Commonwealth Secretariat in assisting the development of drafting capability. And for good measure there will be a Drafting Masterclass with drafters from several Asian jurisdictions participating.

Speakers to date include Peter Quiggin (CALC President), Therese Perera (Sri Lanka), Eamonn Moran (Hong Kong), Katy Leroy (Nauru), Mark Guthrie (Commonwealth Secretariat), Sudha Rani and Saji Kumar (India), Alice Khan (Brunei) and John Leahy (Australia).

This is a not to be missed opportunity for Asian CALC members to come to Colombo in late September for a great learning and networking opportunity at a conference focused very much on legislative drafting in Asia.

I look forward to seeing you in Colombo in September. If you would like a registration form, please email me at CALC@OPC.GOV.AU

Peter Quiggin PSM

President, CALC

CALC – Africa

Preparations are underway for the second Africa regional CALC conference to be held in eastern Africa in 2012. More details on this will follow.

Canadian Institute for the Administration of Justice (CIAJ) Legislative Drafting Conference

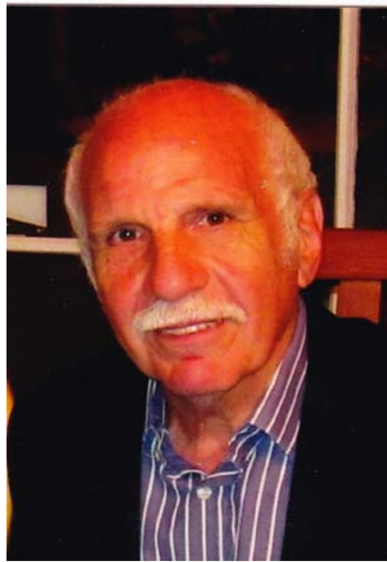
Legislative Architecture – Building with Words

Ottawa, Canada – September 10-11, 2012

The next CIAJ Legislative Drafting Conference will be held in Ottawa, Canada from September 10 and 11, 2012. The theme will be *Legislative Architecture – Building with Words.* It will examine the general structure of legislative systems, including the interplay of different forms of legislation with other legal instruments as well as programs for the revision and reform legislation. It will also include updates on recent case law dealing with legislative matters and workshops on practical aspects such as ethical issues for legislative counsel and drafting provisions governing the commencement of legislation or authorizing the making of delegated legislation. For further information, stay tuned to the CIAJ website: http://www.ciaj-icaj.ca/.

The Language of the Law: How do we need to use language in drafting legislation?

Roger Rose[1]



Abstract:

As a general proposition the drafting of legislation does not require the use of specialised language, but should use the same language as in other kinds of formal writing. But while consistency and conciseness are important attributes of any formal writing, in legislation they are vital, for there is a presumption that different words or expressions used in the same text are intended to indicate differences in meaning. And loose drafting without attention to conciseness can produce sentences that are too long or too complex; these can be not only difficult or tiresome to read and understand but lead to an increased risk of inconsistent use of words and ambiguity.

The attributes of consistency and conciseness are applied in legislation by the adoption of conventional ways of expressing commonly occurring words and groups of words. This is particularly important in the core elements of most legislative sentences: i.e. statements of who is affected by the rule, what it is they are required or empowered to do or refrain from doing, and what the consequences are of failing to comply.

Most legislative sentences are addressed directly to particular persons or groups of persons, and this needs to be done in a consistent way. Traditionally the verb auxiliaries "shall" and "may", with their respective negatives, have been used to indicate obligation and discretion respectively,

[1] Roger Rose is a barrister now working as a free-lance legal consultant specialising in the practice and teaching of legislative drafting, and is Director of Studies for the RIPA legislative drafting and associated courses in London. He was First Parliamentary Counsel in Kenya 1977-84, Assistant Law Draftsman in Jersey 1985-6, and Director of the Commonwealth Legal Advisory Service 1987-94.

but in modern drafting these are being replaced by "must" and other auxiliaries that better reflect modern formal writing. And the drafting of penal sanctions that apply to the contravention of obligations imposed by legislation is so common that it is particularly desirable that consistency and conciseness be applied to them.

This paper examines that way in which conventional devices are used in legislation to apply these vital attributes.

1. What basically is required of a legislative drafter?

Everybody knows that legislation is the main body of formal rules that provides for the conduct of society (although it much more often in practice consists of rules for the conduct of *particular sections* of society). But what actually needs to be done, by the process of legislative drafting, in order to create them?

I believe the basic requirement can be simply stated: good legislative drafting boils down to the need to inform those affected by the legislation, and those who are to administer or enforce it, as far as possible exactly what they must do or not do in general or in given circumstances, or how far their power or discretion to do or not to do things in given circumstances extends.

Clearly, in order to achieve this, a great deal of care and precision is needed in the use of language, and a number of basic attributes of good formal writing[2] need to be applied towards this end:

- clarity
- comprehensibility[3]
- certainty[4]
- completeness
- consistency
- conciseness

[2] By formal writing I mean, for example, textbooks and serious writing on any subject; newspaper leading articles; professional reports, articles and opinions; and professional and business letters generally.

[3] At least to those directly affected. Inevitably some subjects will be technical, complex and not easy to understand on the part of those not familiar with the processes or procedures concerned.

[4] In fact the language used in some formal writing is sometimes deliberately vague (as for example in policy objectives or political manifestos), and in the original edition of his *Complete Plain Words*, Sir Ernest Gowers took a swipe at civil servants by repeating the allegation that the language they use all too often demonstrates "a reluctance to convey any meaning at all" [p.8]. A degree of vagueness is even required in some legal documents, for example in the drafting of international agreements, owing to the desirability of getting as wide a measure of agreement to what is being proposed as possible. But this approach does not normally apply in the drafting of domestic legislation.

However, it does need to be remembered that these attributes are required in most kinds of good formal writing, and so this leads to the next proposition.

2. There is generally no need for special language in legislative drafting

The first thing that I believe needs to be emphasised to those newly attempting the skill is that, contrary to what many of them seem to think, there is generally no need in legislative drafting for the use of special language or structure of language. There are of course, as will be noted, some conventional ways of stating things, and though there are a few technical lawyers' terms that are difficult to avoid without complex explanations or the use of cumbersome English language equivalents (for example, *prima facie*; *ex parte*), legislative drafting should in general be couched in the same language as is used in other kinds of formal writing.

It is also a fact that certain of the attributes referred to do play a more prominent role in legislative drafting than in other formal writing, but this does not detract from the proposition stated above. It is a matter of degree rather than kind.

Unfortunately, those who come newly to drafting seem to be largely unaware of this. They tend to think that patterns of drafting adopted in the past must of necessity be those required to be followed if they are to achieve the necessary clarity, certainty and completeness. I can best illustrate this by an example that must be common enough in financial legislation. Suppose it is required to draft a rule to give effect to the following policy proposition:

> A financial adviser who receives a fee for giving investment advice is to be regarded, until the contrary is shown, as having given that advice in the course of business (and hence to be potentially liable for professional negligence).

All too often an attempt by an inexperienced drafter to embody this principle in a legislative rule will (after his or her careful attempt to copy what is thought to be the required style) go something like this:

> Any financial adviser who shall have received a fee for advising a person in relation to any investment shall be deemed to have advised the said person in the course of business:
>
> Provided that the financial adviser shall not be deemed to have so advised the person in the course of business if he shall prove that…

This provision (of a kind all too often found in enacted legislation around the Commonwealth) involves:

- tiresome repetition of words,
- archaic ways of stating what is to be considered as a fact ("shall be deemed"), and referring to a person already mentioned ("the said"),

- a form of writing (the proviso) that is virtually extinct outside legislation,
- cumbersome and unnecessary uses of the stress word "any",
- unnecessary, and unnecessarily complex, verb tenses (the future and future perfect).

It usually comes as a delightful surprise to those concerned that the proposition can much more effectively be stated thus:

> A person who receives a fee for advising another person in relation to an investment is to be regarded as having done so in the course of business, unless he proves that…

However, any pleasure taken in this comparative simplicity of expression is then often overtaken by the thought that, as "anybody could have written that", the result may not after all be so welcome. A dampening down of enthusiasm follows awareness of a lurking fear that the use of the kind of language that "anybody can write" must necessarily make much of the legal profession redundant. That fear is unfounded. An experienced drafter's answer to such doubts would undoubtedly be to suggest that "anybody" should go ahead and try to do it!

It is of course much more readily accepted by drafters today than formerly that the language they use should indeed be such as "anybody could have written". This is because it is recognised that it is not the *language* (or indeed the structure of language) in drafting that needs to be special, but rather that the process of analysis behind it needs to be rigorous. It is my contention that, so far as the use of language is concerned, observance of the standards of grammar and style that apply to any formal writing, plus some quite simply stated Commonwealth-wide conventions[5], constitute the fundamentals of good drafting.

The most important of these conventions are examined below, but it needs to be re-emphasised that they come about not because there is any necessity for special language, but because legislative drafting requires to a greater degree than in other types of formal writing the application of the last two of the attributes noted in paragraph 1 above: consistency and conciseness. In legislation these are not merely desirable aims but necessities.

3. The particular need for consistency and conciseness

It is an important rule of drafting any type of legal document, and especially legislative rules, that the same words and expressions are used to mean the same things, as there is a presumption that the use of different ones is intentional and indicates a shift in meaning.

[5] There are also some fairly easily stated conventions as to *structure* (usually in the Commonwealth represented by sections, subsections, paragraphs, etc.) and the order in which sections, etc. appear, but these are outside the scope of this account.

The potential for confusion can easily be seen in the commonly required legislative provision for the giving of permission to do certain things in a certain way; it would be easy for a drafter to drift into unthinking use of different words to indicate permission: "allow", "authorise", "consent", "enable", "entitle", "give leave", "license", "let", "permit", "recognise", "sanction", whether these words be verbs or, with any necessary modifications, nouns.

In addition, more than in any other kind of formal writing it is necessary to write "tight" prose. This means reducing the text to the minimum number of words needed in a sentence or series of sentences in order to explain their effect. Loosely drafted sentences incorporating more words than are needed to get a message across can not only be unduly complex or tiresome to read, but also increase the likelihood of inconsistent use of words and expressions and hence ambiguity.

In order to avoid ambiguity it is therefore necessary to take care to use words *consistently* and *concisely*, and the importance of this proposition can be most easily illustrated by looking at the three most common elements of legislative sentences:

- Who is affected by the rule?
- What are they required to do or refrain from doing, or permitted to do?
- What is the consequence of failing to comply with the rule?

Assuming a new drafter is unencumbered by traditional drafting styles of the kind already noted, he or she will, on being asked to draft a rule for the policy proposition "No standing on the bus; penalty £100 fine", probably produce something like this:

> Nobody is allowed to stand on a bus, and if they do they have to pay a fine of £100.

Leaving aside niceties of lack of analysis (Does the rule apply literally to everybody? Are people to be allowed to sit, squat or lie on the floor? Should there be an exception in relation to those getting on or off?), questionable grammar ("...if they do...") and the matter of whether an offender may be ordered to pay less than the stated penalty, this neatly illustrates a typical novice's concept of creating a rule. It is not that the words used are wrong, for they are indeed everyday words that everybody understands, but that they fail to use a conventional format, a format dictated by the need to be *consistent*.

So what are the conventions that have been developed in the Commonwealth towards achieving consistency?

4. Who is affected?

Unless legislative provisions are concerned with explaining meanings or specifying legal consequences (for example, in interpretation or explanatory provisions) they usually need to state that those to whom the legislation is addressed are required to do, or refrain from doing, something or (particularly in the case of administrators or enforcers) have a power

or discretion to do or not to do something. When drafting the requisite rules, the first thing that needs to be done is therefore to refer to the persons affected.

Bearing in mind that legislation is conventionally drafted in the third person (not least because it is often necessary to address more than one kind of "person" in different parts of the same sentence) there are in English a number of possible ways of doing this. If we want to refer to persons generally, we could write "anyone...", "anybody...", "everybody...", "people...", "persons...", "any person...", "every person...", "a person..." or even the old fashioned forms "whoever" or "whosoever". Depending on the shape of the sentence to be drafted, most of these can easily be expressed as negatives: "no-one...", "nobody...", "no person..." etc. However, for the sake of consistency we need to choose a particular form and stick to it; and because it best represents plain language and avoids unnecessary use of words of emphasis[6], modern drafting convention in the Commonwealth favours "a person..."[7]

For drafting convenience the meaning of "person" is almost invariably extended in an Interpretation Act, or equivalent such as a General Clauses Act, to include not only a natural person but also a body of persons, whether incorporated or unincorporated.

5(1) What is required or permitted?

When referring to what is actually required, forbidden or permitted there are also numerous drafting alternatives available:

> A person has a responsibility to.../ has a duty to.../ is required to.../ is compelled to.../ has to.../ shall.../ must...
>
> A person is not allowed to.../ is required not to.../ is not permitted to.../ is forbidden from.../ shall not.../ must not.../ may not... / cannot...
>
> A person is allowed to.../ is permitted to.../ is authorised to.../ is given leave to.../ has a discretion to.../ may.../ is able to.../ can...

This can also be done by using slightly different forms relating to permitted or forbidden conduct that were favoured in the past and are still often seen:

> It shall be lawful/shall be unlawful/shall not be lawful for a person to...
>
> It shall be an offence for a person to...

---

[6] Use of "any", "each" and "every" as words of emphasis needs to be reserved for where a contrast is to be drawn, for example, between the specific and the general: *"Only a [specified kind of member] may propose a candidate for election, but any member may vote at the subsequent election"*.

[7] In practice we more often need to refer to a restricted class of persons. We can do this either by modifying "person": A person *who is qualified under this Part…/ who contravenes this section…/ who is the driver of a motor vehicle...*; or by referring directly to the category of person concerned: *a driver of a motor vehicle.../ a financial adviser... / a licensed dealer...*

Again, the need for *conciseness*, as well as consistency, has led to conventional uses of the shortest of these forms to the exclusion of the others. Traditionally "shall" (and "shall not") have been used to indicate obligation and "may" to indicate discretion.[8] These are known as verb auxiliaries, or merely "auxiliaries". Subject to what is stated below, the examples immediately above would more likely be written:

A person shall/shall not/may/may not...

Increasing recognition is, however, being given to problems relating to the auxiliary "shall", and, as will be seen, "may" is not without problems too.

5(2) Problems with "shall"

(a) to indicate an obligation

The first problem is that, even in formal writing, use of this word to indicate obligation is slightly archaic. A century or more ago it was common when doing so, either in speech or writing, to state:

You shall proceed as directed

He shall do as he is told

In modern English these statements sound slightly awkward or pompous. Today we tend to substitute "will" in each case, and indeed in conversational usage the two words have become largely interchangeable. But strictly speaking if we use "will" an ambiguity arises:

You will proceed as directed

He will do as he is told

Do these statements indicate an obligation? Or are they merely stating what is going to happen (that is, in the simple future tense)? [9] In conversation we tend to get away with this potential inter-changeability as the meaning is usually clear from the context. However, if we want to be precise in indicating *obligation* we would today almost certainly substitute

[8] Indeed, some Commonwealth Interpretation Acts actually define these words accordingly, for example *Interpretation Act*, (Canada) RSC 1985, c. I-21, s. 11.

[9] The rules about the auxiliaries "shall" and "will" as stated in authorities such as the OED and Fowler's *Modern English Usage* are exceedingly complicated, especially as their use has varied both in time and locality. The simplest rule for formal English use seems to me to be the one I was given at school, namely that *in the second and third persons* "shall" indicates an obligation and "will" simply the future tense. To complicate matters, *in the first person* the rule is reversed and "shall" indicates simple future tense, while "will" indicates a settled intention. However, fortunately for our purposes, the first person is not used in legislation unless in specifying particular words required to be used, for example in a prescribed form, or on taking a prescribed oath; or occasionally in a formal preamble to a constitution: "We, the People of Utopia, believing that...

"must"; and indeed this is increasingly the auxiliary used for the purpose, not only in formal language generally, but also in legislation.

Legislative uses of the two examples quoted above (again, bearing in mind that the second person "you" is not normally used in legislation) might be:

> A driver of a heavy goods vehicle must proceed through a weighbridge as directed by...
>
> A person involved in a road traffic accident must follow the instructions of a police officer called to the scene.

The second problem with the use of "shall" is that, as has been seen with "will", it too can beg the question as to whether an obligation is in fact being imposed at all. Consider the following examples:

> Where the application complies with section 10, this section shall not apply
>
> A person who...shall commit an offence
>
> Subject to any conditions that an inspector shall specify, a licence shall be valid for 12 months

Taking the first of these, it is submitted that the rule is not creating an obligation at all (on whom could it be intended that this is to be imposed?) but is merely stating what is going to happen, that is, a state of affairs brought about by the rule. "Shall" presumably therefore merely indicates *the future tense*. This is even more starkly demonstrated in the second example (it would be absurd to interpret this as an obligation to commit an offence), and the same reasoning applies to the words after the comma in the third.

The opening context clause in the third example throws up yet another potential problem: inconsistent use of "shall" (leading in this case to an ambiguity). Is the inspector under a duty to specify conditions in every case, or is this a discretionary power to be applied as necessary? Use of the word "any" would seem to indicate the latter; if so the correct word would be "may".

A simple test as to the way in which "shall" is used is to ask oneself whether "must" can meaningfully be inserted in its place. If not then some other mode of expression is needed.

The modern convention when expressing a state of affairs or consequence is to use the *present* tense. Besides being better style, this neatly gives effect to the maxim of construction "a statute is always speaking".[10] So by use of this convention we would get in place of the above examples:

[10] In fact there *are* occasional uses for the future tense (as also the past tense) in legislation. In order to indicate the future, use of the auxiliary "will" is a possibility: *"An application must contain an estimate by the applicant of what he or she will earn in the period..."* although in practice "would earn", or the present tense "expects to earn", are probably just as likely.

Where the application complies with section 10, this section does not apply

A person who ... commits an offence

Subject to any conditions that an inspector may specify, a licence is valid for 12 months

(b) to set out duties

But there are further potential problems with the overworked "shall". In many cases it is desired to set out what some authority, usually a Minister, a court or a specified official or body, is required to do. Breach of the requirement would almost certainly *not* give rise to penal consequences, and the thrust of the provision is not so much to create an obligation or series of obligations (for operation of the legislation concerned would often be predicated on the doing of the relevant things), but simply to state or list the powers or duties of the authority concerned:

The Minister shall:

(a) appoint the chairman;

(b) give directions as to...

The court shall not give leave to make a further application unless...

The functions of the Utopia Law Society shall be:

(a) to ...;

(b) to ...

In these kinds of case it is usually better to express the sense of the provision by using the present tense in the form "is to" or "are to":

The Minister is to:

(a) appoint the chairman;

(b) give directions as to...

The court is not to give leave to make a further application unless...

The functions of the Utopia Law Society are:

(a) to ...;

(b) to ...

(c) to establish an office, corporation or other thing

The overworked "shall" tends to be used here too:

There shall be a Director of Ports and Harbours.

> The Authority shall be a body corporate with perpetual succession and a common seal...
>
> A tax, to be known as "land transaction tax", shall be charged and due...

In these cases, as with those examined in (b) above, the troublesome auxiliary can better be replaced by "is to" and in the second by replacing "shall be" with "is".

(d) to explain provisions

Examples of the use of "shall" for this purpose have been noted in (a) above. Further typical provisions might be:

> An interim order shall not be deemed to be an adoption order within the meaning of this Act.
>
> The Commission shall be lawfully constituted if there are no less than 4 elected members present.

It has also already been noted in section 2 above that "be deemed to be" in the first example is slightly archaic legalese, hardly ever used even in formal language outside legislation (in modern writing we would state "be treated as", "be regarded as" or "be taken to be"), and so applying conventions already discussed we get:

> An interim order is not to be regarded as an adoption order within the meaning of this Act.

However, applying principles of *conciseness*, the use in this context of the "deeming" words is arguably redundant:

> An interim order is not an adoption order within the meaning of this Act.

In the second example all that is needed is to replace "shall" with "is".

5(3) Problems with permissive words

(a) choice of word

As has been seen, from the variety of words and expressions that could be used to indicate discretion, "may" is the one usually chosen.[11] Of course in informal spoken language another verb auxiliary "can" is often used in this sense too:

> You can call me by my first name or my nickname
>
> He can do whatever he thinks is right in the circumstances

[11] Not invariably, however, as there are other useful expressions that sometimes better reflect the sense of a particular rule, for example, "is entitled to" or "is eligible to".

Indeed, in some Australian legislation the word is actually used in the sense of "may".[12] But it is submitted that it is not correct to do this. "Can" in its correct use is synonymous with "is able to" and should be reserved for referring to physical or mental ability to do something, rather than permission to do it. What we really need is a word indicating permission or discretion:

> An Act may be referred to by its short title or chapter number.[13]
>
> The Authority may direct a course of action that it considers appropriate in the circumstances.

(b) "may not"

At first sight the negative form "may not" seems to have the same meaning as the negative obligation form "must not", and indeed in spoken language we might say any of the following interchangeably:

> You must not smoke in here
>
> You may not smoke in here
>
> You cannot smoke in here

The last of these has already been dealt with, but in legislative sentences there is a fine yet important distinction between the first two, and this needs to be brought out. "Must not" is used to create *an obligation* not to do something; "may not", on the other hand, is reserved for cases in which it is required to emphasise lack of authority to do something, probably without incurring a penalty for contravention:

> A licensee may not apply to renew a licence more than 30 days before it is due to expire.
>
> A court may not convict a person of an offence under this section if that person has paid a fixed penalty.

In these cases a licensee who failed to comply would presumably simply be told to re-apply at the correct time, and in the unlikely event that a person were actually to be convicted of the specified offence in the circumstances mentioned he or she would have an unanswerable appeal. But contrast the more usual type of case:

> A person must not carry on the business of a hawker unless he or she[14] holds a hawker's licence of the appropriate class.

