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THE LOOPHOLE

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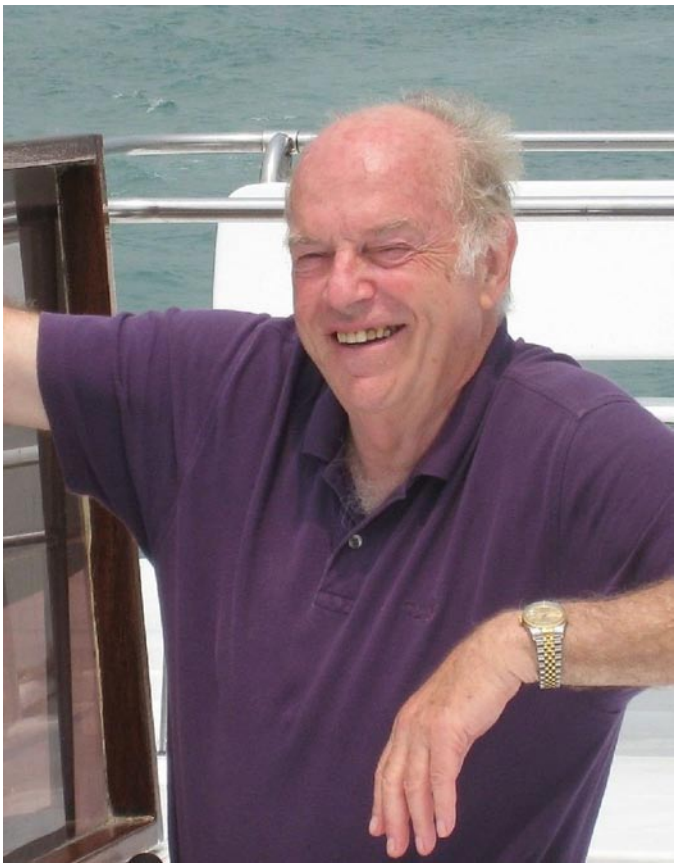
THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel



Special issue published in honour of Duncan Berry on the occasion of his 75th birthday

9 February 2011

THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel

Special Issue: February 2011 (Issue No. 1 of 2011)

Guest Editors: John Moloney, Eamonn Moran, Peter Quiggin, Jeremy Wainwright

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Foreword

Eamonn Moran, PSM, QC, JP[1]

The day on which the CALC conference 2011 opens, 9 February 2011, is significant for another reason. On that day Dr Duncan Elmslie Berry celebrates his 75th birthday.

Some months ago John Moloney, the shy, retiring and taciturn legal drafter from the Department of Agriculture, Fisheries and Food in Dublin, came up with an idea. Why not publish a special edition of *The Loophole* to mark this significant birthday of a great CALC stalwart? John, who of course matches none of the adjectives I have just attributed to him, did not need to use too much Irish blarney to convince me that it was a brilliant idea. He and I then set about seeking contributors. We had a very easy task. Peter Quiggin and Jeremy Wainwright agreed to assist as part of an editorial team. We suggested names and topics; all approached were willing to help. And you will note from their names in the Table of Contents that they are all significant players in the field of legislative drafting. If you are not among the contributors, it is because we had such a range of material from among those who were asked. I am so grateful to all for bringing this idea to reality. And what a reality! This special edition contains a magnificent collection of essays on a wide variety of issues relevant to legislative drafting. Importantly too, this edition includes a history of CALC and an annotated catalogue of CALC publications.

CALC has been in existence since 1983 and Duncan Berry has been an active contributor to CALC from its inception. He has been our Secretary since September 1999 and in that capacity has been the editor of *The Loophole* and CALC *Newsletter*. He has also been a prolific contributor to those publications and to our Conferences. He continues to exhibit endless enthusiasm for CALC and works tirelessly in its interests. For all of that CALC is truly grateful and this publication is a fitting way to honour Duncan's contribution.

Happy birthday Duncan and may there be many more.

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[1] President, CALC.

Duncan Berry: a full life in progress[1]

John Moloney[2]

Duncan Elmslie Berry was born in Derby, England on 6 February 1936, the youngest of three children. His family boasts of Scottish heritage from the area of Aberdeen. A precocious child, Duncan surprised the congregation at his christening by advocating a plain language service and subsequently made the case for the inclusion of purpose clauses in *Ladybird* books, a series of popular children's books of the period.

He was educated at the local Grammar school before studying law at Nottingham University from which he graduated with an honours LL.B in July 1957. He was an active member and sometime captain of the University cycle club. At various times Duncan worked on the buses in Manchester and did his national service in a cosy billet at Catterick in Yorkshire.

University life whetted his appetite for academic distinction and he was called to the Bar of England and Wales at Gray's Inn in 1962; at various stages, he has added membership of the Bars of New Zealand (1966), New South Wales (1975), Tasmania (1979) and Hong Kong (1999) to his list of distinctions. Indeed, it can be truly said of Duncan Berry that he has never faced a bar that he did not work hard to conquer.

Duncan found himself in the position of many a young barrister: "an impecunious party". He emigrated to New Zealand and took up a position in the Land Registry in July 1962, a stage in his career which ended in August 1965 with his leaving the exalted position of District Land Registrar and District Registrar of Companies at Gisborne. Duncan trenchantly denies any suggestion that he was "a ten pound pom". As pubs in New Zealand closed, in those days, at 6 p.m., he picked up a Masters degree in Laws from Victoria University, Wellington in May 1964.

On 6 August 1965, "a terrible beauty was born" and Duncan began his term drafting legislation in the New Zealand Law Drafting Office. The young Assistant Law Draftsman prepared what became the New Zealand Veterinary Surgeons Act, which was one of the first precedents consulted by the present writer when preparing Irish legislation in this area some 35 years later.

In 1971, after five and a half years of preparing, negotiating and settling Bills and subordinate legislation in New Zealand, Duncan moved to Hong Kong as Crown Counsel. This first tour of duty in Hong Kong was followed by three years in the New South Wales Parliamentary Counsel Office from August 1975 to August 1978.

[1] A light-hearted account of Duncan's life up to 2011.
[2] A drafter in the Irish Department of Agriculture, Fisheries and Food and long-time associate of Duncan Berry.

In September 1978, he moved to Hobart as Chief Parliamentary Counsel of Tasmania before returning to Sydney in January 1984 where he remained until November 1995; he also found time to serve in Lesotho between January and August 1992 where he worked on a revised Constitution and Electoral law.

There are unfounded rumours that, in November 1995, Duncan retired. We may now put this scurrilous libel to rest. The following month he was reincarnated as Deputy Principal Government Counsel in the Law Drafting Division of the Department of Justice in Hong Kong and briefly acted as Deputy Solicitor General of Hong Kong.

Duncan, through "effluxion of time", became a consultant in Hong Kong in 1999 where he remained until he came to Ireland in March 2001 to fill a similar position before again returning to Hong Kong for nearly a year (July 2002 to February 2003). Meanwhile, he found time to obtain for himself the degree of Doctor of Juridical Science from the University of Technology, Sydney, for which he presented a dissertation entitled 'Designing usable legislative texts'.

Otherwise, Duncan's twenty-first century has been spent largely working in the Emerald Isle where in August 2005, he celebrated his 40th Anniversary as a draftsman and newly elevated to the rank of SCD ("superannuated colonial drafter") outside Bantry with a memorable meal comprising mainly leg of lamb and red wine and red wine and red…

Duncan spent one more stint in Hong Kong culminating in a memorable CALC Conference in 2009 before returning to Dublin where he remained working until March 2010.

By then, the call of Africa (via a short teaching assignment in Kuala Lumpur) proved too much for him and he went to work in Nairobi which had been the venue of another successful CALC conference (in 2007).

Duncan's wide ranging membership of varied organisations is enough to give the vapours to the late Tail Gunner Joe McCarthy and J. Edgar Hoover. These include varied Inns of Court and Bar Associations as well as Amnesty International, where he has held office. But first and foremost comes CALC of which he is a founding member and long suffering secretary and editor of *The Loophole*.

Duncan has missed only one CALC conference since the founding of the Association, and that was someone else's fault. He is an inveterate traveller, whether on cruises down the Nile or up the Rhone, to South America or on visits to friends on four (or is it five?) continents. One is guaranteed that each journey will bring its own digest of stories; it is not a case of if something goes wrong but when… and how… and he always comes out ahead.

Duncan, in his time in Ireland, has been a rock upon which is built the "Reilly's school of Drafting", an advanced seminar that meets on most Fridays of the year in the eponymous premises. A mixed bag of Parliamentary counsel, civil servants, advisory counsel and "miscellaneous provisions" gather and discuss matters of import or interest in a convivial atmosphere. I must depart…word has gone out—"the Dunc. Is back…see you in Reilly's later". This command cannot be ignored.

Duncan's publications, listed in the Appendix to this account, reflect his passion for communicating the law, whether to the affected citizen or to younger drafters. Rather than merely reflecting instructions, Duncan always questions techniques and approaches – seeking improvement.

Long may his pen hold ink.

Appendix – Legislative publications of Duncan Elmslie Berry[3]

1972	Book review of *Legislative Drafting* (1972), G.C. Thornton, 1st ed., New Zealand Law Journal.
1987	*Legislative drafting: Could our statutes be simpler?* Statute Law Review (1987): 8(2), 92-103.[4]
1988	*Should we have an Acts Restatement Act?* The Loophole (February1988), 49-53.[5]
1990	*Developing the training function in a Parliamentary Counsel Office*, The Loophole (November 1990), 104-125.[6]
1993	*Crown immunity from statute: Bropho v. The State of Western Australia*, Statute Law Review (1993):14(3), 204-222.
1995	*Speakable Australian Acts*, Information Design Journal (1995): 8(1), 48-63.
1995	*A content analysis of legal jargon in Australian statutes*, Clarity 33, (July 1995), 26-39.
1997	*When does an instrument made under primary legislation have 'legislative effect'?* The Loophole (March 1997), 14-30.
1997	*Techniques for evaluating the quality of draft legislation*, The Loophole (March 1997), 31-47.
1997	*Use of the present tense in legislation*, Clarity 38, (January 1997), 33-34.
2000	*Audience Analysis in the Legislative Drafting Process*, The Loophole (June 2000), 61-68.
2001	*The importance of getting savings and transitionals right: Two contrasting cases*, The Loophole (December 2001), 43-54.
2005	*Legislative drafting training in the Hong Kong Department of Justice*, The Loophole (March 2005), 13-19.
2005	*Are Australian judges retreating from adopting a purposive approach to judicial interpretation?* CALC *Newsletter* (June 2005), 20-1.
2006	*Plain language versions of UK Parliamentary Bill*, CALC *Newsletter* (August 2006), 44-6.
2007	*Legislative and Regulatory Reform Act 2006 (UK)*, The Loophole (March 2007), 64-70.
2007	*The effect of poorly written legislation in bilingual legal systems*, The Loophole (March 2007), 88-92.
2007	*Keeping the Statute Book up-to-date – A personal view*, The Loophole (October 2007), 33-49.
2009	*Reducing the complexity of legislative sentences*, The Loophole (January 2009), 37-76.

[3] This list excludes unpublished material including Dr Berry's doctoral thesis as well as his editor's notes published regularly in *The Loophole* and CALC *Newsletter* since he took over the mantle of editor of *The Loophole* in 1999.
[4] Also published in *The Loophole* (February 1988), 30-48.
[5] Pagination in early issues of *The Loophole* is erratic and a quaint reminder of more innocent days. Some items are individually paginated and then given page numbers within the journal. I have preferred to follow the manuscript pagination inserted later in the copies on the CALC website (http://www.opc.gov.au/loophole.htm) for consistency.
[6] See note 4.

2010 *Do communications between parliamentary counsel and their 'clients' attract legal professional privilege?* CALC *Newsletter* (March 2010), 14-19.

2010 *Ignorance of the law is no excuse, but what if you can't access it?* CALC *Newsletter* (March 2010), 19-21.

Short History of the Commonwealth Association of Legislative Counsel

Walter Iles, QC[1]

CALC was established by a resolution carried at a meeting of law drafters held in Hong Kong on 21 September 1983.

At that meeting the names of more than 200 people were put forward for membership. They represented no less than 80 jurisdictions in the Commonwealth and at least 38 of those jurisdictions were represented at that meeting.

It was a most unusual, and most probably unprecedented, gathering of Commonwealth law drafters. Their work, like that of most law drafters, is performed mainly in backrooms. Their essential contribution to law-making often goes unremarked.

That, to a large extent, is still the case. But the establishment of CALC, and the way in which it has grown since its establishment, has, while not putting law drafters into the limelight, made drafters more visible and led to greater recognition of their work.

But more importantly, the opportunities that CALC has provided for meetings of law drafters and the sharing of information between them have enhanced their competence at a time of great change in both the use of English and the use of technology.

The object of CALC was then "to promote co-operation in matters of professional interest between persons in the Commonwealth who are or have been engaged in legislative drafting or in the training of persons to engage in legislative drafting".

CALC's objects became, on 3 June 2005—

(a) to promote co-operation on matters of common interest among Commonwealth persons and others who are or have been engaged—
    i. in legislative drafting; or
    ii. in editing or translating draft legislation; or
    iii. in training people as drafters of legislation; and
(b) to promote public awareness of and to disseminate information about legislative drafting and the role of those who draft legislation; and
(c) to promote the use of effective legislative drafting practices and techniques.

[1] Former Chief Parliamentary Counsel, New Zealand.

The establishment of CALC and the adoption of its constitution in September 1983 were the result of a great amount of preliminary work. It is useful to record how that work came to be performed and who performed it.

The 1960s and 1970s were years in which there was growing interest in legislation and the way in which it was drafted and expressed.

There were two landmark publications, *The Language of the Law* by Professor David Mellinkoff, published in 1963, and *Legislative Drafting* by Garth Thornton, first published in 1970. Garth Thornton first started work on his book in Tanzania in 1967.

Other significant books were *The Fundamentals of Legal Drafting* by Reed Dickerson (published in 1965) and *The Composition of Legislation* by Elmer Driedger (published in 1957).

The Statute Law Society was established in England in 1968.

The Commonwealth Law Bulletin, first published in 1974 by the Legal Division of the Commonwealth Secretariat, drew attention to a variety of legal matters, including legislation passed in Commonwealth countries.

But the genesis of the idea to hold regular conferences of law drafters was the comments made at a meeting of Commonwealth Law Ministers held in London in 1973, where the problems of legislative drafting in developing countries were discussed.

Ministers were concerned about the shortage of competent law drafters. Consultants who considered the matter in 1974 recommended, among other things, that "There should be an increased recognition of the status and the central role of the draftsman in the legislative and law reform processes."

In 1977, Geoff Kolts, the First Parliamentary Counsel in Canberra, wrote to Mr Kutlu Fuad of the Commonwealth Secretariat, stating that it seemed to him "that it would be desirable to establish a Commonwealth Association of Parliamentary Counsel." He sought the assistance of the Commonwealth Secretariat.

The idea to establish an Association was partly nurtured by John Ewens, who, in 1972, had retired as First Parliamentary Counsel in Canberra. His work was continued by a subsequent First Parliamentary Counsel, Bronte Quayle, who retired 2 years before CALC came into existence.

In 1978, Geoff Kolts sought the assistance of the Statute Law Society in running a conference, but that Society was unable to assist.

There was some further correspondence with the Commonwealth Secretariat and in October 1982, the Director of the Legal Division of the Commonwealth Secretariat (Jeremy Pope) wrote to Geoff Kolts suggesting that "the time might be opportune for a 'Commonwealth Association of Parliamentary Counsel' to be established along the lines of other professional organisations of the Commonwealth." The letter also sought support from Australia in "providing the President/Secretary or whatever officer such an Association might have."

In November 1982, Geoff Kolts wrote to the Secretariat suggesting that the proposals for the establishment of an Association be "endorsed by the Law Ministers at their forthcoming meeting in Sri Lanka and then for

CALC to be got off the ground … during the Commonwealth Law Conference in Hong Kong in September 1983." He also suggested that future meetings could be held concurrently with those conferences.

In December 1982, Geoff Kolts, obtained from the Australian Attorney-General his agreement, "to raise the matter [to establish an Association] at the meeting of Law Ministers in Sri Lanka" in February 1983.

The Attorney agreed—

(a) to indicate to the Law Ministers that, at the request of the Legal Division of the Commonwealth Secretariat, he had agreed that the Office of Parliamentary Counsel in Canberra should take the initiative in the formation of CALC; and
(b) to ask the Law Ministers to endorse the proposal.

The Attorney also agreed to the Office of Parliamentary Counsel—

(a) providing the Secretariat;
(b) circulating a *newsletter* (to be edited by Hilary Penfold);
(c) suggesting an inaugural meeting at the Commonwealth Law Conference in Hong Kong in 1983.

On 24 December 1982, Geoff Kolts wrote to Parliamentary Counsel in Australia and overseas to propose the formation of CALC.

He received supportive replies from Garth Thornton (Western Australia), Fiji, Hong Kong, Singapore, Victoria, Malaysia, various West Indies jurisdictions, Canada, India, Sri Lanka, Kiribati, Zimbabwe, Swaziland, Ghana, Nigeria and Lesotho.

Hong Kong offered to "gladly host the inaugural meeting and provide a venue."

George Engle, the First Parliamentary Counsel in the United Kingdom, said that he had forwarded Geoff's letter to the UK Attorney-General whose office advised that "He is delighted to offer you his support for the proposal".

In his letter of February 1983 supporting the proposal, Mu'Azu Abdul-Malik (Legal Draftsman) in Lagos (Nigeria) suggested that "Legislative" rather than "Parliamentary" be used in CALC's name because of the various constitutional governance systems in which drafters in the Commonwealth operated.

In February 1983, Geoff Kolts wrote to all Parliamentary Counsel Offices in Australia and overseas. He advised them of the meeting to be held in Hong Kong, which was to be hosted by Gerry Nazareth (the head of the Law Drafting Division in Hong Kong). Geoff suggested "Commonwealth Association of Parliamentary Counsel and Law Draftsmen" as CALC's name.

The meeting of Law Ministers held in Sri Lanka in March 1983 had before it two papers relating to the selection, training and retention of "draftsmen". One of those papers was prepared by Gerry Nazareth. The other was prepared by John Ewens, a very experienced law drafter who had retired as First Parliamentary Counsel in Canberra in 1972. The contents of those papers are described in an article written by John Ewens and published in the October 1983 issue of the *Australian Law Journal* (pages 567-570).

In March 1983, Gerry Nazareth informed Geoff Kolts that the proposed Association received "overwhelming approval" at the meeting of Law Ministers in Sri Lanka and "the relevant item (Preparation of Legislation) attracted a larger number of speakers than any other."

That approval was seen as giving CALC the "kiss of life".

Gerry Nazareth referred to Jeremy Pope's offer to produce a first draft of CALC's Constitution and suggested that it should be circulated well in advance of the Hong Kong meeting.

The final communiqué issued by the Law Ministers Conference in Sri Lanka stated that the Law Ministers supported the early formation of a Commonwealth Association of Parliamentary Counsel and Law Draftsmen proposed to promote co-operation amongst draftsmen. It continued "They saw CALC as being a non-governmental body run by the draftsmen themselves …The meeting accepted with gratitude the offer by Australia to act as headquarters for CALC and to provide editorial services for a regular *newsletter* for CALC."

In March 1983, George Engle suggested to Geoff Kolts the title "The Commonwealth Association of Parliamentary Draftsmen" instead of Geoff's suggestion, which George described as "a frightful mouthful".

In March 1983, Jeremy Pope sent a draft Constitution to Geoff Kolts. Jeremy's covering letter of 15 March 1983 states "I am enclosing a Draft Constitution, which is very much a first effort and which I tender with some trepidation to be torn apart by those much more experienced than myself. Basically the idea is to maintain as loose a structure as we can get away with."

On 29 March 1983, Geoff Kolts wrote to George Engle "I shall be writing to you again in about a week or so seeking your comments on a draft of a constitution for CALC". Geoff suggested as a title "Commonwealth Association of Legislative Counsel", a title which had already been suggested and which avoided the sexist word "Draftsmen". That title, he said, "seems to overcome the problems mentioned in your letter and has a more easily pronounced acronym".

Also, in late March, Geoff Kolts wrote to Jeremy Pope thanking him for his work on the draft constitution. He said "My colleagues and I have worked to produce a revised version and I have circulated it for comment". Geoff appears to have sent to the heads of all Commonwealth drafting offices a letter setting out information about CALC and enclosing a draft constitution.

In April 1983, George Engle wrote to Geoff Kolts stating "The draft constitution strikes me as generally sensible and commendably unfussy, and I agree with all the assumptions set out in your letter of 29 March. I enclose, for what they are worth, such comments as have occurred to me. Please read them as no more than constructive suggestions. You obviously can't please everybody, and I would not mind if you politely ignored them all."

Not surprisingly (given its audience) Geoff Kolts received many other comments and suggestions on the draft.

The First Parliamentary Counsel in Kenya noted that "there is legislation in most English speaking African countries forbidding the use of the title 'President' except by the head of state/head of government, the commonly accepted substitute being 'chairman'". In his reply of 30 June 1983, Geoff Kolts said that the issue could be dealt with at the inaugural meeting.

On 17 June 1983, Geoff Kolts sent to proposed members a revised constitution.

On 7 July 1983, Geoff Kolts sent to Parliamentary Counsel offices a draft agenda. One of the items proposed for discussion was "developments in methods of drafting, such as use of word processors, computer type-setting, information retrieval systems, etc".

On 20 July 1983, Geoff Kolts sent out to Parliamentary Counsel Offices a list of countries that had expressed interest in CALC, the names of persons who had indicated their intention to attend the inaugural meeting and the names put forward expressly, or by implication, for membership of CALC. He did not then see it as necessary for every member of every drafting office to become a member of CALC. He thought it would be adequate if one or two members of each office were nominated.

The inaugural meeting of CALC was held in Hong Kong on 21 September 1983 during the 7th Commonwealth Law Conference.

The 53 persons who notified their attendance at the meeting included:

- 15 from Africa (Nigeria, Zimbabwe, Kenya, Swaziland, Tanzania, Uganda, The Gambia, and Malawi)
- 12 from Hong Kong
- 8 from Australia
- 4 from the West Indies (Guyana, Trinidad and Tobago, Barbados, Cayman Islands)
- 2 from each of the UK and Sri Lanka
- 1 from each of the Cook Islands, Western Samoa, Scotland, New Zealand, India, Canada, Brunei, Malaysia, the Isle of Man
- 1 representative of the Commonwealth Secretariat

Jeremy Pope, the Director of the Legal Division of the Commonwealth Secretariat, addressed the meeting.

The arrangements made in Hong Kong for the inaugural meeting were first class. Guests at the lunch held on the day preceding the meeting included the Lord Chancellor. Gerry Nazareth, the head of the Law Drafting Division in Hong Kong made a wonderful host and chaired the inaugural meeting in an exemplary fashion. He stood down as chairman once the President was elected.

After adopting the Constitution, the inaugural meeting elected the following officers:

President (or Chairman):	George Engle
Vice president (or Vice-Chairman):	Monica Barnes, Trinidad and Tobago
Secretary:	Sandra Power, Australia
Committee members:	David Zamchiya, Zimbabwe Peri Nasti, India Anthony Mananangi, Pacific Gerry Nazareth, Hong Kong

A notable absentee was Geoff Kolts, who was prevented by his duties from attending the inaugural meeting.

On 23 September 1983, George Engle, in his capacity as the first President of CALC, said in a letter to Geoff Kolts from Hong Kong “I must thank you for all you have done to bring CALC into being. It is a splendid achievement for which you will long be remembered round the world.”

George Engle himself, and others such as Jeremy Pope and Gerry Nazareth, had all played a significant part in bringing CALC into being, but the tribute that George Engle paid to Geoff Kolts, the driving force, was well-deserved.

Later Geoff Kolts became Secretary of CALC.

CALC has moved forward successfully since 1983. All of CALC's ordinary general meetings have, like its inaugural meeting, been held in conjunction with a Commonwealth Law Conference. At those general meetings the members have elected the following Presidents and Secretaries:

Location	Date	President Elected	Secretary Elected
Ocho Rios, Jamaica	10 September 1986	Walter Iles, New Zealand	Peter Pagano, Canada
Auckland, New Zealand	19 April 1990	Mrs Rama Devi, India	Peter Pagano, Canada
Nicosia, Cyprus	5 May 1993	Mrs Rama Devi, India	Edward Caldwell, United Kingdom
Vancouver, Canada	26 & 27 August 1996	Dennis Murphy, Australia	Edward Caldwell, United Kingdom
Petalang Jaya, Malaysia	September 1999	Hilary Penfold, Australia	Duncan Berry, Australia
Melbourne, Australia	16 & 17 April 2003	Geoffrey Bowman, United Kingdom	Duncan Berry, Australia
London, England	9 September 2005	Lionel Levert, Canada	Duncan Berry, Australia
Nairobi, Kenya	14 September 2007	Eamonn Moran, Australia	Duncan Berry, Australia
Hong Kong, China	2 April 2009	Eamonn Moran, Hong Kong, China	Duncan Berry, Australia

Over the years both the size and the quality of the papers published in *The Loophole* and the papers delivered at CALC conferences have increased.

So have the CALC conferences themselves, culminating with the successful conference that was held in Hong Kong in April 2009.

When CALC was first formed, its conference took place on a free day in the middle of the Commonwealth Law Conference.

The disappearance of that free day and the increase in the size of the CALC Conference imposed difficult choices on those attending both conferences.

The Council of CALC accordingly decided to have the CALC conference immediately before the Commonwealth Law Conference. This had two advantages. Those attending both conferences could participate in both programmes. Those wishing to attend only the CALC conference could obtain the benefit of that conference at a lower cost in both time and money.

The first conference held in accordance with the Council's decision was the 2005 CALC conference in London. It was held on Thursday 8 and Friday 9 September, immediately before the Commonwealth Law Conference, which began on Sunday 11 September.

Under the constitution, the Council must, unless it is impracticable to do so, meet immediately after each general meeting of CALC. That is usually the only occasion on which the members of the Council meet in person. The constitution enables the Council to transact business by other means.

The "generally sensible and commendably unfussy" constitution adopted in 1983 worked well but eventually required amendment. Amendment proved difficult. The major problem was obtaining the necessary majority required by the Constitution as the number of members of CALC was much greater than originally envisaged. The original expectation was that only one or two drafters from each office would become members.

The necessary majority was eventually obtained by the very arduous task of obtaining sufficient proxy votes and a new constitution was adopted at an extraordinary general meeting held in Sydney on 3 June 2005. That meeting was actually the second resumption of a meeting held on 30 January 2004 and adjourned twice. The collecting of the proxy votes was organised by Don Colagiuri, the Parliamentary Counsel in New South Wales.

Amendments to the new Constitution were made in 2007 and 2009.

A person is eligible to become a full member of CALC if the person is a Commonwealth person who has been engaged—

(a) in drafting legislation; or
(b) in editing or translating draft legislation
(c) in training people as drafters of legislation.

A "Commonwealth person" is a person who is a citizen or a permanent resident of, or who is domiciled in, a country that is a member of the Commonwealth of Nations or a dependent territory of such a country.

A person is eligible to be an associate member of CALC if the person—

(a) is a Commonwealth person who claims to have an interest in legislative drafting but is not eligible to be a full member of CALC; or
(b) is not a Commonwealth person but is or has been engaged in any of the activities mentioned in paragraphs (a) to (c) above.