---

[12] For example, "A control order *can* be made by a Court in the following circumstances..." *Companion Animals Act* 1998, No.87, of New South Wales, s. 47(2).

[13] This is a common provision in Interpretation Acts in the Commonwealth.

[14] Most Commonwealth jurisdictions now adopt gender neutral expressions instead of relying on the traditional "he".

This clearly creates an important negative obligation, and there would undoubtedly have to be a provision following it making anybody who failed to comply liable to penal sanctions.

There is sometimes inconsistent use of "may", for example simply in the sense of "is" or "are":

> In sections 2 to 9 of this Act references to adoption are to adoption of infants wherever they may be habitually resident.

While there would not in practice be any difficulty in understanding this provision, an ambiguity could conceivably arise with inconsistent use, particularly if the auxiliary is capable of meaning "might":

> The Minister may not make an order if the circumstances set out in subsection (2) apply.

This could be construed either as a lack of power in the specified circumstances, or (reading "may" as "might") as an explanation of the way in which that power could be expected to be exercised in a particular case.

6(1) Are there penal consequences for failing to comply?

We have seen that penal consequences do not always follow non-compliance, and this is so even where an *obligation* to do something is imposed:

> The Authority must, before suspending or revoking a licence, give written notice of its intention to do so to the licensed person.
>
> The Minister must cause any code prepared under this section to be printed and distributed.

It is obvious in these cases that failure to observe either of the rules would give rise to an appeal or application for judicial review on the part of a person adversely affected, rather than a potential criminal penalty to be imposed on the authority concerned. However, in most cases requirements to do or refrain from doing something, or to do something only in a prescribed way, need to be backed by sanctions for non-compliance. These are known as "penal provisions", and they are so commonly required in legislation that it is particularly important that they be drafted both *consistently* and *concisely*.

Taking the example already noted above:

> A person must not carry on the business of a hawker unless he or she holds a hawker's licence of the appropriate class.

there are a number of ways in which penal provisions could be drafted. We might for instance draft a further sentence:

> A person who carries on the business of a hawker without being licensed to do so under this Act is guilty of an offence.

and combine them as separate subsections of the relevant section. But, though clear and certain, the result would be anything but *concise* as the second sentence repeats most of the words in the first. In fact in this instance we could actually dispense with the first sentence altogether, as the second one now contains all the relevant information.

Often in practice, however, the conduct required or prohibited is more complicated. Taking a similar example:

> A person must not carry on a business of dealing in second-hand goods, including that of a pawnbroker:
>
> (a) unless that person holds a licence issued under this Act authorising him or her to carry on such a business; and
>
> (b) except from premises specified in the licence.

It would probably overload the sentence if we now also inserted the sanction, and the whole sense of the rule is better conveyed if we instead add a further sentence (in conventional structure, a new subsection):

> A person who fails to comply with subsection (1) is guilty of an offence.

In fact we can be even more *concise* without affecting the meaning. There is a convenient word "contravenes" which means the same thing as "fails to comply with", and "commits" means the same thing as "is guilty of". It is thus that, in order to be *consistent* and at the same time *concise*, modern penal provisions tend to use the following form:

> A person who contravenes subsection (1) commits an offence

6(2) What are the actual penalties for non-compliance?

It lastly remains to state to what penalty a person found guilty of the offence should be liable. It is constitutionally the role and duty of the courts to assess guilt or otherwise after following the relevant criminal procedure (what is sometimes called "due process of law", or simply "due process") and, after a plea or finding of guilt, to impose an appropriate penalty. But it is accepted that the legislature is entitled to specify a view of society generally as to what the *maximum* penalty should be.[15] So the above sentence might continue (and in some jurisdictions actually still does) on the following lines:

> …and is liable, on conviction by a court of competent jurisdiction, to imprisonment for a term not exceeding six months, or to a fine not exceeding [ten thousand

[15] There are also occasions when legislation states minimum penalties or fixed penalties, but discussion of these is outside the ambit of this paper.

> pounds] [level 4 on the standard scale[16]], or to both such fine and such imprisonment

Once again, we are concerned to be as *concise* as possible, and it is here that another device used towards this end comes into play: elliptical writing. This usually means the omission of words from a sentence that are not relevant or necessary to understand the point being made (conventionally, when quoting from a sentence, by the use three dots to indicate words omitted). But in drafting it also means the deliberate omission of words that, though implied by law, are not required to be stated in order to convey the full sense of the sentence.

Obviously a person may not be fined or imprisoned for an offence unless found guilty of having committed it by a lawfully constituted court that has jurisdiction to try the accused person. Indeed, so fundamental are these constitutional and criminal procedure concepts that in most Commonwealth jurisdictions it is considered to be unnecessary to repeat them every time a penal provision is drafted: they are implied but not stated. And by further applying the test of *conciseness* we can also omit the final five words from the above example as being superfluous. Our provision can thus be reduced to stating simply what the penalties are to be:

> …and is liable to imprisonment for a term not exceeding six months, or to a fine not exceeding level 4 on the standard scale, or to both

6(3) How can penal provisions be made as concise as possible?

Because they appear so frequently in legislation, many Commonwealth jurisdictions have provided further background rules to facilitate consistency and conciseness in penal provisions, typically by insertion of provisions such as those often found either in Interpretation Acts or general criminal legislation:

> (1) Where a penalty is expressed in relation to an offence, unless the contrary intention appears, the offence is punishable with a penalty not exceeding the penalty specified.
>
> (2) Where more than one penalty is specified in respect of an offence, the use of the word "and" between the penalties means, unless the contrary intention appears, that they may be imposed in the alternative or cumulatively.

[16] It is common, if not universal, in some jurisdictions to express monetary penalties not as specified sums of money, but by reference to particular legislative scales (Scale 1: up to £500, etc.) the scales being subject to amendment by subsidiary legislation where this is necessary so that monetary penalties can remain the same in real terms rather than being eroded by inflation. The device is a very practical one that gets round the need to have to directly amend primary legislation for this purpose. Where the maximum level of fine needs to be higher, provision may be made simple for "a fine".

Under authority of provisions such as these, the penal provisions may now be shortened to:

> …and is liable to imprisonment for six months <u>and</u> a fine at level 4 on the standard scale

There is also no reason why we cannot express numbers in figures rather than words, if for no better reason that they are easier to read. Returning to our two examples above, we might thus get:

> A person who carries on business as a hawker without a hawker's licence of the appropriate class commits an offence and is liable to imprisonment for 6 months and a fine at level 4 on the standard scale.

Or, if the sentence is a little more complex:

> (1) A person must not carry on a business of dealing in second-hand goods, including that of a pawnbroker:
>
> (a) unless that person holds a licence issued under this Act authorising him or her to carry on such a business; and
>
> (b) except from premises specified in the licence.
>
> (2) A person who contravenes subsection (1) commits an offence and is liable to imprisonment for 6 months and a fine at level 4 on the standard scale.

7. Summary

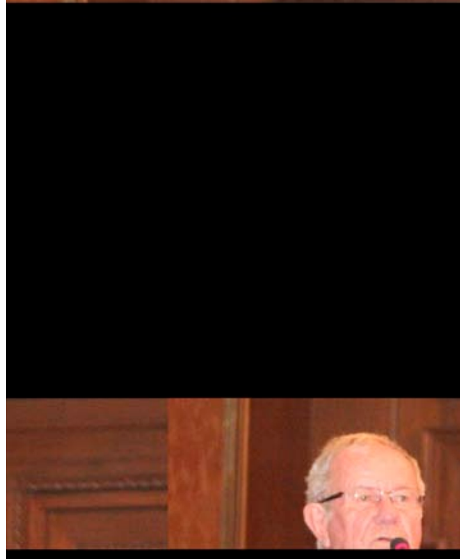
There is generally no special language or structure of language needed in legislative drafting. However, the need for *consistency* and *conciseness* leads to the adoption in modern Commonwealth drafting of certain conventions relating to the most common elements of legislative sentences. These can be simply summarised as follows:

- reference in a standardised way to the person or persons affected by legislative rules: in modern drafting this is done by referring to "a person", modified as necessary, or the specific kind or class of person affected ("a police officer", "a financial adviser", etc.);
- use of the auxiliary "must" to indicate obligation, and "may" to indicate discretion, though other expressions are sometimes also useful to indicate eligibility or entitlement;
- use of the present tense to indicate a state of affairs brought about, envisaged or explained by the legislation;
- use of standard words "commits an offence" to indicate liability to criminal penalties;

- adoption of some straightforward background rules to facilitate the concise and consistent drafting of the penalties themselves.

Legislative Drafting in Mauritius: A Developing Discipline

Sir Victor Glover[1]



Abstract:

This article looks at the development of legislative drafting in Mauritius from its French and British colonial origins through its multi-cultural and religious development and its independence in 1968 to the present. The paper also considers the challenges of recruiting, training and retaining legislative counsel in this country.

Introduction

1. Let me start by explaining that two historical peculiarities have, in different ways, had an impact on the law-making process in Mauritius. The first is that it was, before becoming an independent state on 12 March 1968, subjected to a long period of French rule from 1715 to 1810 and to an even longer span of British rule from 1810 to 1968. It has thus developed a hybrid system of laws which is mostly derived, and sometimes copied from French and English sources. The second is that Mauritius never had an indigenous population. At the time when sugar was the backbone of its economy, planters at first relied on slaves who came from the African continent and Madagascar to work in the cane fields. When slavery was abolished in 1835, indentured labour was brought in from the Indian sub-continent to man the plantations. In more recent times, immigrants from China were allowed into the country where they at first were small traders. I would add, to complete this historical digression that Mauritius was originally so named in honour of the stadhouder Prince Moritz van Nassau during a brief period of Dutch occupation in the 17th Century. The

[1] Kt., G.O.S.K. Former Chief Justice and Attorney General's Consultant in Legislative Drafting, and First Parliamentary Counsel of post-independence Mauritius.

Dutch managed to do 3 things during their short stay, 2 of them good and one bad. On the one hand, they introduced sugar cane and deer from what was then the Dutch East Indies and on the other they decimated the Dodo population.

2. From 1715 to 1722, Mauritius was under French military rule and there was no formal promulgation of laws. From 1722 to 1766, the country was under the administration of the *Compagnie des Indes* and only a few laws were passed: those were compiled in the *Code Delaleu* which ceased to have effect in 1788. A more substantial number of laws were brought into force after 1766 when the Isle de France, as the French had named the island, became a colony belonging to the French King, including a *Code des Noirs* meant for the slaves, a *Code Pénal* borrowed from the law in France in 1793 and three of the famous Napoleonic Codes, namely the *Code Civil*, the *Code de Commerce* and the *Code de Procédure Civile*, which came into operation during the last years of French occupation. An article of the *Act of Capitulation* of 1810, later embodied in the Treaty of Paris of 1815 which formally signalled the end of the Napoleonic wars, provided that "*les habitants de l'île de France pourront conserver leurs lois, coutumes et réligion*" (the inhabitants of Isle de France may retain their laws, customs and religion). The laws enacted between 1766 and 1810 and 1810 and 1840, that is to say the latter part of the period of French occupation and the beginning of British colonisation are contained in two volumes entitled *Code Decaen* and *Code Farquhar*, respectively the names of the last French Commander and the first British Governor of Mauritius, as the occupiers had renamed the territory.

In both those codifications there appear side by side a French version and an English version, which were both authoritative. As from 1841, the English text was said to be the only authoritative one and all laws, including those that amended the French Codes, had thereafter to be written in English. It was only in 1962 that the British rulers were persuaded to pass an Order in Council which authorised the use of French to amend texts written in French. The *Code penal* of 1793 had been replaced by a *Penal Code Ordinance* in 1838 which has since been renamed the *Criminal Code*. It is now the only law which has a French and an English text side by side. It is mainly for that reason, and because the English text is not always a reliable translation from the French, that we have retained section 10 of our *Interpretation and General Clauses Act*, which lays down that -

> Where in an enactment a French term or expression is used, or an English term or expression is explained by reference to a French term or expression, the interpretation of the enactment shall be in accordance with that of the French term or expression.

3. After the abolition of slavery, and the *Code des Noirs* had been done away with, most of the people of African descent were subsequently converted to Christianity so that the need was not felt to make particular provision in our law to cater for any special needs of theirs. The situation of those whose ancestors originated from the Indian sub-continent was different. As early as 1941, provision was included in our law for what was originally

called the *Muhammadan Waqf Ordinance*, and later the *Waqf Act*. The Act enables persons of the Muslim faith to bequeath property in perpetuity for charitable, pious or religious purposes and it states that the Act shall be interpreted in accordance with the principles of Muslim law. While at first our law provided that any person could, instead of taking an oath before a Court, make a declaration on the ground that he had no religious belief or that the taking of an oath was contrary to his religious belief, provision was subsequently included to say that a person of the Hindu or Muslim faith could, instead of taking an oath, make a solemn affirmation. The matter is now formally dealt with in our *Constitution* at section 11 (4), as follows -

> No person shall be compelled to take an oath that is contrary to his religion or belief or to take any oath in a manner that is contrary to his religion or belief.

For similar reasons, the law relating to marriage has over the years undergone two main changes: the first to provide that a religious marriage ceremony performed by an "authorised person" shall have the effect of a legal marriage before a Civil Status Officer; and the second to lay down that any other religious marriage shall have certain consequences for the spouses and their offspring.

4. In contrast, although section 16 (4)(c) of the *Constitution* provides that a law shall not be considered to be discriminatory if it says that the law relating to adoption, marriage, divorce, burial or devolution of property on death shall be the personal law of persons of a particular race or creed, successive Governments have so far been unwilling to accede to requests from several quarters for the wholesale adoption of Muslim personal law in Mauritius.

5. Finally, on this introductory aspect of our law-making process, it is worth pointing out that, no doubt because English appears to have become a universal language for trade and business, there has been a growing move from foreign investors to request that an authoritative version of the *Code Civil Mauricien* in English should be adopted, particularly in relation to its provisions that govern the law of property and of contract. The newly appointed Attorney General has now indicated that this change would be expedited.

Post-Independence Legislative Drafting

6. Legislative Drafting in a structured and modelled form can be said to have really come into its own as from the early 1970's, mainly because as long as Mauritius was a Colony of the British Crown, the Governor was required to forward to the Secretary of State for the Colonies in London a copy of every Bill adopted by the Legislature together with a report and a statement of objects and reasons and the British Sovereign retained a power of disallowance in respect of every law. Moreover there was little or no out-sourcing and Bills were prepared by law officers who had no training in legislative drafting and they drew heavily for models on Halsbury's Statutes.

7. Before that, however, it had become apparent that the United Kingdom had decided to get rid of most its colonies. One may recall Iain McLeod, Secretary of State, telling the leaders of our political parties in the course of a visit in 1961: "Of course, Gentlemen, independence is not a matter of choice, only one of timing". The essentials of what was to become our *Constitution*, to which every other law is subject, were worked out during talks at Lancaster House in 1965, where it was agreed that it would be a Westminster model with a Chapter on Human Rights and Fundamental Freedoms borrowed from the *European Convention on Human Rights*. Professor S.A. de Smith acted throughout as Constitutional Commissioner. But no agreement was reached at the time on the *modus operandi* for the protection of minorities: that was hammered out later in Mauritius by the inclusion of a First Schedule to the Constitution which provided for additional seats in the Legislative Assembly by means of what became known as the Best Loser System.

8. Not very long after independence, however, there came the establishment of the office of Parliamentary Counsel in 1971, of which I was the first holder after following a 6-month course run in London by the Ministry of Overseas Development under the tutorship of Sir Noel Hutton, K.B., the recently retired First Parliamentary Counsel. Incidentally, while listening to the excellent addresses in the First Session of the 2011 CALC conference about whether what legislative counsel does is an Art, a Science or a Discipline, I was reminded of what one of the Tutors at the Course told me, which was: "I hope that in Mauritius you will not have the problems which face the legislative counsel preparing a Bill in England. Here, the Judges expect a nice picture but the member of the House of Commons wants a railway time table". That was followed by the enactment of the *Laws of Mauritius (Correction of Errors and Minor Amendments) Act* in 1972, the *Revision of Laws Act* in 1973 and a new *Interpretation and General Clauses Act* in 1974. All this enabled us to move away from the former practice whereby, for example, Clause 2 of every Bill, headed "Interpretation", used to read -

> In this Ordinance, unless the context otherwise requires, the following words and expressions, including their grammatical variations and cognate expressions, shall have the following meanings, that is to say -.

Clause 2 of every Bill now reads "In this Act-" followed by the list of definitions.

It also led to the redrafting of several old enactments by following a set pattern, which has largely been made use of to the present day. After I had left the Attorney General's Office on being made a Judge of the Supreme Court, the final act of this first phase in an attempt at modernising our law-making process came towards the end of the decade that in 1981 saw an amendment to the *Revision of Laws Act*, which repealed a large number of spent or obsolete enactments, and the publication of an edition of the *Revised Laws of Mauritius,* which was the first one of its kind for 35 years. Those were the work of a Law Revision Unit set up in the Attorney General's Office under the guidance of the Solicitor General L.E.

Venchard Q.C. and Professor A. Angelo of the University of Wellington in New Zealand, whose services were loaned to us for a lengthy period.

Recruitment, Training and Retention of Legislative Counsel

9. Mauritius is a small jurisdiction and it has been the practice since long for the Judges of our Supreme Court not to be recruited from the Bar but appointed by promotion of Magistrates or of law officers from the Attorney General's Office. This has meant that legislative counsel who have undergone training at considerable expense to the State have little scope for making a career in the field but, after a few years, move to the Bench when a vacancy occurs there. It is worth noting in this connection that, between 1993 and 2003, no fewer than 5 law officers held office as Parliamentary Counsel, of whom 3 were subsequently appointed as Judges of the Supreme Court and 2 retired. Besides, the 3 law officers who hold office as Parliamentary Counsel and Assistant Parliamentary Counsel are required to give assistance by performing other duties such as giving advice to Ministries and Government Departments, appearing in Court cases involving public bodies and attending conferences in Mauritius and abroad. Thus, the time they are able to devote to the business of legislative drafting, revision, updating and research is perforce rather limited. This paucity of skilled and experienced draftsmen has led to more frequent outsourcing and, I am told, explains why successive Attorneys General have resorted to my services as consultant over the last 13 years after I had retired from the office of Chief Justice and from the public service.

10. There have, nevertheless, since the 1970s, been quite a few opportunities for the training of some of our law officers in the field of legislative drafting. The Overseas Governments Legal Officers Course which I followed was attended every year by a law officer for as long as it lasted until the 1980s. In the 1990s, 2 law officers were seconded to the Attorney General's Office in Canberra under the Australian Sponsored Training Scholarship Programme, and one obtained a scholarship in 1994 to read for an LLM in Legislative Drafting at the University of the West Indies. Courses have been available in Ghana over the last 4 years run by the Commonwealth Secretariat. We have also had the benefit of courses run in Mauritius, in 2007 and 2008 by Emeritus Professor Keith Patchett and in 2010 by Professor Vincent Crabbe. I have, for several years, been running a course in elementary legislative drafting for newly appointed law officers.

11. More recently, the then Attorney General took the laudable initiative of setting up a permanent Law Reform Commission chaired by a senior member of the Bar and comprising representatives of the Judiciary, the three branches of the legal profession, the Law Department of the University and the civil society. But financial constraints have compelled it to operate with a staff of two with the result that, although the Commission has produced several well researched reports on a number of topics, not all of them were accompanied by a draft Bill, something which the statute setting up the Commission

requires it to do as far as practicable. That in turn has meant that several of its recommendations have not moved on to the implementation stage.

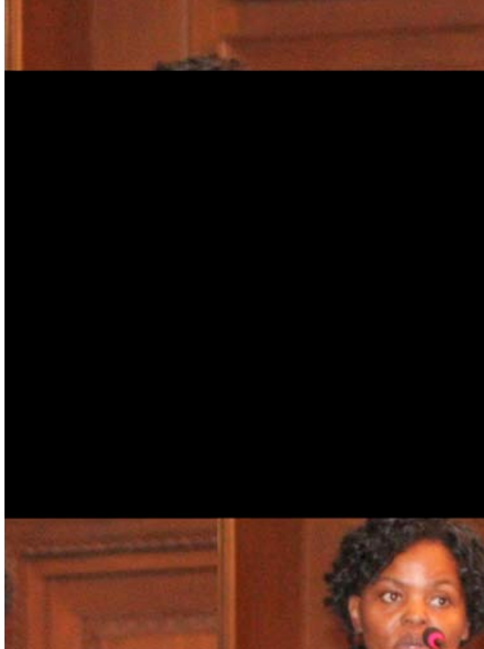
12. One other weakness in our law-making process relates to the absence of any systematic form of training for the administrative staff of our Ministries and Government Departments, which would have enabled them to master the technique of putting up drafting instructions. Legislative Counsel in the Attorney General's Office are more often than not forced to guess at the underlying policy behind legislative proposals if not required to monitor the actual formulation of policy. Since it goes without saying that a good piece of legislative drafting presupposes a clear grasp of the essentials of the motivating idea behind the text, the results produced by legislative counsel are sometimes not quite adequate. I ran a course for 2 sets of administrative officers in 2009 but much more needs to be done in a more formal and regulated setting.

Conclusion

13. The picture which this paper has attempted to portray will not be complete without some reference to two further matters. The first is subsidiary legislation which, owing to financial and staffing constraints, has received far less attention from the law-makers, legal and political, than have Acts of Parliament. The last codification of our statutory instruments, in the form of a Revised Edition, dates back to the publication in 1952 of work which had been completed in 1945. That was when Sir Charlton Lane, who had just retired as our Chief Justice, prepared a Revised Edition of Statutes and Subsidiary Legislation to replace the one which had come into operation in 1923. The second is the absence of any form of noter-up process, even in relation to Statutes. The 2 Attorneys General who wrote prefaces to the latest Revised Editions of our Acts of Parliament, in 2000 and 2007, had given the undertaking that Annual Supplements and/or Consolidation Volumes would be published. A Supplement to the 2007 Revised Edition has just been published updating the text up to 30 June 2009.