Under the 1983 Constitution the headquarters of CALC were located in Canberra. They are still located there even though, under the Constitution, it is possible to change that location.

The generosity of the Government of the Commonwealth of Australia in kick-starting CALC and in continuing to support its activities is well-known. CALC's *newsletter*, *The Loophole*, is currently published from Canberra and CALC's website is hosted in Canberra by the Office of Parliamentary Counsel.

For a long time, CALC had no funds other than a tie fund of very modest amount. CALC is supported by the goodwill of both its members and the governments by which those members are employed. Honorariums are not paid to officers of CALC. Members who attend a CALC conference must pay a fee to cover the costs of the conference but the governments of countries that have hosted CALC conferences have often helped by providing venues and other assistance.

Just as Geoff Kolts was a very significant figure in the establishment of CALC, so Duncan Berry has been a very significant and constant figure in the administration of CALC since he was elected Secretary of CALC in 1999.

Duncan Elmslie Berry was born in England. He emigrated to New Zealand after graduating LL.B at the University of Nottingham in the United Kingdom and performing his National Service. He joined the New Zealand Public Service in 1962 and was the District Land Registrar at Gisborne (on the East Coast of the North Island) before being appointed an Assistant Law Draftsman in August 1965. In that same year he had graduated LL.M from the Victoria University of Wellington.

He can be said to have served his apprenticeship as a law drafter in the New Zealand Law Drafting Office (now the Parliamentary Counsel Office). In February 1971 he joined the Law Drafting Division of the Attorney-General's Chambers (now the Department of Justice) in Hong Kong. He worked in that Division until April 1975.

In May 1975, he joined the Parliamentary Counsel Office in New South Wales as a Senior Legislative Draftsman. Most of the law drafting he did in Australia was done in that Office but he was, from September 1978 to January 1984, Chief Parliamentary Counsel in Tasmania. He retired from the New South Wales Parliamentary Counsel Office in November 1995.

In his very active retirement he has continued to draft in Hong Kong and Dublin. He was elected Secretary of CALC in 1999 and has been re-elected to that position at every subsequent general meeting. He has contributed many papers to CALC Conferences and *The Loophole*.

Throughout his law drafting life, Duncan's interest in law drafting and in training law drafters has never flagged. He was awarded the degree of Doctor of Juridical Science by the University of Technology Sydney in May 2003. John Ewens is recorded as saying that "Once a competent draftsman has been found, he should be encouraged to make this his life's work." Duncan has not, since 1965, needed encouragement to make law drafting his life's work. That has been very much to the advantage of CALC.

CALC and Duncan are still going strong.

Duncan Berry: A visionary of training in legislative drafting

Dr Helen Xanthaki[1]

Duncan Berry has published extensively in the field of legislative drafting. His passionate approach to a simpler, yet elegant, style of legislation has been analysed extensively. But his vision on a formal training programme for legislative drafters seems to have escaped the usual level of attention awarded to his other work. This paper aims to rectify this injustice by drawing attention to the formal training programme that Duncan eloquently advocated. Duncan offers a generous insight to his approach to training and to the application of this approach in practice at the Hong Kong Department of Justice.[2] This article will form the basis of this analysis.

My hypothesis is that Duncan Berry's preference for formal training for drafters is supported by the nature of legislative drafting as a phronetic discipline, and by the transferability of drafting know-how. In order to prove this hypothesis I will analyse the nature of legislative drafting as phronesis: this will allow me to determine the type of intellectual activity undertaken by drafters, and the nature of tasks involved in the drafting of legislation. I will then evaluate whether know-how in drafting can be cross-fertilised or whether the national legal eccentricities render drafting a nation-focused experience. By proving that legislative drafting is a phronetic discipline with general principles and conventions that can be taught, I hope to conclude that there is scope for formal training in drafting. By proving that drafting know-how is not bound to national eccentricities, at least in its general principles, I hope to conclude that formal drafting training benefits from international and comparative experience, under strict prerequisites deriving from comparative legal methods.

Before I proceed to this analysis I must clarify that the formal drafting training, which Duncan and I advocate, does not aim to replace the traditional mentoring method of training altogether. I agree with Duncan that there is scope for mentoring. The question is whether it is now time to supplement the master and apprentice method with formal training.

A. What is the nature of legislative drafting?

In order to assess which is the optimum style of training for modern legislative drafters, it is necessary to identify the nature of drafting. It is only when one understands the nature of the discipline that one can

[1] Academic Director, Sir William Dale Centre for Legislative Studies, Institute for Advanced Legal Studies, University of London.
[2] See D. Berry, "Legislative drafting training in the Hong Kong Department of Justice" [2005] *The Loophole*, http://www.opc.gov.au/calc/papers.htm#CALCpapers2005

determine the style and elements of training that can assist drafters to deliver in their task. But determining what drafting is continues to be under debate.[3]

The prevailing view, mostly within the common law world, is that drafting is a pure form of art[4] or a quasi-craft[5]. It is this approach to the discipline that supported the mentoring style of training for drafters. If drafting is an art or a craft, then creativity and innovation lies at the core of the task. Rules and conventions bear relative value, and the main task of the drafter is to learn the craft from those with more experience. If one believes that drafting is an art, then formal training is not relevant to drafters. In other words, if experience is the only thing that really matters, then simply time spent by a senior may offer the apprentice the only opportunity to learn on the job. But is drafting really a liberal skill possessed by enlightened legal scholars who take part in drafting committees on behalf of a variety of governmental Ministries and agencies drafting legislation[6]?

Or is drafting a science[7] or technique[8]? This is the prevailing approach in most of the civil law world. If drafting is a science, then there are formal rules and conventions whose inherent teleogenesis manages to produce predictable results, provided that the application is correct. If this approach is followed, then there is plenty of scope for formal training. Drafters may learn the rules and conventions of their science, and the correct way in which these are applied in order to produce predictable results.

But is one bound to a strict choice between art or science? If one sees drafting as a sub-discipline of law, then there must be a third option: law is not part of the arts, nor is it part of the sciences[9] in the positivist sense.[10] In sciences rules apply with universality and infallibility: gravity applies everywhere in the world [ok, on Earth], and at all times. Law is different. "All law is universal but about some things it is not possible to make a universal statement which will be correct…the error is not in the law nor in the legislator but in the nature of the thing".[11] Thus, using the term "shall" may be an abomination for those of us who avoid ambiguity, but it would be rather misguided to reject the use of the term rigidly: it may well be that "shall", ambiguous as it is, would be understood better, and therefore be more effective, in amendments of archaic laws where the term is used repeatedly to signify "must"; here, using the term "must" in conjunction with the existing "shall" would create the legitimate impression to the user that the meaning of "shall" and "must" is somewhat different. But rejecting the view that drafting is a science does not necessarily confirm that drafting is an art. Art tends to lack any sense of rules. In the pursuit of aesthetic pleasure, art uses whatever tools are available. Art is anarchic. But drafting is not. Of course its rules are not rigid, but they are present. The use of synonyms is a principle by which drafters abide, mainly to serve clarity. There may

[3] For an analysis on the science v art debate, see H. Xanthaki, "On transferability of legislative solutions: the functionality test" in C. Stefanou and H. Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale*, (2008, Ashgate-Dartmouth, Aldershot), pp.1-18.
[4] See B. G. Scharffs, "Law as Craft" (2001) 45 *Vanderbilt Law Review*, 2339.
[5] See C. Nutting, "Legislative Drafting: A Review" (1955) 41 *American Bar Association Journal*, 76.
[6] See F. Ost and M. van de Kerchove, *Jalons pour une Theorie Critique du Droit*, (Brussels, Publications des Facultés universitaires Saint-Louis, 1987), 52.
[7] See contra Editorial Review, 22 [1903] *Can. L. Times*, 437.
[8] See contra J-C Piris, "The legal orders of the European Union and of the Member States: peculiarities and influences in drafting" [2006] *EJRL*, 1.
[9] For an analysis of the contra argument on law as a science, see M. Speziale, "Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory" 5 [1980] *Vt. L. Rev.*, 1.
[10] See R. R. Formoy, "Special Drafting" 21 [1938] Bell Yard: *J.L. Soc'y Sch. L.*, 3; but see contra C. Langdell, "Harvard Celebration Speeches", 3 [1887] *Law Q. Rev.*, 123-124.
[11] Aristotle, E.N., 5.10.1137b13-24.

be exceptions to all rules of drafting, but this does not mean that there are no rules. And these rules carry with them a degree of relevant predictability, since the latter is one of the six elements of theory.[12]

But if drafting is neither pure science nor pure art, what is it? For Aristotle[13] all human intellectuality can be classified as[14] science as episteme; art as techne; or phronesis[15] as the praxis of subjective decision making on factual circumstances or the practical wisdom of the subjective classification of factual circumstances to principals and wisdom as episteme.[16] Law and drafting seem to be classical examples of phronesis, as they are liberal disciplines with loose but prevalent rules and conventions whose correct application comes through knowledge and experience. Drafting as phronesis is "akin to practical wisdom that comes from an intimate familiarity with contingencies and uncertainties of various forms of social practice embedded in complex social settings".[17] In other words, the art of drafting lies with the subjective use and application of its science, with the conscious subjective Aristotelian application and implementation of its universal theoretical principles to the concrete circumstances of the problem.[18] Phronesis supports the selection of solutions made on the basis of informed yet subjective application of principles on set circumstances.[19] Phronesis is "practical wisdom that responds to nuance and a sense of the concrete, outstripping abstract or general theories of what is right. In this way, practical wisdom relies on a kind of immediate insight, rather than more formal inferential processes".[20]

So the drafter's task simply involves the choice of the appropriate rule or convention that delivers the desired results within the unique circumstances of the specific problem at any given time. In other words, the drafter needs to be aware of the multitude of often clashing rules and conventions; the drafter needs to identify the most relevant set of circumstances applicable to the problem; and the drafter needs to have the theoretical knowledge and practical experience to promote the rule or convention that best delivers under the mostly unique circumstances of the problem. In other words, as drafting entails both elements and art and elements of science, the drafter's task entails both identification of all relevant circumstances and rules; and promotion of the most appropriate rule. And so the skills required are: both an understanding of the relevant rules, and wisdom through experience in the application of the most appropriate rule. These are the main skills that training in drafting must deliver. And they form the core of the reasoning behind the argument that training in drafting must be both academic and practical, both formal and via mentoring. But before we explore this further, let us clarify which are the rules of drafting, and what is the basis of the drafter's subjective choice when selecting the most appropriate one.

In other words, which is the ultimate criterion whose correct application leads the drafter to the appropriate choice between rules and drafting conventions? What is quality of legislation? My definition of quality is neither technical, nor empirical. My definition of quality in legislation is functional. If one sees legislation as a mere tool for regulation, then drafting becomes simply part of the legislative process, which in turn is part of the policy process. The object of a policy process is the promotion of a government policy, or from a

[12] See B. Flyvbjerg, *Making Social Science Matter: Why social inquiry fails and how it can succeed again* (2001, Cambridge University Press, Cambridge), 39.
[13] Aristotle, *Nichomachean Ethics*, bk VI, chs. 5-11 (D. Ross trans. 1980).
[14] M. Griffiths and G. Macleod, "Personal narratives and policy: never the twain?" [2008] 42 JPE, pp.121-143, at 126.
[15] Aristotle, *Nichomachean Ethics*, bk VI, chs. 5-11 (D. Ross trans. 1980).
[16] S-U von Kirchmann, *Die Werlosigkeit der Jursprudenz als Wissenschaft* (1848, Verlage von Julius Springer, Berlin).
[17] See B. Caterino and S. F, Schram, "Introduction" in S. F. Schram and B. Caterino, 8.
[18] See W. Eskridge Jr., "Gadamer/Statutory interpretation" [1990] 90 ColumLRev, 635.
[19] See E. Engle, "Aristotle, Law and Justice: the tragic hero" [2008] 35 NKyLRev, 4.
[20] See C. Rideout, "Storytelling, narrative rationality, and legal persuasion" [2008] 14 Legal Writing: J. Legal Writing Inst., 75.

social perspective the regulation of a citizen's activity. If legislation is seen as a mere tool for regulation, then a good law simply contributes its best to the achievement of the policy that it serves. As a law on its own cannot produce adequate regulatory results without synergy from the other actors of the policy process,[21] a good law is one that, with synergy, is capable of producing the regulatory results required by policy makers.[22] A good law is one that is capable of leading to efficacy of regulation. A good law is an effective law. And ultimately quality in legislation is effectiveness. Effectiveness is the criterion that drafters use when selecting the most appropriate drafting rule for the problem before them. This qualitative definition of quality in legislation respects and embraces the subjectivity and flexibility of both drafting rules and conventions and, ultimately, of phronetic legislative drafting.

B. Training versus mentoring on the job

In the realm of the pursuit for quality in legislation within phronetic legislative drafting, the choice of the most appropriate style of training becomes rather obvious. Drafting is phronetic: it is basically a series of subjective choices made by the drafter. These subjective choices are, or must be, based on two separate yet overriding and intertwining skills: know-how and experience. And thus, in order to prepare for the task ahead, drafters must be encouraged to train in a manner that cultivates these two skills, their knowledge and their experience in drafting.

Experience in drafting is what can flourish in mentoring by an experienced, open, and didactic senior. This is the one aspect or skill that drafters acquire as apprentices. This aspect of drafting acknowledges the arty elements of the drafter's task. And the nature of this type of training is professional, one could even call it vocational.

But Duncan is right. This is no longer enough. By isolating experience as a sole skill for drafters we simply ignore the second element of a drafter's task, namely knowledge and understanding. And this can only be explored through formal training offered in postgraduate mainly academic programmes which are prepared under the guidelines and the aegis of postgraduate educational institutions. After all, their staff are trained in education techniques, their programmes are assessed on consecutive cycles of independent scrutiny, and teaching is what they do. The academic aspect of drafting training is equally important, if not more so, than the vocational aspect of their training. This reflects the science elements of phronetic drafting.

It is academic training, or formal training, that allows drafters to understand the concept of quality in legislation; to become aware of what choices drafting entails; to identify the virtues or values that a drafter pursues; and the criteria and bases upon which these choices are made. And this on an abstract context. The application of this academic or theoretical context in true examples, in practice, comes with experience and through vocational training. Without this academic theoretical background the drafter simply lacks the theoretisation of experience: the link between examples and the reasons behind the solutions offered, and any lessons learnt for the future are lost, as apprenticeship involves isolated and on-the-case education. But without vocational training and practical application the theory is equally lost, as there are no concrete cases to channel lessons learnt and reasoning explained.

The dual nature of drafting, and the dual skill required, makes it impossible to consider a drafter trained without formal academic instruction in combination with practical hands-on experience. This is Duncan's

[21] See J. P. Chamberlain, 'Legislative drafting and law enforcement' 21 (1931) *Am.Lab.Leg.Rev.* 235-243 at 243.
[22] See L. Mader, 'Evaluating the effect: a contribution to the quality of legislation' 22 (2001) *Statute Law Review* 119-131 at 126.

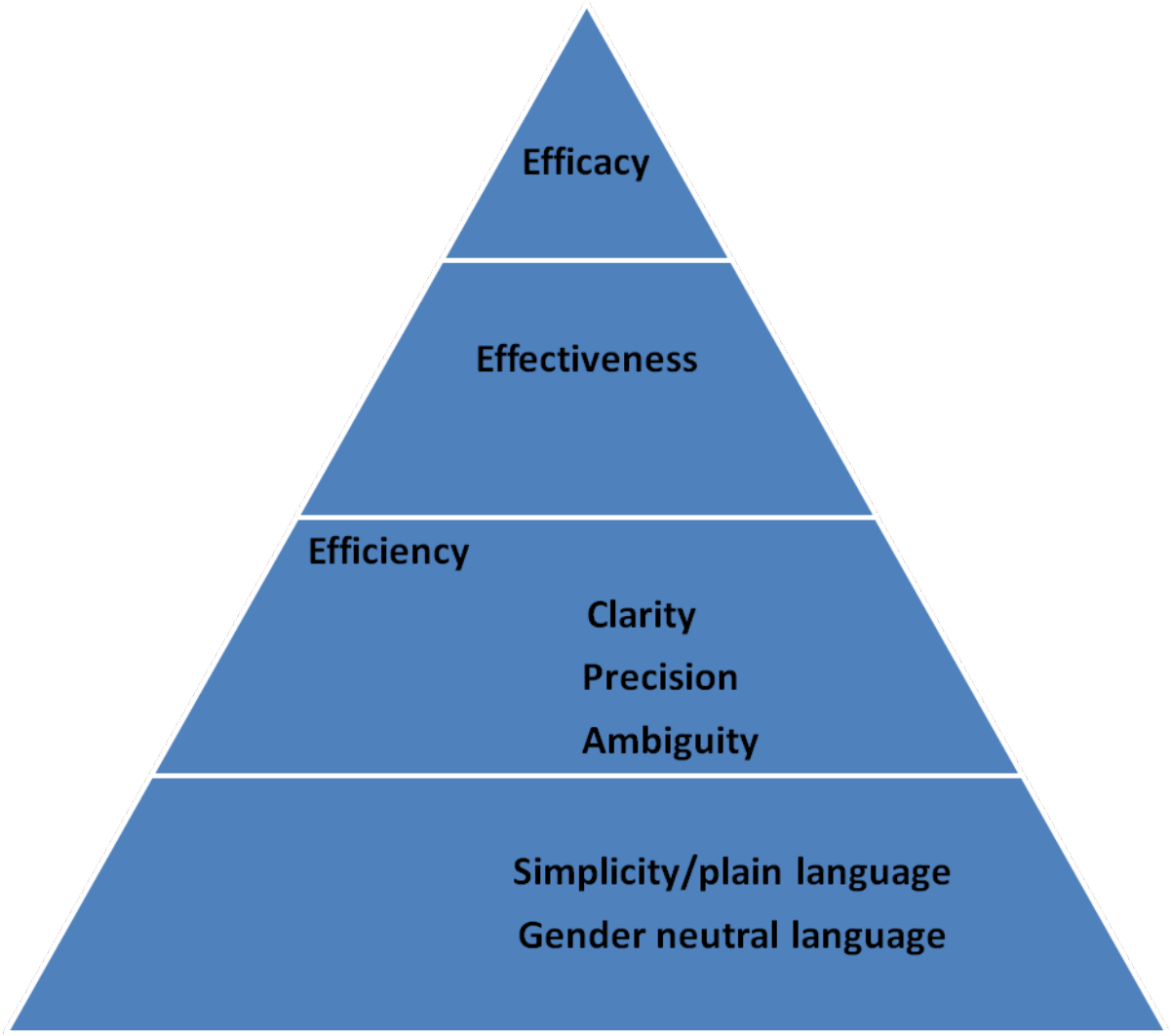
philosophy. This was Sir William Dale's philosophy, now acted upon at the Sir William Dale Centre for Legislative Studies, at the Institute of Advanced Legal Studies of the University of London.

Having proven that Duncan's approach to training is a combination of formal and mentoring education, let us now explore the elements of this training further. What aspects of training must educational institutions provide? Drafting is a sub-discipline of law that requires as a prerequisite a global understanding of law. As a result drafting can only be taught in a postgraduate environment. Of course elements of drafting and statutory interpretation must be offered to undergraduate students of law but this will inevitably be more of a taster and a skills-oriented tuition. One cannot begin to discuss effectiveness and quality in legislation without having awareness of the sources of law, their hierarchy in the legal system, the constitution or constitutional principles, and administrative structures. It is at postgraduate level that students can explore the main concepts of drafting and the general principles on which drafting choices are made. And of course this must be set within an analysis of the legislative environment: drafting is only part of the legislative process that is part of the policy process. And appreciation of law as a mere tool for regulation cannot be undertaken without an exploration of the policy context within which law is expected to function and deliver results effectively. With reference to legislative drafting as a part of legislative studies, what is required from formal training is not the provision of concrete answers to concrete drafting questions: after all, it is doubtful that such answers exist, at least uniformly and generally applicable.[23]

To apply here my writings on drafting manuals, what is required from training is the explanation of the role of the drafter in the drafting, legislative, and policy processes, the introduction of the main theoretical principles of drafting[24], and the setting of these principles in a hierarchy. In other words what is required from drafting manuals is their use as guides [not bibles] for drafters in the making of subjective choices. [25] This type of training, which respects and reflects the nature of drafting as an arty science or a liberal discipline, may assist the drafter in the development of a homogenous[26] drafting style in the jurisdiction.[27] This may prevent drafting surprises, namely circumstances, like the unilateral placement of definitions in the end, rather than the traditional beginning, of the law. But, at the same time, this type of training respects and recognizes the dynamic nature of legal rules,[28] the dynamic and evolving nature of drafting conventions, which, for the purposes of achieving effectiveness, require looseness, flexibility, innovation, and change.[29]

[23] See G. Bowman, "The Art of Legislative Drafting" 7 [2005] *Eur. J.L. Reform*, 15.
[24] See W. D. Lewis, H. Hall, E. Freund, S. Williston, "Report of the Special Committee on Legislative Drafting" 6 [1920] A.B.A. J., pp.503-504, at 504.
[25] See H. Xanthaki, "Drafting manuals and quality in legislation: positive contribution towards certainty in the law or impediment to the necessity for dynamism of rules?" [2010] 4 *Legisprudence*, 111.
[26] See D. Le May, "Pour un manuel de legistique" 21 [1980] *C. de D.*, 995; also see G. Ciavarini Azzi, "Better Lawmaking: The Experience and the View of the European Commission" 4 [1998] *Colum. J. Eur. L.*, 624.
[27] See Interview, "Norm Larsen, "Draftstoevsky [comments]", 28 [2000-2002] *Man. L.J.*, 205; also see J. Kobba, "Criticisms of the Legislative Drafting Process and Suggested Reforms in Sierra Leone" 10 [2008] *Eur. J.L. Reform*, 231.
[28] See B. Deffains and M. Obidzinski, "Real Options Theory for Law Makers" 75 [2009] *Recherches économiques de Louvain*, 117.
[29] See W. Holdsworth, *A History of English Law*, Vol. XII, (1938, Methuen and Co. Ltd., London), 157.

Ultimately, students need to become aware of and explore the following pyramid of virtues:[30]



The pyramid demonstrates the place of effectiveness of legislation as a contributor to efficacy of regulation. And identifies the main drafting rules, and their hierarchical application. This is the backbone of our training philosophy at the Sir William Dale Centre: it reflects the phronetic nature of legislative drafting, and the main principles for the drafter's subjective choices. And it shows very clearly that when these principles clash, there is simply one criterion used for the selection of the most appropriate one: effectiveness. Now how effectiveness can be best served under the circumstances of the specific problem is a matter of prudence as experience. It is through ad hoc practical training that the drafter can be exposed to enough cases and solutions in order to make the link between academic training and actual practice.

Does the need for mentoring somehow negate the need for formal academic training? The answer is of course no. One can draw analogies between drafters and brain surgeons. Just as brain surgeons need to have undergraduate medical training [academic and applied] followed by specialised postgraduate formal education with vocational training in the operating theatre, drafters need undergraduate law training [academic and applied] followed by specialised postgraduate training in legislative studies combined with

[30] See H. Xanthaki, "On transferability of legislative solutions: the functionality test" in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale*, (2008, Ashgate-Dartmouth, Aldershot), 1.

hands on experience in a drafting office by an experienced senior. That level of specialisation and length of training time is necessary for the provision of all the skills required from drafters.

There is no arrogance in comparing drafters with neurosurgeons. Both are subspecialties of professional disciplines. And there is no notion of hierarchy between lawyers and drafters, just as there is no such notion between general medical practitioners and neurosurgeons. The analogy between drafters and neurosurgeons is based simply on the type of super-specialisation required in order to perform adequately; the only difference is that nobody questions the specialised skills of a neurosurgeon, whereas there are still those who feel that any lawyer [often even non-lawyers] can draft adequately. Just as few sane individuals would ask a foot specialist to undertake brain surgery, few sane individuals should be asking untrained professionals to draft. One should expect judges and lawyers to be bad in drafting [unless trained of course], exactly as one should expect drafters to be bad in court [unless trained and practising of course].

And so it is time, at least within the drafting community for a start, to embrace drafting as a sub-discipline of law, and drafting skills as specialised professional skills. And to finally welcome the specialised combined formal and mentoring training advocated by Duncan Berry as a necessity for drafters. But where in the world can this type of training take place?

C. National v universal training for drafters

Is drafting so nation-focused that training must definitely relate to the national eccentricities of the jurisdiction that the student will serve? Or are there universal values in legislative drafting which can be promoted and explored in institutions outside the home jurisdiction?

Effectiveness, as synonymous to quality in legislation, and therefore the ultimate pursuit for drafters worldwide, is universal. The universality of the notion of quality in legislation is linked to the universality of legal rules. And so, if the pursuit for quality in legislation is universal, can the training required to enhance knowledge for that pursuit be equally universal?

If one follows the view that legal systems, despite their national eccentricities, can learn from each other[31], then the question here is not if quality is transferrable but how.[32] Watson[33] claims that legal rules are equally at home in many places, irrespective of their historical origins and connection to any particular people, any particular period of time or any particular place.[34] Others qualify Watson's anarchic borrowing from anyone and anywhere with the qualifier that like must be compared with like,[35] namely with countries in the same

[31] See P. de Cruz, *Comparative Law in a Changing World* (2007, Routledge-Cavendish, London and New York), 513-514; also see E. Örücü, "Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition" [2000] 4 *Electronic Journal of Comparative Law*, http://www.ejcl.org/ejcl/41/art41-1.html .
[32] For an in-depth analysis on borrowing and the drafting process, see Helen Xanthaki, "Legal transplants in legislation: defusing the trap" 57 [2008] *International and Comparative Law Quarterly*, 659.
[33] For an analysis of the term, see E. Öcürü, "Critical Comparative Law: considering paradoxes for legal systems in transition" in [1999] 59 *Nederlandse Vereniging voor Rechtsvergelijking*; also see E. Öcürü, "Law as Transposition" [2002] 51 *ICLQ* 206.
[34] See A. Watson, "Legal Transplants and Law Reform" 92 [1976] *LQR* 80; also see A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974, Scottish Academic Press, Edinburgh); Alan Watson, "Legal transplants and European private law", Ius Commune Lectures on European Private Law, no 2.
[35] See H. Gutteridge, *Comparative Law* (1949, Cambridge University Press, Cambridge), 73; also see Buckland and McNair, *Roman Law and Common Law* (1936, Cambridge University Press, Cambridge).

evolutionary stage.[36] Others allow transferability on the basis of differences, as only differences enhance our understanding of law in a given society.[37]

Jhering, Zweigert and Kötz[38] view the question of comparability through the relative prism of functionality.[39] For them transferability is not a matter of nationality, but of usefulness and need.[40] It is precisely this notion of functionality that supports transferability on the basis of effectiveness.[41] The objective of a good law is to effectuate adequate reform along the lines requested by the government of the day. If the reform requested applies to more than one jurisdiction, then the notion of effectiveness breaks the geographical boundaries of a single jurisdiction. And transferability is not only possible, but also desirable. In the current era of integrative legal globalisation[42] transnational problems require urgent transnational solutions. Nowadays integrative transnational approaches seem to be no longer a luxury but a realistic response. Trade in human organs, organised crime, terrorism, paedophilia cross national borders and therefore require a-national solutions. Borrowing laws already applied elsewhere simply offers the drafting team the opportunity to propose and apply policy and legislative responses with unprecedented insight to the possible results to be produced.

The pyramid of virtues pursued by the drafter promotes effectiveness as the common highest pursuit for drafters, while allowing them to select the most appropriate tools within the constitutional, political, legal, and cultural constraints of the specific society at the specific time. Thus, the qualitative functional definition of quality reflects the integrative nature of our era of globalisation, while emphasising the need for naturalisation of legislative concepts. As a result, it promotes true universality rather than superficial standardisation. Diversity in drafting does not signify drafting nationalism. It is simply a reflection of the inherent subjective prioritisation of drafting virtues within the same hierarchical step to the ladder, based solely on national eccentricities, rather than an alleged rigid civil versus common law divide. But if common versus civil law barriers are demolished, what is it that explains diversity of drafting styles and choices?

If one views drafting as a series of subjective choices, what explains diversity of law as the product can only be diversity in the factors that influence these choices. The nature of the legal system is one, but only one of those influencing factors. But what shines through diversity is universality,

- in the concept of quality of legislation;
- in the virtues that contribute to quality; and
- in their hierarchical classification.

After all, in the sphere of Aristotelian phronesis virtues are moral universals that are indeterminate. Thus phronetic drafting involves the virtue of effectiveness as a moral universal. Effectiveness as a virtue is

[36] See C. Schmidthoff, "The Science of Comparative Law" [1939] *Cambridge Law Journal*, 96.
[37] See F. Teubner, "Legal Irritants: Good faith in British law or how unifying law wends up in new divergences" [1998] 61 *MLR* 11; also see JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (1996, Clarendon Press, Oxford), 16.
[38] See Zweigert, K. und H. Kötz, *Einführung in die Rechtsvergleichung*, 3. neubearbeitete Auflage (1996, J.C.B. Mohr, Tübingen).
[39] See K. Zweigert and K. Sier, "Jhering's influence on the development of comparative legal method" [1971] 19 *Am.J.Comp.Law* 215.
[40] See K. Jhering, *Geist des römischen Rechts* (1955, Volume 1), 8-9.
[41] For an analysis of functionality in legislative drafting, see H. Xanthaki, "Legal transplants in legislation: defusing the trap" 57 [2008] *International and Comparative Law Quarterly*, 659.
[42] See L. A. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations" 34 [2000] 3 *International Lawyer* 1059.

indeterminate. But, like all phronesis, drafting includes a mental-moral habit which, by mediating universals in the particular case, makes them determinate.[43] Thus, effectiveness as quality in legislation is universal and as such indeterminate. In order to attribute to it specific elements one needs to place it within the context of legal system, culture, legislative environment, and policy.

D. Conclusions

Duncan Berry's approach to dual training for drafters is confirmed. Drafting is a phronetic sub-discipline of law, which deserves to be recognised as such. Drafting is not simply academic, just as drafting is not simply a technical science. Drafting encompasses both ends of the spectrum, as it is a liberal art, a phronetic discipline.

Phronetic legislative drafting, in the Aristotelian sense, requires that drafters select the most appropriate subjective choice for the solution of the problem that they face at any given time. In other words, drafting is prudence: just as a judge applies the most appropriate legal norm for the circumstances of the case, a drafter applies the most appropriate theoretical drafting principle for the circumstances of the concrete drafting issue that they are called to address.

In order to complete this task adequately, a drafter needs to possess two distinct skills:

a. Awareness and understanding of theoretical drafting principles, their purpose, their application, and expected results from their use; and
b. Experience in the application of drafting principles in concrete cases within the jurisdiction that they currently serve, and beyond.

To acquire the first skill, a drafter needs to have completed formal academic training in the theory of legislative drafting, both in abstract and applied. This formal training is best offered by academic institutions with experience in academic training, with independent assessment of staff and training offered, and by staff with both academic excellence in the field of legislative studies and teacher training. The use of know-how from other jurisdictions by means of international and comparative experience is useful.

To acquire the second skill, a drafter needs to have completed mentoring training on the job within the jurisdiction of choice by an experienced senior with both long service in that jurisdiction and mentoring skills.

It is rare for authors like myself to be able to affirm so effortlessly statements made by others. Duncan Berry's passionate and applied dual training for drafters has given me the chance to consider the reasoning behind my own passionate conviction that training for drafters must also take the form of formal education. I guess that this is yet one more thing for which I have to thank Duncan Berry.

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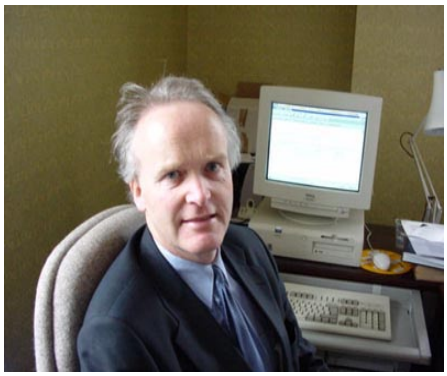
[43] J. Dunne, *Back to the Rough Ground* (1993, University of Notre Dame Press, Notre Dame), 311.

"The laws the Lord gave Moses" – a ditty by Vincent Grogan (1952)



Introduction by Kieran Mooney[1]

Vincent Grogan SC (1915 to 1997) was called to the Irish Bar in 1937 and practised as a barrister until 1943 when he then entered the Office of the Parliamentary Draftsman (now Office of the Parliamentary Counsel to the Government). In 1957 he became the Director of the Statute Law Reform and Consolidation Office which was, along with the Parliamentary Draftsman's Office, part of the Irish Attorney General's Office. After a request was received from Ghana for a drafter to assist them, Vincent was seconded in the early 1960s to work there as a constitutional and legislative draftsman. From 1973 to 1975 he was a director in the Directorate General for Competition Policy in the European Commission. Vincent continued to draft after he had "formally" retired. Apart from continuing to draft for the Parliamentary Draftsman's Office in Dublin, his drafting assignments included work for both Swaziland and Botswana. One of my first encounters with the scope of Vincent's drafting was in 1981 when, on entering the Parliamentary Draftsman's Office, I occupied his room (he was in Africa at the time) and found one of his own files marked "Political Last Will and Testament, Kwame Nkrumah" with a carbon copy draft of that document.

Vincent's short ditty "The laws the Lord gave Moses" came about as follows.

The Attorney General of the day queried the use by drafters of phrases such as "there shall stand established a body to be known as …" or "this order shall extend" (such phrases were used with greater frequency in the 1950s than would be used today). In the Attorney's view their use meant that the intended result could never actually be achieved because, although it had to happen, it always had to happen at some future date. Office memory, even when I entered the Office, did not recall whether or not this was a tongue-in-cheek remark from the Attorney. In any event, the end result was Vincent's ditty which is set out below.

It is initialled and dated by Vincent on 26 February 1952, which would have been during the period Cearbhall O'Dalaigh was Attorney General (subsequently, Chief Justice, member of the European Court of Justice and President of Ireland). However, when I entered the Office it was recounted by some that it was when Aindrias Ó Caoimh was Attorney General (January to June 1954 and 1957 to 1965). He too subsequently held high judicial offices as a Supreme Court judge, President of the High Court and a judge of the European Court of Justice. However, it may have been wishful thinking that it was Ó Caoimh as he had earlier in his career, for a short period, been a drafter in the Office before returning successfully to the Bar.

[1] First Parliamentary Counsel, Dublin.

“This Order shall extend”

Advises the A.G.

Is future, not imperative –

A point that baffles me.

……..

The laws the Lord gave Moses

Do not rule our fate

Due to a drafting error

They’ve no commencement date.

…….

“Thou shalt love the Lord” –

It makes the senses reel –

Only applies in future

Likewise “Thou shalt not steal”.

…….

Don’t say “there shall stand established”

lest you’re misunderstood.

In future, it’s imperative

To say “there is hereby stood…”.

VG

26.2.’52.

Work methods and processes in a drafting environment

Lionel A. Levert, QC[1]

Introduction

In Commonwealth countries, legislative drafting tends to be handled by centralized drafting offices. The main reason for this is that central drafting is generally seen as generating a higher level of consistency and efficiency than situations where drafting is handled by each sponsoring ministry. However, centralizing the drafting of legislation does not automatically produce greater consistency in legislation and greater efficiency in the use of drafting resources. A number of conditions, including the implementation of good work practices and processes, must be met if those results are to take place.

The main purpose of this paper is to discuss work methods and processes, but before embarking on that discussion, it is in my view important to bear in mind some of the building blocks that must guide managers of drafting offices when making decisions regarding the necessary steps to be undertaken in order to establish an efficient and effective drafting office. First, every centralized drafting office has the responsibility of ensuring and maintaining the quality, consistency and integrity of the statute book. Secondly, legislation must be drafted with a view to meeting government expectations, both in terms of its contents and the timing for its completion. Thirdly, legislation must be accessible to all those concerned, both materially and intellectually.

My discussion on work methods and processes will focus on seven broad categories: teamwork approach, work assignment, relations with client or sponsoring ministries, development of a corporate knowledge base, quality control, bilingual (or multilingual) drafting, and drafting tools and other devices/equipment.

1. Teamwork approach

Every step of the legislative drafting process is about teamwork. Not only is it essential for drafters to exchange ideas with colleagues, but as part of their daily work, they work closely with policy developers and other representatives of the sponsoring Ministries. As well, the legislative drafter needs to work closely with central agencies, such as Cabinet, that have a central coordination role to play with respect to the government's legislative agenda. Drafters also work closely with other professionals who may be involved in the preparation of legislation, such as legislative editors, linguists, comparative law experts, as is the case in Canada. Finally, based on Canadian experience where drafting is centralized in the Department of

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Justice, legislative drafters are in constant contact with other legal experts in the Department such as those working for the sponsoring Ministry or lawyers working in specialized advisory legal services (e.g. experts in constitutional law, administrative law, human rights law, criminal law).

Furthermore, when the drafting of primary and subordinate legislation is handled by two separate groups, the drafters of the former should also work closely with the drafters of the subordinate legislation, given the close relationship between primary and subordinate legislation. When a Bill is ready to go to print, drafting services interact with the printing agency. And finally, when the time comes to introduce a Bill in Parliament, drafting services must work closely with officials in Parliament, both before and after introduction of a Bill.

Because legislative drafting involves various experts working together from the beginning to the end of the process, drafting offices should implement sound teamwork approaches and make sure they can maximize some of the positive impacts produced through those approaches on other key aspects in a drafting environment.

1.1 Teaming up drafters strategically

In Canada, the federal drafting office always has at least two drafters working on each file since our co-drafting system calls for both an English-speaking and a French-speaking lawyer to work together in a concerted manner in preparing the two official language versions of each Bill. In addition to ensuring the requirements of official bilingualism are properly attended to by having all Bills drafted by bilingual teams of drafters, the drafting office does its best to have an experienced drafter and a less experienced one paired to work together on any given file, thus allowing the more junior officer to learn from his or her senior colleague through this process. Most Commonwealth drafting offices have various mechanisms in place to ensure the development of skills and expertise through some form of cooperation between senior and junior drafters. Not only is this beneficial for less experienced drafters, but it is also valuable for senior drafters to be able to discuss various issues with their more junior colleagues who often have innovative ideas about the way problems might be handled.

When drafters are members of a team, they must be mindful of the importance of clearly defining the duties of each drafter in order to avoid any kind of misunderstanding and to ensure the best possible cooperation between drafters. Also, junior drafters should get the opportunity to work with different senior drafters over a period of time in order to be exposed to different styles and approaches. Ultimately, the drafting input into any legislative project must speak with one voice.

1.2 Teaming up drafters of primary legislation and subordinate legislation

Because primary and subordinate legislation are so closely linked with one another, the latter fleshing out the broad principles established in the former, where primary and subordinate legislation is drafted by two different groups, appropriate mechanisms should be put in place to ensure the greatest possible consistency between the two sets of legislation. One way to achieve that result and also to save time (no learning curve required) is to have the same team of drafters drafting both the Bill and the ensuing subordinate legislation. Another way is to set up two teams of drafters, one responsible for the drafting of the Bill and the other one in charge of the subordinate legislation, and to make sure the two teams work closely together. At the very minimum, when drafting a Bill that contains provisions for the making of subordinate legislation, the drafters of the Bill should always consult their colleagues who are the experts in preparing subordinate legislation, in order to make sure the enabling provisions contained in the Bill are properly drafted and will not raise legal or policy issues down the road.

1.3 Teaming up with other professionals (e.g. legislative editors)

Legislative drafters need to be supported in their work both linguistically and legally. Drafters are experts in drafting legislation, but this does not mean that they are also, nor can they be expected to be, experts in language issues or in all areas of the law.

Language experts (e.g. legislative editors, linguists) can provide assistance on language aspects, allowing the drafters the opportunity of focusing on what they know best, namely the law and the legal aspects involved in legislative drafting. This is also a way of ensuring that more than one set of eyes (including a *fresh* set of eyes) carefully reviews each legislative text and that such review includes a close verification of technical details such as historical notes, cross-references, spelling and punctuation, as well as syntax and grammar.

On the legal side, drafters should not and cannot be expected to do all the legal research and opinion writing work that may be required for the proper drafting of a particular piece of legislation. They should be able to rely on other colleagues in the Ministry or Department whose responsibility it is do the necessary research work and to provide legal opinions on various legal matters. This enables the drafters to focus on their work and to effectively specialize in legislative drafting, which is an art and a discipline in itself.

1.4 Integrated approach (teaming up with litigators, policy developers, etc.; multidisciplinary approach)

Legislative drafters are not policy developers and should not be expected to do both the policy formulation and the legislative drafting for a particular government initiative. These two disciplines require different skills and ought to be handled by two sets of specialists. That being said, however, there is no doubt that policy developers and legislative drafters must work closely together in the process of developing a given piece of legislation, and there will always be room for at least some policy work to be done by drafters, such as challenging policy assumptions or fleshing out incomplete policies.

There are cases where the Bill being drafted results from a court decision or deals with issues that have been argued before the courts over the years. In those situations, it may be worthwhile and quite advisable, in fact, for the drafters to work closely with the litigators and other legal counsel who have been associated with these court cases. There may be instances where it may be beneficial to set up a multidisciplinary team consisting of drafters, policy developers, litigators, and legal counsel specialized in various areas of the law, to ensure that all aspects of the file are duly taken into consideration. In urgent cases especially, it may save a significant amount of time to have everyone around the table to discuss various aspects of a file.

1.5 Word of caution

As much as teamwork should be valued and encouraged in drafting legislation, a lot of precious time can be wasted if there is no clear understanding as to who has the final say when no consensus is reached on various aspects of the Bill being drafted. The respective roles should be clarified at the very outset (see item 3.3 below). Generally speaking, there should be no doubt that policy related issues are the domain of the sponsoring Ministry (or Cabinet, when matters discussed may impact material aspects of Cabinet's decision), while drafting matters (e.g. drafting style, drafting techniques, terminology) are the responsibility of the drafter or the leading drafter when there is more than one drafter on the file. Legal issues other than drafting issues should be the responsibility of the ministry in charge of legal matters (e.g. Department of Justice, in Canada). During meetings, discussions should always be led by the drafter or leading drafter in charge of the file.

2. Work assignment

Assigning work to drafters is not just about numbers (i.e. making sure each drafter has his or her fair share of work). By assigning files in a strategic manner, managers can significantly influence and increase the quality of the end product, as well as the volume of work accomplished. Here are a few considerations that managers may want to keep in mind when assigning work among their drafters.

2.1 Workload generally

Drafters are subject to very hectic schedules. Therefore files must be assigned in a manner that allows the work to be spread out equitably among the group. Drafters cannot constantly draft under the pressure of tight deadlines. But other criteria should also be taken into consideration in assigning drafting files. For instance, managers should make sure their drafters get to work with a wide range of colleagues and can learn from each other. As mentioned above, more experienced drafters should be matched with less experienced ones. Some colleagues are quicker drafters than others and should therefore be considered for urgent files, provided that the same people do not always end up getting all the urgent files.

It would appear that most drafting offices across the Commonwealth pay attention to individuals' personal areas of interest in assigning files and actually invite drafters to let management know if they are interested in drafting a particular piece of legislation. A drafter is likely to do a better job if he or she is asked to draft a Bill on a subject matter that is of particular interest to them. Also, even if drafting offices do not generally tend to support specialization among their drafters (see discussion on specialization below), in most drafting offices there will be individuals who, either because of past experiences or personal interest, have developed a greater expertise than most of their colleagues in particular areas of the law. Managers would be ill-advised not to take advantage of the expertise developed by individuals in particular areas of the law when assigning files relating to those same areas. Experience should of course be factored in when assigning files. A more experienced drafter can cope more effectively with emergency situations, difficult clients or complex files.

2.2 Specialization (generalist vs. specialist approach)

Legislative drafting is in itself a form of specialization. Professional legislative drafters (i.e. those who exclusively draft legislative texts) are indeed specialists. That being said, most drafting offices do not tend to encourage drafters to specialize even further by developing a special expertise for the drafting of legislation in particular areas of the law, with the possible exception of complex and technical legislation such as tax law writing.

Why would a drafting office opt for a generalist approach as opposed to a specialist approach, and vice versa? In my experience, it is better to avoid ultra-specialization. Because the legislative workload and priorities are generally quite unpredictable and anything but stable, managers need to be able to move files around in order to meet the government's legislative agenda. In order to have that flexibility, managers must be able to count on drafters who are comfortable at drafting just about any kind of legislation and working for just about any sponsoring ministry. This is only possible if drafters are generalists and are not so specialized in particular areas of the law that any other area of the law where legislation is required would almost be totally foreign to them.

That being said, a certain level of specialization may not be a bad thing. For instance, in some drafting offices, the same drafters tend to draft most of the criminal law legislation, but they also draft other types of legislation and are indeed quite comfortable in drafting legislation in just about any other area of the law.

They may be a prime choice for the drafting of a criminal law Bill, but they would also be available to draft all sorts of other Bills. This allows for better quality legislation in the area of criminal law while still supporting the organization's need for flexibility to deal with all kinds of emergencies and a wide range of other types of legislation.

The same could probably be said of the advantages and disadvantages of having a portfolio approach. Some drafting offices have teams of drafters primarily responsible for the drafting of legislation administered by a particular ministry or a limited group of Ministries. This approach obviously has a number of advantages, including the fact that the legislation of those Ministries gets drafted by drafters who have a particular expertise in the various areas falling within the jurisdiction of the Ministries concerned. The downside, however, would be to have a situation where the drafters draft for those Ministries exclusively and know very little about the areas of the law that other ministries are responsible for, in which case management would have relatively little flexibility to move files around according to government priority changes. A portfolio approach that would still allow drafters to draft legislation in areas falling under other portfolios would likely be a sounder approach as it would allow for all drafters to build a broader drafting expertise.

2.3 Large files (several teams)

The drafting of large Bills (e.g. several hundred pages) requires time and concentration, but sometimes, for political or other reasons, those large files become urgent and need to be ready for tabling in Parliament in a very short timeframe. A good way to deal with that kind of situation is to create several teams of drafters to work on various parts of the Bill, with one team or one senior drafter being put in charge of the whole file and coordinating all aspects of the file in order to ensure consistency and compliance with deadlines.

However, this multi-team approach will not work very well and will likely only create a real bottleneck on the client's side unless the sponsoring Ministry also establishes corresponding teams that can instruct each one of the drafting teams put in place to deal with this extraordinary emergency situation.

2.4 Prioritization of files

Whether or not a government establishes a legislative calendar with its priorities well spelled out, government priorities are bound to change. Circumstances (political, economic, social) change over the lifespan of a legislative calendar and this will necessarily mean that drafting services will have to adjust to the government's changing needs and priorities. Priority-setting or priority-shifting related issues should always be dealt with by a central agency (e.g. Cabinet, Prime Minister's Office) that will be able to let drafters know what the government's new priorities are and, accordingly, which Bills should now retain the drafters' attention on a priority basis. It should not be the responsibility of the drafters or even their managers, let alone individual Ministries, to decide what the government's priorities are at any given time.

2.5 Empowerment

By its very nature, an effective legislative drafting process requires quick decision-making. Once they have a few years of experience, drafters should be empowered to make decisions on their own files, subject of course to normal quality control mechanisms discussed below. As well, the instructing officers representing the sponsoring ministries and interacting with the drafters on an almost daily basis should also be selected for their authority to make decisions or because of their easy access to decision makers. The approval structure in place in some drafting offices may be too heavy and may have to be revisited in order to ensure its efficiency and to ensure a greater level of empowerment for legislative drafters.

3. Relations with *client* or sponsoring ministries

One must never lose sight of the fact that, in the end, legislation must not only be workable, be legally sound and meet Cabinet's expectations, but it must also support sponsoring ministries in achieving their policy objectives. Therefore, sponsoring ministries must be at the heart of the legislative drafting process. Their views must always be closely considered and taken into account. Drafters must make sure the sponsoring ministries are happy with the end product and are not simply dictated what the law should be.

3.1 General approach

Legislative drafting should in all cases be a client oriented service. Sponsoring ministries must be kept informed of the progress of their Bills at all times, must be consulted at every stage of the drafting process, and must be told about problems encountered in the drafting process and be part of the problem-solving process. Drafters are not there to tell the client ministries what should be in their Bills, but to listen to what the client ministries wish to achieve with their Bills, as approved by Cabinet, and to turn these desires and policy objectives into a workable and legally sound piece of legislation.

3.2 Policy role of the legislative drafter

As discussed above, drafters are not the policy experts. Policy development is the sponsoring organization's domain. But the drafters should never hesitate to raise questions with client officials in order to make sure they have a good understanding of the policy that is about to be translated into legislation, and to make sure all aspects of the policy have been thought through. When the policy appears to be incomplete for the purposes of having a workable Bill drafted, it is part of the drafter's role to raise all necessary questions and to make suggestions to fill the apparent policy gaps. Drafters are not as close to the working out of the policy as the sponsoring ministry is, and so they can approach a Bill with a fresh and independent eye. They should not take things for granted and should be prepared to question ideas. That being said, it is not enough, however, for the drafters to challenge bad ideas. Their capacity to contribute fresh and constructive ideas is even more important.

3.3 Clarifying respective roles

Good working relations between drafting services and client ministries are premised on a clear definition of their respective roles and responsibilities in the legislative drafting process. Preparing a short document describing respective roles and responsibilities will go a long way in avoiding potential confusion and misunderstanding. Every Ministry should receive a copy of the document when it is completed and should also be provided with a copy every time a drafting file is opened for that Ministry. It might be advisable to discuss the document briefly at the beginning of the first meeting held on any particular legislative file, as a reminder.

3.4 Relations with central agencies

It should always be clear that drafters take their marching orders from Cabinet or some other central agency (e.g. the Prime Minister's Office). They should never be at the mercy of particular sponsoring ministries. This is particularly important in the context of changing government priorities, as discussed above.

3.5 Drafting instructions (not in the form of a Bill)

As a general rule, drafters should work on the basis of drafting instructions and not on the basis of a document that is already in the form of a Bill. These instructions should be contained in the Cabinet decision authorizing the drafting of a Bill. Drafting services ought to be consulted by officials preparing

Cabinet memorandums that envisage the preparation of legislation and be given an opportunity to provide advice on the drafting instructions to be included in the memorandums and eventually in the Cabinet decisions.

When working from instructions that are prepared in the form of a Bill, drafters waste precious time deconstructing this draft Bill in order to properly understand its underlying policy and to make sure the policy is complete and workable, and then to reconstruct the Bill according to accepted drafting standards.

3.6 Preparing guidelines for the preparation of drafting instructions

In order to ensure consistency in the way drafting instructions are prepared across government, it would be advisable for drafting offices to prepare guidelines that can be used by those responsible for the preparation of the drafting instructions across government.

3.7 Drafting meetings

Finding out what the sponsoring ministry actually wants is essential, and this cannot possibly be done merely by reading the drafting instructions prepared by the ministries, unless the Bill to be drafted is extremely simple and straightforward, which would be rather exceptional. The best way to understand the sponsoring ministry's policy objectives is through meetings. The drafting process should always start with a preliminary meeting where respective roles are discussed and a general discussion is held on the sponsoring ministry's intentions, as approved by Cabinet. Background information would also be provided to drafters during that preliminary meeting. This meeting should be followed by as many meetings as may be required to make sure both the drafters and the client officials are satisfied that the Bill, as drafted, properly reflects the sponsoring ministry's and Cabinet's intention.

3.8 Exchanging drafts (drafting shuttle)

After the first meeting with the sponsoring ministry officials, a first draft of the Bill should be prepared and circulated to the sponsoring ministry for their comments. Then another meeting should be held to discuss the first draft. Depending on the nature and complexity of the Bill, there may be as many as twenty or thirty drafts prepared before everyone agrees on a final draft. There may be a need to have as many meetings, although in most cases many of the changes suggested can be discussed over the telephone.

4. Development of a corporate knowledge base

A number of work methods and processes are directly or indirectly aimed at developing a solid corporate knowledge base in order to increase the collective knowledge and information available to all members of a legislative drafting office. Formal training is the most obvious way to develop the group's collective knowledge base, but there are numerous methods besides formal training to assist an organization in that respect. Here are but a few of the methods that can be used to that end.

4.1 Regular staff meetings

The simplest and most effective way of developing a solid knowledge base within the group is to hold meetings on a regular basis and to consider the meetings as a priority for everyone. Members of a drafting office ought to meet regularly to share information, to discuss problems, to identify solutions together, to discover innovative ways of dealing with new emerging problems, to share ideas on best practices, and, generally speaking, to make sure the group drafts in a consistent manner. A lot of that information sharing can be done by exchanging emails or through some other vehicle supported by information technology (IT),

and drafters should be strongly encouraged to use that device for information sharing purposes. However, IT cannot totally replace meetings. Solutions identified during meetings could then be incorporated into a legislation desk book.

4.2 Informal meetings

Managers in drafting offices should strongly encourage the emergence of an information sharing culture within their groups. Informal exchanges (e.g. meetings around a cup of coffee/tea) are an excellent way of sharing information and keeping everyone aware of what is happening within the group.

4.3 Mentoring

A mentoring system allows newcomers and less experienced drafters to have regular access to a more senior drafter who can answer their questions, provide advice and guide them in their daily work as legislative drafters. Every time a new officer is hired, one of the more senior drafters should be identified as his or her mentor, responsible for providing guidance and assistance to this new officer for a fixed period of time (at least one year). This would be a way of facilitating the new officer's full integration in the group and making sure newcomers are exposed to a wealth of information and brought up to speed in a timely manner.

5. Quality control

Because legislation is often drafted in difficult circumstances (e.g. emergencies, political pressures, unreasonable timeframes), it is of the utmost importance for any drafting office to have in place appropriate mechanisms to ensure its legislation meets the highest quality standards possible. There are a number of ways to ensure greater control over the quality of legislative products. Here are a few suggestions in that respect.

5.1 Drafting standards

Consistency in legislative drafting is extremely important. Quality legislation simply cannot exist without consistency. To that end, every drafting office should establish drafting standards, and these standards should be established collectively through discussions and participation by everyone, rather than dictated by management. Once established, these standards should be incorporated into the group's legislation desk book for ease of reference and should be updated, as needed, over the years.

5.2 Mainly the responsibility of drafters

The main responsibility for ensuring high quality legislation lies in the hands of the drafters themselves. They are the guardians of the statute book. They are the experts. They have (or should have…) the last word when it comes to drafting techniques, terminology, structure of a Bill, etc. Of course, as discussed above, they ought to be assisted by other professionals, such as legislative editors, in ensuring the quality of their legislative product, but they are ultimately responsible for the quality of the Bills they draft.