Behind-the-Scenes Actors? Towards Enhancing the Visibility of Legislative Counsel in Developing Countries

Elizabeth Martha Bakibinga[1]



Abstract:

For decades, there has been on-going debate regarding the role of legislative counsel and their direct relevance to the development and governance process, most especially in the developing world. This paper examines whether legislative counsel are behind-the-scenes actors in the legislative process, most especially as it focuses on the development of economies, and makes a case for their greater involvement in the development and governance process in developing countries. In order to put the subject into proper focus and perspective, the paper also examines the recruitment and retention of legislative counsel and the role they play in the legislative process and possibly in the development process and the challenges they face – which factors diminish their visibility. The paper proposes the way forward on enhancing the visibility and participation of legislative counsel in the overall development of developing countries.

[1] Vice President CALC and Legal Officer, Office of the Special Representative of the Secretary General, United Nations Interim Administration Mission in Kosovo. This paper reflects only the personal views of the author and not the views of the United Nations and CALC.

Introduction

"Make visible what, without you, might perhaps never have been seen." Robert Bresson[2]

Legislative counsel are often times relegated to the backseats and rarely acknowledged for the contribution they make to the legislative process and governance as a whole.[3] This in itself has many repercussions, not only on attracting and retaining highly motivated staff, but also on the planning for their capacity building and professional development. The problems associated with law making in developing countries affect legislative counsel and the public's perception of their role, duties and relevance.

Visibility is limited, not only at the international level, but also at the national level and within the governmental institutions. The factors diminishing the visibility of legislative counsel are two-pronged, some arising from the external environment and others from the internal environment – namely the institutions that employ legislative counsel.

This paper briefly examines whether legislative counsel are behind-the-scenes actors in the legislative process, most especially with regard to the development of economies, and makes a case for their greater involvement in the development and governance process in developing countries. The paper proposes the way forward on enhancing the visibility and participation of legislative counsel in the overall development and governance of developing countries. Given the limitations in time, most of the examples in this paper are derived from Africa, but remain relevant to the rest of the developing world.

Legislative Counsel in Developing countries

Currently, of the 54 members of the Commonwealth of Nations, 28 are categorized as developing countries, based on the statistical definitions provided by the International Monetary Fund (IMF) and the United Nations (UN.[4]

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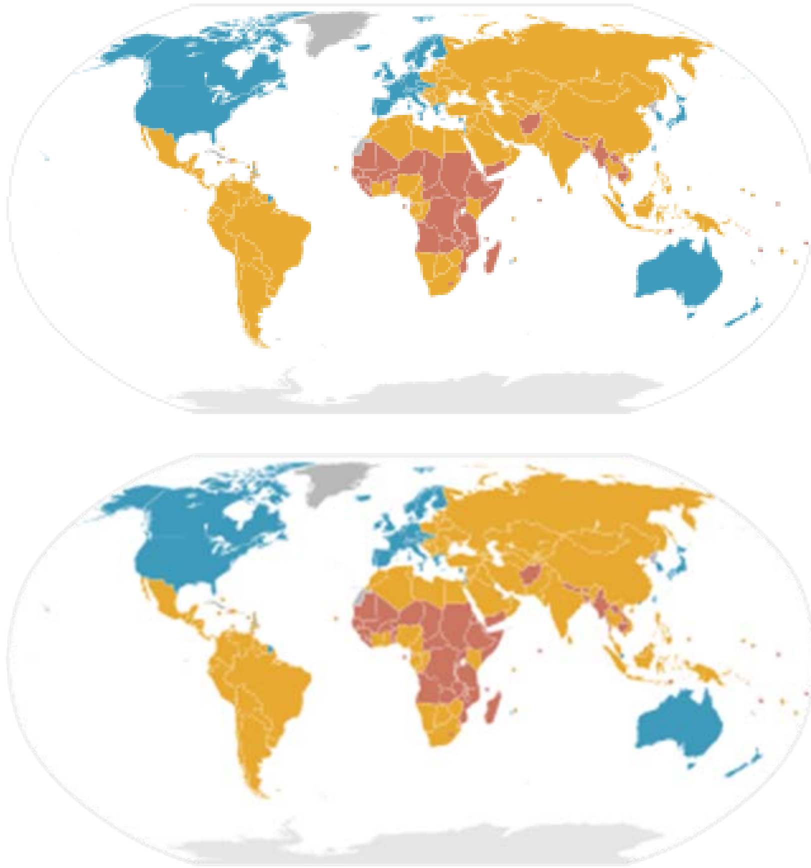
[2] French film director (25 September 1901 – 18 December 1999) known for his spiritual, ascetic style.

[3] See F. Ruhindi, "Transition from a Professional Legislative Drafter to a Policy and Lawmaker: Experiences from Uganda", Paper presented at Africa Region CALC Conference in Abuja, April 2010 and V. Crabbe, "The Role of Parliamentary Counsel in Legislative Drafting", Paper written following a UNITAR Sub-Regional Workshop on Legislative Drafting for African Lawyers-Kampala, Uganda 20-31 March 2000. Available at http://www.agora-parl.org/node/1878.

[4] Antigua and Barbuda, the Bahamas, Bangladesh, Belize, Botswana, Cameroon, Dominica, the Gambia, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Mauritius, Mozambique, Namibia, Nauru, Nigeria, Pakistan, Papua New Guinea, Rwanda, Samoa, Seychelles, Sierra Leone, Solomon Islands, South Africa, Sri Lanka, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu and Zambia.

Classifications by the IMF and the UN



Advanced economies

Emerging and developing economies (not least developed)

Emerging and developing economies (least developed)[5]

In light of the prevailing conditions in developing countries and, by necessary implication, the role of the international community in providing development assistance, a number of internal and external actors are involved in governance and the development planning and implementation processes. It is with these actors that we seek to build partnerships which will ensure that the role of legislative counsel is highlighted and re-defined.

Legislative Counsel in Action

Without dwelling on the trite details, I will quickly summarise the role of legislative counsel – especially those in the mainstream as officers of the government (for example, in an Attorney General's chambers) or in parliamentary bodies, including legislative

[5] Table available at http://en.wikipedia.org/wiki/Developing_country .

assemblies, with the required expertise and experience to ensure that policies are effectively translated into law for the benefit of society.[6]

Legislative counsel, directly posted or deployed in parliamentary bodies, do more than draft legislation as they are tasked as lead counsel of parliamentary committees, sitting in a quasi-judicial capacity, to read witness statements, prepare questions and review committee reports for legal propriety. They also guide parliamentary committees on statutory interpretation and institutional mandates during the review of ministerial policy statements during the committee stage consideration of the budgets. And they draft key-note addresses and position papers on legal issues for senior parliamentary administrators and Members of Parliament and sometimes act as rapporteurs and secretaries to official parliamentary delegations to regional and international conferences or meetings.[7]

Within parliamentary bodies, legislative counsel:

- provide technical support to members of Parliament and committees during the process of drafting private members' bills;
- support the House in plenary, individual members of Parliament and parliamentary committees in drafting proposed amendments;
- interpret existing laws and make analysis of bills as the need may arise for the benefit of parliamentary commissions;
- provide drafting services for motions, resolutions and questions as may be required;
- give legal advice on matters relating to the administration of Parliament; and
- provide up-dated information on the progress of bills for posting to the Internet;
- ensure the accuracy of assent copies of bills and cause the timely publication of the final text as assented to.[8]

In some offices, Speaker's counsel have not been appointed even if this is provided for in the institution's organogram and the budget and so legislative counsel have to provide legal services in that capacity (providing advice to the House and its committees on all

[6] V. Crabbe, above n. 3.

[7] See E.M. Bakibinga, "Parliamentary Processes and Procedures: An Overview based on the Ugandan Experience", paper prepared for Diploma in Legislative Drafting Programme, International Law Institute-African Center for Legal Excellence, Kampala 31 October 2007 and E.M. Bakibinga, "The Role and Challenges of Parliamentary Counsel: Examples drawn from Uganda", paper prepared for Legislative Drafting IV Seminar , International Law Institute-African Center for Legal Excellence, Kampala 15 November 2007.

[8] Parliamentary Commission, Parliament of Uganda, 'Administration of Parliament-Department of Legislative and Legal Services'. Available at http://www.parliament.go.ug .

legal advisory aspects of legislative business) as well, in addition to providing legislative services.

Outside the mainstream, legislative counsel working in consultancy firms, non-governmental organization (NGOs), offices of development agencies and supranational organizations[9] are frequently more involved in policy development, planning and implementation of programmes, in addition to their work involving the drafting of legislative proposals and instruments. In most parts, if not all of the developing world, these legislative counsel are rarely referred to as such, due to their multi-dimensional role, but are designated as programme officers and specifically in the case of the UN and the African Union (AU), as 'Rule of Law officers', 'Judicial Affairs Officers', 'Legal Officers' or 'Advisers'.

For example, staff recruited as Human Resources Officers (Legal) in the Human Resources Policy Service of the UN, are charged with drafting or coordinating revisions to the staff rules and administrative issuances setting out rules, policies and procedures, among others. The positions of legal officers in the UN are located primarily in the Office of Legal Affairs, the Department of Management, the UN Compensation Commission, the Regional Commissions, the Department of Peace-keeping Operations, International Criminal Tribunals and Peace-keeping missions, but they may also be found in other offices throughout the UN Secretariat. Candidates for the position of legal officer must have years of progressively responsible experience in law, including legal analysis, research and writing, but some vacancy announcements may specifically require experience in legislative drafting.

The work of legislative counsel, especially while drafting, is largely behind the scenes, consequently not much recognition, funding and planning is allocated towards individual legislative counsel and drafting offices. Recognition of legislative counsel is also limited within parliamentary bodies. In my experience, it is not surprising to be involved in turf battles with regard to who is more superior or relevant to the legislative process and the work of parliamentary committees and the eternal debate surrounding the importance and relevance of intellectual and advisory support provided by legislative counsel vis a vis technical and administrative support provided by other categories of legislative staff.

Notwithstanding the role of legislative counsel as highlighted above, there is lack of appreciation sometimes from members of Parliament and at times from colleagues. One can imagine having to explain on regular basis to a senior parliamentary official and potential supervisor what the role of legislative counsel is.

[9] For example, the UN, the African Union (AU), the secretariats of the regional economic communities such as the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern Africa Development Community (SADC).

M. Mayer states that 'probably the greatest compliment a lawyer can receive from his profession (a compliment never publicized) is an assignment to draft a major law',[10] but in reality the accolade does not follow. This is further exacerbated by a tradition in most civil services that individual or group inputs are rarely publicly acknowledged (save at office or staff farewell parties).

Factors Affecting Visibility of Legislative Counsel

As pointed out above, the factors that diminish visibility of legislative counsel range from the limitations of legal education, especially concerning the content of the syllabi of institutions providing legal education, the focus of recruiters, the level of participation in the activities of professional associations and other entities, the assignment of tasks, the focus of needs-assessment exercises and planning for capacity-building programmes, among others.

Content of Legal Education

The syllabi of institutions providing legal education at under-graduate level across the developing countries, in varying degrees, address issues of constitutionalism, statutory interpretation and general principles of law, without promoting legislative drafting and legislative business as a viable career option. This is a missed opportunity to expose under-graduate students to legislative drafting earlier on in their pursuit of legal studies. The same applies to the programmes preparing candidates for admission to the Bar or legal practice where, in most instances, legislative drafting features on the timetable once in a week for approximately two hours. This does not allow sufficient contact time for those who may be persuaded to consider a career as legislative counsel. By way of comparison, the post-graduate course in Institute of Advanced Legal Studies provides 22.5 hours of contact-time per week[11] and the legislative drafting course in Boston University exposes students to 56 contact hours over 14 weeks.[12]

Recruitment of Legislative Counsel

Vacancy announcements run by government departments in developing countries, many times, call for interested candidates to apply for positions as 'state attorneys' and lump the duties together without any form of distinction. An example of this is set out below:

> DUTIES: The incumbent will be responsible to the Senior State Attorney for performing the following duties: Advising Government, its Allied Institutions and the general public on legal matters and proceedings to which Government is a

[10] Martin Mayer, *The Lawyers*, (Harper Collins, London: 1967) at.50.

[11] Centre for Legal Studies, 'Legislative Drafting Course'. Available at http://ials.sas.ac.uk/postgrad/courses/cls_legislative_drafting_course.htm.

[12] Boston University School of Law; 'Syllabus of Legislative Drafting Clinics', Spring 2011.

> party, Representing Government and its Allied Institutions in Courts of Law or any other legal proceedings to which government is a party, Assisting in Drafting Government Legislations, and any other duties as may be assigned from time to time.[13]

In the absence of identification or designation of specific posts for the units providing legal advisory services, civil litigation and legislative drafting (Office of Parliamentary Counsel), a number of applicants will be disappointed with the final result of the selection process. Some candidates who are randomly selected from the list of recommended candidates for positions as state attorneys and advised to report for duty to the legislative drafting office feel trapped and will look for all avenues of escape. Even in the recruitment by international organizations, the importance of the legislative drafting role is not obvious and does not stand out as an essential requirement, normally appearing at the bottom of the announcement in this form: "Experience in legislative drafting is highly desirable".

The point of recruitment is critical given the fact that many junior lawyers are subjected to peer-pressure when it comes to choice of career. The deliberate choice to become a legislative counsel is at many times frowned upon and often met with words of sympathy from colleagues who consider litigation and corporate work to be the more exciting options in legal practice.

Training and Capacity-building

In some jurisdictions in developing countries, legislative counsel may not receive many opportunities for training and capacity building in other areas of relevance to legal professionals, managers and administrators. Yet when the need arises, they are called upon to take on all forms of tasks, sometimes at the senior-most level of administration within their institutions of employment. J. Wilson illustrates the point clearly when he gives an example of legislative counsel being asked to step in and prosecute a case at short notice.[14] Many are the times when the only instruction legislative counsel receives is "*you go and represent us*".

Participation in Policy Formulation

The participation of legislative counsel working in the mainstream in policy analysis and programme development is very limited in most jurisdictions because historically the perception was that legislative counsel were not expected to look beyond the form of the

[13] Public Service Commission Uganda; Jobs in Uganda Published 23 September 2010. Available at http://jobseastafrica.com/job/3666/state-attorney-at-justice-and-constitutional-affairs/ .

[14] J. F. Wilson, "Contrasts-Challenges of drafting in Developing Countries", 2007-2, *The Loophole* 36 (http://www.opc.gov.au/calc/docs/calc_loophole_july_2007.pdf).

Bill.[15] For complex historical reasons, drafters generally deny that they have any responsibility for the bill's substance. As their primary task, they claim they must focus on the bill's form. The question remains whether legislative counsel can realistically still claim to focus on form and not substance. In a number of jurisdictions outside the Commonwealth, a survey of the practice reveals that legislative counsel are expected to participate to some extent in planning the delivery of legislative services. The history of legislative counsel in Finland shows that drafters were tasked with planning and preparing reforms that were to be carried out through legislation and this incorporated the additional dimensions for research and planning necessary for drafting.[16] The same applies to the United States of America.

On a number of occasions at CALC conferences, questions have been posed as to what the expectations should be for legislative counsel's participation in policy formulation and analysis and to what extent they should be involved in policy formulation, analysis and design. Professor Crabbe concludes that even though the classic theory is that parliamentary counsel do not initiate policy and are only expected to translate policy into law, they need to have a vivid understanding of policies so as to advise on them as their cardinal professional role is that of adviser.[17]

Involvement in Development Planning

In most instances, legislative counsel are not involved in planning activities for development. The planning teams for legislative strengthening programmes normally comprise rule of law experts and experts in development assistance. Legislative counsel in the institutions in which the programmes are being delivered do not easily find someone within the project team to identify with, someone who understands the challenges of serving as legislative counsel. The clerks and legislative researchers on the other hand may not face the same challenges.

Legislative counsel are relegated to the backseats when development interventions are being planned, yet the 'how' is as important as the 'what' and it is crucial for legislative counsel to be equal partners at the negotiating table and not after thoughts when legislative assistance programmes are being developed. Additionally, the tendency is to focus on the bill-drafting role of legislative counsel, yet there is more to the job of the legislative counsel than that. The observation that establishing a legislative bill-drafting office in Parliament

[15] A and R. Seidman; 'Between Policy and Implementation: Legislative Drafting for Development' in *Drafting Legislation A Modern Approach*, edited by C. Stefanou and H. Xatanhki (Ashgate, London, 2008) at 287-319 and 294.

[16] M. Niemivuo, 'Legislative Drafting Process. Main Issues and Some examples', Seminar on The Quality of Law, European Commission for Democracy Through Law-Venice Commission, Strasbourg, 1 July 2010. Available at http://www.venice.coe.int/site/dynamics/N_Subject_ef.asp?T=28&L=E

[17] V.A. Crabbe, above n. 3.

may be expensive and underused[18] reflects how little is known about the role of legislative counsel within legislative bodies.

Involvement in Professional Activities

Legislative counsel are on the whole not very much involved in the activities of professional associations. This denies legislative counsel the opportunity to benefit from the advantages of participating in professional networks. Law societies and Bar associations represent legal professionals and promote their interests. They also promote professional and social intercourse, provide fora for voicing concerns on legal reform and provide support to their members throughout their careers.[19]

As a result of this disengagement with professional associations, it is difficult to attract new blood to legislative drafting offices and there is poor retention of legislative counsel and activities and programmes relevant to legislative counsel are limited**.**

Proposals on the Way Forward

The question is that, after analyzing what the situation is on the ground, what do we do? My thoughts on the way forward vary in accordance to the nature of the challenge or limitation identified. All recommendations are to be considered generally by all legal professionals with an interest in legislative drafting and the work of legislative counsel, bearing in mind the limitations and restrictions on the mandate of officials employed in the civil service.

Largely, it is important to identify ways of enhancing visibility, participation and recognition for legislative counsel.

Staffing and Training

Vacancy announcements, especially for state attorneys, should be specific to the unit recruiting and the activities the selected candidate will be involved in, as it will be very difficult to keep randomly selected staff. This has been done for recruitment of legislative counsel in other jurisdictions and can be emulated by those jurisdictions that have not done so.

Secondly, during training and mentoring, the identification of viable career options and paths for legislative counsel is important. Whereas legislative counsel are required to primarily focus on drafting and remain in permanent and pensionable positions of employment, they need to know that options are available for career planning and

[18] National Democratic Institute for International Affairs, *Guidelines for Implementing Legislative Programs*, June 2000 at 6. Available at http://www.ndi.org/files/22_gov_legisprghbk00.pdf

[19] National Bar Association, 'Objectives of the NBA', available at www.nationalbar.org . See International Bar Association, 'Public and Professional Interest Division', available at http://www.ibanet.org/Committees/Divisions/Public_Professional_Interest_Div/home.aspx

retaining highly motivated staff. In addition, it is important for legislative counsel in developing countries to always seek opportunities to teach, speak at public fora and participate in consultancies. After all, one of the noblest roles of a public sector lawyer is to provide legal education. It is from this exposure and interaction that the younger generation of legislative counsel can be inspired to pick up the ropes and join the profession. In an increasingly global arena of practice, promoting bilingualism or multi-lingualism boosts the competencies of legislative counsel to rise up to some of the challenges presented by the changing trends and compete favourably in the dynamic job market.

In the area of legal education, CALC can make proposals to the administrators of institutions that provide legal education on ways in which the syllabus can be further developed to address the limitations that have been identified.

Development Partners

It is crucial to advise or remind development partners behind most of the reform programmes taking place in developing countries of the importance of involving legislative counsel in the project planning processes – emphasizing what legislative counsel can bring to the table for the successful implementation of projects and the achievement of goals. The United States Agency for International Development (USAID) in their guidance on implementing legislative strengthening programmes lists "develop bill drafting services" on the checklist for legislative strengthening activities[20] and Appendix A of the Sample Legislative Needs and Priorities Assessment Questions under the heading "Lawmaking: Authority and Performance" includes the question: "Are bill drafting services available? By whom?"[21] Greater intervention by legislative counsel at this point can lead to a more detailed and relevant needs and priorities assessment.

The relevance of legislative counsel building rapport with development partners in developing countries is evident in, for example, how the USAID-funded Uganda Parliament-Technical Assistance Project[22] for the modernization of the Parliament resulted in the re-alignment of the administration of the Parliament in such a way that the staff now identify more with the American way of conducting legislative business, emphasizing the relevance of legislative counsel in committees, among others, more than would have been envisaged if the funding had originated from another source. It is very clear that earlier involvement of legislative counsel in programme design and project implementation can have a positive impact on needs-assessments.

[20] USAID, *USAID Handbook on Legislative Strengthening* at.55. Available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacf632.pdf .

[21] Ibid.

[22] USAID/Uganda Monitoring and Evaluation Services, *Evaluation of the Uganda Parliament-Technical Assistance Project*, December 2003. Available at http://pdf.usaid.gov/pdf_docs/PDACF477.pdf.

In all jurisdictions, legislative counsel from developing countries have to be their own public relations agents, to advertise their relevance and do a reversal of the process by addressing stakeholders on how their acts or omissions affect the efficacy of legislation, among others. It does not help much for legislative counsel to be quiet performers in a political arena: they have to enjoy their place in the sun. The presence of assertive legislative counsel serves to inform and correct the misconception that legislative deserts exist in developing countries.[23] Legislative counsel have to participate in regulatory impact assessments to be sure that their work has contributed to the desired impact and to expose them to their counterparts in the regulatory process.