5.3 Role of the sponsoring ministries

Sponsoring ministries also have a key role to play in ensuring that the Bills meet their needs and properly carry out their policy objectives, as approved by Cabinet. To that end, they will benefit from the drafters' assistance, but they should not strictly rely on the drafters to ensure that the legislation being drafted will achieve its goals and is of good quality.

5.4 Objective review of all Bills

Even if drafters use a teamwork approach to draft a Bill and therefore more than one drafter gets to see each Bill, having in place a review mechanism that allows for an objective review of the Bill by other colleagues who have had nothing to do with the actual drafting of the Bill can be very useful. Of course, legislative editors play that role to a large extent, but they are generally not legally trained (which indeed is one of their advantages…). It is therefore important that an objective review of all Bills drafted be carried out by other legally trained colleagues. This can be done through a review committee (which can be an interesting training ground for less experienced drafters) or simply by one or more other colleagues (not necessarily more senior) who have been tasked to do this on an ad hoc basis or otherwise (review officers).

6. Bilingual (or multilingual) drafting

Many countries draft their legislation in more than one official language. Canada, with its two official languages (English and French), is of course one of those countries. It may therefore be useful to briefly discuss a few methods that are available and have been tried out in terms of dealing with bilingual or even multilingual requirements.

6.1 Co-drafting method

Canada's co-drafting method is quite appropriate when there are two official languages in place with equal legal status, as it does ensure equal treatment for both official versions of the laws. This method entails the participation of two drafters on each Bill, one representing each official language. In Canada, one of the drafters is an English-speaking lawyer, usually trained in the common law system, and the other drafter is a French-speaking drafter, usually trained in the civil law system. The two drafters work closely together in devising the scheme of the Bill and they each draft the language version of the Bill for which they are responsible. Because each drafter is bilingual, he or she can, and is encouraged and expected to, comment on the other language version.

For practical reasons, one of the drafters is the leading drafter. This leadership role is exercised by English-speaking drafters and French-speaking drafters on an equal basis. Normally, the leading drafter produces a first draft in his or her mother tongue and discusses it with the other drafter. The latter then prepares a first draft in his or her mother tongue, based on the legislative scheme agreed to by the two drafters and on the first draft prepared by the other colleague, as well as the discussions held on that draft between the two drafters. There is therefore no translation involved in producing the two language versions of Canada's federal legislation. The sponsoring ministries are expected to instruct and comment on both language versions.

This method, in our view, has proven to be the best way of ensuring equal treatment and the same level of quality for both language versions. Furthermore, each file is handled by two drafters and we like to think that two heads are better than one… This approach would of course be rather cumbersome in a country where legislation has to be drafted in more than two official languages.

6.2 Bilingual drafting by a single drafter

In some very rare instances, some drafters are sufficiently fluent in both languages in which a Bill has to be prepared to actually handle both versions quite effectively. In Canada, we tried this method at the federal level in the late 70s and quickly came to the conclusion that drafters can generally produce good quality legislation only in their own mother tongue. The versions produced by the drafter in his or her second

language were generally not up to standards, at least not up to the high standards expected for the legislation of a country. We would therefore not encourage other jurisdictions to consider this as a worthwhile option.

6.3 Drafting/translation approach

Generally speaking, jurisdictions that produce bilingual legislation use a variety of different translation models. In essence, with different variations, they use two models. The first one consists in preparing a translation in isolation and almost after the fact, once the draft Bill has been completed in the other language. This method is not very satisfactory as the translators generally have no access to the drafters or to Cabinet materials or other relevant materials. They essentially produce a translation based on the draft they received in the other language.

The second model is much more satisfactory as it allows the translators to work along with the drafters and be associated with the drafting process. They also have access to all relevant documentation, including Cabinet materials. They may also be invited to attend some of the drafting meetings.

7. Drafting tools and other devices/equipment

This paper is not meant to discuss in great detail the various tools or other devices or equipment that can assist legislative drafters in their daily work. But because they are closely associated with work methods and the effectiveness of a drafting office, it might be useful to mention a few of them.

7.1 Standards and precedents (legislation desk book)

As discussed above, establishing standards and precedents is necessary in order to ensure consistency in legislative drafting. They should normally be incorporated into a legislation desk book that each drafter should consult on a regular basis.

7.2 Issuing drafting notes

It is sometimes advisable for management to issue drafting notes to all drafters. Ideally, these notes would be the result of group discussions and would eventually be incorporated into the group's legislation desk book. Drafting notes would deal with various drafting issues as they arise and would alert drafters to new problems and possible solutions to address those problems.

7.3 Legislation desk book

Having a legislation desk book at the disposal of each drafter is particularly helpful, especially when a good number of the drafters have relatively little experience in legislative drafting. As a bare minimum, a good desk book should normally contain drafting standards, legislative precedents, and various guidelines to assist drafters in their daily work. A desk book should be seen as a good tool that incorporates and communicates the group's collective wisdom.

7.4 Computer-assisted drafting

Computer-assisted legislative drafting can make the whole process much more efficient, especially when the drafters themselves use the computer to draft their Bills. If the drafters still prepare their drafts by hand and then rely on their support staff to input the data on computer, very little is gained by computerizing an office environment. But, the pace of the drafting process is significantly enhanced when legislative drafters input their data themselves and can access various documents including legislative precedents via their local area network, documents that they can then directly incorporate into their drafts.

In Canada (federal level), the drafting office even has computer-equipped drafting rooms where legislation can be drafted on site, with client Ministry officials present and witnessing legislative drafting in the making. This technique has its downsides of course, but it is extremely useful in the case of urgent legislation, in particular.

7.5 Local area network

Local area networks linking all computer stations and allowing all drafters to share information, ask questions, and access numerous documents deposited on a common server, greatly facilitate the application of common standards and the dissemination of information on the drafting of legislation.

7.6 Legislation databases

The development of legislation databases is particularly helpful for drafting offices. It enhances the group's research capability, allows for greater consistency in the drafting of legislation, and facilitates access to provisions that need to be amended, to precedents, etc. Of course it also facilitates the consolidation, revision and publication of legislation.

7.8 Separate offices for drafters

It may sound awfully trite to say this, but because legislative drafting requires a lot of concentration, legislative drafters should all have separate offices. It is extremely difficult to be productive when one is continually interrupted by conversations, people walking around, surrounding noise and the other varied sounds that go towards making a work environment. This may sound very obvious for most developed countries, but it is still an unattainable dream in most developing countries.

CONCLUSION

In a legislative drafting environment, as in any other type of professional environment, establishing appropriate work methods and processes is sometimes just as important as having properly trained employees or hiring people with the right skills and qualifications. The implementation of work methods is generally much less costly than formal training and can actually have an impact on the development of people's skills and abilities, as well as on the number of people required to do the job properly. There is no doubt that appropriate work methods and processes can have a positive and significant impact on the volume and quality of work accomplished, the dissemination of knowledge among colleagues and capacity building generally within a drafting office.

It is worth noting that many of the suggestions discussed in this paper can be implemented at little or no extra cost.

Shaping policy into law: A strategy for developing common standards[1]

Nick Horn[2]

1 Introduction

I am honoured to have the opportunity to give a presentation half way around the world at this first Africa Regional meeting of the Commonwealth Association of Legislative Counsel. I feel humbled to be sharing a platform with such distinguished speakers, but I hope I may offer a modest contribution to the discussion at the conference on the topic of drafting standards.

Today I will discuss the interaction between policy and legislative drafting. First I will make a few remarks on the general topic of the proper role of the legislative drafter. Then I will introduce a working tool refined in my office—the "legislative plan" or blueprint—by which drafters are encouraged to work with instructors in the development of their policy for new legislation. Finally, I propose a more structured way in which this tool might be put to use to reinforce a uniform approach to the legislative drafting task, at least as it is undertaken in most Commonwealth countries.

It may surprise you to hear that the poet T. S. Eliot wrote about the relationship between policy and law. He took a very bleak view:[3]

> Between the idea
> And the reality
> Between the motion
> And the act
> Falls the Shadow

Today I will be reflecting more positively (I hope) on the capacity of the drafter and instructor together to find a passage across the shadowy territory between the policy "idea" and the "reality" of the drafted law; between the "motion" expressed in drafting instructions and the "act" of parliament.

2 The role of the legislative drafter

It would appear from most of the literature in the Commonwealth drafting tradition that drafting technique consists mostly in finding the *right words*, and putting them in the *right order*.[4] Many of us were introduced

[1] Originally presented by Nick Horn at the CALC Africa Region Conference Abuja, Nigeria, 6-8 April 2010.
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[3] T. S. Eliot, "The Hollow Men", lines 72-76, *Selected Poems*, Faber 1954-1961 p 80.

at an early age to Coode's rule on the ordering of the legislative sentence. In Australia, at least, and I suspect in many other places in the Commonwealth where drafters are trained through an apprenticeship system, we have absorbed from our senior drafting masters, and from our local statute book, not only Coode's seminal analysis, but also the drafting principles of Sir Henry Thring, Sir Courtenay Ilbert and Sir Alison Russell (albeit perhaps unconscious of the origin of these principles). To a significant extent, modern textbook writers on the subject, led by Elmer Driedger and Garth Thornton, have continued this emphasis on the centrality of language to drafting technique. The latter-day proponents of plain English legislative drafting have continued this tradition. If I may sum up the received wisdom, it is that the drafter's expertise is the ability to deploy the English language to write effective legal rules with clarity and force.

Yet legislative words do not occupy empty air. They are the tokens for concepts that represent government policy. The policy comes first. A drafter's first and most crucial task (and probably the more difficult job) is not to *draft*, but to *shape policy* into a form that can be drafted as law. As Professor Ann Seidman—who I am pleased to see will be presenting a paper at this conference— writes (with her co-authors Professor Robert B. Seidman and Nalin Abeyesekere) in *Legislative Drafting for Social and Democratic Change* (Kluwer, 2001):

> Between 'policy' and 'legislation', open spaces exist. Just as an architect creatively helps to fill in the open spaces between 'house' and the plans and specifications for building it, so a drafter creatively contributes to filling in the open spaces between a policy and the law that aims to put that policy into effect. (27)

Words are not enough. The communication of a given policy is not enough. As these authors argue, the Commonwealth drafting tradition unduly restricts the role of the drafter to that of wordsmith. They advocate a much more significant role for the drafter, as an agent of social change. A "communication" model (for which Thornton is their paradigm) is unfavourably counterposed against a "translation" model of drafting, as advocated by the authors. As a translator, the legislative drafter must apply "reason informed by experience" to *translate* policy into "transformatory" laws that beneficially modify behaviours on a significant scale; laws that can contribute to the social and democratic change of their text's title.

This ideal is especially difficult to achieve in countries with the legacy of the Commonwealth tradition because of fixed institutional roles and administrative history that require division rather than integration of policy and drafting. Some of the work the authors assign to the drafter —in particular the preparation of a reasoned and evidence-based "research report" for any significant legislative reform—is more properly the responsibility of public policy officials in many countries. Seidman et al are critical of such compartmentalising of the drafting process, tracing its origins to a bureaucratic compromise reached as part of the centralising of legislative drafting under Henry Thring (later Sir Henry) in 1869 (30). But to this day, more than ever it remains a fact of life.

Although in Australia and elsewhere in the Commonwealth the division between "drafter" and "instructor" undoubtedly confines the drafter's role in formulating transformatory laws, I take my starting point for this talk from the more profound reality, as the authors state, that:

> ...whoever writes out a law's detailed provisions inevitably serves not merely as a communicator, but as a participant in the process of determining the policy's operational content. That reality exists because form and content remain inextricably linked. (26)

[4] For an excellent survey of the literature, see Spring Yuen Ching Fung and Anthony Watson-Brown, "Traditional Drafting in Common Law Jurisdictions", *Statute Law Review* (1995) 16.3, pp 167-186.

Since the form of the drafter's translation (into law) determines the law's policy content, the drafter must take proper responsibility for policy as well as formal technical matters (in order to bridge the gap between the "motion" and the "act"). The drafter, intent on wordsmithing, who declines to take an active role in shaping policy, runs the risk of drafting beautifully expressed laws that are not fit for purpose. The use of the planning technique that I will now go to describe can help us towards the goal of ensuring that our *belles lettres* are as effective as they can be in achieving the policy objectives of our legislatures and governments.

3 A useful tool for shaping policy into law[5]

I want to introduce to you today a particular tool that the Australian Office of Parliamentary Counsel ("OPC") has developed to encourage drafters to be aware of their role as policy translators, and to manage the day-to-day process of working in collaboration with instructors in refining policy. This is a working document known as a "drafting plan" or "blueprint". Particularly at the earlier stages of a drafting project, this is seen as assisting the members of the drafting and instructing teams to tackle their task at a conceptual level before a commitment is made to a particular drafting form or approach.

Many of you will be familiar with the checklist of matters to be considered by the drafter as listed by Mr Justice VCRC Crabbe.[6] This covers such important matters as defining the problem to be addressed, establishing the policy objective, locating evidence and research on which the policy proposal is based, setting out the state of the law and constitutional issues. The OPC legislative planning tool enables the drafter to canvass these issues in consultation with the instructing team, in an iterative way, in order to further refine the policy proposal and possible drafting approaches.

An approach known as "drafting from a blueprint" was developed in OPC starting in 1991, as the brainchild of one of our most innovative drafters, Adrian van Wierst. Over the last decade it has become generally used by most OPC drafters, at least for medium- to large-scale projects. In its original conception, the bulk of the drafting process is taken up with developing the "blueprint" in collaboration with the instructors to the stage where drafting and settling a Bill based on its concepts becomes a relatively simple exercise. In practice, most drafters (myself included) would generally start to draft the Bill proper at an earlier stage than this. However, this does not take away from the main advantage of this approach, which is to focus on what the real problem to be solved is, and the development of a sound and simple solution to the problem at the conceptual level. This is still a valuable achievement even if many details remain to be sorted out in the drafting phase.

Attachment A sets out a hypothetical OPC Plan for the "Social Welfare Benefits Amendment Bill 2010". The cover page of the Plan is used to record basic background information in an accessible way, including contact details, details of government authority and priority and timelines.

The Plan itself is set out in a table. We have found that the tabular format is very convenient for enabling topics, amendments/rules and comments to be visually correlated. As the Plan is to be used as a vehicle for communication, it is most important that it be as accessible as possible. Also, since instructions generally come in narrative form, the table gives the drafter the opportunity (and challenge) of "shaping" the instructions into a form more susceptible of being translated into legal rules, and that may bring out aspects of the instructions not immediately apparent in the narrative format. In particular, the change of format enables the drafter to convey a bird's-eye view of the instructions, and to start to apply appropriate logical principles to the organisation of the material.

[5] This section of the presentation draws significantly on a paper prepared by my colleague Louise Finucane, and another by Adrian van Wierst (a former OPC drafter). Attachment A is based on an example prepared by Louise Finucane.
[6] *Legislative Drafting: Volume 1*, Cavendish 1993 rpt 1998. See Appendix C, "Tin tacks for Parliamentary Counsel" (adapted from Reede Dickerson, *Materials on Legal Drafting*, p 115).

From this particular plan you can see the bare bones of the amending legislation necessary to give effect to policy changes to a fairly typical benefit scheme as those amendments emerge in the middle column (although in this case they are still sketchy). It usually takes several iterations before any "rule" or detail appearing in this column began to look like a draft law.

The right-hand column offers a convenient way to summarise some of the consequences of the instructions, to convey queries to the instructors and to record agreements regarding policy and drafting approaches to the project.

A plan like this might be prepared following an initial meeting with instructors, and then be used as a way to advance the project for some time. The drafter would control the content of the plan, but the instructors often find it convenient to respond to the plan by annotation. Multiple planning tables may be used for larger, more complex schemes. As greater policy clarity is achieved through the planning process, many drafters start to "draft in" to the middle column, but in its purest conception this column is still expressed in flexible language and the drafting itself is a relatively short process that occurs after the plan is "complete". The drafter aims to prepare a "blueprint" for the scheme (in constant collaboration with the instructor) to the stage where drafting becomes a relatively technical operation, with all major conceptual problems solved.

There are no fixed rules about using the plan, nor about whether to use it or not. For shorter projects, particularly if time is tight, drafters might not use a plan at all. For any project of a significant size, a positive side-effect of the planning approach is to assist in the project management aspect of drafting (timing, need for authority, provision of formal legal advice, need to refer to relevant central policy agencies etc.).

The plan is also a very good training tool. For a project for which a "junior" drafter is primarily responsible, the junior drafter's conceptual capacity and project management ability can be developed more systematically than if the junior drafter goes straight to a draft. In the short course I teach on drafting at the Australian National University the plan offers a very useful pedagogical vehicle for the same reason.

4 Shaping policy using a template

The OPC plan has proved a most effective tool overall for bringing drafter and instructor together (literally) onto the same page, and enabling the drafter to make contributions to the policy development process before committing to any particular drafting solution to an individual project. Notwithstanding this, apart from highlighting the broad shared drafting principle of working together with those on the policy side of the table to knit policy into law, the use of the plan (as outlined) would not of itself assist in the development of uniform standards.

However, the OPC plan could potentially be used in a more fundamental way in the process of shaping policy into law. It is in this further aspect that I will argue that the use of the plan or blueprint has some capacity to contribute to the development of more uniform drafting standards.

I have mentioned earlier the work of Professor Ann Seidman and the other authors of *Legislative Drafting for Social and Democratic Change*. They propose a "default" outline of topics for structuring a Bill. In the classification and ordering of these topics in a legislative plan I see the germ of an idea for developing a uniform standard (or starting point) for shaping amorphous policy schemes into effective legislative frameworks. With some minor variation on the 7 categories outlined by the authors (at p 221-222), I propose the following basic generic template (with 8 categories):

(i) **Framing** provisions (title, commencement, definitions, etc.);
(ii) **Primary** rules ("a law part that prescribes the primary role occupants' behavior") (221);

(iii) **Implementation** rules (the "part that prescribes the behavior of the implementing agency" (221));

(iv) **Compliance** rules (not separately identified in Seidman et al). These include inspection, monitoring and reporting rules designed to encourage compliance but also to support enforcement action where necessary. Such rules are a subset of the implementation rules, but they also have something in common with enforcement rules. In my experience it is very often useful to set them apart as a separate group of provisions "in between" those falling into the other two topics;

(v) **Enforcement** rules ("A sanctions part that provides for penalties or other direct conformity-inducing measures with regard to the prescribed behaviors" (221));

(vi) **Dispute settlement** rules (e.g. administrative and judicial review, or conciliation);

(vii) **Finance** rules (the "part that provides for resources (the necessary funds) to implement the Bill's provisions" (222));

(viii) **Miscellaneous** provisions (e.g. powers to make subordinate instruments; other executive powers; provisions safeguarding constitutional validity; possibly definitions in a "dictionary" at the end of the Bill) (222).

There is not sufficient time to discuss any of these categories in detail here. Some familiarity with the legislative process would however enable you to understand the broad ambit of what is encompassed by each genre of rule. And of course there will always be exceptional cases that don't quite fit, or that require a different ordering of topics.[7]

At Attachment B I have sketched a legislative plan for a scheme to regulate dealings in coins and collectibles inspired by a perceived need to deal more systematically with organised currency forgery. The first item in the plan sets out the government decision with little by way of detailed instructions. The plan is a response to the policy that structures the issues involved in accordance with the general template outlined here. It indicates gaps and ambiguities in the policy at a broad level, but also concerns itself with the routine drafting and administrative matters that will arise (referring particular matters to other agencies etc.). Its "shaping" task is further implemented by grouping known rules and issues together under the template headings.

(i) Overview and general considerations (including "framing" provisions)

Matters of purpose at item 1.1 and the "big picture" at item 1.2, in particular are intended to initiate a conversation with the instructors about the fundamental policy for the intended scheme. By listening carefully to the response of the instructors to a range of alternatives offered in the plan, the drafter will be able to tune his or her approach, using "reason informed by experience" (as Seidman et al advocate) with drafting different types of scheme to guide the instructors, who may not have the same breadth of experience. Other items under this rubric concern essential legal matters (1.3 constitutional power) and the drafting frame (1.4 legislative vehicle).

[7] There will be local variations, of course, as well. In Australia, there is a longstanding modern tradition (in all our jurisdictions) of blending primary legal rules prescribing behaviour with enforcement rules by the beguilingly simple device of appending "penalties" at the foot of the behavioural rule (supported by general interpretative rules in the relevant Crimes Act or Interpretation Act). This mixes "primary" and "enforcement" rules, with some unfortunate results. First, it goes against the assumption that we should be making as drafters, that as a general rule, those subject to law would prefer to understand and obey the law rather than know how they are to be punished for disobeying it. Therefore the drafter should be emphasising the behavioural rule. But the drafter wishing to do so can find herself thwarted by a criminal law policy, particularly in a couple of Australian jurisdictions with Criminal Code default rules on physical and mental elements, which insists on particular (user-unfriendly) drafting forms to be adopted to make enforcement easier for the Director of Public Prosecutions. However, this is a topic for another presentation.

(ii) Primary rules

One of the key architectural principles of Seidman et al is the identification and prominent placement of the primary rules in a scheme: those rules intended to modify behaviour. It is very common for instructors to prioritise administrative (implementation) matters, and the main rules of the scheme are often disguised. In this case, the setting down of a potential primary rule in the central column allows it to be examined from a number of different angles, including in particular the exploration of conceptual difficulties (dealing what, how, by whom and with what permission?).

(iii) Implementation (administration)

This section sets out some of the issues that arise in devising legislation of the general regulatory type. Here again the drafter is able to draw on the familiarity with the nuts and bolts of such legislative schemes to give advice to the instructors about how to put together a workable administrative framework. Such advice includes the note to the instructor (at 3.2) that the criteria for the grant of the "permission", while apparently a matter of administrative detail, is actually a crucial way in which the overall purpose of the legislation will be implemented.

(iv) Compliance

As indicated at 1.2, it could be that one of the main aims to be achieved by the scheme is simply to allow police to keep tabs on the numismatics trade. If that is the case, then the compliance powers at section (iv) will be critical, and the drafter must do his or her best to lead the instructors through a range of possible methods of compliance.

(v) Enforcement

The drafter is always aware of enforcement at the "bottom line" of any law: one fundamental question must be answered by almost all legislation, namely, "what happens if there is a failure to obey the law?". In section (v), given that we have little or no instructions to speak of, a range of possible sanctions is set out: criminal and civil penalties and administrative disciplinary action.

(vi) Dispute resolution

In this type of law, the question of statutory administrative review should be tackled. The default standard (established and monitored by parliamentary scrutiny committees in Australia) is for administrative decisions that have a significant effect on rights and liberties to be subject to independent merits review. By raising the issue of administrative review and other dispute resolution methods as a matter of routine, the drafter is helping to ensure either that policy is framed around the standard, or at least in conscious departure from it.

(vii) Financial

At the federal level in Australia, the Department of Finance has significant input into every proposed legislative scheme that involves the appropriation of Commonwealth finance. Drafters need to be conscious of the criteria applied by that Department in advising instructors. All of the issues raised in this section are aimed at attempting to guide instructors through the thickets of finance and tax policy. For schemes funded by annual departmental appropriations, however (in Australia at least) there may be no need to include any "financial" rules at all.

(viii) Miscellaneous

There are always some things that don't quite fit, try as we obsessive drafters might. Routine drafting matters such as commencement, transitional, regulation-making powers can also be noted here (or at (i) (Framing)), together with anything specific to the project that cannot be classified.

5 Conclusion : towards a uniform drafting template

As the template approach I have outlined is not a feature of my office's current drafting practice, still less of any other Australian drafting office, it seems a trifle premature to be advocating its use as a basis for uniform standards internationally at any level. However, I believe that Professor Seidman and her colleagues, in this basic schema, have distilled something in common between countries that share the common law tradition of legislative drafting. They have done at the policy level what Spring Yuen Ching Fung and Watson-Brown[8] have done at the technical drafting level in drawing together the various strands that make up our legislative tradition.

In addition to the distillation of the common elements of our tradition, which we can use as a common template on which to shape many new policy schemes, the uniform template is aimed at keeping the user of the law at its centre, with every other aspect structured around the emphasis on the primary rules that are to modify user behaviour. By contrast, the administration of the scheme is given a subordinate priority; while the implementation of the law is of course vital (and it is vital that it be informed by fundamental humanitarian principles) the law is not first and foremost a handbook for administrators—though naturally a transparent process is important in its own right and greatly beneficial for the primary user, for example in contesting the impact of the law.

The consideration of a template structure such as that presented here, based on the work of Seidman et al, as the basis for a uniform statutory architecture (or one of the forms for such an architecture) would be just a small step in the direction of uniform drafting standards. However, to return to the theme with which I began, it is as an architect, giving shape to abstract ideas, that the drafter exercises a crucial beneficial influence in policy formation. Therefore it seems best to develop drafting standards from this stage, where we can influence the overall shape of the law as it emerges from its policy beginnings. Common legal forms are not enough to achieve uniformity and uniformly high drafting standards if there is no agreement on common methods of translating policy into legal forms.

[8] In the article already cited, and particularly in *The Template: A Guide for the Analysis of Complex Legislation*, Research Working Papers, Institute of Advanced Legal Studies, University of London, London, 1994.

OPC plan for

Social Welfare Benefits Amendment Bill 2010

Instructing agencies: Agency 1

OPC drafters:

Nick Horn	(Ph: 6270-XXXX; email: nickthedrafter@opc.gov.au)
Drafter 2	(Ph: 6270-XXXX; email:drafter2@opc.gov.au)

Instructors:

Julia	(Ph: 62XX-XXXX; email: Julia.XX@agency1.gov.au)
Robert	(Ph: 62XX-XXXX; email: Robert.XX@agency1.gov.au)

Authority: Agency 1 is seeking policy approval from the PM.