CALC and its Members

It is also important for legislative counsel, as members of CALC and also in individual capacity, to be heard at the highest levels of governance whenever the opportunity presents itself. Members of CALC can make great contribution to the legislative developments taking place at national, regional and international levels.

CALC should interest itself in the work of the Sixth Committee of the UN General Assembly, which is the primary forum for the consideration of legal questions in the General Assembly.[24] CALC can also distinguish itself as one of the non-State actors that the UN Secretary-General can target for purposes of enlisting support for and comprehension of key multilateral treaties as envisaged in the *Strategy for an Era of Application of International Law*.[25]

Specific areas in which CALC members can individually and jointly make contributions include

- the process of codification of international law undertaken by the International Law Commission[26] and the Codification Division of the UN, which also prepares drafts of international conventions and agreements,
- the development of bilateral and multilateral treaties specifically undertaken by the Treaty Section of the UN, which also collaborates in the drafting of final clauses of treaties and agreements concluded under the auspices of the UN, [27]

[23] J.M. Otto, W.S.R. Stoter and J. Arnscheidt, “Using Legislative Theory to improve law and development projects”, Leiden, RegelMaat afl 2004/4.

[24] United Nations Secretariat; UN General Assembly Sixth Committee. Available at http://www.un.org/en/ga/sixth/ .

[25] United Nations Secretariat; Available at http://untreaty.un.org/ola-internet/action_plan_final.pdf.

[26] Currently, the Commission is handling the following topics: reservations to treaties, responsibility of international organizations, shared natural resources, expulsion of aliens, effects of armed conflicts of treaties, obligation to extradite or prosecute, protection of persons in the event of disaster, immunity of State officials from foreign criminal jurisdiction, treaties over time and the Most-Favoured-Nation clause.

- the activities of the Inter-Parliamentary Union[28] in the execution of its mandate as well as the work of the International Development Law Organisation,[29] the International Institute for the Unification of Private International Law (UNIDROIT)[30] and the Global Legal Information Network of the Law Library of Congress,[31] among others.

CALC members can benefit from building partnerships with the proponents of various programmes targeting parliamentary staff in developing countries.

Parliamentary Associations and Networks

The Association of European Parliamentarians with Africa (AWEPA) works in partnership with African parliaments to strengthen parliamentary democracy in Africa, keep Africa high on the political agenda in Europe, and facilitate African-European parliamentary dialogue.[32] In addition to many other activities, AWEPA seeks to strengthen democratic institutions. AWEPA's capacity-building programmes offer training, workshops, seminars and study visits for parliamentarians and parliamentary staff, with the objective to create a space and environment that fosters knowledge-sharing of the democratic process.

The Inter-Parliamentary Union operates a Technical Cooperation Programme under which it assists national parliaments, particularly in developing countries, to improve the organization of their work and strengthen their infrastructure. It focuses on strengthening the parliamentary institution itself, as well as providing assistance to elected parliamentarians and parliamentary staff.

The UN Department of Economic and Social Affairs-managed Africa Interconnected-Parliaments Project and the African Parliamentary Knowledge Network (APKN) associated with it have presented yet other opportunities through which legislative counsel can independently influence and shape the development process in developing countries. The Africa i-Parliaments Action Plan, *Strengthening the Role of African Parliaments in*

[27] Both the Codification Division and the Treaty Section are part of the Office of Legal Affairs, UN Secretariat.

[28] IPU, *Promoting Democracy Worldwide*. Available at http://www.ipu.org/dem-e/overview.htm.

[29] http://www.idlo.int/english/Pages/Home.aspx.

[30] UNIDROIT; 'UNIDROIT: An Overview', available at http://www.unidroit.org/dynasite.cfm?dsmid=103284.

[31] www.glin.gov. A summary on participation in GLIN was published in the CALC Newsletter of March 2010 under the title 'Online Legal and Legislative Information Databases: The Global Legal Information Network'. Available at http://www.opc.gov.au/calc/newsletters.htm.

[32] AWEPA, available at http://www.awepa.org/about-us.

Fostering Democracy and Good Governance through Knowledge and Information Management, is an Africa-wide initiative that aims to modernize African Parliaments' information management capabilities and provide them with skills, services and applications that will allow them to become open, participatory, knowledge-based learning organizations.[33] It builds on the experiences, lessons learned, tools and applications developed during the implementation of the initiative.

The Plan more specifically provides a set of common XML standards called "Akoma Ntoso" (**A**rchitecture for **K**nowledge-**O**riented **M**anagement of **A**frican **N**ormative **T**exts using **O**pen **S**tandards and **O**ntologies)[34] for the management of digital documents. The standards allow the exchange and reuse of parliamentary, legislative and judiciary documents more efficiently. They define a set of simple, technology-neutral electronic representations of parliamentary, legislative and judicial documents for e-services in a Pan-African context. It also provides an enabling framework for the effective exchange of "machine readable" parliamentary, legislative and judicial documents such as legislation, debate records, minutes, judgements, etc. The Plan also provides the Bungeni Parliamentary Information System, which is a solution for drafting, managing, consolidating and publishing legislative and other parliamentary documents.[35]

Under the same umbrella the APKN portal (www.apkn.org) was officially launched in 2008 as a network that supports the work of African assemblies by establishing mechanisms and procedures for exchanging information and experience in areas of common interest. It also intends to strengthen cooperation for capacity-building, staff training and collaboration on technology development to serve parliamentary functions. Major areas of cooperation include legislative processes, information and research services, ICT tools and communication with the public. Through the APKN portal, African parliamentary assemblies have access to tools and services that facilitate the sharing of information and documentation and promote collaboration. These tools include Legislative Drafting Guidelines and the Africa Parliamentary Information Exchange (APEX), which is meant to facilitate the flow of information among national parliaments and to expand the information available to national parliaments with regard to cross-national initiatives.

UN Operations and Programmes

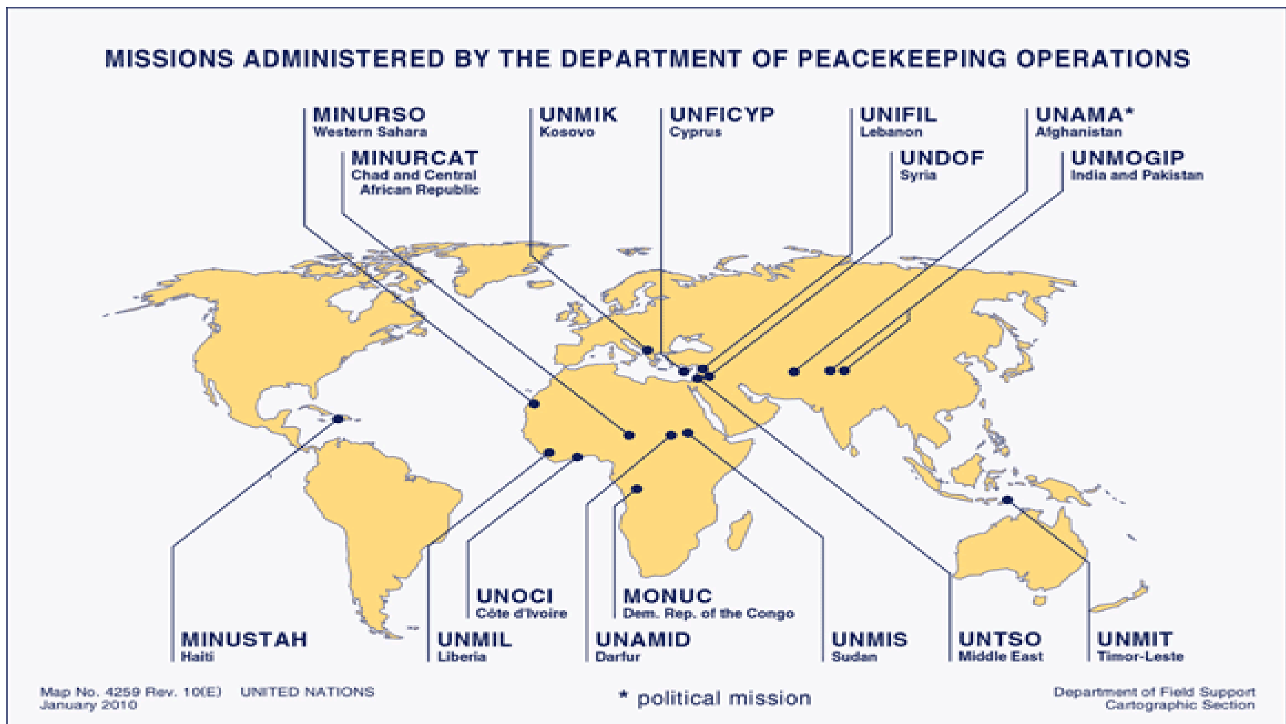
Crucial partnerships for legislative counsel in developing countries can be with the UN Department of Peacekeeping Operations missions (15 of the 16 missions are currently deployed in developing countries, as shown in the figure below) with a current annual

[33] APKN, available at http://www.apkn.org/ .

[34] Meaning "linked hearts" in the language of the Akan people of West Africa, a symbol of understanding and agreement.

[35] Available at http://www.parliaments.info/.

budget of $7.3 billion US.[36] A large number of them have rule of law mandates under which rule of law and judicial affairs officers execute and manage programmes critical to rebuilding rule of law institutions and legislative drafting capacity, among others. Since 1999, all major peacekeeping operations and many special political missions have had mandates to work with the host country to strengthen the rule of law, but the emphasis has been on police, the judiciary and prisons/corrections services and not on legislative services. The Department of Peacekeeping Operations (DPKO) aims to address these three institutions simultaneously, deploying police, judicial and corrections officers. As a first step the Department works to stabilize the security situation and then begins to work on short- and medium-term plans to rebuild the criminal justice system. The focus is on police, judicial and corrections institutions and this has to be changed to accommodate the needs of legislative counsel, something that can only be achieved through interaction.



In addition, the UN has at its highest level of management, in the Executive Office of the Secretary General and directly under the supervision of the Deputy Secretary General, a small substantive Rule of Law Assistance Unit. It offers guidance that emphasizes national ownership of rule of law programmes, which presents an opportunity for us as legislative counsel to step forward and participate directly.

[36] UN, Department of Management, Peacekeeping operations budget 2010-2011, available at http://www.un.org/en/hq/dm/pdfs/oppba/Peacekeeping%20budget.pdf.

The UN is currently engaged in an ongoing process to strengthen its approaches to rule of law engagement at the national and international levels. This is another point at which CALC can intervene. The UN common approach to the rule of law at the national level emphasizes strategic considerations and partnerships. This involves all relevant UN entities jointly

- conducting thorough assessments with the full and meaningful participation of national stakeholders to determine rule of law needs and challenges;
- supporting the development of a comprehensive rule of law strategy based on the results of the assessment;
- developing a UN rule of law programme guided by the strategy; and
- assigning accountabilities and implementation responsibilities.

Effective coordination and strong partnerships with other rule of law stakeholders are also key aspects of the approach.[37]

In his report, "Strengthening and coordinating United Nations rule of law activities (A/63/226)", the Secretary-General requested the Rule of Law Coordination and Resource Group and the Rule of Law Unit to *"initiate a dialogue with Member States on strengthening promotion of the rule of law at the international level."* [38] CALC can engage with the Rule of Law assistance unit which, among other things, seeks to develop partnerships with non-UN rule of law actors, both governmental and non-governmental, to maximize resources. In the public practice sector there is greater room for legal professionals, including legislative counsel, to get involved in the implementation of rule of law and democratic governance programmes.

The United Nations Development Programme (UNDP) provides technical assistance to more than 60 parliaments around the world in their efforts to build the capacity of legislators and technical staff, among others. For ten years, the UNDP Global Programme for Parliamentary Strengthening has been setting global standards and benchmarks, exchanging regional best practices and building capacity in selected countries.[39]
S. N. Carlson emphasizes the importance of strengthening engagement with host-country

[37] UN Secretariat, Rule of Law Coordination and Resource Group Joint Strategic Plan 2009-2011. Available at http://www.unrol.org/files/RoLCRG%20Joint%20Strategic%20Plan.pdf.

[38] UN Secretariat, available at http://www.unrol.org/search_results.aspx?cx=012143788501653073323:muml8h1ts2y&cof=FORID:10&ie=UTF-8&q=A%2F63%2F226#1100.

[39] UNDP Global Programme for Parliamentary Strengthening, available at http://www.undp.org/eu/Global_Programme_for_Parliamentary_Strengthening.shtml .

rule of law partners and that the concept of partners should include independent professionals and civil society groups, including women's groups.[40]

Enhanced Role for Legislative Counsel

Legislative counsel cannot draft relevant legislation without constantly addressing the factors best pointed out in a proper analysis of a given society. Given the importance of rule of law and human rights based approaches to development in developing countries, legislative counsel need to be more attuned to the impacts and repercussions of drafting that does not address such issues. When legislative counsel are competent in policy analysis and more involved in the development of legislative assistance programmes they attract better interventions from governments and development partners as they may be involved in the diagnostic process of technical assistance and development needs.

It is critical to note that most vacancy announcements for legislative-strengthening consultants' positions will require the candidate to do more than advise on the drafting process. Candidates must have demonstrated expertise in any of the following areas within the legislative strengthening sector:

- constituency outreach;
- legislative-executive relations;
- legislative drafting;
- parliamentary caucus strengthening, parliamentary budgeting;
- legislative ethics;
- legislative research and library development;
- legislative staff training;
- legislative new member orientation;
- women's caucuses strengthening;
- legislative media relations; and parliamentary advocacy.[41]

For legislative counsel to rise to the challenges presented by such opportunities, training and exposure to other aspects of legislative administration and management remain critical. S. Lortie asserts that for external assistance to be truly effective, it is essential for a

[40] Scott N. Carlson, *Legal and Judicial Rule of Law Work in Multi-dimensional Peacekeeping Operations: Lessons-Learned Study*, UN Legal Consultant March 2006 at16. Available at http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/ROL%20Lessons%20Learned%20Report%20%20March%202006%20FINAL.pdf.

[41] Management Systems International; 'Vacancy announcement for an 'Adviser-Legislative Drafting Capacity Building, Afghanistan' posted by the UN Office on Drugs and Crime. Available at http://unjobs.org/vacancies/1303645543294 .

recipient country to have a clear sense of the type of law-making system that it wants and of the particular role of the legislative drafting agency.[42]

Legislative Counsel Associations

There is a need to increase membership of CALC. There is strength in numbers. Membership can be increased by spreading the word and interacting with colleagues from the law reform commissions and legal education facilities and also reaching out to non-Commonwealth citizens through associate membership. One way of encouraging this is through the regional integration frameworks in which legislative counsel engage with counterparts from non-Commonwealth countries. A case in point is the East African Community (EAC) in which four out the five member States belong to the Commonwealth, making it important to attract legislative counsel from Burundi to sign up for membership as associates. The debate remains open as to the likelihood of an increase in the membership of the EAC to include potentially interested states like South Sudan after the final status-determination, Democratic Republic of the Congo and Central African Republic.[43]

Local participation and consolidated interaction at local and international levels, numbers permitting, in a manner similar to bar associations or law societies is another way in which the profile of legislative counsel can grow, most especially within the circles of legal professionals. CALC can draw lessons from the National Council of State Legislatures which is a bipartisan organization that serves the legislators and staff of the 50 US states, its commonwealths and territories with capacity-building, training and support.[44]

Conclusion

With all these strategies in place, the odds are high that there will be greater visibility for legislative counsel in developing countries, which is likely to yield more returns for all involved. By way of self-actualization, increase in recognition and visibility may result in higher retention of legislative counsel and the establishment of legislative drafting as a viable career. Hopefully, this will limit or bring to rest the debate on whether legislative counsel are relevant to the legislative process as a whole, which has been proven beyond doubt in a number of jurisdictions, such as the US, Finland and Canada, among others.

Further, greater visibility of legislative counsel has a way of completing the legislative process cycle. Regular input and involvement of legislative counsel in the translation of

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[42] 'Providing Technical Assistance on Law Drafting', Statute Law Review 31(1), 1-23, doi:1.193/slr/hmq4, available at http://slr.oxfordjournals.org/content/31/1/1.short?rss=1&ssource=mfc.

[43] Transcript of the interview of J. Mwapachu, Secretary General of the EAC 'South Sudan and Democratic Republic of Congo lining up to join EAC', available at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=97493&cause_id=1694

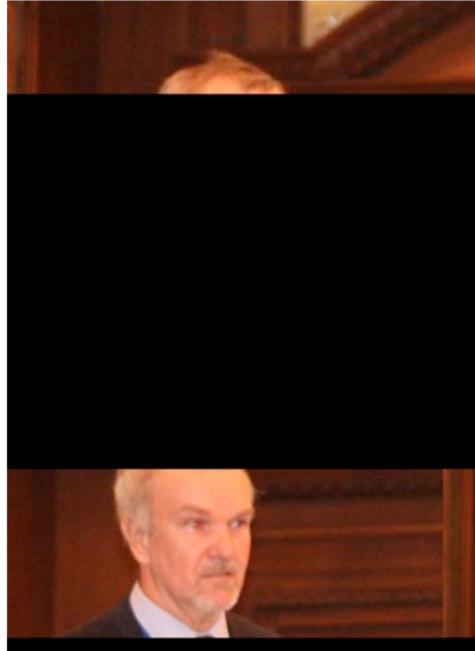
[44] Available at http://www.ncsl.org/LegislativeStaff/tabid/788/Default.aspx.

policy into law affects the quality of policy analysis and regulation due to the feedback provided to counsel after an impact assessment has been done and reviews have been conducted to establish what was appropriate, what worked and the efficacy of legislation among others. Any increase in communication should yield better results and a re-definition of roles.

As discussed above, it is possible to build and maintain high visibility for legislative counsel in developing countries for the advantages that it brings. The onus remains on us as individuals and collectively as members of CALC to advocate for increased participation. Hopefully, further discussion of the role of legislative counsel in the rule of law and governance process will shape developments that will result in the desired reforms.

Testing Client Policy: The Emperor's Clothes

Paul Salembier[1]



Abstract:

This article considers the role of legislative counsel in terms of the practical application of the legislation. This role is cast in terms of "road-testing" the proposed legislation: doing a reality check to make sure it is comprehensive and workable. The article provides numerous examples of the logical problem-solving that characterizes this role of challenging, not the policy goals, but rather the way to attain them.

Drafting and Policy

There is a mantra, repeated in the drafting community, that legislative counsel should restrict their attention to drafting, and not meddle in the policy issues underlying the legislation being drafted. Where the line between drafting and policy falls, however, is not always clear, and I'm going to suggest that the line should properly be drawn to encompass some areas where legislative counsel may traditionally have feared to tread.

Legislative counsel are not just scribes, of course, or even literate scribes who happen to be knowledgeable in the arcane rules, forms and ornamentations of legislative drafting. The legislative counsel's role is to translate policy decisions into effective law,[2] and it is

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[1] General Counsel with the Canadian Department of Justice (Canada) and the author of *Legal & Legislative Drafting* (Toronto: LexisNexis, 2009). The views expressed in this paper are personal and do not necessarily reflect those of the Department of Justice (Canada).

[2] G. Tanner, "Imperatives in drafting legislation: a brief New Zealand perspective", (2004), 52 *Clarity* 7 at 7.

therefore not enough for them to simply copy down what the instructing official wants to say. Legislative counsel *draft;* they do not take dictation. Their job is instead to take the client's policies and transform them into text that will promote those policies as effectively as possible.

Now, there are ways – all within the legislative counsel's traditional role – in which legislative counsel can and do affect their client's policies. They do this by applying accepted legal constraints:

1. reviewing the content of proposed legislative rules for constitutionality;
2. reviewing proposed rules for consistency with the jurisdiction's statutes of general application; and
3. when drafting regulations, ensuring that the regulations are within the regulation-making powers in the enabling statute.

In each case, any content that is inconsistent with these legal requirements will have to be altered or discarded.

Another straightforward way in which legislative counsel challenge a client's policy – and one that is generally accepted as being within the four corners of their role – occurs when they point out that one rule in a proposed legislative scheme contradicts another. If section 5 says a citizen must do X, and section 10 says the citizen must not do X, then the legislative counsel draws the conflict to the attention of the instructing officials, asks which rule must give way, and adjusts the text accordingly.

In doing so, the legislative counsel is not usurping the instructing official's policy role, because it is not the legislative counsel who makes the choice about which policy will apply. Rather, they are simply pointing out an incoherent aspect of the proposed legislative scheme, leaving it to the instructing official to decide how the policy will be adjusted.

I would suggest that a good legislative counsel should go well beyond this, however. I'd like to propose that legislative counsel also have a role to play in "road-testing" the client's proposed legislation: doing a reality check to make sure it will work in practice. And I suggest to you that this should be considered, not as trenching on the client's policy domain, but rather as an extension of the "what-if" scenarios that all good legislative counsel run through to ensure that the legislation they are working on is comprehensive and workable.

What distinguishes a top legislative counsel from one less skilled is not so much knowledge of the rules of grammar – because this is the minimum expected of all legislative counsel – but rather the ability to determine whether a provision gets across the message clearly and effectively. This involves not only a determination of whether a draft contains potential ambiguities or contradictions, but also whether the proposed legislative provision is the best way to achieve the client's goals, or in fact achieves them at all.

The legislative counsels' independence from the policy development process gives them the ability to look at a legislative proposal with "fresh eyes", which can make it easier to identify logical inconsistencies that have escaped the attention of those who developed the underlying policy. Logical gaps in legislative proposals can arise out of unwarranted assumptions made by the client, or perhaps simply from an unfamiliarity with the way in which binding legal rules are developed. As Justice Keith Mason observed about client ministries:

> Their rosy vision of desired outcomes may blind them to the need to cover all bases so as to pre-empt the avoidance techniques of those not favourably disposed to the new dispensation.[3]

What appears clear and simple to an inexperienced person may – to the practiced professional – be anything but.