Priority: T (**Time-critical**, that is, the highest priority) is being sought

Timetable

Week 1 introduction

13 August	Settle Bill
14 August	Send Bill to OPC editorial section
20 August	Send Bill to PM&C
25 August	Bill cleared by LAP
27/28 August	Introduction

Week 2 introduction

20 August	Settle Bill
21 August	Send Bill to OPC editorial section
27 August	Send Bill to PM&C
1 September	Bill cleared by LAP
3/4 September	Introduction

Abbreviations used in these notes:

Benefit Act	= *Social Welfare Benefits Act 1995*

B1	= Benefit 1
B2	= Benefit 2
B3	= Benefit 3
OPC	= Office of Parliamentary Counsel

Table 1: Benefit 1

#	Topic	Amendments/rules	Comments
5	Extension to eligibility for B1	Amend section 10 of the Benefit Act to include: • Payment 1; • Payment 2; • Payment 3; • Payment 4.	1. This amendment will extend eligibility for B1 to those who are receiving payment 1, payment 2, payment 3 or payment 4. 2. Recipients of payments 5, 6 and 7 won't be eligible for B1. Agency 1 said on 14/11 that this is correct because it would not be possible for those recipients to qualify for B1.
10	Increase of B1 rate	Section 11: omit "$50", substitute "$150".	1. This amendment will increase the rate of B1 to $150 for a person who is not a member of a couple, and $75 for a person who is a member of a couple.
15	Half yearly payments of B1	Amend the definition of "B1 qualifying day" in subsection 12(3) of the Benefit Act to include 1 January.	1. This amendment will result in there being 2, instead of 1, B1 qualifying days of: • 1 January • 1 July. 2. At the meeting on 20/11 it was decided not to align the qualifying days with the current qualifying days for B3 (20 January, 20 July). At that meeting it was also tentatively decided to change the B3 qualifying days so that B1, B2 and B3 qualifying days were all the same. However, Agency 1 said in their email on 12/12 that there are to be no changes to the B3 qualifying days.
20	Amount of instalment of B1	Amend section 15(1) of the Benefit Act: omit "1", substitute "2".	1. This amendment will result in each instalment of B1 being half the annual rate, rather than the whole annual rate. 2. This amendment relates to the half yearly payment amendment in item 15 above.
25	Multiple entitlements	Repeal paragraph 14(2)(b) of the Benefit Act, substitute: (b) either B2 or B3 are payable in relation to that day.	1. This amendment will prevent B1 being payable for a qualifying day if B2 or B3 is payable for that day. 2. At one stage, we were going to make an amendment that prevented a payment of B1 if 2 instalments of B1 or B2 under the Benefit Act were payable to the person in that financial year (i.e. amend subsection 14(1) to omit "1" and substitute "2"). However, with the alignment of the B1 and B2 qualifying days, that amendment could have resulted in a person being paid double the amount on a particular qualifying day (1 payment of B1 and 1 payment of B2) and so get the money earlier than they should have. The benefit of this amendment is that this stops this happening, and it also is easier to understand (i.e. recipients will understand that you don't get B1 if you get B2). 3. At the meeting on 17/12 the main situation we considered for this issue was this: • a person who is a eligible for B2 applies on 18/2 for payment 5 before the qualifying day on 25/2;

Table 1: Benefit 1

#	Topic	Amendments/rules	Comments
			• the person is paid B2 on the 1/3; • a determination is made on 3/3 that the person is granted payment 5; • the grant determination takes effect retrospectively to the date of application (18/2). 4. On the qualifying day (25/2), the Benefit Act will operate so that both B1 and B2 are payable to the person: B1 is payable because payment 5 was payable on the qualifying day so B1will also be payable on that day. B2 will be payable because the person will still have been eligible for payment 5 on the qualifying day (i.e. cancellation of payment 5 in those circumstances could only take effect on or after the day of the determination and not retrospectively back to the time of grant of the payment: see s45 of the Benefit Act). For this reason, the amendment will prevent the payment of B1 where the person has already been paid B2. 5. Agency 1: At the meeting on 17/12 we decided that the amendment should provide that B1 is not payable for a qualifying day if B2 has been paid for that day. However, I think that we can stick with "payable", just in case it hadn't actually been paid. This term is consistent with the current language of the provisions and, because we are not inserting a similar provision in the B2 provisions, there won't be a circularity between the B1 and B2 provisions on this issue.
30	Indexation of B1		1. We won't be amending the indexation rules for B1. However, the first indexation of the new rate of B1 is to occur on 1 July 2011. See the transitional provisions in item 45 below. 2. The indexation rules for B1 are in section 55 of the Benefit Act. The indexation days are 1 January and 1 July.
35	Commencement	Royal Assent.	1. Agency 1: The Bill may receive Royal Assent before, on or after 1/7. • If the Bill receives Royal Assent before or on 1/7, the new B1 amount will be able to be paid on 1/7. • If the Bill receives Royal Assent after 1/7, the new B1 amount won't be able to be paid on that day, only the existing amount will. This is because, on 1/7, the Benefit Act won't have been amended by the Bill to provide the new B1 amount. However, after the Bill commences, the increased amount can be paid because of the application provision in item 40 below.

Table 1: Benefit 1

#	Topic	Amendments/rules	Comments
			That is, after commencement, a person will be entitled to be paid the difference between what he or she was actually paid on 1/7 and the new increased amount.
40	Application	The amendments apply in relation to B1 that is payable on and after 1 July 2011.	
45	Transitional	#1. A transitional provision that provides that there is no indexation of the B1 rate on 1 July 2011.	1. The transitional in #1 will stop the new rate being indexed (the new rate will start on the same day as it would usually be indexed).

OPC plan for

Currency Dealers Bill 2010

DRAFT-IN-CONFIDENCE
This draft is supplied in confidence and should be given appropriate protection

Instructing Department(s):

OPC drafter(s):

Name (Ph: 6270-14?? Fax: 6270-1403)

Instructor(s):

Name (Ph: ; Fax:)

Authority:

Priority: T A B C

Timetable

[*] Settle Bill
[*] Send Bill to OPC editorial section
[*] Send Bill to PM&C
[*] Bill cleared by LAP
[*] Introduction

Bill(s):

Bill 2010

Abbreviations used in these notes:

OPC = Office of Parliamentary Counsel

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Currency Dealers Bill 2010

#	Topic	Details/rules	Comments and questions
1.	***Overview and general considerations***		
1.0	General scope of project	1. There have been an increasing number of currency forgeries, threatening the integrity of Australian currency. 2. A national policy task force has traced the forgeries to coin, medal and currency dealers. 3. Cabinet has decided to legislate to	1. This plan is designed to elicit more detailed instructions for the government scheme. 2. Further policy authority will have to be sought from Cabinet or the Prime Minister as further details of the scheme are worked out in the course of the drafting process.

Currency Dealers Bill 2010

#	Topic	Details/rules	Comments and questions
		regulate the numismatics industry to deal with the forgery problem systematically. 4. The outline of the scheme proposed is as follows: • to have Government permission deal in numismatic materials, a person or company must be registered on a national register; • a person cannot be registered if the person has a criminal record; • registration lapses every 5 years, but is renewable; • annual fees based on 0.5% of profits to be imposed, to be applied directly to administration of scheme.	
1.1	Purpose *[why legislate?]*	To provide a control system to reduce the incidence of forgery of Australian currency.	1. You indicate that there is a need to regulate other aspects of industry (e.g. fraudulent dealings in rare coins, medal, tokens, etc.) Additional authority would be needed for this. 2. Do you want a purpose clause? 3. Is the suggested short title adequate? Should a reference be made to 'collectibles'?
1.2	Nature of scheme [the big picture]	(a) entry controls (permission); (b) ongoing supervision: (reporting, monitoring, inspection, renewal); (c) exit controls (revocation of permission); [Indicates 'main rule' e.g. 'A person must not deal in currency etc.]	1. How is the proposed scheme to give effect to the purpose? If, for example, the police say that the principal reason for the proposal is to collect information about the industry & monitor changes, it might be appropriate to devise a scheme based around automatic registration coupled with information-gathering (e.g. regular reporting), inspection & monitoring powers—i.e. no 'entry' or 'exit' controls at all.
1.3	Legislative vehicle		1. New primary Bill? Or insert in *Currency Act 1965*? (amending Bill) • How self-contained is the scheme? • How much amendment to the Currency Act would be needed? (what is the degree of interaction with other provisions of the Act?) • Are there any political considerations?

Currency Dealers Bill 2010

#	Topic	Details/rules	Comments and questions
1.4	Power	Constitution s 51(xii) – currency, coinage & legal tender; also taxation & appropriation powers — extension to external territories (must be expressly provided for)	1. Australian Government Solicitor advice needed re extension to medals & tokens & to 'rare' coins & notes; incidental area? (Const. s 51(xxxix)) other powers (e.g. corporations, trade & commerce, taxation).
2.	***Primary rules***		
2.1	Rules about dealing in currency and collectibles	1. A [person] must not [deal] in [currency or collectibles] unless the [person] has a [licence/is registered] under this Act. 2. A [person] must not [deal] in [currency or collectibles] except in accordance with a [licence/registration] under this Act.	[These are the primary rules for the scheme. The primary rules are those that are intended to directly affect the behaviour of the primary users of the law.] 1. For rule 2 (which relates to licence conditions), see topic 3 below (implementation). 2. For compliance and enforcement issues (e.g. criminal/civil/administrative sanctions), see topics 4 & 5 below.
2.2	Dealing in what?	1. Coins, notes, medals, other collectibles.	1. Need clear instructions about exactly what things are to be covered. Consider industry practice & terminology, coverage of existing Cwlth/State/Territory laws.
2.3	Dealing how?	1. Commercial dealing or trade.	1. What about hobby numismaticists who occasionally trade for profit? - where should we draw the line between 'commercial' and 'non-commercial' trade?
2.4	Dealing by whom?	1. Individuals 2. Companies	1. What about other entities? e.g.: partnerships trusts other incorporated entities unincorporated entities 2. Criteria for grant (see below) may extend beyond permission holder - e.g. to persons with degree of control over corporate entity/other individuals ('active' vs 'sleeping' partners).
2.5	Nature of 'permission'		1. Is it intended that a 'permission' is to entitle the holder to trade? If intention is to grant privilege only (revocable at will by Minister), significant concerns will be raised by Attorney-General's Department (civil justice) and Senate Scrutiny Committee (Cwlth). 2. If 'permission' is in reality an entitlement, concepts of 'licence' or 'registration' preferable.
3.	***Implementation (administration)***		

Currency Dealers Bill 2010

#	Topic	Details/rules	Comments and questions
3.1	Implementing agency		1. Department [e.g. controls given to 'Minister' - query re delegation & extent of delegation - Scrutiny Committee concern] 2. Existing independent agency? (e.g. ASIC, Reserve Bank) 3. New statutory agency? (detailed instructions needed - legal status, degree of independence from Crown, how appointed etc.)
3.2	Criteria	1. Criminal activity	1. General test of character and competence (fit & proper person)? Or more specific criteria (no prior conviction for forgery or similar offences - Cwlth/State/Territory/foreign law? 2. Should criteria apply to affiliates etc. of individuals/persons with some degree of responsibility/control in corporate entities etc.? Consider similar concepts in other laws, e.g. Income Tax law, Corporations Act. [Note that criteria for grant is crucial in implementing purpose. Ensure that this aspect is fully investigated.]
3.3	Administrative procedures & controls	1. 5-year duration.	Topics that need addressing include: 1. application - who? - fees - form 2. conditions (statutory & specific to holder - e.g. reporting requirements) 3. variation 4. duration (5 years) 5. renewal & criteria for renewal [6. discipline—aspect of enforcement (see topic 5)] [7. review - see topic 7]

Currency Dealers Bill 2010

#	Topic	Details/rules	Comments and questions
4.	***Compliance***		
4.1	Monitoring		1. *Generally*: These powers will allow police to keep tabs on the industry. They are a crucial element of the scheme and need to be thought out carefully, with a balance between the value of obtaining information and impinging on individual liberties (an AGD civil justice and scrutiny committee concern). 2. Should there be a requirement to report significant dealings (this could be imposed as a licence condition)? 3. Information-gathering powers (see 4.2). 4. Privacy concerns? Consult relevant department re policy
4.2	Inspection		1. Inspectors - appointment, id cards etc. 2. Powers of entry, warrants (warrant-less entry will attract criticism AGD Civil Justice & scrutiny committees) 3. Inspection & information-gathering powers (requirement to answer questions etc.) 4. Powers of seizure 5. Compensation for seized items (not directly the subject of criminal activity). Need to consult Attorney-General's Department criminal law policy.
5.	***Enforcement***		
5.1	Criminal & civil controls	1. Main offences dealing etc. without a licence (or other than in accordance with a licence)—see 2.1 2. Secondary offences needed e.g. to support information gathering/monitoring/inspection powers.	1. Offences - nature & penalties 2. Civil penalties (perhaps coupled with an infringement notice system)? Consultation necessary with Attorney-General's Department criminal law policy.
5.2	Administrative controls		1. Disciplinary system (suspension/cancellation licence etc.). Effective controls for licensees once they are in the system: • by whom? • show cause - natural justice • reprimand/monetary penalty/suspension/cancellation ? • restriction on future registration (including restriction of "influential persons" with respect to corporate entities whose registration is

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#	Topic	Details/rules	Comments and questions
			cancelled/suspended)
6.	***Dispute resolution***		
6.1	Decisions		1. Decisions for which review may be recommended by Attorney-General's Department administrative law policy • grant/refusal licence • licence conditions • cancellation of licence • compensation for seized items
6.2	Type of review		1. Type of review • internal (Minister)/external (court/tribunal) • merits? (e.g. Administrative Appeals Tribunal) • due process judicial review only? (*Administrative Decisions (Judicial Review) Act 1989*)
7.	***Financial***		
7.1	Tax on profits	1. 0.5% tax on annual profits.	Consultation with Treasury needed 1. How are 'profits' determined? 2. Taxation cycle? (at what point is tax imposed, in relation to which annual profits) 3. Administration/implementation? Apply existing taxation administration system? 4. Need for separate imposition Bill (Constitution, s 55)
7.2	Use of tax for administration of numismatic regulatory scheme.	1. Tax is to be dedicated to costs of administering scheme.	Consultation with Treasury/Finance needed 1. To avoid tax going into Consolidated Revenue Fund, an amount needs to be 'specially' appropriated out of CRF equivalent to the amount of tax collected. 2. Need for special appropriation provision in the Bill (Cwlth: Constitution, s 83 (appropriation by law); s 53, 54, 56 for parliamentary procedural rules). 3. Method of 'dedicating' tax - [special fund under *Financial Management and Accountability Act 1991*] 4. Investment of funds? Proceeds of investments? 5. Other accounting considerations, e.g. reporting (may dictate features of the legislative scheme). Consider similar schemes elsewhere in statute book e.g. Cwlth: *Plant Health*

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#	Topic	Details/rules	Comments and questions
			Australia (Plant Industries) Funding Act 2002.
8.	***Miscellaneous***		
8.1	Consultation		(a) internal – e.g. [Cwlth] Dept of Finance and Administration; Treasury (tax); Attorney-General's Dept for criminal justice, administrative law and any international law issues; Dept of Foreign Affairs and Trade (treaties); (b) external – States & territories; foreign and international agencies if there are relevant international legal obligations (e.g. Interpol)—issue for instructors more than drafters
8.2	Commencement		1. Delayed commencement may be necessary to: • phase in licensing/reg. scheme (particularly if there are existing schemes which are to be superseded); • allow for time for administrative implementation, e.g. IT registration system, administering agency staffing & systems etc.
8.3	Transitionals		If there are any existing regulatory schemes that are to be superseded—options: • preserve operation existing scheme for existing scheme members? • grandfather existing scheme members into new scheme? • require existing scheme members to enter new scheme on same basis as others?
8.4	Consequentials		What amendments to other Acts will be necessary? Still to be determined.

Sustainable Drafting

John Mark Keyes[1]

Introduction

There is no shortage of reminders that human activity has a profound impact on our planet and its intricate web of natural systems. Undersea wells spewing oil into the sea and melting polar ice are only some of the more vivid illustrations of this impact, which increasingly gives us pause to consider where our human project is heading, how long it will last and what our children's children will inherit when their turn comes to live their lives.

The purpose of this article is to look at these fundamental questions in terms of the role of legislative counsel. This may come as a surprise to many, particularly to those of us whose work is focused on meeting short deadlines and tending to the details of legislation. The too often frantic nature of our work leaves us little time, much less the inclination, to think about these questions. But we should. In fact, we need to.

This article is also written on the occasion of honouring one of the most rigorous and tireless modern contributors to legislative drafting: Duncan Berry. Dr Berry has spent most of his professional life pushing the bounds of legislative drafting, most notably in his doctoral work on improving the readability of legislative texts, reminding us of one of the most fundamental aims of drafting: to communicate the law so that it can operate effectively to shape social behaviour. This article aspires to provide another equally important reminder to legislative counsel about the nature of their work in building a sustainable world.

Sustainable Development

Throughout human history, and indeed the history of most every species, the fundamental goal of living has been to foster the regeneration of life. There have, of course, been exceptions like the Shaker movement in the United States in the late 19th century, but they are just that: obscure exceptions eclipsed by a far more widespread impulse to continue human life and society in this world as opposed to the next. Today, as we grasp the effect of human activity, this impulse is expressed in terms of sustainable development, which the 1987 World Commission on Environment and Development (Bruntland Commission) defined in 1987 as

[1] Chief Legislative Counsel, Justice Canada. The views expressed in this article are those of the author personally and are not made on behalf of the Department of Justice (Canada). The author would also like to acknowledge the assistance of Lucette Santerre who has worked tirelessly to assist counsel in the Department to integrate sustainable development into their work.

"development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

Although the concept of sustainable development initially focused on the sustainability of the natural environment, it has since expanded to encompass social and economic sustainability, most notably in the *Johannesburg Plan of Implementation*, arising from the 2002 World Summit on Sustainable Development, which conceived sustainable development as comprising three interdependent and mutually reinforcing pillars: "economic development, social development, and environmental protection." This broader focus of sustainable development recognizes that environmental sustainability not only supports the other two pillars, but that it also cannot be achieved without paying attention to the other two. Indeed, it may be more accurate to describe this conception of sustainable development as the sustainability of all three dimensions.

This broader approach often evokes apprehension amongst those who work in the social or economic spheres. They see it as an attempt to subordinate all disciplines and, in a government context, all policy to environmental imperatives. And indeed, there are those who argue that this is as it should be. Thus, Klaus Bosselman argues that sustainable development is doomed to fail if it is nothing more than a balancing of social, economic and environmental concerns. He argues for the principle of sustainability as something distinct from sustainable development that can provide "guiding ideals for the design of public policy" and give direction to sustainable development.[2] He also argues that:

> it is crucial to realize the ecological core of the concept [of sustainability]. Not realizing it means the social, economic and environmental interests have nowhere to go. There is only ecological sustainable development or no sustainable development at all. To perceive environmental, economic and social as equally important components of sustainable development is arguably the greatest misconception of sustainable development and the greatest obstacle to achieving social and economic justice.[3]

Sustainable development has also moved beyond the conceptual realm of principle to find a place in a multitude of international agreements[4] and countless pieces of domestic legislation.[5] Although most implementing legislation is focused on activities that have a significant impact on the environment, there are also examples of more broadly applicable legislation. In Canada, the federal Parliament and three provinces have enacted statutes recognizing that sustainable development or environmental sustainability should orient all government action.[6] For example, section 5 of the *Federal Sustainable Development Act* says that:

> The Government of Canada accepts the basic principle that sustainable development is based on an ecologically efficient use of natural, social and economic resources and acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government.

The breadth with which sustainable development is being applied to government action through international agreements and domestic legislation, suggests that sustainability should also be recognized as a fundamental legal principle, taking its place alongside the rule of law, human rights and natural justice. Bosselman has

[2] K. Bosselman, *The Principle of Sustainability*, Ashgate Publishing Ltd., Hampshire (UK), 2008 at 62-63.
[3] Bosselman, ibid. at 23.
[4] See, for example, the preamble to the Marrakesh Agreement establishing the World Trade Organization (http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm). See generally *An introduction to trade and environment in the WTO*: http://www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm .
[5] See, for example, the *Resource Management Act*, 1991, No. 69, s. 5 (NZ) and the *Environment Act*, SNS 1994-95, c. 1. S. 2 (Nova Scotia).
[6] *Federal Sustainable Development Act*, SC 2008, c. 33; *Sustainable Development Act*, C.C.S.M. c. S270 (Manitoba); *Sustainable Development Act*, R.S.Q. c. D-8.1.1 (Quebec); *Environmental Bill of Rights*, SC 1993, c. 28, s. 2 (Ontario).

argued that it too should orient the legal system through which government action is realized.[7] If the rule of law, human rights and natural justice are cornerstones of the legal system, then why not sustainability, which itself embraces the others as principles that support sustainable societies and economies?

But this leads to a further question: is the legal content of sustainability nothing more than our principles of justice or does it add something else to orient government action? The answer can be found in first recognizing that principles of justice have traditionally concentrated on mediating relationships between individuals and social groups. Even when these principles have been applied in relation to the environment, their purpose has been to achieve a just division of environmental resources among people. What sustainability adds is the recognition that the environment does not merely provide the substance of rights that may be held by people, but that the environment itself demands legal protection because its survival is a precondition for the existence of all else.[8]

Role of Legislative Counsel

What then is the role of legislative counsel in relation to sustainable development? Do we simply assume that it is reflected in the drafting instructions we receive, that it is someone else's job to make sure legislative policy is consonant with sustainable development? I do not think so. Sustainable development, like the fundamental legal principles of the rule of law, human rights and natural justice, is everybody's business, and particularly that of legislative counsel. There are three dimensions to the role of legislative counsel in relation to sustainable development.

The first relates to the drafting of legislation like that mentioned above[9] that is particularly intended to advance sustainable development. To draft it well, legislative counsel should have a good understanding of sustainable development and the way the principles it incorporates are expressed.

The second dimension involves ensuring that the legislation they draft is consonant with principles of sustainable development that have been incorporated into laws enacted to advance them. For example, many international trade agreements acknowledge sustainable development in provisions that allow protective measures to be adopted that might otherwise be considered barriers to trade. Chapter 20 of the General Agreement of Trade and Tariffs (GATT) allows protective measures in the following terms:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...
>
> (b) necessary to protect human, animal or plant life or health;...
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. ...

An understanding of general concepts related to sustainable development ("the protection of human, animal or plant life or health"; "the conservation of exhaustible natural resources") is thus needed to assess the scope for enacting the protective measures. Assessing the need for such protective measures is similar to that of

[7] Bosselman, above n. 2 at 43ff.
[8] Bosselman, above n. 2 at 79ff.
[9] Above, notes 5 and 6.

assessing whether a restriction on a human right is justifiable within the terms of a constitution that guarantees such rights.[10]

The third dimension has to do with legislative counsel's role in influencing policy development. This role encompasses advice on the consonance of legislative measures with legal principles that do not necessarily have binding legal force on legislators. Before the advent of entrenched constitutional rights and freedoms, principles of justice and due process were subject to the policy choices of legislators. But the role of legislative counsel has traditionally been to inform these policy choices and to argue in favour of legal principles that support sustainable societies, notably those related to the rule of law, and to remind legislators of the interpretive presumptions that protect individual rights.

One rule of law principle that is particularly close to the role of legislative counsel is that the law should be intelligible and accessible to those who are bound by it. Legislative counsel have been responsible for making the statute book more usable since the middle of the 19th century and in many jurisdictions around the world they have more recently led the charge in the many remarkable advances that have been made to improve the general readability of legislation.

The role of legislative counsel also at times strays beyond the legal world to address the workability of legislation. Legislative counsel are to a large extent the repositories of legislative experience gleaned not only from their own efforts, but also from working with a wide variety of instructing officials who have brought their own experience and wisdom to the drafting table. In this context, the principle of sustainability brings a long-term perspective to practical drafting matters, urging solutions that will not simply solve some current political issue, but which will stand up over time, as Janet Erasmus has reminded us.[11] This objective of durable laws has many dimensions ranging from the adaptability of legislation to circumstances that may change over time to its intelligibility as language itself evolves.

A comparable policy role has more recently developed in the corporate world with the concept of corporate social responsibility. It suggests that corporations should have broader objectives than simply maximizing profit for their shareholders and it has been recognized both internationally and in domestic law. For example, the *OECD Guidelines for Multinational Enterprises*[12] provide recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in various areas, including: disclosure; employment; human rights; environment; combating bribery; consumer interests; science and technology; competition; and taxation.

If legislative counsel are called upon to discharge both legal and policy functions that have traditionally encompassed the advancement of legal principles like those related to the rule of law and the practical workability of legislation, is it not perhaps time to consider expanding this role to encompass the principles of sustainable development? Indeed, just such a proposal is currently before the Canadian Parliament. Bill C-469 would amend existing provisions relating to the examination of bills and regulations for conformity with fundamental rights.[13]

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[10] For example, article 15 of the European Convention on Human Rights allows derogations in time of war or public emergency while section 1 of the Canadian Charter of Rights and Freedoms allows "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[11] Janet Erasmus, "Keepers of the Statute Book: Lessons from the Time-Space Continuum", *The Loophole*, 2010, Issue No. 1 at 7.

[12] http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html

[13] See Bill C-469 (40th Parliament, 3rd Session), s. 28:
28. Paragraph 1(*a*) of the *Canadian Bill of Rights* is replaced by the following:
(*a*) the right of the individual to life, liberty, security of the person, including the right to a healthy and ecologically balanced environment, and enjoyment of property, and the right not to be deprived thereof except by due process of law;

Principles of Sustainable Development

But what, exactly, are the principles of sustainable development and how are they relevant to drafting legislation? Some guidance on this is to be found in the International Law Association's New Delhi Declaration of Principles of International Law Relating to Sustainable Development.[14] This declaration sets out the following principles:

1. Duty of states to ensure the sustainable use of resources.
2. The principle of equity and the eradication of poverty.
3. The principle of common but differentiated responsibilities.
4. The principle of the precautionary approach to human health, natural resources and ecosystems.
5. The principle of public participation and access to information and justice.
6. The principle of good governance.
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

Each of these principles is explained in some detail in the declaration. And, although they have not all been accepted as principles or rules of international law,[15] they provide a good indication of which principles are developing. In the remainder of this article, I will outline three of the more well-developed of these principles.

Precautionary Principle

The precautionary principle, or approach as it is called in the Delhi Declaration, is intended to inform decision-making about measures to prevent harm, notably harm to the environment or to human health and safety. It is particularly applied in making decisions that depend on matters of science. It recognizes that the absence of full scientific certainty is not to be used as a reason to postpone decisions when faced with the threat of serious or irreversible harm.

The principle is formulated in Principle 15 of the Rio Declaration on Environment and Development:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[16]

This principle has since been both incorporated into legislation[17] and recognized in court decisions.[18]

Polluter-pay Principle

The polluter-pay principle is an element of the third of the Delhi principles (common but differentiated responsibilities). It assigns polluters, particularly those in the private sector, the responsibility for remedying

[14] Resolution 3/2002.
[15] Bosselman above n. 2 at 58.
[16] http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163
[17] See, for example Federal Sustainable Development Act, SC 2008, c. 33, s. 2; Canadian Environmental Protection Act, 1999, preamble and ss. 2.1, 6.1 and 76.1; Environmental Protection and Enhancement Act, RSA 2000, c. E-12, s. 2(c) (Alberta) and the Environment Act, SNS 1994-95, c. 1. S. 2 (Nova Scotia).
[18] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40 http://scc.lexum.umontreal.ca/cgi-bin/print.pl?referer=http://csc.lexum.umontreal.ca/en/2001/2001scc40/2001scc40.html Interpretation and application of *Town of Hudson By-law 270—Cities and Towns Act, R.S.Q., c. C-19, s. 410(1)*; bylaw limiting the use of pesticides accepted as "health" based, and application of the international law's precautionary principle accepted as preventive action of the Town.

contamination they have caused or contributed to and imposes on them the direct and immediate costs of pollution. It is widely recognized in environmental protection legislation throughout Canada[19] and applied in court decisions.[20]

Inter-generational Equity Principle

The Inter-generational Equity Principle is an element of the second Delhi principle relating to equity and the eradication of poverty. It is also embedded in the *Brundtland Report* (1987) definition of sustainable development and countless pieces of domestic legislation that adopt this definition.[21] It is elaborated as follows by Edith Brown Weiss:

> The basic concept is that all generations are partners caring for and using the Earth. Every generation needs to pass the Earth and our natural and cultural resources on in at least as good condition as we received them. This leads to three principles of intergenerational equity: options, quality, and access. The first, comparable options, means conserving the diversity of the natural resource base so that future generations can use it to satisfy their own values. The second principle, comparable quality, means ensuring the quality of the environment on balance is comparable between generations. The third one, comparable access, means non-discriminatory access among generations to the Earth and its resources.[22]

The Inter-generational equity principle has also been discussed in decisions of the Supreme Court of Canada. In 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*,[23] L'Heureux-Dubé, J. stated:

> The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. In the words of the Superior Court judge: "Twenty years ago, there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in, and what quality of life we wish to expose our children [to]" ((1993), 19 M.P.L.R. (2d) 224, at p. 230). This Court has recognized that "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment … environmental protection [has] emerged as a fundamental value in Canadian society": *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 55. See also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 16-17.

Similarly, two years later in *Imperial Oil Ltd. v. Quebec*,[24] Judge Lebel, said:

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[19] See, for example, the *Canadian Environmental Protection Act, 1999*, s. 98 and the *Environment Act*, SNS 1994-95, c. 1, s. 2(c) (Nova Scotia); *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12, s. 2(i) (Alberta).

[20] Imperial Oil Ltd. V. Quebec (Supreme Court of Canada) http://scc.lexum.umontreal.ca/en/2003/2003scc58/2003scc58.html . Interpretation of *Environment* Quality *Act,* R.S.Q., c. Q-2, s. 31.42*; British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board (Supreme Court of Canada*) http://scc.lexum.umontreal.ca/en/2005/2005scc1/2005scc1.html . Granting the right to appeal in a case dealing with the application of the B. C. *Environmental Management Act* (formerly *The Waste Management Act (British Columbia)*), in relation to the polluter liability in the case of amalgamated corporations.

[21] See, for example, the *Federal Sustainable Development Act*, SC 2008, c. 33, s. 2.

[22] E. Brown Weiss, "Climate Change, Inter-generational equity and International Law" (2008), 9 *Vermont Journal of Environmental Law* 615 at 616. See also *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, Tokyo, Japan: United Nations University; Dobbs Ferry, N.Y.: Transnational Publishers, 1989.

[23] [2001] 2 S.C.R. 241, 2001 SCC 40 at para 1 http://scc.lexum.umontreal.ca/cgi-bin/print.pl?referer=http://csc.lexum.umontreal.ca/en/2001/2001scc40/2001scc40.html .

[24] [2003] 2 S.C.R. 624, 2003 SCC 58 at para. 19 http://scc.lexum.umontreal.ca/en/2003/2003scc58/2003scc58.html .

> The Québec legislation reflects the growing concern on the part of the legislatures and of society about the safeguarding of the environment. That concern does not reflect only the collective desire to protect it in the interests of the people who live and work in it, and exploit its resources, today. It may also be evidence of an emerging sense of intergenerational debt to humanity and to the world of tomorrow.

However, if the basic notion of equity to future generations is incontestable, the articulation of this equity is not nearly so obvious. Edith Brown Weiss outlines some of the issues as follows:

> One criterion [of inter-generational equity] is to balance the needs of future generations with those of the present, neither licensing the present generation to consume without attention to the interests of future generations or requiring it to sacrifice unreasonably to meet indeterminate future needs. Since we cannot predict the values of future generations, we also have to provide them with the options and quality to satisfy their own values and needs. In addition, the principles need to be generally acceptable to the many different cultures in the world, and finally they have to be reasonably clear so that they can be implemented and applied.[25]

Conclusion

In this article, I have attempted to provide a general framework for understanding how legislative drafting should find its place in perhaps the most fundamental of human projects: building and maintaining a sustainable world. Legislative counsel as much as anyone else in society must understand and bear in mind the links between sustainable development and their work. The 20th century has seen the rise of fundamental concepts like the rule of law and human rights. The 21st promises to build on this quest for social order and human dignity and to extend it to respect for the world at large.

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[25] Weiss, above n. 22 at 616-617.

Giving effect to policy in legislation: how to avoid missing the point[1]

Sir Stephen Laws, KCB[2]

1 When describing the importance of the work of Parliamentary Counsel, I follow the Office's own document "Working with Parliamentary Counsel"[3] by saying that there are five reasons why our work is important.

- Government policy which depends on the enactment of legislation will not be delivered unless the legislation is properly drafted and effective.
- Unless legislation is clearly expressed and simple to apply, large amounts of both public and private resources can be wasted on unnecessary litigation.
- Proposals for legislation are at the heart of Parliament's business and of the democratic process, with Government Ministers spending much of their time in both Houses defending and explaining the policy and wording of Government Bills.
- The drafting of primary legislation sets both the context (by providing the powers) and the standard (by example) for the drafting of all other legislation, including, in particular, SIs.
- The way legislation is structured and expressed is essential to the preservation of a stable constitutional relationship between Parliament and the courts. It is important that the way legislation is drafted does not debase the coinage of communication between Parliament and the courts, eg through obscurity or the inclusion of extraneous, unnecessary matter.

2 This paper concerns the first of these reasons, but it must do so in the context provided by the other four reasons. I propose to examine the process by which legislative effect is given to political programmes and objectives. I propose to draw attention to some of the inherent tensions in that process, and to the need for those tensions to be managed by Parliamentary Counsel. My objective is to illuminate how what is essentially a political idea mutates into a proposition of law.

3 My thesis is this—

- that there are technical and conceptual aspects of the process of turning policy into law that have an inherent, and sometimes irresistible, tendency to make the policy-maker think that maybe the legislative drafter has "missed the point", or is being obtuse;

[1] This lecture was delivered on 10 November 2010 as the Statute Law Society's Lord Renton Lecture at the Institute of Advanced Legal Studies. It is published with the permission of the Controller HMSO and the Queen's Printer for Scotland. I am very grateful to Jackie Crawford for her help in preparing this lecture. Any infelicities that remain are, of course, my own.

[2] First Parliamentary Counsel, United Kingdom

[3] http://www.cabinetoffice.gov.uk/parliamentarycounsel/working/background_to_opc/why_it_is_important.aspx .

- that, although these aspects are a part of a wider phenomenon by which both legislative and non-legislative effect is often given to high level policy in a relatively indirect way, it is a responsibility of Parliamentary Counsel to keep obtuseness in legislation to a minimum;
- that it is essential for Parliamentary Counsel to have a clear understanding of how translating policy into legislation may produce obtuseness: in order for the drafter to make a judgement about when the tendency is resistible and how, when irresistible, its effect can be minimised; and
- that such an understanding will also provide Parliamentary Counsel with the wherewithal to make the judgement that must always be made (though in different ways with different legislative projects) about how far to become involved in policy formulation.

4 There is a particular recent context to this discussion. The extent to which policy implementation requires a direct or indirect approach has been under consideration in different ways. These include, first, the controversy there has been in relation to Acts to enact statutory policy objectives or "targets" for Government[4]. That is a controversy that adds to the long running controversy in drafting circles about the value of purpose clauses[5]. There is also the current inquiry by a sub-committee chaired by Baroness Neuberger of the House of Lords Science and Technology Select Committee into the use of socio-economic interventions, rather than legislative regulation, to achieve policy aims involving behaviour change[6].

5 It is obvious, and appropriate, in a society in which legislative change is under democratic control, that the majority of legislation is drafted to give effect to policy aims. Our Parliamentary system gives the bulk of the Parliamentary time available each year for making primary legislation to the Government of the day. Nevertheless that time is still in short supply; and competition between Government departments for a place in the legislative programme is intense.

6 When it comes to the allocation of the limited Parliamentary time, decisions are generally made according to political priorities, subject of course to legal necessities and emergencies.

7 The overwhelming majority of legislation that reaches the statute book each year is enacted in order, directly or indirectly, to improve things for citizens in ways that are defined by the political priorities that the Government has been elected to pursue. It may be to fulfil a promise or, perhaps, as a response to events. But even a proposal that is confined to providing additional protection or security in relation to what are thought to be the existing arrangements is a change designed to produce an improvement.

8 It is axiomatic that legislation can have only one function and that is to change the law[7]. In practice too, the policy to which legislation gives effect also always involves an intention that the legal change should produce a change in the practical world. The two need to connect and it is the intention to produce that practical change that logically comes first. This lecture is about whether and how to make the connection clear enough for the legal change to be effective.

9 Public policy implemented by legislation seems to involve three different sorts of practical change. These may overlap and combine to achieve practical, political objectives. The three sorts of change are—

- change that is intended to have a specific and direct effect on the behaviour of individuals and other legal persons by modifying the legal consequences of their behaviour— "regulatory change";
- change to the ways in which the resources of the executive (including any of its emanations within the public sector) may be applied and are collected —"resource allocation and fiscal changes"; and

[4] As in the case of the Climate Change Act 2008, the Child Poverty Act 2010 and the Fiscal Responsibility Act 2010.
[5] http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/173/4062304.htm (Q338) and http://www.opc.gov.au/calc/docs/CALC%Newsletter%20April%202009.doc .
[6] See the request for evidence with a deadline for comments of 8 October 2010. http://www.parliament.uk/documents/lords-committees/science-technology/behaviourchange/CfEBehaviourChange.pdf . See also Mindspace report on influencing behaviour through public policy, which was produced jointly by the Cabinet Office and the Institute for Government in March this year http://www.instituteforgovernment.or.uk/content/133/mindspace-influencing-behaviour-through-public-policy .
[7] http://www.cabinetoffice.gov.uk/parliamentarycounsel/working/working methods specific/scoping and planning.aspx .

- changes to governance and to the accountabilities within the British constitution or more widely in the public sector— "constitutional and organisational change".

10 Changes affecting resource allocation or taxation, as well as changes to governance or accountabilities may overlap with, or supplement, regulatory change because they may be intended indirectly to provide incentives for behavioural change, sometimes within the executive, but also more generally.

11 They may also be intended to produce behavioural change by facilitating eg socio-economic or other interventions designed to produce such change without a more direct incentive in the form of particular legal consequences. So they may provide the authority for the expenditure on socio-economic interventions where that is needed because of the "new services" principles in the Treasury guidance "Managing Public Money"[8]. Or they may raise the funds needed for such expenditure. Or they may provide the legal capacity, and the management and accountability, for the activities of the executive etc. when they are influencing behaviour using incentives other than in the form of legal consequences. A resort to such methods is not necessarily an alternative to legislation. It is only an alternative to using legislation to effect regulatory change directly.

12 However, policy priorities and objectives also often address public expenditure and taxation, or governance and accountabilities, in their own right. This may be because there is an issue of fairness, or it may be with a view to devolving responsibilities to others closer to the subject-matter of the decision.

13 A change to governance or accountabilities (eg for a regulator) may be intended to change the behaviour of those who are regulated by changing the behaviour of the regulator. However, it may rather be aimed at improving the efficiency of the regulatory process (freeing up resources for other purposes) or (perhaps by increasing the transparency or democratic control of the regulator) at improving the level of acceptance of the regulatory process amongst the regulated, or at raising their level of satisfaction with it.

14 It follows that the purpose of legal change is not confined to creating incentives for people to do things or not to do things. Observably legislation has been used extensively in modern times for purposes other than the imposition of that sort of regulatory change. In practice, the law does also deal with the mechanisms by which priorities are decided and other managerial decisions taken within the public sector.

15 There are clear risks in making the assumption that legislation is a tool to be used only for the purpose of changing behaviour. For a legislative drafter asked to amend the law affecting eg resource allocation or governance and accountabilities, there is a risk in inferring an intention to produce a behavioural change, just because that seems to be the natural and probable consequence of the proposed amendment. What appears neutral to the policy-maker can appear weighted in favour of a particular outcome to the drafter. In this way a choice of structure for the legislation to reinforce or guarantee a particular outcome may produce a result that was not intended.

16 The likely practical effect of a proposed legal change can be ascertained partly from social research; but the legislative drafter also has a role, using legal analysis, to consider if other particular outcomes would be implicit in the proposal. The drafter's consideration of anti-avoidance risks, for this purpose, will often involve an assessment of the extent to which legislation needs to be flexible enough to allow for different, unforeseen circumstances, and of the extent to which it should be ratcheted to deny enough flexibility to secure the maintenance of the status quo.

17 It is the responsibility of the legislative drafter to ascertain whether a proposed legislative proposition is intended to be understood—legally, as well as politically—as an indirect attempt to change behaviour, or is intended, to be something which (eg by producing better decision-making) is of value in its own right and to be neutral so far as eventual outcomes are concerned.

[8] Under these principles a provision may be needed in primary legislation to "frank" expenditure for the purposes of the PAC concordat of 1932 (see Managing Public Money http://www.hm-treasury.gov.uk/d/mpm_annex2.1.pdf) on something constituting a new service (see ibid. http://www.hm-treasury.gov.uk/d/mpm_annex2.5.pdf). This is sometimes called a "Baldwin agreement" provision.

18 Where there is an intention to affect behaviour by indirectly facilitating a non-regulatory intervention, a question will arise about whether the connection between the policy and the legislation needs to be spelt out and, if so, how. And if the intention is to produce neutrality as to outcomes, is that something that needs to be signalled, and, if so, how?

19 According to the circumstances, it may be more or less difficult for legislation to produce a change to governance and accountabilities which guarantees (or at least tends to encourage) a particular sort of behaviour or to produce a change that is neutral; but the task is even more difficult if the legislative drafter does not know which is intended.

20 In these circumstances, a decision about whether obtuseness about policy objectives is unavoidable requires initial clarity about what exactly the objectives are. Technical, conceptual or political reasons may mean that an obtuse approach is unavoidable. Obtuseness may also be the inevitable result of a need to balance the competing claims of the five matters I have already mentioned as making the work of Parliamentary Counsel important[9]. However, it is important that what goes in the Bill is not obtuse about the objective just on the basis of false assumptions about what it is possible and safe for legislation to contain. And if obtuseness is not always bad, or avoidable, it is always something that needs to be questioned.

21 So what other factors may lead to obtuseness?

22 I have identified three categories of change for which legislation is used (first, regulatory changes, second resource allocation and fiscal changes, and thirdly constitutional and organisational changes). But there is a more complex process by which policy at that high level is reduced to more detailed legislative policy (that is policy in the form of decisions about what legal changes are necessary to implement the high level policy).

23 There are several aspects of this narrowing-down process which create risks of introducing obtuseness. I shall mention four, in particular—

- the necessary incompleteness of legislation;
- the risks from extrapolating a legislative solution from a failed non-legislative solution;
- the precedent trap; and
- the difficulty of hitting a moving target from a moving platform.

24 I then want to say something more about one other very significant factor: the inherent differences between policy issues and legal issues. This has an impact on all the others.

Necessary incompleteness

25 Legislation must be confined to the legal changes that are necessary to give effect to policy. The risks of changing the law when it is unnecessary to do so have been discussed elsewhere, and are widely understood. In practice, many of the things that need to be done to achieve a policy objective will be possible without legal changes. There will be existing mechanisms that can be used. The policy-makers will often find themselves needing a Bill to cover only part of the picture. From their perspective, the Bill will constitute only a number of discrete fragments from a bigger picture.

26 It is the function of the legislative drafter to be aware of this and, if necessary, to arrange the fragments in a way that can best be presented as contributing to the bigger picture.

27 Other factors (to which I shall come) may all contribute to any apparent incompleteness of a Bill from the policy-maker's point of view. But the fact that new legislation is always just a further layer built on a pile of existing law is certainly also a significant factor.

[9] See paragraph 1 above.

Legislative policy produced by extrapolation

28 There is also a potential for creating obtuseness in the assumption that the limited availability of Parliamentary time makes primary legislation a last resort for policy-makers.

29 Much legislative policy begins with a search for a non-legislative method for implementing the policy. It is common for considerable ingenuity to be deployed in that search. It is then human nature, when the search has proved unsuccessful, to continue the thinking towards the legislative solution from where the non-legislative route reached a dead-end.

30 The last resort theory, and the pronouncements of Parliamentary Counsel, might, wrongly, be thought to encourage that. We frequently quote the aphorism that unnecessary matter in statutes, as in humans, tends to turn septic.[10] However, where there is a more straightforward route to what is wanted—the rule against redundant provisions does not require the legislative route to begin at the place closest to that destination that was capable of being reached by non-legislative means.

31 A direct route from the problem to the desired solution will be the one that will produce the greatest clarity about the intention of the policy-maker and is preferable even if it contains a larger legislative element. The directness of the route needs to be assessed by reference to the original starting point, disregarding any intervening but abandoned meanderings in search of a non-legislative route. There is a clear risk of obtuseness in a provision that starts from the wrong place: from a starting place chosen out of sight of those who will need to understand the intended route.

32 Parliamentary Counsel have both the experience and the authority to be able to challenge the policy by asking whether "we should be starting from here". This is one of the important policy functions they have in practice.

33 Interestingly, however, it did not emerge as such in Prof Page's valuable research on the involvement of Parliamentary Counsel in policy-making[11]. Perhaps this is because it is a function that needs to be discharged early in the process. In the past though it has also inhibited Parliamentary Counsel from the necessary early involvement. They have wanted to retain their objectivity until the eventual solution could be tested against the original problem. However, there is also an obvious practical difficulty in waiting until the building is largely constructed before testing the soundness of the foundations. Recent practice has taken this into account to produce a little more flexibility and pragmatism from us in deciding at what stage to become involved in policy questions.

The precedent trap

34 Another related risk of obtuseness arises from the process by which the solution to a problem is often sought first amongst solutions that have already been used for other problems. When that is done, the case to be dealt with may have to be manipulated to fit a solution that was originally intended for something else. Parliamentary Counsel think as professionals whose job it is to draw the line rather than just to find it[12]. In this context, what that requires in practice is a willingness to depart from the apparent safety of precedent to deal more clearly with the unique features of the problem in front of them.

The problem of hitting a moving target from a moving platform

35 The Office of the Parliamentary Counsel's guidance for drafting instructions for Parliamentary Counsel makes the identification of the mischief an essential element of any drafting instructions[13]. The same is true of policy-making at the political level, where a situation will have been identified as requiring a

[10] Quoted by Sir Geoffrey Bowman KCB, QC, LLD "Why is there a Parliamentary Counsel Office?" (2005) 26 *Statute Law Review* 69 at 77.
[11] "Their Word is Law: Parliamentary Counsel and Creative Policy Analysis" [2009] *Public Law* 790.
[12] See "Drawing the Line" - Chapter 2 of *Drafting Legislation: A Modern Approach* (2008) ed Constantin Stefanou & Helen Xanthaki.
[13] http://www.cabinetoffice.gov.uk/parliamentarycounsel/working/instructing opc/structure of drafting instructions.aspx .

practical change in order to make things better. However, primary legislation is usually prepared on the basis that it will continue in place until it is repealed, rather than expire when its initial purpose is fulfilled. Potentially it has an indefinite life, and it may need one to prevent the revival of the mischief. But this, together with the complexity of life in general, means that legislation is very likely to have an effect beyond its immediate objective.

36 Legislation must also be effective in relation to the consequences of its own operation. So, taking a simple case of a regulatory change to stop people engaging in activity A, it may be that individuals forbidden from engaging in activity A will choose to start engaging in activity B instead. Even though B is rare now, (because activity A is a more attractive and legal alternative) that may change as a result of a prohibition on activity A. Activity B could be equally objectionable if it became more common. Policy-making needs to be able to work through all the consequences of forbidding activity A: including if necessary prohibiting activity B, and then working through the consequences of that, and so on.

37 As the range of permutations will ultimately depend on the terms of the prohibition on activity A, Parliamentary Counsel are inevitably drawn into consideration of the matter and may need to remove some of the clarity of a clear prohibition on A in order to extend it to the possibility that resort might be had to B instead. This phenomenon leads to descriptions of what is covered that are more abstract than might seem appropriate to the policy-makers. They, like the drafter when making the extension, will wish to put the emphasis on the existing problem with A, rather than the hypothetical one with B.

38 A comparison can be drawn with the need for the helmsman of a yacht to allow for the flow of the tide, or for a golfer to allow for the wind on a drive or the borrow on a putt. Policy starts from now and broadly speaking defines a destination that must be reached. Legal policy, however, has to allow for the fact that every change on the way to the destination is a move away from the starting place and itself changes the context which defined it. So the process of change may itself create the need for an adjustment of direction to secure eventual arrival at the proposed destination. The implementation of the solution itself will interact with the problem to require perhaps a different solution or a more complex one.

39 This is particularly the case where time is also taken into account: the need for legislation to anticipate, not only the immediate consequences of a change, but also its longer term effect.

40 It is the number of potentially moving pieces in the process that create the need, sometimes, for the legislative drafter to aim at a moving target from a moving platform, with the consequence that the initial aim may appear wide of the target, and destined to miss the point.

The Limits of Adjudication

41 The undoubted limit on the extent to which a policy proposition can be reduced to something that can be satisfactorily decided by a court is a related phenomenon.

42 Policy formulation invariably involves proposing solutions to “polycentric” problems. These, as explained in the seminal essay of the US jurist Lon Fuller on “The Forms and Limits of Adjudication”[14], are problems that give rise to the sort of questions which, depending on the extent to which the polycentric elements are significant or predominant, may approach or pass the limits of what it is possible to submit to adjudication by the courts.[15]

43 For this purpose, and briefly explained—the concepts will already be very familiar to some of you—a polycentric problem is one where the answer to each question to which the problem gives rise depends on the answers to the others.

44 Fuller gives the example of the selection of a football team. The premise is that judicial adjudication requires a process for arriving at a decision in which the affected parties participate by presenting proofs and arguments to be tested against established rules. It is impractical to select a team by having such an

[14] Published in (1978) Harv LR 355.
[15] Ibid p 398.

adjudication for each of the different field positions, because the choice of each team member needs to depend on who is chosen for the other positions, and there is no necessary starting place for that selection process.

45 A more pertinent example of a polycentric problem is one relating to the allocation of limited public funds. An adjudication by the application of established rules on the use of resources for a particular purpose needs to consider the validity of all other adjudications on the application of those resources for other purposes. The problem is too complex to be subject to judicial adjudication. It is more managerial in nature. The parties cannot all make a case to the tribunal on the basis of rules that determine each allocation separately from the others.

46 Both policy-making and the drafting of legislation themselves present those involved in them with polycentric problems.

47 For the policy-maker different interests will invariably have to be balanced against each other. Seldom is the answer to a policy problem clear-cut or simply two-sided, and a balancing of different and potentially unrepresented interests is fundamental to the process.

48 For the legislative drafter, a polycentric problem can also arise at a technical level. The structuring of legislation, like all writing, including—I found—this paper, often depends on a choice of the best starting place.

49 An example of the need to address polycentric issues at the technical, drafting level arose when one of my colleagues was asked, a little while ago, to provide the test for deciding whether an activity required a licence. The proposed test was whether or not, in a particular case, the benefits of requiring a licence outweighed the disadvantages. On analysis, that was a polycentric question because the answer depended on the answers to a whole series of subordinate and logically subsequent questions about the terms of the hypothetical licence. In the event, the drafter suggested the imposition of the test on decisions about each condition of a licence, rather than on the decision whether licensing itself was required.

50 However, there is also a more fundamental tension between the inherently polycentric features of most policy and the characteristics of questions that are the most suitable subjects of legislation.

51 A question arises whether the appropriate subject-matter of legislation must always be confined to something that is capable of adjudication by a court. Is that an unavoidable factor that will always tend to make legislation obtuse? There are some I am sure who will argue that it should. But if that is a rule, it is certainly one to which there are numerous practical exceptions.

52 Nevertheless, it is certainly the case that, for most legislation, the legislative policy must, in practice, depend on the assumption that disputes relating to both its meaning and its application will need to be decided upon by the courts, and so should be framed with that in mind.

53 What Fuller suggested happens when an attempt is made to deal by adjudicative forms with a problem that is essentially polycentric is one or more of three things—

- first—the solution to the problem fails or is ignored—because it has consequences that were unforeseen;
- secondly—the adjudicator abandons adjudicative methods and adopts what is essentially a trial and error method of negotiating different solutions, stepping outside the process to involve affected persons who are not parties to the adjudication; or
- thirdly—as an alternative to changing the method of decision to fit the problem, the adjudicator reformulates the problem to make it fit the adjudicative method.

54 It is, of course, the duty of Parliamentary Counsel to avoid the first thing Fuller suggested—solutions that fail. But both the second and the third of his suggestions do give clues as to how in practice legislation tends to tackle the political and practical need to provide the solution to a polycentric problem in a legislative form. Both, however, create a tendency to obtuseness. I shall deal with them in reverse order.

Reformulating the problem to allow for judicial adjudication

55 Reformulating the problem by breaking it down into issues capable of judicial adjudication is Fuller's third suggestion. This is how legislation very often deals with a polycentric problem. The separate issues may then be determined in series, or, alternatively, in parallel but in an unconnected way. This method of tackling these issues is most obvious when the chosen method of implementing the policy involves private law or the use of the criminal law. Furthermore, there is a reciprocal principle that private law and criminal law are more likely to be adopted as the legislative route to a policy objective when the issues are those that are most easily broken down into adjudicable issues.

56 Adjudicable issues are essential in any modification of private law or in any use of the criminal law, because the courts are involved in those aspects of law in the most direct way. The determination of private law rights and liabilities and of criminal liabilities is a matter exclusively for the courts.

57 So in those contexts, it is important for Parliamentary Counsel to question any concept in the instructions that depends on balancing different interests that will not be represented before the court. This includes challenging the application of a discretion that is essentially managerial, rather than judicial. An example of the effect of this analysis can be seen, perhaps, in the way the legislation on "anti-social behaviour" has operated by requiring a court to make the prohibition specific in the form of an order before criminal liability is imposed for contravention of the order.

58 Nevertheless, even in the case of private law and criminal law, where the intention is to produce some general behavioural shift, that effect may still rely on other factors that will not be covered by the legislation. One major factor of this sort may be the extent to which an enforcement mechanism is within the control of the policy-maker, and can be operated to further the policy objective.

59 There are two major factors on which any modification of private law or criminal law relies for its effectiveness. The first is respect for the law amongst the law-abiding classes and the second is the risk amongst the less law-abiding classes of being subjected to the consequences of enforcement.

60 Both of these factors make the use of private law changes a less attractive mechanism for producing an intended behavioural change. Even amongst the law-abiding, private law liabilities are not necessarily regarded as things that have to be avoided at all costs. Many may be regarded as risks that have to be run. They may need to be insured against; but they may have to be accepted. Furthermore, the enforcement of private law rights is also made unpredictable by being dependent upon commercial assessments of the benefits likely to accrue from enforcement.

61 So, it is relatively uncommon for policy-making to choose modifications of private law as a means of changing behaviour. Most modern law of that sort is confined to certain specific areas such as consumer law, employment law and the law of landlord and tenant, where the policy objective is ultimately to restore balance to a legal relationship in which one party has an inherently superior bargaining position.

62 Criminal law, on the other hand, may more easily be used directly to address a problem requiring behavioural change. Certainly criminal law does attract a significantly greater level of respect from the law-abiding.

63 However, in practice it too may operate only indirectly. In order to impose obligations that both are capable of judicial adjudication and identify conduct that will be recognised as inherently wrong, criminal law may concentrate on the perceived causes or, sometimes the most unacceptable symptoms, of the behaviour it is seeking to change. This is particularly true if the real mischief may be seen as a misfortune (such as unhealthy drinking or smoking).

64 Furthermore, the rule of law and the democratic scrutiny of legislation both involve assumptions about the need for proportionality. This requires criminal conduct to be defined in a way that ensures that the distinction between the circumstances in which it may be justifiable and those in which it is undesirable are clear and capable of judicial determination.

65 Nevertheless the circumstances that make criminal sanctions legitimate, or indeed effective, in policy terms may still in practice give rise to polycentric issues that cannot be dealt with in this way. Where that happens the policy-maker may need, in practice, to rely on other factors such as the way in which prosecuting or sentencing discretions are exercised to achieve the policy objective. Both prosecuting and sentencing discretions may themselves involve polycentric issues, for example about resource allocation. That inhibits making them subject to legislative direction, quite apart from the inhibitions resulting from the constitutional relationship between the executive, on the one hand, and the prosecuting authorities and the courts on the other.