A failure to cover all of the logical bases creates a loophole: the "gotcha" moment when those who are not favourably disposed to a new rule surge through a gap in the legislative scheme. There will always be some uncertainty in how well a proposed law will meet its objectives when confronted with the vicissitudes of life in a complex society. The military equivalent of this is "No plan survives first contact with the enemy"[4] or, in the context of sport, "Everything is complicated by the presence of the other team".[5]

Legislative counsel can identify logical gaps by questioning muddled instructions, challenging any unstated assumptions and verifying the cohesiveness and coherence of the proposed legislative scheme. This isn't as difficult as it sounds. The way in which a legislative counsel tests any proposed scheme is to mentally apply it to a hypothetical situation or, optimally, to a range of hypothetical situations.

On one type of logical challenge there is general agreement in theory but very haphazard observance in practice. I am speaking of instances in which clients give instructions that they think are clear, but which on closer examination are revealed to be ambiguous. Too often legislative counsel don't think about what they are being asked to write and simply reproduce the ambiguous instruction as ambiguous text.

Consider the following provision:

> 1. The executive director shall be a member of the Board.

[3] K. Mason, "The View from the Other Side - Judicial Experiences of Legislation", paper delivered to the Fourth Australasian Drafting Conference, August 3, 2005.

[4] Attributed to the Prussian General Helmuth von Motke.

[5] Jean-Paul Sartre, *Critique of Dialectical Reason* Vol 1 (London: Verso, 2004) at p. 473.

Provisions virtually identical to this can be found in the legislation of Canada, Ontario, New Zealand and Hong Kong.[6] Such a provision can give rise, however, to two different but equally plausible rules:

> 1A. A person is not eligible to be appointed as executive director unless the person is a member of the Board.

or:

> 1B. On appointment, the executive director becomes an *ex officio* member of the Board.

It is the legislative counsel's job to identify this sort of ambiguity, press the instructing official for clarification and draft the provision accordingly. If the intended meaning is 1A, then if there is any possibility that the position of executive director might be occupied by a person who is not a member of the Board at the time the provision comes into force, a transitional rule should be added to determine whether:

1) the incumbent would have to resign;
2) the provision would apply only to subsequent appointments; or
3) the incumbent would be required to seek appointment to the Board, coupled with a further provision to address a situation in which the incumbent did not succeed in becoming a Board member.

One can look at a case like this as an instance of a legislative counsel simply clarifying muddled drafting instructions, and in some situations that will be true. In most situations, however, I've found that clarifying the muddle takes the client into a new realm of policy development in which the legislative counsel is the trusty guide who points out the various paths the client can take and advises on where those paths lead. In these cases, the legislative counsel plays an integral role in formulating the ultimate policy.

Doing the Math

Provisions incorporating mathematical formulas present one of the easiest situations in which the legislative counsel can test the logic underlying a proposed provision. To do so, they simply plug in some sample figures for the variables (or requests representative samples from the client) and see whether the formula produces the expected results.

The following example involved a scheme for repayment by a pool of local government borrowers of a shortfall caused by a default on the part of one of the borrowers. The idea

[6] See, for example, *Marine Transportation Security Regulations* (Canada), SOR/2004-144, s. 210(1); *Real Estate Agents Act 1976 No 9* (New Zealand), s. 67(1); *Judicature Act 1908 No 89* (New Zealand), s. 388(2); *Chinese Medicine Ordinance* (Hong Kong), Cap. 549, s. 31(b)(i); *Professional Engineers Act* (Ontario), R.S.O. 1990, c. P.28, s. 3(8). Tobias Dorsey discusses a similar example in his *Legislative Drafter's Deskbook* (Washington, D.C.: TheCapitol.Net, 2006) at 193. See also Elmer Driedger, *The Composition of Legislation*, 2nd ed. (Ottawa: Department of Justice, 1976) at 15.

was that the non-defaulting borrowers would be required to remit payments to cover the shortfall in an amount proportional to the amount of tax revenues available to each borrower. The formula initially proposed for the amount of the payment by each non-defaulting member was:

> 2 – Every member shall contribute to repayment of the shortfall in accordance with the formula:
>
> $$\frac{A}{B} \times C$$
>
> where
>
> A is the gross annual tax revenue of the borrower,
>
> B is the aggregate gross annual tax revenues of all borrowers, *and*
>
> C is the amount of the shortfall to be recovered.

If you plug figures into the example,[7] it all appears to work out very well until you think back to the original reason why the clause is being invoked: a default by one of the borrowers. If the defaulting borrower couldn't make the payment that led to the shortfall in the first place, then there is reason to doubt whether it can make the payment needed to cover the shortfall.

A more logical formula, then, would allocate the responsibility for repayment of the shortfall among the remaining *solvent* borrowers. The scheme eventually put into place provided for negotiations with any defaulting borrowers to determine what amounts they could pay, followed by a call for repayment of the remainder by the remaining non-defaulting borrowers. The corrected formula was:

> 2A – Every member who has not defaulted shall contribute to repayment of the shortfall in accordance with the formula:
>
> $$\frac{A}{B - C} \times \left(D - E\right)$$

[7] To test the logic of this formula, the drafter would work out a sample problem, assuming borrowers (B_1, B_2, B_3, B_4, and B_5) with varying percentages of the total available tax revenues (5%, 10%, 20%, 30% and 35%, respectively) and a shortfall of $100,000 caused by a default by borrower B_5. Once the formula is worked through it produces payments owed of $5000, $10,000, $20,000, $30,000, and $35,000, which together add up to $100,000 – the amount of the shortfall.

where

A is the gross annual tax revenue of the borrower,

B is the aggregate gross annual tax revenue of all borrowers, and

C is the aggregate gross annual property tax revenue of defaulting members

D is the amount of the shortfall to be recovered, and

E is the aggregate of any payments negotiated from the defaulting members.

Another case that was more straightforward involved a ministry that was attempting to recover large sums of money from the banking community. The formula that was proposed, though, was based on making payments that constituted a fixed percentage of a declining balance. It was relatively easy to point out to them that they would *never* succeed in recovering the total amount owed as long as the percentage to be recovered was fixed at less than 100%.

Putting the Cart before the Horse

One type of logical error to which clients are prone is to address the subject of a legislative provision as if the provision had already been applied to it.

Consider the following example:

> 3 – A statement of claim may be served by mailing a copy of the document to the last known address of the individual, accompanied by an acknowledgement of receipt card in the form set out in Schedule 1, if the individual returns the acknowledgement of receipt card.

The provision contemplates the service of a statement of claim on someone by mailing it to the person, along with a card that the person can mail back to confirm receipt of the document. The idea would be that if the plaintiff can get the defendant to send back the acknowledgment of receipt card, the plaintiff can avoid the effort and expense of serving the document personally.

The problem with the drafting of the provision lies in the trailing condition *if the individual returns the acknowledgement of receipt card*. The trailing condition imposes a requirement that must be satisfied before the permission conferred by the provision is given. Given that a receipt card can never be returned until the document has been sent, the condition can never be satisfied until after the act for which permission is required has been undertaken.

What the provision is attempting to convey is that the plaintiff can *try* to serve the document by mail, but that the attempt will be successful only if the defendant returns the acknowledgement of receipt card. This is more appropriately expressed by focusing on the attempt/success aspect of the process:

> 3A – (1) A plaintiff **may attempt to serve** a statement of claim on an individual by mailing a copy of the document to the last known address of the individual, accompanied by an acknowledgement of receipt card in the form set out in Schedule 1.
>
> (2) Service of a statement of claim under subsection (1) **is made if** the individual returns the acknowledgement of receipt card.

While the impact of the logical error in this example is fairly benign, such an error could make the provision difficult to enforce where compliance with the rule in question is more onerous.

Hanging Qualifiers

The next example is similar in that it contains a trailing condition that determines whether the rule will operate or not:

> 4 – At least 60 days before amending a property taxation law, the municipal council shall
>
> (a) publish a notice of the amendment law in a local newspaper,
>
> (b) send the notice, by mail or electronic means, to every municipal taxpayer, and
>
> (c) obtain the approval of the Municipal Board,
>
> unless the amendment is not significant in nature.

This provision sets out three requirements that a municipal council must satisfy –if the amendment is significant in nature. Unlike the last example, the problem with this provision is not one of timing, since it is possible to have an idea whether an amendment is significant or not before the rule is to apply. The problem lies in the fact that the condition contains a subjective element, without identifying who will determine that element. In other words, the provision does not tell us who gets to decide whether the amendment is significant or not.

To determine the extent of the problem this poses, the legislative counsel needs to simply apply it to the range of possible scenarios. The most likely scenario is that the municipal council would make a preliminary determination of significance or insignificance in relation to a proposed property taxation law and would act accordingly – and, if it thought it was *not* significant, it would not bother to fulfill the conditions set out in paragraphs (a) to (c). It would continue doing so until such time as a disgruntled taxpayer challenged an amendment in court.

Because the issue of significance/insignificance relates to a condition precedent to the making of the amendment in question, identifying which entity is empowered to make that determination is key to the validity of the amendment. If the court determines that the municipal council itself was indeed the appropriate determiner of significance, its decision

would be difficult to overturn.[8] Given that the provision contemplates approval by a superior entity (the Municipal Board) and that courts are reluctant to sanction a scheme in which a lower body can insulate its decisions from review (by simply determining them to be insignificant), it is likely the court would consider that the Municipal Board was intended to be the arbiter of significance. This would open the amendment up to a whole new line of attack – failure to satisfy a condition precedent – that would not otherwise be available in a normal application for judicial review.

If the court ultimately determined that the municipal council was not entitled to determine significance, it might rule the amendment to be inoperative until the appropriate entity (the Municipal Board) ruled on the issue of significance. To avoid the uncertainty and delay this would entail, the court might also decide to short-circuit the process and make its own determination of "significance". If the court disagreed with the municipal council and considered that the taxation amendment was indeed significant, it would likely rule the amending law to be *ultra vires*, because the conditions precedent set out in paragraphs (a) to (c) of the provision would not have been satisfied.

To avoid the uncertainty and expense of litigation, an attentive legislative counsel would ask his or her instructing official to identify who the arbiter of significance or insignificance was intended to be. Two possibilities (other than an eventual court) present themselves:

- the municipal council itself, or
- the Municipal Board referred to in paragraph (c).

If the intention was that the municipal council should itself determine whether its proposed amendment is significant or not, the provision can be redrafted in a much more clear-cut manner to reflect that intention:

> 4A – Where the municipal council proposes to amend a property taxation law **and the council considers the amendment to be significant in nature**, at least 60 days before making the amendment the council shall
>
> (a) publish a notice of the amendment law in a local newspaper;
>
> (b) send the notice, by mail or electronic means, to every municipal taxpayer; and
>
> (c) obtain the approval of the Municipal Board.[9]

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[8] *Reference re Chemical Regulations*, [1943] S.C.R. 1, at 12; *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[9] A shorter, but more indirect, version would be:

> At least 60 days before making a property taxation law amendment that the municipal council considers to be significant in nature, the council shall
>
> (a) publish a notice of the amendment law in a local newspaper;
>
> (b) send the notice, by mail or electronic means, to every municipal taxpayer; and

However, since the instruction contemplates that a municipal council must obtain approval for significant amendments from a superior body (the Municipal Board), that superior body is not likely going to concede to the council the authority to determine which amendments require their approval and which do not. The council would otherwise be able to shield all of its amendments from review by the Municipal Board. The most likely scenario, – and what was in fact the decision in the provision on which this example is based – is therefore that the Municipal Board is to be given the discretion to determine whether a property taxation law is significant enough to require its approval, or viewed from another perspective, whether a given amendment is insignificant enough that its approval (and the advance notice requirements) can be dispensed with.

In order to make any such determination, though, the Board will first need to see the amendment. The most convenient manner to achieve this is to provide that all amendments must be forwarded to the Board, and for the Board to grant an exemption from the publication and notice requirements for insignificant amendments. The provision would therefore be split into two rules:[10]

> 4B – (1) At least 60 days before amending a property taxation law, the municipal council shall
>
> (a) apply to Municipal Board for approval of the law;
>
> (b) send the notice, by mail or electronic means, to every municipal taxpayer; and
>
> (c) publish a notice of the amendment law in a local newspaper.
>
> (2) At the request of a municipal council, the Municipal Board may exempt the council from the requirements of paragraphs (1)(b) and (c) **if the Board considers that the amendment is not significant in nature.**

Rules Made to be Broken

Instructing officers who are more acquainted with administering policy than enforcing binding legal rules may at times find themselves suggesting redundancies in rules "just in case the first one doesn't work". Such an approach is reminiscent of the Groucho Marx philosophy: "Those are my principles, and if you don't like them... well, I have others."

(c) obtain the approval of the Municipal Board.

[10] Since the Board will already have reviewed the amendment and determined that it is not significant, it makes most sense for the Board to go ahead and approve the amendment at the same time as it grants the exemption. There is therefore no point in the Board approving an exemption from its own approval, and the exemption is therefore limited in this provision to an exemption from the publication and notice requirements.

This, however, is not logical and it is anathema to good drafting principles; if one had to draft alternative rules in order to take into account the possibility that an expressed legal rule might not be followed, the recitation of successive alternatives would be never-ending. The norm is therefore to draft the rule in question just once, and to provide for appropriate consequences for non-compliance.

Sometimes a rule appears to contemplate its own contravention simply because it is drafted in absolute terms, even though exceptions were in fact contemplated. Consider the following example:

> 5 – All documents required to be filed under these Rules shall be in either English or French and, if submitted in a third language, be accompanied by a translation in English or French and an affidavit attesting to the accuracy of the translation.

What we have here is a rule:

> All documents required to be filed under these Rules shall be in either English or French …

followed by another statement that

> … if submitted in a third language, [a document must] be accompanied by a translation in English or French and an affidavit attesting to the accuracy of the translation.

Here, it is apparent that languages other than English and French were contemplated from the outset. The rule is not therefore that *all documents … shall be in either English or French*. In fact, the rule contemplates that documents can be filed in any language, but if they are filed in English or French they do not require a translation. The rule is hence *all documents … shall be in English or French or some other language (with a translation).* The rule could consequently more properly have been drafted as:

> 5A – All documents required to be filed under these Rules shall be in English or French **or** be accompanied by a translation in English or French and an affidavit attesting to the accuracy of the translation.

Now, since the rule doesn't actually require that documents must be in English or French, it could in fact be stripped down to its essence by addressing only the translation requirement for documents that are not in English or French:

> 5B – **A document** required to be filed under these Rules **that is not in English or French** shall be accompanied by a translation in English or French and an affidavit attesting to the accuracy of the translation.

The Impossible Takes a Little Longer

It has been a tenet of law from at least the Roman era that "No obligation to do the impossible is binding."[11] Nonetheless, from time to time, text will appear in statutes that appears to require just that.

Donald Hirsch gives an amusing example of a sign instructing Washington commuters on Independence Avenue to "Use All Lanes".[12] I would normally have thought that such a direction was impossible to follow, but after a few days of driving in India I'm no longer quite so sure.

Often, the drafting of an impossible requirement arises out of an ill-advised attempt on the part of instructing officers to encourage those bound by the legislation to *do their best* to advance a goal of the legislation by establishing an objective that turns out to be unattainable. While vigorous exhortation might be laudable in a non-legal setting, it has no place in a statute.

Therefore, while it may be human nature to encourage others to do their best – as in "a man's reach should exceed his grasp" – in drafting legislation, a line must be drawn between an exhortation to stretch personal limits and a legal duty to do so.[13] Consider the following example:

> 6 – The employer shall report the date, time, location and nature of any accident, by telephone, to the regional safety officer, as soon as possible but not later than 24 hours after becoming aware of the occurrence, where the accident results in
>
> (a) the death of an employee; or
>
> (b) a disabling injury to two or more employees.

Now, this provision appears to contemplate the creation of one obligation (*employer is to report as soon as possible*) followed by an alternative obligation (*employer is to report within 24 hours*), in case the employer decides not to comply with the first one. Beyond this, the provision in question could give rise to two situations in which the employer might satisfy one of the obligations while breaching the other.

Consider, for example, a situation where it is later determined that it was possible to make a report within 6 hours, but the employer made the report 15 hours later. The employer

[11] *Ad impossibilia nemo tenetur*, attributed to Marcus Tullius Cicero (106–43 B.C.), Roman orator, philosopher, and statesman: Celsus's *Digesta*, L, 17.

[12] D. Hirsch, *Drafting Federal Law* (Washington: Office of the General Counsel, Legislation Division, 1980) at p. 3.

[13] Note that strict liability statutes do not impose unreachable standards; they instead merely impose an unconditional requirement to pay for damages caused by those who choose to engage in certain hazardous activities.

will have breached the requirement to report *as soon as possible*, but will have complied with the requirement to report *not later than 24 hours* afterwards.

In another situation, in which it is later determined that it was not possible to make a report until 30 hours later but at which time the employer did so, the employer will have breached the requirement to report *not later than 24 hours* afterwards, but will have complied with the requirement to report *as soon as possible*.

Is the employer in either of these cases liable for having contravened the provision? In both situations the legislator will certainly have breached the rule of law requirement that it must avoid enacting contradictory rules.[14]

In my discussions with the Chief Legislative Counsel of two Commonwealth jurisdictions, one opined that, of course, the *as soon as possible* portion of the provision would be the only binding rule, while the other was equally adamant that the *not later than 24 hours* portion would be the only operative component. While the view of the courts might well be tempered by the facts of the particular case before them, it is clear that the regulating agency will in this case have failed to clearly convey the law to be applied.

The provision can be remedied by simply omitting either the words *as soon as possible but* or *but not later than 24 hours* from the provision. Keeping *as soon as possible* would produce:

> 6A – The employer shall report the date, time, location and nature of any accident, by telephone, to the regional safety officer, **as soon as possible** after becoming aware of the occurrence, where the accident results in
>
> (a) the death of an employee; or
>
> (b) a disabling injury to two or more employees.

A client opting for this rule should be advised that a breach may be difficult to prove, since the regulator would have to demonstrate that an earlier possible opportunity existed and was not seized. It should be kept in mind as well that a provision that requires an employer to act *as soon as possible* imposes a fairly high standard of conduct, which could cause the employer to incur substantial costs to avoid a breach, and perhaps even result in delays in treating injured workers if a priority is given to reporting over treatment. A standard such as this should therefore only be imposed for good reason.[15]

Retaining the *not later than 24 hours* option would produce:

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[14] L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) at pp. 65-70.

[15] Such a standard might not be defensible, for example, if the regulating agency would typically take weeks to respond to such a report. Perhaps in recognition of such difficulties, the A.C.T. Parliamentary Counsel's Office recommends that *as soon as possible* and *as soon as practicable* not be used, and that a set period be substituted instead: *Words and Phrases: A Guide to Plain Legal Language*, Oct. 2006, pp. A-77, A-78.

> 6B – The employer shall report the date, time, location and nature of any accident, by telephone, to the regional safety officer, **not later than 24 hours** after becoming aware of the occurrence, where the accident results in
>
> (a) the death of an employee; or
>
> (b) a disabling injury to two or more employees.

In establishing a 24 hour maximum, the regulator will have to keep in mind that some prosecutorial discretion might have to be exercised in circumstances where the rule has been contravened but where it appears that no earlier opportunity presented itself. This option presents another logical gap, in that it would be impossible for an employer to comply with the rule if a single employee were injured in an accident and the employee died two days later. In this situation, because only a single employee was involved, paragraph (b) of the provision would not require a prompt report, but the eventual death of the employee would trigger paragraph (a) *ex post facto*, bringing the employer into breach of the 24-hour requirement of the provision long after the window for compliance had passed by.

This can be remedied in one of two ways. Paragraph (a) could be modified to make it apply only to immediate deaths:

> 9C – The employer shall report the date, time, location and nature of any accident, by telephone, to the regional safety officer, not later than 24 hours after becoming aware of the occurrence, where the accident results in
>
> (a) the **immediate** death of an employee; or
>
> (b) a disabling injury to two or more employees.

This, however, would relieve the employer of any requirement to report where the employee died later, which might not meet the policy requirements of the regulating agency. To make the provision applicable to eventual deaths as well, the adverbial phrase *not later than 24 hours after* would need to modify the result of the accident[16] rather than the occurrence of the accident. Redrafted in this manner, the provision would read:

> 9D – **Where an accident results in the death of an employee or a disabling injury to two or more employees**, the employer shall report the date, time, location and nature of any accident by telephone to the regional safety officer not later than 24 hours after becoming aware **of the death or injury**.

Why Challenge the Logic?

While the examples I've presented give a taste of the type of logical anomalies that can crop up in legislative and legal documents, the list is by no means exhaustive. There are no

[16] That is, paragraphs (a) and (b) would have to become the object of the adverbial phrase.

limits on the types of logically-challenged legislative schemes the human mind can invent, or of the interpretive quirks that can undermine the operation of an apparently sound legislative provision. To paraphrase Albert Einstein, only two things are limitless: the universe and the ability of a client ministry to mix things up, and I might be wrong about the universe.

I've addressed a number of other types of logical challenges in *Legal & Legislative Drafting*,[17] to which I would naturally refer any who have a further interest in this area.

The most a legislative counsel can therefore do – and what I would suggest of all legislative counsel – is to attempt to develop a habit of confirming that a scheme that on its surface appears logical will still operate properly when tested against real-world possibilities. Most of the time, this can be done by simply posing the question: "So how will this work in practice?"

The salient question, however, is whether doing this goes beyond the legislative counsel's role in providing legal advice and whether it trenches unnecessarily on the realm of policy. The answer to this is clearly "No".