66 What can be taken from this is that the natural tendency of the legislative drafter to insist on clarity and certainty, carries extra weight, in relation to private law and criminal offences, specifically because adjudication by a court is the primary consequence of the inclusion of a proposition in that sort of law.

67 It is also clear that, in the process of achieving that clarity and translating the policy into legislation, some clarity is likely to be lost about the objectives of the policy and the polycentric nature of the issues to which achieving those objectives gives rise.

Abandoning the adjudicative method

68 It follows that reducing policy to questions that are suitable for judicial adjudication will sometimes seem to fall short of adequately implementing policy in law.

69 What then happens, it seems to me, is that those preparing legislation turn to Fulller's second suggestion: the abandonment of the adjudicative method. There is a mass of evidence that this method is adopted in practice, particularly where the legislative change is implemented by a provision relating to governance or accountabilities or to the use of resources. Provisions of that sort do constitute a very large part of Parliament's annual legislative output.

70 The legislative policy-maker is relying in those cases on the existing extent to which the law makes governance and resource allocation provisions less subject to judicial adjudication than, say, propositions of private law or criminal law. When a matter is submitted to decision-making that is administrative, rather than judicial, the effect may be to allow decision-making by trial and error, broad consultation or perhaps a managerial discretion. The principles applied by the courts when considering the matter will not generally allow for the simple substitution of a court decision for one reached by administrative means.

71 There is, as we know, a clear-cut distinction between the way in which the courts will adjudicate on legal rights and duties arising under private or criminal law and the extent to which they will interfere, under the principles of administrative law, with a discretion exercised by a public body[16].

72 Of course, for this purpose, it also has to be accepted that there is not always a clear distinction between what is judicial and what is administrative decision-making. There is a spectrum between, at one end, say, the quasi-judicial functions of administrative tribunals and, at the other, the resource allocation decisions of democratically constituted assemblies. Nevertheless to move an issue onto that spectrum does allow a polycentric issue to be decided more easily within the framework of the law, without a court being required to do something beyond its natural competence. Both the legislature and the courts recognise the inappropriateness of judicial adjudication methods for decisions that are more or less executive or managerial in nature.

[16] A separate issue may arise in relation to the extent to which conferring a "managerial function" on a public authority should be capable of giving rise to a private law remedy in respect of the way in which that function is exercised or performed. (See Lord Hoffman's Bar Law Reform Lecture in November 2009 "Reforming the Law of Public Authority Negligence" http://www.barcouncil.org.uk/assets/document/Lod%20Hoffman's%20Transcript20171109.doc . The relationship between these issues and those discussed in this lecture requires more space than is available here; but they are issues that need to be borne in mind in a way that is consistent with the rest of what I say.

73 In this way legislation is also addressing polycentric issues by simplifying the questions for proper judicial adjudication to questions about eg procedural correctness and rationality. The courts will review decisions but will defer, in many respects, to the judgement of the designated administrative decision-maker.

74 A good illustration of this can be found in the various mechanisms set up in the privatisation legislation of the 1980s, where the policy required various interrelated factors to be balanced for ensuring that newly privatised monopolies did not abuse their monopoly positions. The technique was to create a regulator to control the provision of the monopoly service. The regulator was subjected to a general duty to balance various competing interests in determining how to exercise his or her functions[17]. The monopoly provider was required to be licensed to provide the monopoly[18]. The provider was then subjected to various obligations (eg about pricing and supply) by the conditions of the licence[19]; and those obligations had to be imposed in accordance with the regulator's general duties (duties formulated for addressing the polycentric questions inherent in determining what constitutes the abuse of a monopoly position). Enforcement of the licence conditions was then a matter for the regulator and gave rise to liabilities to customers only once the regulator had made an order requiring compliance on the basis of a determination the making of which was also subject to the general duties[20].

75 In this case the law is able to cope with the general duties imposed on the regulator, because the regulator is not required to act in a wholly judicial way in determining how they apply. The application of the duties is in some respects outside the scope of the question subjected to judicial adjudication, but is acceptable as a mechanism for articulating the policy because of the limited extent to which it is capable of judicial revision.

76 This casts an interesting light too on the drafting controversy about "purpose clauses". Setting out an objective for a change to private law or for the imposition of a criminal liability will usually be challenged by a legislative drafter on the grounds that its only effect is to add an element of uncertainty to the interpretation of the carefully framed and specific rights and obligations created in the law. But underlying that objection is also the notion that purposes giving rise to polycentric issues would tend to create an issue for the determination of a court that was outside the limits of adjudication.

77 Different considerations apply where the decision is made in a non-judicial context and accountability for it is not wholly to a court.

78 So far this analysis has assumed that there are only two levels of adjudication in the current law: that in which the court takes full responsibility for determining all questions under consideration and that in which the court confines itself, particularly in circumstances in which polycentric issues are likely to have been considered, to reviewing another's decision, in the context of its application to an individual - but without re-opening every element of the decision.

79 Paul Daly in his recent article on "Justiciability and the 'Political Question' Doctrine"[21] suggested, however, a more nuanced approach to the function of the courts in determining political questions. According to this concept of secondary justiciability, "judges should not open their toolboxes fully on all occasions"[22], and he proposes different reasons and circumstances in which different approaches might be taken.

80 This certainly seems to me to be the premise on which much legislation on governance and accountabilities, and certainly on resource allocation, is drafted in practice. It is certainly true that constitutional legislation also operates on the basis, which Paul Daly discusses, that the level of justiciability on constitutional matters, including, for example, matters within Parliament's exclusive cognisance, is kept to a minimum, even without eg any entrenchment for Article IX of the Bill of Rights 1688/9.

[17] See eg section 3 of the Telecommunications Act 1984, as originally enacted.
[18] Ibid. section 5.
[19] Ibid. section 7(5).
[20] Ibid. sections 16 to 18. The liability to customers was in section 18(5)-(8).
[21] [2010] *Public Law* 160.
[22] Ibid p. 173.

81 However, this whole area does create a dilemma for Parliamentary Counsel. What assumptions can be made about the limits of justiciability that the courts will accept in practice? Polycentric issues will nearly always involve a tension between the general issue and the way it impacts on an individual. Do the courts or Parliament decide the priorities between the two? How can Parliamentary Counsel be certain of avoiding an inappropriate delegation of a policy decision to the courts? How can they ensure an issue is put on the appropriate part of the justiciability spectrum? Are the answers to these questions affected by the fact that the courts will inevitably be considering a polycentric issue in circumstances in which the arguments in the case, and the limited number of parties, will tend to suggest that the issue has already been reduced to one that is suitable for judicial adjudication?

82 In this respect, there is a different moving target problem. The extent to which the courts will interfere with a decision in a particular case is not always easily predictable, but theory says that it is capable of being influenced by legislative provision and by practice. A pessimistic assumption for Parliamentary Counsel would be that the courts will assume that, once something is in legislation, it must be assumed to have been submitted in its entirety to the law and so to be potentially fully justiciable, even if it extends beyond the limits of what is appropriate for judicial adjudication, and that any attempt to mitigate that in the Bill itself is likely to be ineffective. What I think is clear is that that is not in fact the assumption on which much legislation is drafted or indeed construed, even though legislative drafters do in practice need to accept that the making of that assumption is a risk that has to be managed.

83 If the assumption wholly governed drafting practice, those preparing legislation would have to impose a rule on themselves not to legislate in any way in relation to issues that would not be suitable (either in practice or for constitutional reasons) for judicial adjudication[23]. The consequence would be that eg constitutional changes affecting the relationship between different branches of government would have to be kept off the statute book and that policy-making would have to confine all polycentric decisions to mechanisms within the managerial control of the policy-makers, and indeed within their current inherent powers.

84 In relation to private law and criminal law there is an appropriate element of self-restraint when it comes to abandoning the adjudicative method, and an appropriate discipline in reducing the issues for determination to those that are not polycentric. It seems impractical to assume, however, that that restraint could be extended in a modern state to every other area in which policy requires legal change.

85 So it will continue to be necessary for a sovereign Parliament to make clear its intentions in relation to areas where decision-making involves issues that cannot satisfactorily be adjudicated upon by a court. Parliamentary Counsel need to be aware of the principles on which the courts will intervene and also conscious that there are risks of putting polycentric issues on the statute book. But the reality is that the risk that dealing with such an issue in an Act will subject it to an inappropriate level of judicial adjudication needs to be balanced against the risk that a failure to mention it at all will result in legislation that is construed to be incompatible with the policy objective for which it was enacted in the first place.

86 In practice, it is unlikely to be practicable to manage the risks by simply avoiding them; but it is clear that the judgement made to balance them may involve some compromise between what is said and what is not. That result may, from the point of view of the policy-maker, contribute to the impression that the Bill is missing the point.

Role of Parliamentary Counsel in relation to polycentric issues

87 This analysis illuminates for me the role of Parliamentary Counsel in policy-making, both as regards the reduction of polycentric questions to adjudicable issues, and as regards provisions that require the judicial method to be abandoned.

[23] Hints of this approach can be found, in a different context in the evidence of the Clerk of the House of Commons to the Political and Constitutional Reform Committee of the House of Commons on the Fixed-term Parliaments Bill 2010. See "Second Report of 2010-11 Session" at p.EV 1-10 http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/436/436.pdf .

88 Parliamentary Counsel need to act in a way that is similar to the role of the translator, as it is described in Umberto Eco's book "Mouse or Rat—Translation as Negotiation"[24]. In that book he describes the process of translating a literary work as one of negotiation. He gives the opening words of Moby Dick as an example of a sentence in need of negotiation: "Call me Ishmael". In English this produces a subtlety about whether the name is real or hypothetical or is, perhaps, chosen as appropriately metaphorical in the context of the plot, and about whether it is creating a familiarity with the reader. These subtleties are not possible in many other languages. So a choice is required by the translator.

89 Parliamentary Counsel have the task of translating the language of policy into the language of the law, not in the caricature sense of transforming plain language into incomprehensible legalese, but rather in the sense of identifying the essence of the policy so that as much of it as possible can be retained when polycentric issues are reduced to adjudicable questions or when the existing structural assumptions of the law need to be used to avoid the use of the judicial method. In the translation something is likely to be lost; but exactly what will need to be negotiated with the policy-maker.

90 Inherent differences between different languages may mean that a translator cannot capture the essence of an original text without some cost, and so needs to negotiate that cost with the original author. Equally the tasks of the legislative drafter will often include a negotiation with the policy-maker about how much of the political objective can be made express when the Bill is drafted.

CONCLUSIONS

91 It is time I began to draw some conclusions. I should emphasise that in discussing the process of turning policy into law, I have not sought to be normative, but only to analyse what I see as happening in practice.

92 I started with a question that was troubling me. Why is it that policy-makers, when confronted with legislation to implement their policy, have a tendency to feel—

- This may do all that is necessary
- But it seems to miss the point.

93 That feeling relates, for the policy-maker, to whether the Bill is effective, comprehensible and politically capable of passing. So Parliamentary Counsel should seek to avoid that feeling from arising, because those things are all important objectives for the work of the legislative drafter.

94 I assumed that an examination of the origins of the feeling, and of how it can be minimised, would illuminate the proper role of Parliamentary Counsel in policy-making.

95 I drew attention to a number of features of the process of turning policy into law which might create the impression of obtuseness—

- There was the one I described as "necessary incompleteness". There the function of Parliamentary Counsel appears to be to use technical expertise to assemble the fragments of the policy picture represented by the required isolated changes in the law into something that is consistent with the rest of the picture and so far as possible suggests what it contains.
- There were "legislative policy-making by extrapolation" and "the precedent trap". Here the role of Parliamentary Counsel is to question the premises on which the drafting instructions are based, operating on a clean sheet of paper and standing back from the detail to look at the whole proposition for that purpose.
- I mentioned the problem of the "moving target and the moving platform"—that characteristic of change which means that each component of it contributes to the context in which the other components operate. Parliamentary Counsel's role there is to work closely with policy-makers and

[24] 2003, Weidenfeld and Nicolson.

departmental lawyers to identify all aspects of the problem. Some will be identified by evidence from social research and some will need to be identified by legal or conceptual analysis, and the two may interact.

96 Finally, I turned from technical matters to the more fundamental issue (with similarities to the "moving target and moving platform issue") of the frequently polycentric nature of policy and of the need for the courts (but maybe not of legislation) to work only with the issues that are appropriate for judicial adjudication.

97 In this context I identified that there is indeed a phenomenon in which, in the area of private law and criminal law, polycentric policy issues need to be broken down into adjudicable questions without any statement of the unifying policy objective.

98 In this context regulation is often operating by creating a number of uncoordinated incentives to a change of behaviour that may not be specified in the legislation. Nevertheless it is in those areas that a statement of objectives could only be for interpretative purposes and is therefore likely to be unhelpful to the reader.

99 But I also identified that, empirically, legislation does, to a very large extent, operate in the area of polycentric issues by relying on principles that limit the extent to which different questions are justiciable, and in which different standards of review apply. In practice, legislation recognises and relies on the courts' own self-restraint in relation to questions that are inappropriate for judicial determination. Legislation tends to deal with those questions by conferring administrative discretions and through rules about governance or accountabilities, or provisions about the allocation or collection of resources.

100 I noted that legislation may contain incentives calculated to produce policy results or may provide the necessary legal authority or framework for action to produce them in non-legislative ways. But the same sort of provisions may be made as having value in their own right and be neutral as to the end result.

101 Finally I suggest that the role of Parliamentary Counsel in relation to the problems of reconciling the frequently polycentric nature of policy and the limits of judicial adjudication is—

- to recognise the different approaches; and
- to act as a translator for the policy-maker by "negotiating" the transition from policy to law, recognising that some elements of the policy will not be reproduced in the process; but
- to draft— and it always comes down to this—in a way that makes the intention of the legislature so far as justiciability and review is concerned, as clear as possible.

Accessibility of European Union legislation

William Robinson[1]

1. Introduction

Access to legislation is a key element of the rule of law.[2] This contribution considers aspects of accessibility of European Union (EU) legislation and focuses on whether the rules are physically available, findable and understandable, in particular whether their form, structure and language create barriers to understanding.[3]

Calls for accessible EU legislation

The heads of State and Government of the EU Member States have twice called for EU legislation to be made more accessible, prompted by concern for the rights of citizens and a favourable regulatory framework for business.

In 1992, the European Council adopted the Birmingham Declaration which included the resounding demand: "We want Community legislation to be clearer and simpler".[4]

Just five years later the 1997 Intergovernmental Conference adopted a declaration annexed to the Amsterdam Treaty[5] in which it:

> notes that the quality of the drafting of Community legislation is crucial if it is to be properly implemented by the competent national authorities and better understood by the public and in business circles. ... It also stresses that Community legislation should be made more accessible.

The Conference called on the EU institutions to:

> establish by common accord guidelines for improving the quality of the drafting of Community legislation … and [to take] the internal organisational measures they deem necessary to ensure that

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[2] See "The rule of law", Tom Bingham, Allen Lane 2010, Chapter 2.
[3] An overview of barriers to accessing and understanding legislation was given by Duncan Berry in "Obstacles to Communicating Legislation", a paper presented at International Conference on Clarity and Obscurity in Legal Language, Boulogne-sur-Mer, France, July 2005.
[4] European Council Presidency Conclusions, 16.10.1992, DN: DOC/92/6, point A.3.
[5] Declaration No 39 on the quality of the drafting of Community legislation (OJ C 340, 10.11.1997, p. 139).

> these guidelines are properly applied [and] make their best efforts to accelerate the codification of legislative texts.

The European Parliament, the Council and the Commission reacted the following year by adopting an Agreement establishing 22 drafting guidelines and listing the internal organisational measures they would take.[6] The guidelines, which are not binding,[7] call amongst other things for the drafting of acts to be clear and simple[8] and to take account of addressees.[9]

In 2003 the EU institutions reaffirmed their commitment to improving the technical quality of EU legislation and agreed a package of other measures to improve broader aspects of law-making, including in particular "Greater transparency and accessibility" and "Simplifying and reducing the volume of legislation".[10]

2. Rules on access to EU legislation

General

The preamble to the Treaty on European Union (TEU) twice affirms the importance of the rule of law[11] and Article 1, second paragraph, of the TEU provides:

> This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

A general right of access to EU documents is given by Article 15(3) of the Treaty on the Functioning of the European Union (TFEU):

> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.[12]
>
> General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.
>
> Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph…

[6] Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation of 22 December 1998 (OJ C 73, 17.3.1999, p. 1).
[7] "these guidelines are to be regarded as instruments for internal use by the institutions. They are not legally binding" (recital 7).
[8] "Community legislative acts shall be drafted clearly, simply and precisely" (Guideline 1).
[9] "The drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously, and of the persons responsible for putting the acts into effect" (Guideline 3).
[10] Interinstitutional Agreement on better law-making of 16 December 2003 (OJ C 321, 31.12.2003, p. 1). See in particular points 25 to 31 (quality), 10 and 11 (accessibility) and 35 and 36 (simplification).
[11] Second and fourth recitals.
[12] An almost identical provision is contained in Article 42 of the Charter of Fundamental Rights of the EU, which, according to Article 6 of the TEU, has "the same legal value as the Treaties".

Pending the adoption of the regulations provided for in the second subparagraph, the detailed rules applying are still those laid down in a 2001 Regulation.[13]

Publication of legal acts

Article 297 TFEU requires the publication in the *Official Journal of the European Union* of all legislative acts and all Regulations, as well as of Directives addressed to all the Member States.

Language rules

The EU now comprises 27 Member States and some 500 million citizens who need and expect access to EU legislation in their own languages. Under Article 342 TFEU the rules governing the languages of the EU institutions are to be determined by the Council acting unanimously by means of regulations.

Regulation No 1[14] provides that regulations and other documents of general application must be drafted in 23 languages which are recognised as "official languages" and also that the *Official Journal* must be published in all those languages.

3. Barriers to accessibility of EU legislation

Complex procedures

One reason why EU legislation is less accessible than it could be, probably common to many legal systems, is that the legislative and administrative machinery turns with more regard for compliance with the basic rules and for the smooth running of the machinery than for the needs of users of legislation.

The EU machinery is more complex than most. Agreement has to be reached between the 27 Member States whose circumstances and views may be very different. To achieve such agreement, texts may, at one extreme, resemble international agreements and be left sufficiently vague or ambiguous to cover many eventualities or else, at the other extreme, made subject to numerous conditions, riders, qualifications and exceptions.

The draft texts originate in the Commission and are submitted for adoption to the European Parliament and the Council. The three institutions are quite independent and each body jealously guards its own prerogatives. The legislative process is a lengthy one, leaving scope for distortion of the draft.

Numerous official languages

At every stage the text must be negotiated by drafters speaking 23 languages and the final text must be authentic in all those languages. Most of the substantive negotiations will centre on one language version but it cannot be optimally drafted because the majority of those involved will not be native speakers of the drafting language. Also some solutions which are the neatest and clearest for the drafting language may have to be rejected because they are not capable of being rendered accurately in all the 22 other languages. At the end of the process the 23 language versions must be coordinated to ensure that they all reflect the outcome of the final negotiations and have the same legal effect.

[13] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43). In 2008 the Commission submitted a proposal for a regulation laying down new rules and repealing Regulation (EC) No 1049/2001 (COM/2008/0229).

[14] EEC Council Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385/58).

Non-specialist drafters

Some accessibility problems are undoubtedly also attributable to the fact that drafting specialists play little part in the EU legislative process.

Broadly speaking common-law countries tend to regard the drafting of legislation as something to be done by specialists, legislative counsel or parliamentary counsel.

In many civil-law countries the job is done by civil servants who are generally lawyers but have many other responsibilities apart from drafting. There are often mechanisms to permit a central department or independent body to check the quality of drafting against set standards.

In the EU legislative process the first drafts are generally prepared by civil servants of the Commission who are technical specialists in the sector concerned. In most cases they are not lawyers and have had little training in drafting. For this reason, and also because most of them will have to draft in a language that is not their mother tongue, they rely heavily on standard templates and on precedents from their own sector or other sectors of EU law. The resulting off-the-peg solutions may be ill adapted to the problem, with some being unnecessarily complex and others incomplete.

The Commission's technical specialists have very wide-ranging responsibilities for their respective sectors: carrying out preliminary work for all legislation, including consultation of the Member States, business circles and the general public and impact assessments; drafting proposals for basic legislation and steering them through the legislative process; drafting secondary legislation; advising Member States on how to implement the EU rules, both in the basic legislation and in the secondary legislation; giving interpretations of those EU rules to business circles; drafting interpretive notes; publishing guidance on websites and awareness-raising materials such as press releases; monitoring compliance and following up non-compliance by Member States or by business circles; and bringing proceedings before the European Court of Justice (ECJ) if appropriate.

They may sometimes fail to recognise the requisite boundaries between the different functions. For example, if something is not covered in the basic legislation, they may see no reason not to put it in the implementing legislation, if something is not covered in the implementing legislation, they may put it in guidance notes and so on.

They may believe that it is not so necessary to make the actual legislation particularly easy to understand because simpler explanations are provided in the interpretive notes, guidance or citizens' summaries. They are often unaware that some of the language they use is jargon impenetrable to those outside the sector. And they have such wide-ranging responsibilities and so many documents to produce that they overlook the fact that drafting legislation requires more skill, more care and more time than writing a guidance note or a press release.

Revision

At quite an early stage in the Commission internal procedures, lawyers with specific responsibility for drafting quality, the legal revisers in the Commission Legal Service,[15] are consulted on the draft. The legal revisers check that the draft is clear and precise, complies with the rules on form and presentation, and is translatable into all the other official languages. Their work is, however, hampered by the fact that generally they have just eight days to revise a text, they have little contact with the drafter, and their suggestions are not always followed.

[15] The Legal Revisers' public website is at: http://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm .

The legal revisers of the European Parliament and of the Council check the text at a late stage in the legislative procedure. However, by then it is very hard to improve drafting quality and the main emphasis must be on compliance with the basic formal rules and consistency of all the language versions.

4. Physical accessibility of EU legislation

Publication

The Publications Office of the European Union (Publications Office) is responsible for publishing all EU legislation.[16] Since the inception of the European Communities it has published the *Official Journal* on paper for a modest subscription. Since 1998 it has also published it online but the electronic versions are not authentic.

In addition, in response to the calls for improved accessibility of EU law over the years, the Publications Office has developed a system of websites and databases covering all aspects of EU law. Between 2003 and 2005 it created a single portal, called EUR-Lex, for accessing all that information which is now available without charge.[17] That portal gives access in particular to:

- the electronic version of the *Official Journal*;
- collections of the treaties, international agreements, legislation in force, legislation in preparation, case-law, parliamentary questions – all accessible via hyperlinks;
- search engines for legislation and related measures;
- consolidated texts of legislation, that is to say non-authentic texts combining the enacting terms of original acts and all amendments to them (covering some 3 000 acts);
- Pre-Lex, the database on the interinstitutional decision-making process; and
- a site on legislative drafting.

The Europa website also includes 3,000 summaries of EU legislation divided into 32 subject areas.[18] The summaries have no legal force but they are “validated” by the relevant department of the Commission and updated regularly.

The EU institutions also maintain large databases of information about the legislative process and its preparatory stages.[19] The European Parliament, where EU legislation is debated by 736 Members directly elected by EU citizens, goes to great lengths to offer access to its sessions.[20] When the Council deliberates and votes on draft legislation, its sessions are open to the public.[21] Most of the departments of the Commission maintain public websites offering explanatory material about legislation in their respective sectors.[22]

While the rules on publication are generally complied with, as recently as 2009 the European Court of Justice (ECJ) was confronted with provisions of an EU regulation that had not been published at all. The provisions

[16] In this article, “legislation” is used to cover both basic legislation adopted jointly by the European Parliament and the Council and secondary legislation adopted by the European Commission.
[17] http://eur-lex.europa.eu/en/index.htm
[18] http://europa.eu/legislation_summaries/index_en.htm
[19] See the websites of the EU institutions accessible from their common server Europa:
http://europa.eu/about-eu/institutions-bodies/index_en.htm
European Parliament Legislative Observatory:
http://www.europarl.europa.eu/oeil/index.jsp?language=en
European Commission database on the EU decision-making process:
http://ec.europa.eu/prelex/apcnet.cfm?CL=en
[20] See http://www.europarl.europa.eu/eng-internet-publisher/eplive/public/default.do?language=en .
[21] See Article 7 of its Rules of Procedure, OJ L 325, 11.12.2009, p.35.
[22] http://ec.europa.eu/about/ds_en.htm

related to aviation security and had remained unpublished not through inadvertence but as a result of a deliberate decision to keep them secret. An Austrian citizen, who had been removed from a plane because his hand luggage included a tennis racquet, an item prohibited by the EU regulation, challenged the validity of those provisions. His challenge was upheld by the Court.[23]

In the EU system the principle that laws must be physically accessible to those to whom they are to apply has implications that do not exist in other systems and are perhaps not immediately obvious.

In 1998, in a case in which a Greek trader was contesting a charge levied on it under EU law, the ECJ held that a corollary of the principle that EU laws are authentic in all official languages is that a trader in a Member State cannot be bound by a regulation if the text has not been published in the language of that trader, even if the other language versions have been published.[24]

In 2006 a case was referred to the ECJ concerning the non-availability of the paper version of the *Official Journal* in Czech shortly after the Czech Republic joined the EU. The ECJ held that, as EU law stood, the only acceptable form of publication was in the *Official Journal* on paper and that the availability of texts on the internet did not equate to valid publication.[25]

Can we find the act we are looking for?

It is not enough for legislation to be published in the prescribed form and in the requisite languages. It must be published in such a way that it can be identified, found and consulted without undue burden.

All EU legislation is indeed published in the *Official Journal*, which, however, has a complex structure not explained on the *Official Journal* page of EUR-Lex.[26]

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[23] Case C-345/06 Gottfried Heinrich [2009] ECR I-1659. Commission Regulation (EC) No 622/2003 (OJ 2003 L 89, p. 9) contained in an annex measures on aviation security. Article 3 provided: "Those measures shall be secret and shall not be published". The ECJ held "the annex to Regulation No 622/2003, which was not published in the *Official Journal of the European Union*, has no binding force in so far as it seeks to impose obligations on individuals" (paragraph 63).

[24] Case C-370/96 *Covita AVE* v *Greek State* [1998] ECR I-7711, paragraphs 26 and 27:
"it is mandatory for Community provisions introducing a countervailing charge to be published in the Official Journal of the European Communities. From the date of that publication no person is deemed to be unaware of that charge ...
None the less, ... it cannot be accepted that a trader such as Covita was aware that Regulation No 1591/92 had been adopted if it proves that the Official Journal of 23 June 1992 was not available on that date in its Greek language version at the Office for Official Publications of the European Communities, situated in Luxembourg. If evidence is produced that actual publication of the Official Journal was delayed, regard must be had to the date on which the issue was actually available".

[25] Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paragraphs 33, 34, 38, 48 and 49:
"... a Community regulation cannot take effect in law unless it has been published in the Official Journal of the European Union.
... the proper publication of a Community regulation, with regard to a Member State whose language is an official language of the Union, must include the publication of that act, in that language, in the Official Journal of the European Union.
... the principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies ....
...although Community legislation is indeed available on the internet and individuals are using this means more and more frequently to acquaint themselves with it, making the legislation available by such means does not equate to a valid publication in the Official Journal of the European Union in the absence of any rules in that regard in Community law.
... although various Member States have adopted electronic publication as a valid form, it is the subject of legislation or regulations which organise it in detail and set out exactly when that publication is valid. Accordingly, as Community law now stands, the Court cannot consider that form of making Community legislation available to be sufficient for it to be enforceable".