Logical challenges test the mechanism by which the client seeks to attain its policy goals, and not the goals themselves. It is always in the client's best interests to have the legislative counsel, in his or her role as legal adviser, point out any errors or inconsistencies that might prevent the client's objectives from being realized.

In short, no one benefits from seeing the emperor parade about in his birthday clothes.

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[17] (Toronto: LexisNexis, 2009), Ch. 8.

The Wavering Line between Policy Development and Legislative Drafting

Elizabeth Grant[1]

Abstract:

This paper looks, from the perspective of a legislative drafter, at policy and legal advice, including their purposes and how they are distinguished. It considers a legislative drafter's role in various situations: where good instructions or (as often occurs) poor instructions are received; on being invited to step into the policy whirlpool; and in unusually hard cases. It recognises that legislative drafters give legal advice, and advice about what the law ought to be. Generally, though, the role of policy adviser is not part of the legislative drafter's role. If a person is required to fulfil a policy role in addition to the role of a legislative drafter, it is important to retain an awareness of the nature of the distinct functions involved in each role. What is policy, and what is its purpose?

Introduction

According to the Oxford English Dictionary, the most basic definition of policy is that it is "(t)he art, study, or practice of government or administration".[2]

For our purposes, we can leave aside the study of government or administration, and maybe also policy as an art. It is essentially policy as the practice of government or administration that a legislative drafter encounters from day to day, both from the drafter's vantage point as an observer of governments and administrators, and, more immediately,

[1] Parliamentary Counsel Office, New Zealand.

[2] *Oxford English Dictionary*, 3rd edition, July 2010; taken from the online version of November 2010.

as a drafter of legislation that will give effect to the policies developed by the government of the day.

Policy development encompasses many areas that legislative drafters do not see much of on a daily basis. For example, policies are developed by governments and administrators to determine the structure of work resources within departments. Policies may also be developed to determine priorities in spending in relation to such matters as public health or the achievement of the nation's educational goals. Policy development helps to form attitudes to, and eventually to decide the allocation of resources among, the many possible objects of the attentions of a government and its administrators.

For legislative drafters, it can be easy to forget that a huge part of policy development has almost nothing to do with our work as legislative drafters. That is because the kind of policy development that legislative drafters encounter on a regular basis is the specific kind of policy development that results in changes to the laws of the land, either by the creation of entirely new laws or, more often, by the amendment of existing laws.

When a legislative drafter receives instructions from a department to draft a bill, in New Zealand at least, it is because Cabinet has agreed to a policy or set of policies and has agreed that drafting instructions should be issued to Parliamentary Counsel to give effect to the decisions that Cabinet has made. The Cabinet Minute on the topic and the Cabinet papers that the Minute summarises are always the outcome of policy work by the instructing department, even if the original impetus for proposing the legislative change came from the Minister rather than from the department itself.

Regulations are a little different. They are the result of prior decisions of Parliament itself, which has envisaged that certain kinds of enactments will be acceptable to it, and do not need to be brought before Parliament again in the same way as a new bill must be. Regulations must meet whatever criteria Parliament has decided upon in the legislation that empowers the making of the regulations. In New Zealand, the regulations will be looked over by one of the committees of Cabinet before the regulations are finally made, and then again by a committee of Parliament after they are made. Thus the specific policies that result in regulations are constrained by the empowering legislation and to a large extent have already been developed long before any drafting instructions for them are written. But still there is always in the immediate background further recent policy work that has been done before any drafting instructions are issued in relation to regulations.

Both bills and regulations make changes to the law as it exists. Policy expresses what the government has decided that the law ought to be.

In summary, for legislative drafters, policy is the expression of the practices of government or administration, in the form of instructions that we receive and that, once drafted and enacted, will give effect to the actions that the government has decided upon as those it wishes to carry out.

What is legal advice, and from whom does it come?

To develop sound policy, policy advisers call upon legal advisers to assist in the process. Legal advisers may not be as skilled as policy advisers in weighing various public interests in the balance, but they bring invaluable skills. For example, legal advisers are able to say with some authority what the law is now, not just in terms of what is in statutory law at present, but also the meaning of the statute as elucidated in any relevant judicial decisions.

Legal advisers can also draw attention to any overlying or underlying legal principles that may pertain to the particular matter. In New Zealand, we have an expert Legislation Advisory Committee that offers its views on proposed legislation, usually after a bill is introduced to the House. It publishes guidelines on the process and content of legislation,[3] and these contain useful checklists for departments to consider when they are developing proposals for legislation. For example, the guidelines suggest giving thought to whether the *Interpretation Act 1999* has been considered, whether the common law has been considered, and whether there are any international obligations and standards relevant to the legislation.

The guidelines also require people involved in the preparation of legislation to consider whether the policy objective has been clearly defined, and whether consideration has been given to achieving the policy objective other than by legislation. So the guidelines are of use to policy advisers as well as to the legal advisers involved with the proposed legislation. But many of the questions posed by the checklists in the guidelines are more easily answered by legal advisers than by policy advisers.

Legal advice is often advice about what the law is; but, like policy, legal advice is also concerned with what the law ought, and ought not, to be. And this is so whether the legal adviser is a departmental one, helping to develop policy and eventually drafting the instructions that go to the legislative drafter, or whether the legal adviser is the legislative drafter, looking at the law that he or she is drafting and considering how, for example, it is to fit with the rest of the law. Any conscientious legal adviser cares very much about what the law ought to be.

A legislative drafter's role

On receiving good or (ordinarily) poor instructions

The legislative drafter is required to give effect to the government's policy decisions by drafting the instrument that will turn the current law from what it is now into what it has been decided that it ought to be. It follows, therefore, that in no way is it part of the legislative drafter's brief to decide what the law ought to be. That is where the line is drawn, and yet it wavers.

[3] See http://www.justice.govt.nz/lac/index.html for the latest version of the guidelines.

With any luck (from the point of view of the legislative drafter), it is a legal adviser working in the department that administers the relevant law who writes the drafting instructions for a bill. Ideally, the legal adviser has considered, before writing the drafting instructions, all the legal aspects of the policy and any legal questions that may be raised by the instructions, and in turn has already gone back to the policy advisers with any queries that arise during that process to clarify just what the policy seeks to deliver.

Even with good instructions that set out to address all the legal questions a drafter may have, and that are otherwise clear and helpful, there are often gaps. There may be outstanding issues that were not spotted by the departmental legal advisers, or unintended ambiguities. Identifying the gaps often happens just as a result of the new perspective brought to the proposal by the legislative drafter; working out of the details also occurs during drafting, so that a legislative drafter returns time and again to the instructor.

A good instructor is generally the determining factor in whether or not a drafting job is going to go well for the legislative drafter, or not so well. Even if the job is complicated, or has to be carried out under great time pressure, or the policy has not been well developed, a collaborative and courteous instructor will usually make all the difference necessary to enable the result to be achieved smoothly and with relatively little stress for the legislative drafter and perhaps the instructor too. And this is especially apparent given the iterative process of drafting with its frequent exchanges between drafter and instructor.

A good instructor can convert initially poor instructions into perfectly adequate ones with a little prompting. Part of the process of doing so is the dialogue between the instructor and the legislative drafter. A good working relationship helps both instructor and drafter, and that is so even if the instructor is a departmental policy adviser rather than a legal adviser.

A policy adviser who provides drafting instructions commented to me that she had found the following to be the case: if there is a good working relationship between instructor and drafter, the line between advising on policy and legal issues can become a little blurred. A legislative drafter may express opinions on policy issues and those who develop policy may have views about how to achieve the desired legal outcome, even though that is normally the preserve of the legislative drafter. This flexibility has advantages: if the line can be stepped over, problems can be headed off before they happen, in the experience of that instructor. However, policy and legal advisers (including drafters) must on some occasions go back to their own clear side of the line and their usual roles. If the advisers and drafters do not have a close working relationship, then they tend to stay more in their own particular roles and this can be counter-productive, in the view of my instructor colleague.

When there is the flexibility described by my instructor colleague, it seems that the legislative drafter does help to decide what the law ought to be. The objective is a law that fits well with basic legal principles and the rest of the relevant law, as well as achieving the policy objectives articulated and approved by Cabinet. There can be adjustments to the

policy along the way and it may be that the instructors return to Cabinet to obtain agreement to additional or modified policies.

In summary, with good instructions, a good instructor, or both, most drafting problems can be worked through quite readily. On occasions in the process, the line may waver or be stepped across. The roles of each participant in the process are understood and respected by all and adhered to when it counts, but the possibility of a flow of ideas and a constructive problem-solving approach is retained.

On being invited to step into the policy whirlpool

It can happen that an instructor can invite the drafter to provide policy advice. For example, instructions may require the drafting of a new offence, but be silent on the penalties required.

In that case, the drafter must return to the instructor for further instructions. But on occasion an instructor will ask the drafter what he or she thinks would be appropriate. The furthest a drafter can go is to refer the instructor to the relevant legal principles and similar offences and penalties in related legislation, whilst making it clear that the decision is one of policy and not for the drafter. The drafter may have strong views on how the law ought to be, but a drafter cannot try to fill the gap in the instructions without reference to whoever is deciding the policy, nor should a drafter be the person responsible for the final policy decision.

Select committees also are inclined on occasion to ask Parliamentary Counsel for what amounts to advice on policy matters. Again, the nature of these requests needs to be identified on the spot and this kind of request should be referred to the policy advisers present at the select committee.

So when a legislative drafter is asked to become the policy maker, it is especially important that the drafter recognises the situation and eschews any temptation to become the one who decides what the law should be. It is a time to keep firmly on the legislative drafter side of the wavering line.

In unusually hard cases

Some situations that legislative drafters may face in regard to the line between policy and drafting are unusually difficult, but fortunately rare, in New Zealand at least. These are situations where there is a policy expressed in instructions that is in conflict with basic legal principles. For example, it may propose a penalty that is clearly disproportionately harsh in relation to any penalty that already exists for very similar offences. This kind of situation can raise a moral dilemma for legislative drafters.

It is not unusual for a policy to be one that a legislative drafter disagrees with personally. That is how these things go in a democracy and no reason at all of itself to raise any objection to instructions. It is hard to imagine a drafting office functioning at all if drafters

had to agree with the policies of every government of the day. It is more unusual to receive an instruction to draft legislation that the drafter considers is in conflict with his or her own moral values, but is otherwise not legally exceptionable. If this conflict is severe, the drafter can ask for the drafting job to be reassigned to another drafter.

When a policy raises legal issues such as a basic conflict with legal principles the matter of itself is not purely one of policy. It is just as much one of legal advice. If a government seeks to disenfranchise a large part of its population, to reintroduce the death penalty or imprison people for non-criminal behaviour, legal advice must be given that these policies are legally unsound. The objective is a modification of the policy until it falls within the bounds, or not so far outside them, of currently accepted legal principles. With legislation, radical departures from current principles set poor precedents for the future.

Of course, there can be an overlap to the drafter between legal wrongness and personal morality: one may believe it is morally wrong to participate in the making of a law that conflicts to an unacceptable degree with fundamental legal principles. If the stratagems to help modify the policy fail, the drafter must decide what his or her action should be.

What do you do if you must develop policy and provide legislative drafting?

In New Zealand, there are policy development experts in each department and Ministry. We also have our separate Parliamentary Counsel Office, and those of us who are Parliamentary Counsel have a clear function: to provide legislative drafting. We draft Acts and regulations for all of New Zealand. It is well understood that we do not engage in the policy development process. And we do not need to as there are always other people ready and available to do that.

Not all other Commonwealth legislative drafters are in the same situation as we are in New Zealand. Legislative drafters in other countries may be required to carry out several different functions. This may be because there is not enough work for a legislative drafter to do whatever drafting is required as a full-time job. So a drafter may have other functions and these could include acting as a prosecutor, helping in the day-to-day running of a department or Ministry, or providing legal advice to Ministers as part of the process of the development of policy. Or there could be a great deal of drafting to be done, but still a legislative drafter may be required to undertake other types of work as well, just because there are insufficient funds to employ an ideal number of people to do all the work that is needed.

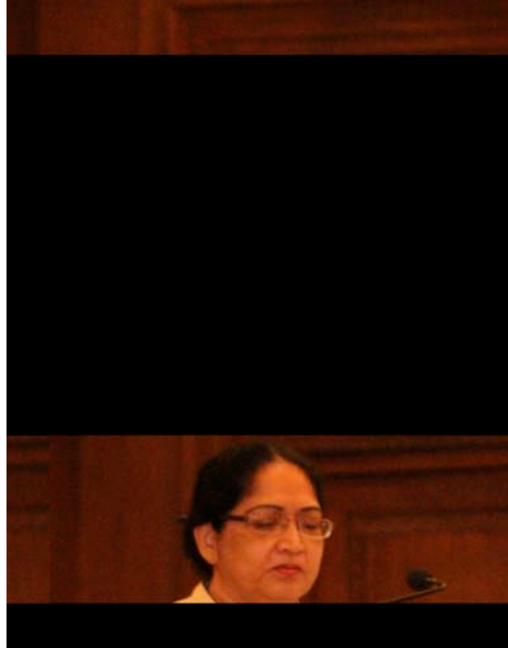
If legislative drafters are required to supply policy advice, legal advice and drafting, then they have to accept the realities of their situation. However, it is worth recalling the different nature of the functions and what is required for each. A person who is developing policy as a policy adviser is engaging in that discipline, weighing competing policy interests, considering the wider interests of the government, and carrying out the other aspects of that role, so as to arrive finally at decisions about what the law ought to be.

When a person is acting as a legal adviser engaged in policy development, the role is ancillary to the development of sound policy. When a person is acting as a legal adviser providing drafting instructions, the task is to translate policy into the form that will enable the legislative drafter to understand what needs to change in the law as it is at present and what the law needs to become. Legislative drafters provide the means to turn the law from its current version to what it ought to be, according to decided policy.

In the situation where a person who is a legislative drafter is also required to undertake roles that are additional to, and different from, the role of a legislative drafter, the line between policy development and legislative drafting will be drawn differently, or at least the person may find himself or herself on different sides of the line according to the functions he or she is performing at the time. The authority and requirement to give policy advice are distinct from the requirements of the drafting role, but maintaining an awareness of the nature of each function will enable each role to be carried out in a way that retains clarity of purpose.

The Wavering Line between Policy Development and Legislative Drafting

Therese Perera[1]



Abstract:

This article looks at the role of legislative counsel in terms of the centralized legislative drafting model used most widely in Commonwealth countries, particularly in Sri Lanka. This model is premised on a distinction between policy development and legislative drafting. This article accordingly considers the benefits of this model and the challenges of maintaining it as well as the related questions of what are good drafting instructions, how can policy officials be instructed on preparing them and should the legislative counsel sit in with the policy makers or should they act as a third party facilitator of the people's will through the legislature?

Introduction

I am grateful the hon. Gentleman for the tribute that he has paid to Parliamentary Counsel. The Government -- and, in that sense, the House -- gets an absolutely first class service from these people, who are a somewhat insufficiently sung part of the legislative and the governmental process.[2]

Since it is the legislative counsel who is responsible for drafting legislation, and since it is this same legislative counsel who is subject to the many constraints of the present day in carrying out this job effectively and efficiently, I thought this quotation would be apt to

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[1] President's Counsel, Legal Draftsman, Department of the Legal Draftsman, Sri Lanka.

[2] Leader of the Government in the House of Commons (Mr. Newton), *House of Commons (UK) Debates*, July 11, 1996, column 635.

make all of us smile broadly and remember that there are people who do recognise and pay tribute to legislative counsel and their very complex job of drafting of legislation, and more so when the policy behind modern day legislation is obscure and the finished product (Act) may very well reflect the policy as understood or interpreted by the legislative counsel and not that intended by the Executive!

In order to be able to understand the *nuance* involved in the topic that is before us today, we must firstly delve into the history of 'what is policy', 'why policy is important' and 'whose policy is it that we are talking about'. As a legislative counsel with over 36 years of experience in the field of legislative drafting, to me policy, which is the basis of all legislation of a country, is the engine which powers the job of a legislative counsel.

Policy

Policy can be explained as the manifestation of an objective. The use of the word "policy" by a legislative counsel is therefore intended to mean the objectives of the governing party of a State in relation to each distinct legislative proposal enunciated by it. These objectives are described as the policy for which the executive gives its approval and which is then required to be transformed into law in order that the governing party may then implement such laws and thereby prove to the general public, which is its electorate, the soundness of the policies expressed in its election manifesto. Indeed there are religious policies, social policies, political policies, economic policies, education policies and so on, which are born out of election manifestos and which are paraded by the would-be parliamentarians to convince the voting population of a country into voting for a particular political party at a forthcoming election. As such, policy is a tool and even at times a weapon in the hands of politicians, administrators and governments the world over.

It is therefore correct to say that the primary function of a legislative counsel is to transform governmental policy into understandable and implementable laws: to be responsible for the preparation of primary legislation. Thus in relation to a Government in a parliamentary state, the onus of making policy and manifesting such policy rests with the Executive arm of the Government.

Here I digress for a brief moment to recall the Doctrine of the Separation of Powers, which is the backbone of the Westminster system of Government and which is also applicable to Sri Lanka. The main feature of this system is the compartmentalisation of the three main arms of governance or the holy trinity of good governance: Parliament, the Executive and the Judiciary. The function of the Executive is to conceive/make policy and manifest such policy; the function of Parliament is to enact legislation giving effect to such policies; the function of the Judiciary is to interpret the legislation enacted by Parliament on the basis of the policies conceived/made and manifested by the Executive.

Thus the policy relating to any subject which needs the attention of the legislature will, once approved by the Cabinet of Ministers on the basis of the Cabinet memorandum and

the accompanying explanatory notes prepared by the relevant Ministry, be forwarded to the Office of Legislative Counsel for the commencement of the process of drafting the required legislation. Here the Executive is playing its role in the legislative process by identifying and approving the policy underlying the proposed legislation. The legislative counsel is then required to prepare the draft legislation in accordance with the approved policy in order that the Legislature may proceed to enact it as an Act of Parliament and make it implementable. Thus we see very clearly that modern day legislative drafting in most parliamentary jurisdictions the world over is expected to be premised on a clear distinction between policy development and legislative drafting.

Drafting

Now that I have explained the position that "policy" enjoys within the scope of the functions of a drafter, I will proceed to discuss the importance of this "thing" which is labelled "POLICY". The process of drafting begins with the arrival of the Cabinet decision in respect of a particular subject at the Office of the Legislative/Parliamentary Counsel. This is accompanied by the relevant Cabinet memorandum, which is what is called the policy document and any other documents which are relevant to that particular subject. These documents then are the starting point of the drafting process, which has to be carried out in terms of the provisions of the Constitution of the country and any other administrative rules or regulations which may be issued in that regard by the Cabinet.

A careful study of the Cabinet memorandum is then made by the particular drafter who by this process, prior to putting pen to paper to start drafting, ought to have been able to understand/identify –

(1) the new concept in respect of which legislation is sought to be introduced;

(2) if not a new concept, then, the scope of the amendment needed to introduce a new concept into the law, the wrong sought to be rectified, the actions done without legal sanction to be validated, the immunities to be granted and so on;

(3) the manner of setting about writing the required legislation in order to best address the requirements of the Cabinet memorandum.

If the drafter has attempted and done what I have enumerated above, then it can be said that the drafter has understood the scope of the policy of the memorandum and is now in a position to write the required legislation in order to address the concerns of the particular Ministry.

But sadly today, the process of understanding a present day Cabinet memorandum and embarking on the drafting process is not so straightforward as it was a decade ago. The drafter is very often placed in a very difficult position in trying to ascertain the policy underlying a particular piece of legislation which he or she is required to write in pursuance of the Cabinet memorandum.

There are many reasons for this difficulty and this is the point at which we see the distinction between the wavering line between policy development and legislative drafting becoming more and more indistinguishable and then becoming almost non-existent in certain cases.

Most present day Cabinet memorandums and related policy papers are not well done, the main reason being that the writers of these documents (at least in Sri Lanka) are more often than not persons who are not lawyers. They lack the understanding of the concept sought to be introduced and therefore cannot explain it properly. Whereas Cabinet memorandums of yesteryear were masterpieces, today's are pale imitations. The writers of these policy documents are administrative officers in most cases who are rotated among the Ministries since they belong to a transferable service. They do not stay long enough in one place to understand the subject assigned to that Ministry and are therefore totally incapable of addressing the issues coherently. At times even if the writers are legal officers we find that they try to see the problem in a different light and therefore do not articulate themselves well in the policy papers in order to be of any assistance to the hapless drafter. In this situation, we see very clearly that the drafter is subject to a number of constraints that can result in the drafting of provisions of the law being less satisfactory than both he or she and the reader of the legislation would like.

What does the harassed drafter do in such a situation, even after several efforts to communicate with the officials and sieve out the main requirements of the policy paper in a sequential and coherent form have proved to be fruitless? The drafter sits down, conceives what he or she thinks are the requirements of the Ministry and then proceeds to write the legislation based on the jigsaw-puzzle-like pieces of the policy which stare out like an unfinished symphony. The drafter then proceeds to fill in the gaps as best as he or she can, and then invites the officials of the relevant Ministry to come for a discussion in order to see whether the draft meets the policy objectives they were seeking. More often than not, the officials are delighted since the draft looks very good and contains much more detail than they had envisaged. This means that they are more than satisfied with the legislative drafter for having stepped into their shoes and extracted the policy for them and for writing the legislation on the basis of such policy.

Today in our jurisdiction it has become a common phenomenon for the relevant line Ministries to obtain the services of lawyers who are not trained drafters and prepare a draft of the proposed legislation in the way that they think it ought to be drafted. These drafts more often than not tend to make it more difficult for the drafter as the relevant officials always say to us, "but we have it stated differently in the draft"! This is a practise which we discourage in every possible manner by insisting that the translation of policy into legislative form is the sole purview of the drafter and the erosion of this function is not tenable. But it is easier said than done, most often because the officials of the relevant Ministry have some concern in the subject of the legislation or have been otherwise convinced by the persons who are "affected" by the proposed legislation.

For most part, the process of drafting of legislation is conducted on instructions of departmental officials/lawyers who are following the instructions of their Ministers, but how accurately they are understand and translate these instruction is yet another matter. The draft legislation is also sent back and forth many a time until each one in turn thinks it is exactly what they want. Then the draft legislation is forwarded to the Ministry concerned, after obtaining the observations of the Attorney General on the constitutionality of the draft legislation, so that the procedure for the enactment of the draft as law can be followed.

Today the question is also asked as to whether the legislative counsel ought to sit in with the policy-makers and assist in the conceptualisation of the policy of legislation, or whether the legislative drafter should act as a third party facilitator of the people's will through the legislature by waiting till the policy (good or bad) is formulated by the relevant officials and then play the role of the devil's advocate and write the draft on the bare skeleton of policy available to him, and then write in words filling in the gaps in the policy and make the skeleton acceptable. To aptly summarize the above I quote the words of Justice VCRAC Crabbe,

> Parliamentary Counsel must have a strong interest in substantive policy. Yet the classic theory is that Parliamentary Counsel do not initiate policy. They are only technicians whose function it is to translate policy into law. But, like the architect or the engineer, they must be brought into the particular problem long before the actual stage of drafting of a Bill. ....They must not seek to initiate policy. Policy issues are the preserves of others. But how does one translate policy without understanding that policy? Herein lies the inevitability of Parliamentary Counsel getting involves in policy considerations. The training given to Parliamentary Counsel, their vast knowledge of the existing law, their experience of the probable consequences of a piece of legislation, all these matters place them on a pedestal from which they have to be consulted on policy issues and from which they need to advise and warn. … Parliamentary Counsel do not usurp the role of the policy maker … they must appreciate their own limitations, learn to submerge their own feelings and thereby act with scrupulous objectivity and integrity. They should not seek to dictate policy … but as seasoned legal advisors they should help to shape policy … a Parliamentary Counsel who is 'deferential, decently reticent, candid and diplomatic can make much policy as a public servant.' [3]

The facts discussed above would have given you a very clear picture of the realities of the present day. That is where the legislative counsel leaves aside the traditional role of a drafter and gets involved in the identification/evolution of policy. In the context of today, I think the question is not whether it is proper or not. It is more correct to say that it is

[3] Ethics of Legislative Drafting, Commonwealth Law Bulletin Vol. 36, No 1, March 2010.

becoming more a matter of necessity and therefore *appears* to justify the fusion of the roles of the policy maker and the drafter in the process of drafting of legislation.

While the traditional debate in legal academia has revolved around the role of the judiciary in developing policy when interpreting statutes of the legislature, considerably less scrutiny has been focused in the direction of the very drafters of the words which are the subject of interpretation and the manner in which a legislative counsel can, by getting involved in the evolution of the policy behind legislation, fashion legislation which would reflect not only policy as articulated by the policy maker and understood by the legislative counsel in that light, but would go further and reflect policy extracted by the legislative counel.

Regulatory Impact Assessment

I wish to briefly highlight what is called Regulatory Impact Assessment" (RIA) and which has been introduced by the United Kingdom and many other countries, which is a process of analysis of their proposed legislation. The nature and purpose of Regulatory Impact Assessment (RIA) is that it is a tool which informs policy decisions. In relation to draft legislation, it is an assessment of the impact of the policy option in terms of the costs, benefit and the risks of a proposal.

The contents of a partial/full/final RIA are –

1. Identification of the objectives of the proposal.
2. Identification and quantification of the risks that the proposal is addressing.
3. Explanation on how each option would fit in with existing requirements and a description of the key risks associated with the options and how these could be mitigated.
4. Identification of the sectors affected.
5. Identification of any issues of equity and fairness.
6. Comparison of the benefits and the costs for each option considered in the partial RIA.
7. Positive and negative benefits of the proposed legislation.

Does this mechanism help to preserve the traditional role of the legislative drafter as purely the writer of the legislation or does it perceive a new role for the legislative counjsel? To me it appears that it is a combination of roles and it is left to be seen whether it is something that we as legislative counsel can emulate is our own jurisdictions.

Conclusion

Here are some concluding thoughts on the role of the legislative counsel in preserving the line between policy making and the drafting of legislation.

1. What are good drafting instructions and how can policy officials be instructed on preparing them?

This means that the office of the legislative counsel needs to get involved to a greater extent in the identification of the objectives of legislation and the formulation of the policy based thereon. To avoid this, drafting offices ought to be able to explain/demonstrate to the officials who write policy the importance of writing clear, unambiguous and coherent instructions.

2. What are the benefits of this model and the challenges of maintaining it?

There are pro's and con's in maintaining the line between policy-making and legislative drafting. But the exigencies of modern drafting would sometimes require a legislative counsel to deviate from the traditional role in order to discharge these functions more effectively/efficiently.

3. What are good drafting instructions?

Good drafting instructions mean clear policy papers, setting out clear objectives which are formulated on the basis of a consultative process which involves all the primary stakeholders. You need good government officials to achieve this. But remember that for most of these officials this would most often be their first legislative experience.

4. Whither the doctrine of the "Separation of Powers"?

Dicey and the "theoretical framework" of the separation of powers and the (unseen) role of the legislative counsel in facilitating checks and balances on each organ of State may have to be observed in the breach wherever there is a need to produce a coherent piece of legislation based on inadequately expressed policy.

5. What is a centralised legislative drafting model and what are its benefits?

Most development organizations today have a tendency to draft model legislation on complex areas of law in order to help countries draft legislation in these areas. Donor agencies try to 'convince' the executive of a country that it is far better to adopt the model as the base for the intended legislation. The use of these models tends to make legislation totally different to the pattern adopted by the particular drafting office and also forces the legislative counsel to include standards and concepts which may not be acceptable. The disadvantages of these models could be said to be forgetting/ignoring drafting precedents and the adoption of *ad hoc* provisions.

I would finally refer to the Renton Report of 1975 of the United Kingdom, which states

> In the end the legislative counsel must effect a sensible compromise, so that the legislation deals clearly and concisely with the Government's policy, addressing all such cases as are thought reasonably likely to arise, without confusing the issue by attempting to deal with the improbable or far-fetched. The legislative counsel must bear in mind always the importance of sparing the citizen from litigation that could

> have been avoided *(had the drafting instructions / policy paper been accurately drafted – these words are mine)* by the inclusion of a few additional words, but at the same time he must bear in mind that it will be impossible to formulate cogent policy in relation to matters that are unlikely to arise … the degree to which a compromise can sensibly be achieved *(between a good draft and the lack of instructions – these words are mine)* depends to a considerable extent on the circumstances under which, and the constraints within which, the legislative counsel has to operate.[4]

Therefore, always remember that though it is not the function of legislative counsel to determine legislative policy, the legislative counsel has to make a substantial contribution in rounding out the policy and filling in the details in a proposed legislative draft as there are additional policy matters that may not be known or foreseen until the drafting process is well under the way.

Concluding, I would echo the words of Eamonn Moran: "legislative drafting is still the best legal job going" and "there are many matters which make drafting such an attractive career".[5]

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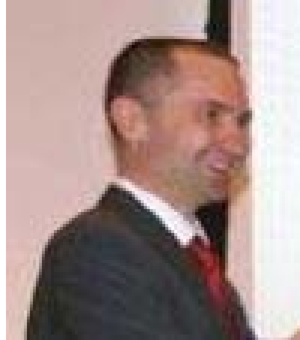
[4] *The Preparation of Legislation*, Cmnd 6053, May 1975.

[5] Eamonn Moran, PSM QC, JP, Commonwealth Law Bulletin Vol. 36 No 1. March 2010.

Human Rights: the Role of Legislative Counsel

Daniel Lovric[1]



Abstract:

This article looks at the influence legislative counsel can have on policy development in terms of human rights. Part 1 outlines recent developments in human rights in Australia. Part 2 provides some general comments about the legislative counsel's role in human rights protection, particularly noting the ad hoc or light-touch approach focusing on particular issues that arise regularly in draft legislation and deferring to human rights experts. In Part 3, the paper suggests how legislative counsel can build on the ad hoc approach and look towards a more systematic approach to human rights issues involving the notions of certainty and proportionality.

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[1] First Assistant Parliamentary Counsel, Australian Commonwealth Office of Parliamentary Counsel. This paper expresses my personal opinions only. Thank you to Paul Argent for looking over a version of this paper and giving helpful comments. I own all errors!

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Introduction

Legislative counsel have a subtle influence on policy development. There have been many articles written on how this influence is exercised.[2] This article looks at a particular example of such influence: namely, the influence of legislative counsel on human rights policy.

Legislative counsel have always had a significant role in human rights protection. It is well accepted that they should comment on issues such as the content of warrant provisions, search and seizure power provisions, information-collecting provisions and the details of criminal offences. Traditionally, legislative counsel are not responsible for policy in these

[2] One example is Stephen Laws, "Giving effect to policy in legislation: how to avoid missing the point," *Loophole*, Special Edition 9 February 2011 at 66.

areas. However, they do scrutinize legislative proposals in these areas – and raise warning flags for the Government to consider further if it wishes.

Two aspects of this traditional role should be highlighted. Firstly, legislative counsel have tended to take an ad hoc approach to human rights. That is, they tend to react to a limited range of issues that have been raised in the past. This approach can be very valuable, as it allows legislative counsel to draw on the collective experience of their drafting office in identifying situations requiring particular scrutiny. For example, a provision that reverses the onus of proof in a criminal offence will always be commented upon by the legislative counsel. In the Australian Commonwealth, this ad hoc approach has led to the creation of a large list of issues that the legislative counsel must refer to other government departments, in particular, the Attorney-General's Department.[3] This list is a valuable distillation of decades of experience in such issues by Australian federal legislative counsel. However, it is ad hoc in nature, and does not purport to deal with relevant issues in a systematic way so far as human rights protection is concerned.

Secondly, legislative counsel deal with human rights issues with a light touch. They have a modest view of their role in human rights protection and tend to defer, in the final analysis, to human rights experts. Legislative counsel play a role at the periphery of human rights protection – not at the centre.

I would suggest that this light-touch approach and this modest view of the legislative counsel's role are quite valuable. It would be dangerous for legislative counsel to move to a central role in human rights protection, without gaining a detailed knowledge of human rights law and practice. It may be that in some jurisdictions, legislative counsel have gained this knowledge. For example, I understand that in both Canada and the United Kingdom, legislative counsel have gained a good basic knowledge of relevant human rights law. This is not surprising given the constitutional status of human rights law in those jurisdictions. Yet, in systems where human rights do not have a constitutional status, I question whether legislative counsel should claim to have more than a peripheral role in human rights protection.

Although legislative counsel should retain their light touch in human rights matters, they should start to think about whether they could improve on the traditional ad hoc approach. The international trend towards human rights protection needs some kind of drafting response: legislative counsel cannot simply cling to traditional methods and procedures in the hope that they will continue to work in the future.

The tension for legislative counsel and human rights should be clear at this point. How can legislative counsel reconcile their modest, light-touch approach with the need for a more systematic approach in their consideration of human rights? How can they do this without

[3] *Drafting Direction No. 4.2: Referral of Bills to other agencies*, Document release 7.1, February 2011: http://www.opc.gov.au/about/drafting_series/DD4.2.pdf (visited 29 May 2011).

overstepping the boundaries of their own expertise, while at the same time providing better service to government?

This paper suggests one way in which legislative counsel can build on the ad hoc approach and look towards a more systematic approach to human rights issues. This is the subject of Part 3 of the paper, which takes recognized human rights methods of analysis and considers them from a legislative counsel's perspective. Before moving to this discussion, however, Part 1 of this paper outlines recent developments in human rights in Australia. Part 2 of the paper provides some general comments about the legislative counsel's role in human rights protection.

Part 1 – Human rights protection in Australia: recent developments

It is not the purpose of this paper to describe the robust debate about the desirability of a Bill of Rights that has taken place in Australia over the last decade. Australia is one of the only developed countries without a Bill of Rights at the level of central government. However, Australia already has a very high level of human rights protection. The federal legal system includes many effective human rights safeguards. The central question in the debate is whether human rights protection is better served by the existing system, or could be improved by the addition of a formal Bill of Rights.

Although there is no Bill of Rights in Australia at the level of the central government, there are 2 regional governments with such Bills. The Australian Capital Territory has its *Human Rights Act 2004*, and the State of Victoria has its *Charter of Human Rights and Responsibilities Act 2006*. We have now seen the first trickle of decided cases under these two Acts, including the first two declarations that legislation is incompatible with protected human rights. One of these cases, from Victoria, is currently on appeal to the High Court of Australia.[4]

It is in the light of these developments that the Federal Government introduced into Parliament the Human Rights (Parliamentary Scrutiny) Bill 2010. The Bill lapsed with the announcement of the 2010 Federal election, but was reintroduced into Federal Parliament with the re-election of the Government. It is unclear at the time of writing if and when the Bill will pass both Houses of the Parliament (keeping in mind that the Government controls neither of those Houses).

The Parliamentary Scrutiny Bill is not a Bill of Rights, although it contains some features typical of a Bill of Rights. It does not contain an enunciated list of human rights, but rather refers to human rights set out in international instruments. For the purposes of the legislative counsel, the most relevant of those instruments is the *International Covenant on Civil and Political Rights*. The Scrutiny Bill also does not propose to grant any jurisdiction to

[4] *Momcilovic v R* (2010) 265 ALR 751 (CA Vict.). The other case is *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (ACT Supreme Court).

a court to implement human rights, and accordingly contains no post-passage procedure for declarations of incompatibility. However, as I will discuss below, the Scrutiny Bill does set up the familiar pre-passage procedure of declarations of compatibility by the executive.

The Parliamentary Scrutiny Bill proposes to set up a Parliamentary Joint Committee on Human Rights, with a statutory mandate to scrutinize bills and proposed legislative instruments for their consistency with human rights. This would build on the current practice of the non-statutory Parliamentary committees on scrutiny of bills and regulations.[5] However, those non-statutory committees deal with many more issues than just human rights, and one might expect the proposed statutory committee to therefore bring a more concentrated spotlight on human rights issues.

The provisions setting up the statutory joint committee on human rights are complemented by other provisions setting up a pre-passage procedure for declarations of compatibility by the executive. This familiar process, contained in the human rights legislation of many other jurisdictions, requires the executive to publish a statement of compatibility to accompany every proposed Bill or legislative instrument. In the case of the Parliamentary Scrutiny Bill, it seems likely that these statements will be contained in the explanatory memorandum to the proposed legislation. Failure to comply with this procedure will, however, not affect the ultimate validity of the legislation if it is passed by the Parliament.

These aspects of the Parliamentary Scrutiny Bill have provoked some discussion within Australian Commonwealth drafting offices. The Bill has squarely raised the issue dealt with by this paper, namely, how legislative counsel should position themselves to deal with human rights issues. It is unclear at this point exactly what role legislative counsel will play, although one would expect that they will retain their role at the periphery of the human rights system. It is also noteworthy here that the Commonwealth Attorney-General's Department already contains a human rights branch, staffed by human rights specialists. Yet the Parliamentary Scrutiny Bill raises the question of how legislative counsel can better assist the Government, the Parliament and the general community in dealing with human rights issues.

Part 2 – Legislative counsel's role in human rights issues

As mentioned in the introduction, it is not the purpose of this paper to look at the general role of legislative counsel in dealing with policy issues. However, human rights raise particular issues relating to this general role. This Part discusses 2 such issues: the distinction between highly visible and less visible legislative proposals, and the technical ability of legislative counsel to deal with human rights law. As we will see, both issues

[5] Currently, the Senate Scrutiny of Bills Committee examines proposals for primary legislation, while the Senate Standing Committee on Regulations and Ordinances examines proposals for secondary legislation.

suggest that legislative counsel can and should play a limited but important role in protecting human rights.

Two types of proposals: highly visible and less visible

When legislative counsel deal with a proposal for legislation affecting human rights, the proposal generally falls into one of two categories.

The first kind raise *big picture, highly visible, politically controversial issues*. Examples include proposals for anti-terrorism measures, immigration rules, laws on the protection of indigenous peoples, etc. These kinds of proposals gain wide attention across the community. They attract the personal attention of politicians, they hit the front page of newspapers and they are the subject of comment by many human rights specialists. I suggest that legislative counsel have a significant, but peripheral role to play in the human rights protection system in respect of these kinds of proposals. The relevant issues are already the subject of expert discussion and public debate.

Legislative counsel still have a role in dealing with these big picture proposals. However, this role is not so much focussed on protecting human rights, but is rather focussed on the more traditional drafting goals of ensuring constitutionality and conceptual coherence.

The second kind of these proposals raise *small picture, less visible, politically less controversial issues*. Typically, these issues are raised by secondary provisions in legislation – the kind that provide the mechanics for implementing the details of a big-picture proposal. Examples of these kinds of issues include the details of criminal offences (onus of proof, mental element, etc.), search and seizure powers, warrant powers, information-collecting powers, etc. In many cases, the only people scrutinizing the content of such provisions are members of the bureaucracy.

In the case of such small-picture issues, I suggest that legislative counsel have a major role to play in human rights protection. Politicians, the media and human rights specialists may not be aware of the issues involved, or may be fully occupied with other issues. In some cases, the only person able to scrutinize a small-picture proposal from a human rights perspective will be the legislative counsel. It is his or her duty in such cases to provide such scrutiny. Nevertheless, even in these cases the legislative counsel cannot play the role of human rights protector. Rather, the legislative counsel must maintain a light-touch approach: he or she can only wave a warning flag to the government. It is the prerogative of the government to heed or ignore such a warning. Admittedly, a warning can be given with varying degrees of intensity! Furthermore, it would be very rare for a government simply to ignore a clear warning.

So we can see that the legislative counsel’s role in a human rights issue expands as the political prominence of the issue decreases. A highly prominent issue will be covered by the scrutiny of politicians, human rights specialists and public opinion. An issue with little or no prominence will not have this comprehensive external scrutiny: here the legislative

counsel will become more active so as to cover some of the scrutiny gap. However, even in the latter case, the domain of the legislative counsel is a limited one. The legislative counsel holds up a light to policy problems (and obvious solutions), but deliberately refrains from becoming an active human rights advocate.

The ability of legislative counsel to deal with human rights law

The limited role of the legislative counsel is often a function of the extent of his or her knowledge of human rights law. This law can be complex in its details. A human rights lawyer usually has to deal with a national Bill of Rights, several international treaties as well as a large body of case law at the national and international level. An introductory text on human rights law usually runs to a couple of hundred pages. I suspect that in many drafting offices, there would be no expectation for counsel to read such a text. Interestingly, however, some drafting offices appear to place higher expectations on their counsel to master the basics of human rights law.[6] Nevertheless, many legislative counsel do not have the time or inclination to become human rights experts.

In many larger jurisdictions, such as in the Commonwealth of Australia, legislative counsel can rely on the advice of dedicated human rights experts. In smaller jurisdictions, the legislative counsel may be "multitasking", playing both the legislative drafting role and a human rights advisory role. My comments here about the limited role of legislative counsel in human rights issues may appear strange to those "multitaskers". However, one can see the role of legislative counsel in the larger jurisdictions as being a kind of ideal type: the role of the legislative counsel unencumbered by other responsibilities.

Despite the limited time available for legislative counsel to study human rights law, and despite the availability in larger jurisdictions of specialized human rights advice, it is useful for legislative counsel to have a basic working knowledge of human rights law. It is possible for them to gain this basic working knowledge without a huge investment in time and training. There are a number of reasons for this possibility.

Firstly, only a small slice of human rights case law affects the day-to-day work of legislative counsel. Most human rights case law deals with the application of legislation or executive power in a particular situation. These kinds of cases do not deal with the abstract, generalized issues concerning legislative counsel. It is only a small proportion of human rights case law that deals with these more abstract issues of the general consistency of legislation with human rights standards. Furthermore, one does not need to read a great many of these "legislative consistency" cases to gain a solid understanding of the underlying legal analysis (this analysis is outlined in Part 3 of this paper).

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[6] For example, I understand that legislative counsel working for the federal government of Canada would be expected to have a solid basic knowledge of Canadian human rights law. This may be a function of the constitutional status of human rights law in Canada.

Secondly, only a handful of human rights are generally relevant to the day-to-day work of legislative counsel. Two rights in particular are relevant here: the right to a fair trial and the right to privacy.[7] I estimate that these two rights make up about 90% of a legislative counsel's human rights workload.[8] Most other human rights, while important, rarely occupy a legislative counsel's time. Rights such as the right to life, the prohibition of torture, the prohibition of forced labour, the right to vote, the freedom of assembly, the freedom of association and the right to found a family usually arise in the context of politically controversial, big picture issues. Accordingly, these are the kind of rights that are unlikely to demand a lot of attention from legislative counsel.

Therefore, despite a traditional reluctance for legislative counsel to become involved in human rights, it is no objection to say that there is no time or opportunity for them to understand human rights law. The basic outline of human rights law, as it applies in the day-to-day work of legislative counsel, can be mastered without a huge educational program. Indeed, it is possible to set out such a basic outline – in a useful, practical way – quite succinctly. The next part of this paper is an attempt to do this.

Part 3 – A standard framework for legislative counsel to deal with human rights

Introduction

This Part sets out a concise outline of human rights law and principles for the purposes of the work of legislative counsel. The main purpose of setting out this outline is to demonstrate the relative ease with which legislative counsel can gain a practical working knowledge of human rights law.

This outline is not original, and is based on the methods of courts in decided human rights case law. Nevertheless, different courts use slightly different methods and may vary these methods depending on the kind of case concerned. Furthermore, different judges may use different terminology to describe the same concept. This should be no deterrent to setting out a generalized outline of their method. In each case, one can see common elements in their analysis.

[7] These general rights cover a number of more specific rights, including: the right to a hearing by an impartial and independent tribunal established by law, the right to a hearing within a reasonable time, the right to remain silent, the presumption of innocence, the prohibition of retrospective criminal law, the right to legal representation, procedural rights in search and seizure, the right to data security (in collection, storage and use) and legal professional privilege. The grouping of these specific rights under the general rights of "right to a fair trial" and "right to privacy" follows the structure of the International Covenant on Civil and Political Rights and the European Convention on Human Rights. It may be that they are grouped under different general rights in other human rights instruments.

[8] At the 2011 CALC conference, I had this idea confirmed by one legislative counsel from a European jurisdiction, who said that if he could remember the details of any rights in the European Convention, it would be those in article 6 (fair trial) and article 8 (privacy). Another counsel who read over this paper also suggested that the right of non-discrimination might also be a fairly frequent issue.

The most basic concept in human rights case law is the distinction between intrusion and breach. An ***intrusion*** into a human right exists where the protected area of the right has been trespassed upon. But an intrusion into a human right is not necessarily a ***breach*** of that right. If an intrusion can be ***justified***, there is no breach of the right.[9] For example, a statute authorizing the collection of personal information clearly "intrudes" into the right to privacy. But just as clearly, such an intrusion can be justified (for example, to provide national statistics) and is therefore not necessarily a breach of that right.

It is said that some rights are absolute, and that an intrusion into such a right always amounts to a breach. For example, it is sometimes said that the right to a fair trial is absolute in this way and that any derogation from the fair trial standard is always a breach of the right. This may be a nice question for human rights specialists.[10] However, for practical purposes, the distinction between intrusion and justification still applies. Even if the fair trial standard is an absolute one, one still has to determine whether regulations or limitations on trials are "fair". This is normally a matter of asking whether such regulations or limitations are justified. Thus the distinction between intrusion and justification, in a practical sense, is still relevant in respect of the right to a fair trial.[11]

In most cases, it is relatively simple to determine whether a legislative proposal ***intrudes*** into the protected area of a human right. Such an intrusion exists, in most cases,[12] where there is any interference at all in the protected area.

This means that the issue most faced by legislative counsel is that of ***justification***. For this reason, they should be able to form an initial view as to whether a particular interference can be justified or not. The question of justification is not an open one, relying simply on instinct and gut feeling. Rather, it is a structured question built on two separate issues. Firstly, for an intrusion to be justified, it must be based on ***sufficiently certain*** law. Secondly, for it to be justified, it must also use means ***proportional*** to its purpose.[13] This

[9] As mentioned earlier, different judges use different terminology for dealing with this issue. For example, some judges may use the term "breach" in the sense of an intrusion. This does not affect the underlying analysis described here. If one uses "breach" in this sense, one might say that a "breach" that is justified is nevertheless consistent with the relevant human right.

[10] C. Grabenwarter, *Europäische Menschenrechtskonvention*, 4th edn. München, CH Beck, 2009 at 110.

[11] Ibid, at 123.

[12] Admittedly, there are some cases where the intrusion issue can be quite difficult to determine. For example, the International Covenant on Civil and Political Rights definition of the right to privacy (in article 17) only protects against "arbitrary" interferences. Determining whether a particular regulation interferes with privacy is relatively easy. However, determining whether this interference is "arbitrary" can involve difficult questions: see *WBM v Chief Commissioner of Police* [2010] VSC 219.

[13] The breakdown of the justification process into the elements of certainty and proportionality follows the structure of the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

means that legislative counsel are mostly concerned with the issues of certainty and proportionality. It is worth spending some time unpacking the meaning of these two concepts.

Certainty analysis

If a law intrudes into the protected area of the human right, it can be justified only if it achieves an adequate degree of certainty. This degree of certainty will depend on the context of the law. In particular areas of regulation (such as criminal law, court jurisdiction, search and seizure and surveillance etc.), the degree of intrusion into human rights is usually quite substantial. This means that laws in these areas of regulation need an above-average degree of certainty in their operation. In other words, the more intrusive the law, the more certain it needs to be to provide a sufficient justification for human rights purposes.[14]

Legislative counsel are familiar with the danger signs in the certainty context. Firstly, a law that provides only vague concepts is in danger of being insufficiently certain. We are all familiar with criticisms of criminal offences that are too broadly drafted. Secondly, a law that leaves important aspect of regulations to delegated rules is also in danger of being insufficiently certain. Part of the certainty requirement is that the primary level of legislation in itself must provide a minimum level of guidance.[15] Thirdly, wide administrative discretions in a law may indicate a lack of certainty. If a legislative proposal involves any of these three kinds of issues, legislative counsel should be wary of the possible consequences in respect of human rights. Such issues will make a legislative proposal harder to justify for human rights purposes.

It is useful to give some examples of the certainty requirement at this point. Let us have a look at two classic cases decided by the European Court of Human Rights.

In many jurisdictions, the national Bill of Rights appears to have a different structure (e.g, with basis in law and certainty being separate issues).

However, at a more fundamental structural level, the justification process is pretty much the same under all human rights instruments. The ICCPR and ECHR structures are a handy way to describe this process.

[14] For a detailed discussed, see D. Lovric, *Deference to the Legislature in WTO Challenges to Legislation*, Kluwer, 2009, Chapter 8.

[15] In many jurisdictions (such as Australia), this proposition is not a mature legal rule. However, cases like *Malone* (see text and note 16) show that international human rights law has already moved a long way in accepting the proposition. The proposition is a well-accepted constitutional rule in Germany, Austria and Switzerland.

The first of these cases is *Malone v UK*.[16] Mr Malone was charged with handling stolen property. He was acquitted. He later claimed the police had intruded on his right to privacy by tapping his phone calls. At the time, UK phone tapping laws were a mix of executive power, administrative practice and widely drafted statute law. The European Court of Human Rights found the intrusion could be justified in theory, but that the legal basis for it in UK law was too uncertain:

> ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ... the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.[17]

This case illustrates several points about the certainty analysis. Firstly, phone tapping laws constitute a clear and deep intrusion into the protected area of the human right to privacy. This means that any phone tapping law needs to achieve an enhanced degree of certainty of operation. Secondly, the general standard of certainty (the application of which may vary in particular circumstances) is based on the ability of citizens to understand the law.[18] Thirdly, it is a dangerous practice for a government to argue that administrative practices provide sufficient certainty. In the case of deep intrusions into a protected area of a human right, a minimal degree of certainty of operation needs to be demonstrated in the primary legislation itself.

The second case is *Sunday Times v UK*.[19] The Sunday Times proposed publishing an article about a drug that was the subject of litigation. The Attorney-General obtained an injunction restraining publication – as publication would constitute a contempt of court. The Sunday Times claimed that this intruded on its freedom of expression. The intrusion was justifiable, but was the power to issue an injunction set out clearly enough? The Court held as follows:

> ... a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in

[16] [1984] ECHR 10.

[17] Para. 67.

[18] This principle is reflected in Australian law about the validity of delegated legislation. "A by-law must be certain in the sense that it must contain adequate information as to the duties of those who are to obey": Williams J in *Brunswick v Stewart* (1941) 65 CLR 88 at 99.

[19] [1980] ECHR 6.

> its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. [20]

One can draw the following lessons from this decision. Firstly, one needs to moderate the idea set out in *Malone* that the standard of certainty is measured against the ability of a citizen to understand the law. In many cases, or perhaps in most cases, it is acceptable to require the citizen to obtain expert advice to understand the law. That is, legislation may achieve the necessary degree of certainty even if it can only be understood by experts. However, this idea should not be taken as an absolute rule. Where it is possible to express an intrusive law such that the ordinary citizen can understand it, human rights law may require the law to be expressed in this way. Secondly, certainty need not be absolute. This should be a relief to most of us! Instead, a law that intrudes into human rights need only be as certain as it reasonably can be. Admittedly, there is a large degree of judgment involved in deciding what is a "reasonable" level of certainty.

Any legislative counsel reading the previous discussion will be struck by the familiarity of issues relating to certainty. An analysis of certainty in the human rights context raises issues that are part of their day-to-day work. This suggests that the certainty aspect of human rights analysis should pose few problems for an experienced legislative counsel.

Proportionality analysis

Perhaps less familiar to many legislative counsel is the proportionality aspect of human rights analysis.

In the past, common lawyers often had deep suspicions about the proportionality concept. Perhaps this was because of its origins in the civil law (and in particular, the police law of Germany). Alternatively, this suspicion may have arisen because of the allegedly abstract and formless nature of the proportionality concept.

Today, the proportionality concept has been entirely accepted as a part of human rights law. For example, proportionality is applied in the courts of the United Kingdom, Canada and New Zealand. It is now a firm feature of the common law world.

It is worth stressing that legislative counsel should not perform a deep ranging proportionality analysis. That kind of analysis is best left to parliamentarians, human rights specialists and courts. Instead, legislative counsel should perform a lighter scanning and scrutinizing task, only detecting obvious problems of disproportionality. The role of legislative counsel is to raise warning flags, not to find a better policy. The legislative counsel must also keep in mind that the proportionality concept always gives the

[20] Para. 49.

Parliament a "margin of appreciation" – that is, an area of unchallenged discretion – in determining whether a particular law is proportional or not.

Happily, proportionality involves a highly organized analysis, and is not merely an impressionistic and formless approach. This section sets out the structure of this analysis, with a view to illustrating the ease with which it can be performed by legislative counsel.

Proportionality is commonly broken into three elements:

1. Effectiveness (whether the law achieves its purpose);
2. Optimality (whether there an obviously less intrusive way of achieving that purpose effectively);
3. Balance (whether there is obvious offensiveness).

Different jurisdictions will deal with these elements in different categories. For example, some jurisdictions treat proportionality as covering only the balance issue (otherwise known as "proportionality in the narrow sense"), and treat effectiveness and optimality (often labelled as "necessity") as separate issues. However, at a more fundamental level, any analysis of proportionality will deal with all three elements.

As we will see, it is the optimality part of the proportionality analysis which most concerns legislative counsel in their day-to-day work. However, we will work through all three elements in turn.

A recent case decided in Australia provides a useful illustration of all three elements. Before discussing these elements, it is worthwhile setting out the facts of this case. In *Momcilovic*[21] the Victorian Court of Appeal dealt with a statute that reversed the persuasive onus of proof in a serious drugs offence. While searching Ms. Momcilovic's flat, the police found illegal drugs (in a coffee jar and in the crisper and freezer of a bar fridge). Ms. Momcilovic said she wasn't aware of the drugs (noting that she did have a flatmate). Under section 5 of the *Drugs, Poisons and Controlled Substances Act 1981*, she was taken to be in possession of the drugs unless she "satisfie[d] the court to the contrary". In the decision, this reversal of the onus of proof was seen to be a reversal of the *persuasive* burden of proof. Ms. Momcilovic was convicted of drug trafficking, sentenced to 2 years and 3 months imprisonment. On appeal, she argued that the reverse onus was incompatible with her right to a fair trial. The Victorian Court of Appeal agreed, and issued a statement of incompatibility. The case is currently on appeal to the High Court of Australia.

The main issue in the case was whether the reverse onus provision could be justified.[22] It clearly intruded into the protected area of the right to a fair trial. It could just as clearly be

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[21] *Momcilovic v R* (2010) 265 ALR 751 (Victorian Court of Appeal).

[22] As discussed earlier, there is a theoretical question in human rights law as to whether the right to a fair trial is absolute, or whether it can be intruded upon by rules that are certain and proportionate: see text at footnote 10.

justified, on the basis of the need for special measures to combat the social dangers of illegal drugs. The real issues were whether the reverse onus satisfied the requirements of effectiveness, optimality and balance. Admittedly, the Victorian Court of Appeal did not use these labels in its judgement. However, the fundamental structure of its judgement turned on these issues.

Effectiveness

Effectiveness is a requirement of causality, involving an examination of whether the proposed law will in fact have its desired consequences. It is important to remember that there is no need for complete certainty here. Rather, only a degree of likelihood is required in most cases.[23] It is also important to remember that the primary judge of effectiveness is the Parliament, and not the executive, the legislative counsel or the courts. The primacy of the Parliament here is the consequence of the margin of appreciation doctrine mentioned above.

We can illustrate the effectiveness concept by looking at the *Momcilovic* case. The issue here was whether the reversal of the onus of proof, using a persuasive burden, was *effective* in achieving the purpose of combating drug crime. My own opinion is that the effectiveness criterion (leaving aside issues of optimality and balance) was clearly satisfied here. Reversing the onus of proof clearly makes it easier to achieve drug trafficking convictions. Nevertheless, the Victorian Court of Appeal took a slightly stricter approach, requiring the government to provide evidence of such a causal effect:

> In our view, this was a case where evidence was required. The mere assertion that the reverse onus was essential to the effective prosecution of trafficking offences could never have been sufficient by itself to establish that fact. ... The government party seeking to make good a justification case under s 7(2) will ordinarily be expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision.[24]

This may be a valid approach for a *court* to take, especially in a case like this one where there is a substantial intrusion into the protected area of the right to a fair trial. However, this should not be the approach for *legislative counsel* in examining effectiveness. It is not for the legislative counsel to demand evidence of effectiveness from the government (although they may advise instructing officers to prepare such evidence if human rights issues are raised). For the most part, the legislative counsel merely examines whether a claim of effectiveness is plausible. For legislative counsel, this means that in almost all cases the

[23] There may be some cases where the degree of intrusion into a human right is so clear and so serious that a higher degree of effectiveness is required. This is likely, however, to be the exception rather than the rule.

[24] Para. 146.

effectiveness criteria will be satisfied. It would be odd indeed if a legislative proposal intruded on a human right, but the proposal had little chance of achieving its desired purpose.

Nevertheless, as a matter of rigorous analysis, it is worthwhile for legislative counsel to ask the effectiveness question. Merely asking the question may prompt instructors to consider whether the policy may be achieved by other, less intrusive means. In other words, asking the effectiveness question provides useful context for answering the other two proportionality questions, namely, the questions of optimality and balance.

Optimality

The optimality question is the most practical one for legislative counsel. Legislative counsel should ask whether there are alternative means of regulation that intrude less on the protected human right, while still achieving the desired purpose. If the legislative counsel is easily able to find such an alternative, he or she should warn the government. It is then the government's choice whether or not to respond to this warning.

As with all questions regarding proportionality, the legislative counsel needs always to consider the Parliament's margin of appreciation as providing the basic measure of the legislative counsel's role. The legislative counsel is not in the business of finding the best policy, but rather of identifying cases where there is an obviously better alternative: where the alternative achieves the desired result effectively, intrudes less on human rights and is relatively cost-effective. Clearly, the legislative counsel is not in an ideal position to make such judgements. This explains why the legislative counsel can only point out *obvious* problems with optimality.

The *Momcilovic* case is also a good illustration of the optimality concept. The legislation in question reversed the onus of proof of an offence in order to combat drug trafficking. The reversal of the onus was coupled with a *persuasive* burden of proof placed on the defendant. Was there an obviously better alternative measure that could achieve the same goal as effectively? The main alternative here was to maintain the reverse onus, but coupled only with the less demanding *evidential* burden of proof.

This issue is a fairly common one in jurisdictions with a binding Bill of Rights[25] and there is probably no simple one-fits-all answer to it. However, the extensive intrusion into a defendant's trial rights by such a measure suggests a restricted margin of appreciation for the legislature. Accordingly, courts are likely to engage in a more searching proportionality analysis in such cases. This may suggest a more active role for legislative counsel in warning the government about the human rights risks of reverse onus provisions (particularly when coupled with a *persuasive* onus of proof on the defendant).

[25] *Oakes* [1986] 1 SCR 103 (Canada); *Hansen* [2007] 3 NZLR 1 (New Zealand); *Johnstone* [2003] 1 WLR 1736, *Lambert* [2002] 2 AC 545, *Sheldrake* [2005] 1 AC 264 (UK).

In *Momcilovic*, the optimality question was pre-empted by an admission from a prosecution counsel:

> Far from submitting that the imposition of a reverse legal onus was essential to the task of successfully prosecuting trafficking offences, senior counsel candidly acknowledged that a change from a persuasive onus to an evidentiary onus would make little difference. Pressed by the Court, counsel eschewed any suggestion that a change of the onus from persuasive to evidentiary would make a major or demonstrable difference to drug trafficking prosecutions. As to the need for evidence, he submitted that empirical evidence of the efficacy of the persuasive onus would have been virtually impossible to obtain. It was mere speculation, he said, whether the outcome in a particular trial would have been different had the prosecution not been able to rely on a reverse legal onus.[26]

Once an admission of this kind is made, it seems to me that the optimality question is answered: there is undoubtedly an equally effective and less intrusive alternative (an evidential reverse onus). If the government makes such an admission, it follows that the legislation not only intrudes on the relevant human right, but also breaches it. Such an admission is likely to be rare!

Balance

The balance question will rarely be a major issue for legislative counsel. It is essentially a policy question: is the use of an intrusive measure so offensive that it must be a breach of human rights (even if it is effective in achieving its purpose and is the only way to achieve that purpose)? Thankfully, legislative counsel do not often have to deal with such proposals. When they do, the proposal is likely to be a big-picture issue, gaining the personal attention of politicians, the media and human rights experts.

One might also ask how an "unbalanced" policy can ever be "optimal". Consider a law which allows shopkeepers to shoot shoplifters, if this is the only way to stop them getting away with their loot. The law is effective: it definitely combats crime. The law is also optimal: it only allows shooting as a last alternative. It seems to me, however, that the law is unbalanced. This example is, admittedly, rather theoretical.[27] Perhaps its unlikelihood illustrates the rare nature of the balance question.

[26] Para. 145.

[27] John Mark Keyes pointed out to me that a federal Canadian Bill (C-60 in the 3rd Session of the 40th Parliament) aims to give shopkeepers more flexibility in making citizens' arrests of shoplifters. This appears to be a 'big picture' issue in Canada, with very prominent media attention (e.g., see http://www.cbc.ca/news/canada/toronto/story/2011/04/07/lucky-moose-election.html). The Bill (a.k.a. the "Lucky Moose" Bill, named after a convenience store whose owner detained a shoplifter) may provide an interesting illustration of the interplay of effectiveness, optimality and balance.

In *Momcilovic* the court dealt with balance in a way that supported its findings on optimality:

> ... the combined effect of s 5 and s 72(1) is to presume a person guilty of the offence of possession unless he/she proves to the contrary. That is not so much an infringement of the presumption of innocence as a wholesale subversion of it. It was not suggested on the appeal that either the nature of the offence or the exigencies of prosecution could justify such a step.[28]

An interesting question is whether a legislative counsel should be able to give such an opinion about a legislative proposal. At first glance, the role of the legislative counsel might suggest the use of less powerful language. However, a legislative counsel would be fully justified in warning the government that a court may use such powerful language. Such language could cause the government substantial embarrassment. This kind of warning may be the most useful contribution a legislative counsel can make in discussions about balance.

Conclusion

This paper has been written from an Australian perspective – and this perspective is necessarily coloured by the absence, until recent times, of a formal Bill of Rights in any Australian jurisdiction. Australia's high standard of human rights protection has been achieved to date without such a Bill of Rights. However, recent human rights statutes in some Australian jurisdictions raise questions about the human rights role of legislative counsel in those jurisdictions. So far as the Australian Commonwealth is concerned, the Human Rights (Parliamentary Scrutiny) Bill might provide impetus for legislative counsel to develop new methods for dealing with human rights protection.

Legislative counsel from other jurisdictions may see these issues in a different light. In particular, legislative counsel in jurisdictions with a long-standing Bill of Rights may have already been wrestling with these issues for some time. In some cases, they may already play a substantial role in protecting human rights. Their enhanced role in human rights protection may indicate a future direction for the role of legislative counsel generally.

Whether or not legislative counsel deepen their role in human rights protection, their role will continue to be a light-touch one. Legislative counsel should be very careful about moving into substantial policy debates. Legislative counsel are not legislative gate-keepers, they do not decide which policy gains access to the Parliament. However, legislative counsel can and should notify the government where a proposed policy is likely to violate accepted human rights standards. Legislative counsel have a particularly important role to play here where the policy in question is a secondary one, and is not receiving public attention.

[28] Para. 152.

Legislative counsel can enhance their role here by moving from an ad hoc human rights approach to a more systematic approach. A first step would be to gain a good basic grasp of human rights law – which would not require much investment in time and training. As a result, legislative counsel would be able to carry out a rough analysis of intrusion and justification in the human rights context, and be able to make some conclusions about the certainty and proportionality of proposed legislation. This exercise would pick up obvious human rights problems in a systematic way. Part 3 of this paper demonstrates one possibility for developing a more systematic approach for legislative counsel to deal with human rights.

If legislative counsel can achieve this system, in a light-touch and tactful manner, they are likely to be rewarded for doing so. Legislative counsel are uniquely placed to pick up problems early in the legislative process. When problems are addressed early in the process, they cause a minimum of fuss and political embarrassment. For this reason, seasoned policy officers appreciate early warnings from legislative counsel. If legislative counsel can develop a useful early-warning system in respect of human rights, they will enhance their reputation both within and outside government. In other words, the legislative drafting profession can make substantial gains if it looks towards a more systematic approach to human rights protection.

Human rights are continuing to grow in importance both in the legal and political arenas. This trend is both international and domestic in nature. It is a trend that legislative counsel cannot ignore. Legislative counsel have tended to deal with human rights in an ad hoc manner – and in doing so have made very useful contributions to human rights protection. However, it may be time to review this ad hoc approach, and look to more systematic ways in which they can make such a contribution.