[26] The OJ is divided into three series, the L series for legislation, the C series for information, and the S series, a supplement with public procurement notices. The C series has two annexes: the C A series with notices of staff vacancies

To make EU acts easily identifiable, they are given titles, composed of text and a number.

The numbering system itself may confuse lay users because there is one numerical sequences for regulations, another sequence for directives and yet another for most decisions. So each year there will be three legal acts bearing the number 1, and three bearing the number 2 and so on (four acts counting those of the European Central Bank, which form a separate sequence).[27]

A further complication is that decisions of the European Parliament and Council are treated as regulations for the purposes of numbering. That means that it is possible that there will be two decisions with the same number, although the format is different.[28] Staff of the EU institutions are familiar with the different types of acts and may be able to find the one they want without difficulty but for others the numbering may be a source of confusion.

Titles of legal acts should be concise so that they fulfil their purpose of handy identifiers. The Member States have different ways of making their titles concise: in France laws may be known by the name of their sponsor: a noted law on language matters was the *loi Toubon*; in Germany a complex system of abbreviations is in common use: the *Bundesausbildungsförderungsgesetz* (Federal law promoting education) is widely known as the BAföG; in the United Kingdom and Ireland the aim is to have a convenient short title such as the Human Rights Act.

The EU it seems has not always managed to find appropriate and concise titles for its legal acts. In a speech in 2000[29] the Swiss Chancellor Ms Huber-Hotz spoke of the "all too grotesque inaccessibility, laboriousness and incomprehensibility of EU legal acts"[30] which she illustrated by two titles of EU regulation: the first was 92 words long and she described it as "quite simply incomprehensible";[31] of the second, which referred to coefficients for "cereals exported in the form of Irish whiskey",[32] she said:

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and such things as common catalogues of plant varieties; and the C E series with links to electronic texts that are not published in the paper version of the OJ, often of preparatory materials from the legislative procedure. The L series itself is divided into section I "Legislative acts", section II "Non-legislative acts", section III "Other acts" and "Corrigenda". Section I "Legislative acts" may be divided into: "Regulations", "Directives" and "Decisions".
Section II "Non-legislative acts" may be divided into: "International Agreements", "Regulations", "Directives", "Decisions", "Recommendations", "Acts adopted by bodies created by international agreements".
A very concise overview of the structure of the Official Journal is given on the EUR-Lex homepage:
http://eur-lex.europa.eu/en/tools/about.htm
More detailed information is given in the Interinstitutional Style Guide:
http://publications.europa.eu/interinstitutional_style_guide/index_en.htm .

[27] The numbers have different formats. Examples are: Regulation (EU) No 232/2010, Directive 2010/107/EU, Decision 2010/424/EU.

[28] See for example: Decision No 283/1999/EC of the European Parliament and of the Council of 25 January 1999 establishing a general framework for Community activities in favour of consumers (OJ L 34, 9.2.1999, p. 1) and Commission Decision 1999/283/EC of 12 April 1999 concerning the animal health conditions and veterinary certification for imports of fresh meat from certain African countries (OJ L 110, 28.4.1999, p. 16).

[29] Recht haben - gerecht sein, 6.11.2000: http://web.archive.org/web/20030701101153/http://www.admin.ch/ch/d/bk/hu20001106.html

[30] "Die grösste Herausforderung für die Verständlichkeit unserer Gesetze stellt aber zurzeit zweifellos das EU-Recht dar, das wir seit längerem "autonom nachvollziehen" und mit den bilateralen Abkommen zum Teil nun auch direkt anwenden. Verstehen Sie mich richtig: Ich bin eine überzeugte Europäerin, aber ich meine, wir sollten die manchmal geradezu groteske Unüberschaubarkeit, Umständlichkeit und Unverständlichkeit der EU-Rechtserlasse nicht einfach als ein Naturgesetz hinnehmen".

[31] Commission Regulation (EC) No 2592/1999 of 8 December 1999 amending Regulation (EC) No 1826/1999 amending Regulation (EC) No 929/1999 imposing provisional anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway with regard to certain exporters, imposing provisional anti-dumping and countervailing duties on imports of such salmon with regard to certain exporters, amending Decision 97/634/EC accepting undertakings offered in connection with the anti-dumping and anti-subsidies proceedings concerning imports

> If whiskey is a form of cereal, that is almost touching the fundament of our language. Such legislative pomp does not promote trust in the legal order. Belief in the law cannot flourish.[33]

Still today the titles of EU acts seem problematic, especially in the case of the acts which are liable to be referred to most frequently. Two examples may illustrate this.

The major new system for regulating all chemicals used in the EU is commonly known as "REACH". The full title of the regulation which established that system is:

> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.[34]

That title is too long for an act that is referred to often, no short title is given, and indeed the full title cannot easily be abbreviated. The short form REACH does not indicate the subject matter and is meaningless in most of the official languages.

The full title of the important act commonly referred to as the "Air passengers' rights regulation" is:

> Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.[35]

Once again, at 45 words that title is too long, no short title is given, and the sector concerned is identified only indirectly, by the reference to "delay of flights".

5. Stability

Law must be stable if those subject to it are to be able to know and avail themselves of their rights and to know and comply with their obligations. As James Madison, the "Father of the US Constitution", wrote:

> It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?[36]

Some EU acts are certainly changed quickly and often, either by amendments or corrections or both.

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of such salmon and amending Council Regulation (EC) No 772/1999 imposing definitive anti-dumping and countervailing duties on imports of such salmon (OJ L 315, 9.12.1999, p. 17).

[32] Commission Regulation (EC) No 1632/1999 of 26 July 1999 fixing the coefficients applicable to cereals exported in the form of Irish whiskey for the period 1999/2000 (OJ L 194 , 27.7.1999, p. 9).

[33] "Den Titel der Lachsverordnung versteht man schlicht und einfach nicht. Wenn Whiskey eine Form von Getreide sein soll, rührt das schon beinahe an die Grundfesten unserer Sprache. Solch ein gesetzgeberischer Pomp fördert das Vertrauen in die Rechtsordnung nicht. So kann Rechtsüberzeugung nicht gedeihen".

[34] OJ L 396, 30.12.2006, p. 1.

[35] OJ L 46, 17.2.2004, p. 1.

[36] *The Federalist*, No. 62

Amendments

One example of an oft-changed act is Regulation (EC) No 881/2002[37] which in November 2010 was amended for the 139th time![38]

That may be a special case but another example is the new basic regulation on the agricultural markets, Regulation (EC) No 1234/2007.[39] It was adopted in October 2007 and in three years has already been amended by at least 15 other acts. The original text consisted of 204 articles but some 120 complete new articles have been added (quite apart from other changes to the articles and to the annexes). The consolidated text is some 330 A4 pages and it is not easy to navigate.

It is possible that EU acts would not need to be changed so often if more time was allowed for their preparation and drafting. The tendency of those involved in the EU legislative process to rush to adopt acts has been noted and criticized.[40]

All amendments to EU acts can be tracked down using EUR-Lex but since the beginning of 2009 the texts as published in the Official Journal no longer contain any indications of amendments to acts cited.

It should be noted that the EU institutions are aware of the problems resulting from the frequent amendment of EU legislation, which is now estimated to exceed 100,000 A4 pages. They have taken steps to reduce the volume of legislation and offer users simpler texts by codification and recasting[41] and by repealing obsolete acts.

[37] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ L 139, 29.5.2002, p. 9).

[38] By Commission Regulation (EU) No 1027/2010 (OJ L 296, 13.11.2010, p. 13).

[39] Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ L 299, 16.11.2007, p. 1).

[40] G. Sandström, "Knocking EU law into shape", *Common Market Law Review* 40, 1307 (2003). Sandström had experienced the haste first hand as representative of Sweden in an EU legislative procedure and then seen the ensuing problems in his own country as judge of the Swedish Supreme Administrative Court and a member of Lagrådet. He quoted G. Lambertz, who was later Swedish Chancellor of Justice: "It is not easy to see why many of Europe's legislators allow themselves to be carried away by the temptation to demonstrate their rapidity rather than to assume their responsibility for ensuring that the laws are properly worked out. Short-term gains in rapidity almost always entail long-term structural defects and enormous costs, not least in the form of distrust and lack of respect for the European legislative apparatus. The mania for being clever and the desire to impress which are bound up with the obsession with rapidity – often accompanied by the quite pathetic arguments that 'The people of Europe are waiting impatiently for these rules' or 'We shall be overtaken by events if this act cannot be adopted immediately' – are in my view irresponsible. Sweden should work energetically and single-mindedly to ensure that endeavours to improve the quality of EU legislation are not merely confined to paper" (*Svensk Juristtidning* 2000, p. 247).

[41] Codification under the Interinstitutional Agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts (OJ C 102, 4.4.1996, p. 2) is a process whereby an original act and its amendments are repealed and replaced by a single new act adopted by the legislative authority by an accelerated procedure.
Recasting under the Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts (OJ C 77, 28.3.2002, p. 1) is a process whereby an original act and its amendments are repealed and replaced by a single new act adopted by the legislative authority, which makes further changes to the rules.

Corrections

The problem of legislation that has to be corrected after adoption seems more prevalent in the EU system than in national systems. The requirement to adopt acts in 23 languages may be part of the explanation, but the phenomenon is a cause of concern.[42]

The correction may be made by a new act which may include express provisions on temporal effects in the interests of legal certainty. Most corrections are, however, effected by a corrigendum, which is published in the *Official Journal* and takes effect from the date of the adoption of the original act. All too often an act is republished in its entirety by means of a corrigendum, in which case it is hard to ascertain what the errors in the original text were. Users have to familiarise themselves with whole text twice and there is still a risk that a user will rely on the wrong version because the original incorrect text remains in the *Official Journal* and in the databases.

Examples of corrections are to be found affecting some of the most important EU acts.

Regulation (EC) No 1234/2007 on the agricultural markets has, according to EUR-Lex, already been corrected six times.

The REACH regulation has also been corrected six times. Some of those corrigenda relate just to specific language versions but the first involved the republication of the entire act, some 1,500 pages, in all the official languages.

It is not easy to ascertain the full extent of the problem.[43]

On occasion there are signs of large numbers of corrigenda. In 2004 the EU institutions rushed to publish a large number of acts before the accession of 10 new Member States on 1 May 2004, which made it necessary to work in another 9 official languages. Many of those acts were published on 30 April 2004, the last day before the accession. Because those acts were published in great haste, there was not time to prepare them as thoroughly as usual and after accession no less than 20 issues of the *Official Journal* containing 2897 pages had to be republished in their entirety in all the official languages.[44] It seems that those corrigenda were also prepared in haste because in April 2005 a special *Official Journal* had to be published in all the official languages republishing for the second time as "corrigenda to corrigenda" four of the acts concerned.[45]

Again, shortly after the accession of Bulgaria and Romania in 2007, it was necessary to republish in all languages as corrigenda the acts contained in 14 *Official Journals* totalling 3,225 pages.[46]

For the anecdote, the Interinstitutional agreement on better law-making itself had to be corrected, apparently because of mistakes in the signatures.[47]

[42] See Michal Bobek, "Corrigenda in the Official Journal of the European Union: Community law as quicksand", ELRev 2009, 950.
[43] A search in EUR-Lex amongst all legislation published in 2009 revealed 19 correcting acts (accessed on 8.11.2010). A search using the English search term "corrigendum" yielded 152 hits but the reliability of that search cannot be guaranteed. To obtain the full picture, it would be necessary to repeat the search using the appropriate search term in the other 22 official languages.
[44] See the list of *Official Journals* concerned inside the back cover of OJ L 244, 16.7.2004.
[45] OJ L 92, 12.4.2005. A search in EUR-Lex (accessed on 8.11.2010) for "corrigendum to corrigendum" resulted in 11 items, some of which did not concern legislation.
[46] See the list of *Official Journals* concerned inside the back cover of OJ L190, 21.7.2007.
[47] OJ C 321, 31.12.2003, p. 1; corrigendum in OJ C 4, 8.1.2004, p. 7.

6. Technical barriers to accessibility

One barrier to accessibility arises when the rules on a matter have to be found in several places ("scatter"), whether in different acts or within the same act.

Rules scattered in various acts

Some scatter is inherent in the EU system (as it must be in any system) and cannot be eliminated. The structure of EU rules is a hierarchical one with the most fundamental rules being laid down in the EU Treaties. Other basic rules are laid down in legislative acts adopted jointly by the European Parliament and the Council under the "ordinary legislative procedure" under Article 289 TFEU. Those fundamental acts may then be fleshed out by delegated acts adopted by the Commission under Article 290 TFEU or by implementing acts under Article 291 TFEU.

In some cases a first act will establish a framework for a sector and then specific acts will be adopted for subsectors. The rules on waste are an example of a particularly complex area of regulation.[48] One directive lays down a general framework.[49] A number of acts establish a more detailed framework for all types of waste covering such things as: prevention and control of pollution, waste management statistics, landfill, incineration and shipment. Further acts apply to specific types of waste such as: hazardous waste, waste from consumer goods, packaging and packaging waste, spent batteries and accumulators, waste oils, motor vehicles, waste electrical and electronic equipment, and radioactive waste. Some acts apply to waste from specific activities such as: extractive industries, ship dismantling, and offshore oil and gas installations. A search in EUR-Lex for legal acts on waste produced no less than 213 hits.[50]

The structure of the EU rules is not always rational. It is not unusual for EU rules to have been adopted piecemeal, as and when needs were perceived and as and when progress with a legislative initiative was possible. Sometimes too it is only after the adoption of an act that the need for exceptions and special provisions becomes apparent and they will then often be adopted by a series of ad hoc acts.

For example a comprehensive system of registration of all cattle was introduced in the wake of the mad-cow-disease crisis in the late 1990s with the aim that animals and food derived from them should be traceable from farm to table. The system provided in particular for: double ear tags for each animal with an individual number, a register on each farm; cattle-passports; and national computerised databases.[51]

Once the system was in place, a series of acts had to be adopted providing for exceptions from the obligation for each animal to be fitted with ear tags soon after birth, in particular for bulls appearing in bull fights,[52] cattle being displayed on show farms portraying old farming practices,[53] and calves born in remote areas where they might not be found by the farmer for some months.[54]

[48] See the overview with references to many of the individual acts given in the summaries of legislation on the Europa website: http://europa.eu/legislation_summaries/environment/waste_management/index_en.htm .
[49] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste (OJ L 312, 22.11.2008, p. 3).
[50] Search for "Secondary legislation" including in the title the word "waste" (accessed 4.11.2010).
[51] See: Regulation (EC) No 1760/2000 of the European Parliament and of the Council (OJ L 204, 11.8.2000, p. 1) and Commission Regulation (EC) No 1825/2000 (OJ L 216, 26.8.2000, p. 8).
[52] Regulation (EC) No 2680/1999 (OJ L 326, 18.12.1999, p. 16).
[53] Regulation (EC) No 644/2005 (OJ L 107, 28.4.2005, p. 18).
[54] Decision 2006/28/EC (OJ L 19, 24.1.2006, p. 32).

Rules scattered within one act

Even within a single act, provisions may be scattered, partly because of the structure of EU acts which, in addition to the enacting terms, always include a title and a statement of the reasons on which the act is based and often include one or more annexes which are intended for technical elements.

For example, if one wishes to ascertain the aims of the important regulation on the rights of air passengers,[55] elements are to be found within the act:

- in the title: "common rules on compensation and assistance to passengers";
- in recital (1) "aim ... at ensuring a high level of protection for passengers", "full account should be taken of the requirements of consumer protection in general";
- in recital (4) "raise the standards of protection set by" Regulation (EC) No 295/91, "strengthen the rights of passengers";
- in Article 1 "This Regulation establishes ... minimum rights for passengers"

This is quite apart from the sources outside the regulation itself such as:

- two explanatory memoranda that the Commission published when it submitted its original proposals to the other institutions;[56]
- two websites:
  http://ec.europa.eu/transport/passenger-rights/en/03-air.html
  http://ec.europa.eu/transport/passengers/air/air_en.htm
- a leaflet and a poster available at airports or from the website:
  http://ec.europa.eu/transport/passengers/air/air_en.htm
- numerous press releases, in particular the one of 16 February 2005 issued at the time of the entry into force of the regulation;[57]
- a summary: http://europa.eu/legislation_summaries/transport/air_transport/l24235_en.htm

7. Comprehensibility

Numerous authentic versions

Another feature of EU law which impacts on the accessibility of EU legislation is the existence of 23 language versions of each act. The ECJ stated in the *CILFIT* case:

> it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.[58]

The consequence is that no single version is authentic, reminiscent of Boswell's observation "He who praises everybody praises nobody".[59]

The results may be very surprising to those used to monolingual systems. For example, in one case where the Netherlands sought to rely on the Dutch version of a regulation to support its interpretation of the rules, the

[55] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1).
[56] Published in OJ C 103 E, 30.4.2002, p. 225 and OJ C 71 E, 25.3.2003, p. 188.
[57] IP/05/182.
[58] See Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 18.
[59] James Boswell, *Life of Johnson*, 1791, footnote, 30 March 1778.

ECJ held that the Dutch version contained a manifest error and that the Netherlands could not place reliance on an interpretation based on that version.[60]

Staff of the EU institutions know that to interpret EU legislation they must compare the different language versions. They can often do that themselves or with the assistance of colleagues nearby or of the institutions' language specialists. But few users in the Member States will be familiar with that principle and when they are made aware of it, find it a major barrier to arriving at a reliable interpretation of EU legislation.

When drafting EU legislation, staff of the EU institutions must ensure that the texts are translatable and that the different language versions will produce the same legal effects in all the Member States. They are accordingly instructed to avoid terms that are specific to one national legal system[61] and must aim for a neutral terminology.

This aspect was highlighted by the ECJ in *CILFIT*:

> It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.[62]

In fact the ECJ has held that: "the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect".[63] This suggests that the meaning of a term in national law will rarely be a reliable guide to its meaning in EU law.

Definitions

Definitions are increasingly being included in EU acts as a partial solution but problems remain. Since there is no interpretation act in the EU system, in contrast to most common-law countries, the status and effects of definitions in EU legislation have not been regulated by the legislative authority. They have not been settled by the case-law either. The ECJ appeared to suggest, for example, in February 2007 that if a term is not defined in the act under consideration a definition given in an earlier act may generally offer guidance as to the meaning of the term.[64]

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[60] Case C-132/99 *Netherlands* v *Commission* [2002] ECR I-2709. See paragraph 24:
"The Netherlands authorities were closely involved in the drafting of Regulation No 1469/94. By comparing the Dutch version with the other language versions, they should have noticed immediately that there was an error. In any event, they should have contacted the Commission's representatives to discuss the problem and find a solution to it".

[61] Joint Practical Guide, point 5.3.

[62] Paragraph 19.

[63] Case C-103/01 *Commission* v *Germany* [2003] I-5369, at paragraph 33.

[64] Case C-34/04 *Commission v Netherlands* [2007] ECR I-1387, paragraphs 34 to 38: "It is common ground that neither Article 5 of Regulation No 3690/93 nor that regulation as a whole gives any indication as to how the phrase 'definitive withdrawal from fishing activities' is to be understood. However, in Regulation No 3699/93, more precisely in Article 8(2) thereof, it is stated that measures to stop vessels' fishing activities permanently may include, inter alia, scrapping, permanent transfer to a non-Member State, provided such transfer is not likely to infringe international law or affect the conservation and management of marine resources, and permanent re-assignment of the vessel in question to uses other than fishing in Community waters.
Regulations No 3690/93 and No 3699/93 differ greatly in both subject-matter and purpose... .
However, although the purpose of those two regulations is different, there is nothing to indicate that the meaning of 'measures to stop vessels' fishing activities permanently' applies exclusively to Regulation No 3699/93 and that it cannot be used in the context of other instruments of secondary legislation relating to the sphere of fishing policy.
Regulation No 3699/93, which defines the measures to stop vessels' fishing activities permanently, was, moreover, adopted after Regulation No 3690/93. As is clear from most language versions of Regulation No 3699/93 ... the

Just a few days later, however, the ECJ held that a term that had not been defined in the directive under consideration "should be interpreted independently on the basis of the wording of the provisions in question and on the purpose of the directive"[65] even though the Advocate General in that case had expressly stated that the definition given in another EU act should be adopted.[66]

Even though definitions are called for by the Interinstitutional Agreement on drafting of 1998,[67] there are wide divergences in the use of definitions in EU acts.

Framework Decision 2002/584 on the European Arrest Warrant[68] does not contain an article setting out definitions, even though the Commission proposal had contained an article with six definitions. The Framework Decision was challenged by a Belgian association of lawyers on the grounds in particular that it listed criminal offences in terms that were too vague and was thus contrary to the principle of legality in a case referred to the European Court of Justice for a preliminary ruling[69].

Regulation (EC) No 261/2004 gives air passengers certain rights if they are "denied boarding" or if their flights are cancelled or delayed.[70] Passengers are entitled to compensation **and** assistance (for example with meals and accommodation) in the first two cases but **just** assistance in the case of delay. The regulation defines the key terms "denied boarding" and "cancellation", but not "delay". In the *Sturgeon* case,[71] the ECJ noted the absence of a definition of "delay" and held that long delays could be equivalent to cancellation; the passengers concerned could accordingly claim compensation, despite the legislature's apparently deliberate exclusion of compensation for delay.

The REACH regulation contains well over 40 definitions extending to more than 2 A4 pages. The list is not in alphabetical order, which cannot be used in EU legislative drafting because it would be different in the various languages. Users therefore have to search it laboriously to find whether a given term has been defined.

It is both surprising and regrettable that the EU does not have a specific database of definitions given in legislation or of ECJ interpretations of concepts. As a result, drafters of new acts are often unaware of definitions already given in existing acts and draw up new ones diverging—perhaps unnecessarily—from those already given. In any case, since there is no interpretation act, many recurring terms have to be defined repeatedly in individual acts. What is more serious is that users cannot find guidance as to the meaning of terms in EU legislation, even though, in the light of the *CILFIT* case, they are unable to rely on the meanings of those terms in their national systems.

Community legislature knowingly intended to choose the same expression as that already used in Regulation No 3690/93.
Accordingly, there is nothing to preclude the definition ensuing from Regulation No 3699/93 being used in the context of the implementation of Article 5 of Regulation No 3690/93 regarding the temporary or definitive suspension of fishing licences".

[65] Case C-391/2005 *Jan De Nul* [2007] ECR I-1793, at paragraph 22.

[66] "By referring in that directive to 'inland waterways', without giving a specific definition of that term, the Community legislature must necessarily have been referring to the existing definition of what that term covers. Moreover, I consider that it would be inconsistent and contrary to the principle of legal certainty to adopt different definitions of the term 'inland waterways' depending on the Community measure in question" (point 79 of the opinion).

[67] OJ C73, 17.3.1999, p.1. See Guideline 14: "Where the terms used in the act are not unambiguous, they should be defined together in a single article at the beginning of the act".

[68] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1.

[69] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

[70] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1).

[71] Joined Cases C-402/07 and C-432/07 *Sturgeon* [2009] ECR 1-10923.

Interference effects

Another problem resulting from the number of languages in use in the EU institutions is the misuse of technical terms because of interference effects. Even though drafters are increasingly working in English, only a small minority of them are native English speakers (and some of those have become unsure of English usage after a long period abroad in a multilingual environment).

In some cases the result is merely use of the wrong technical term with no risk of confusion. For example, instead of the correct English term “amendment” to refer to the adoption of a new act to change the wording of an existing one, drafters often use “modification”, influenced by the French term. Similarly, instead of “correction” to describe the process of putting right mistakes in the text of an existing act, they use “rectification”, again because of the French term.

In other cases though the result can be misleading, as when “derogate” is used for “repeal” (influence of Spanish), “motives” for “statement of reasons on which an act is based” and “visas” instead of “citations” (both influenced by various Romance languages), or “guideline” for “directive” (influence of German and Dutch).

Long sentences

It is widely recognised that overlong sentences make legislation unnecessarily difficult to understand and the EU duly adopted a guideline recommending the use of short sentences.[72] The fact remains that in strictly grammatical terms each EU legal act consists of a single sentence. The name of the institution appearing immediately after the title is the subject. It is followed by the preamble setting out the legal basis, procedural steps and reasons for the act, which may occupy many pages. After the preamble is the predicate which begins with words such as “have adopted the following regulation:”. The colon indicates that the rest of the text of the act, comprising all the articles and any annexes, merely completes that sentence.

It would perhaps be hard to find a consensus amongst all the EU Member States about the appropriate length of sentences, with the Nordic countries seeming to favour much shorter sentences than southern countries. However, many EU acts contain sentences that are overlong by any standards. To take just one of our examples, Framework Decision 2002/584 on the European Arrest Warrant includes seven provisions with sentences of 150 words or more, the longest being over 400 words.[73]

8. Conclusion

Some of the problems discussed are common to all legal systems. Others are inherent in the nature of the EU system which is negotiated between and has to apply in 27 Member States and exists in 23 authentic language versions.

But the fact that some of the problems are inescapable reinforces the need for strenuous efforts to make EU legislation as clear and accessible as possible. One thing that would certainly help would be to involve specialists in legislation at an earlier stage and to give them a more central role in the process.

[72] OJ C73, 17.3.1999, p.1. See Guideline 4: “Provisions of acts shall be concise and their content should be as homogeneous as possible. Overly long articles and sentences, unnecessarily convoluted wording and excessive use of abbreviations should be avoided”.
[73] OJ L 190, 18.7.2002, p. 1: Article 2(2): 292 words; Article 3: 156 words; Article 4: 436 words; Article 5: 313 words; Article 8(1): 150 words; Article 27(3): 266 words; Article 28(2): 219 words.

When the EU institutions adopted an Agreement in 1998 on measures to improve drafting,[74] following the urgent call from the Member States,[75] they agreed on implementing measures, including the following:

> In particular, the institutions ... shall foster the creation of drafting units within those bodies or departments within the institutions which are involved in the legislative process.[76]

That measure has been repeatedly endorsed by the United Kingdom.[77]

Of the three EU institutions involved in the legislative process, the European Commission is the one primarily concerned since it produces the first drafts of almost all EU legislative acts and the final texts of almost all the implementing and delegated acts. In fact, though, the Commission has not set up any new drafting units. The first drafts are still almost invariably produced by experts in the technical subject matter, not drafting experts, and later revised by legal revisers working to tight deadlines (typically just over a week). In just a handful of cases are legal revisers brought into a drafting team at an early stage. In only one or two Directorates General (DGs), notably the Agriculture DG, are there also legal units which have some drafting expertise.

It is time that the EU institutions recognised that the preparation of legislation is a particular skill and that experts will produce a better result than laypersons. Investment in improving the very first drafts would pay off at every subsequent stage of the legislative process. If the first draft is good, the legal revisers can polish it to an even higher standard but if the first draft is poor, they struggle to identify the intended meaning and often have to work in the dark, as there is rarely the dialogue between the originating department and the revisers which should be the ideal.[78]

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[74] Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation of 22 December 1998 (OJ C 73, 17.3.1999, p. 1).

[75] Declaration No 39 on the quality of the drafting of Community legislation (OJ C 340, 10.11.1997, p. 139).

[76] Implementing measure (c).

[77] See in particular:
R. Bellis, "Implementation of EU legislation", a study for the UK Foreign and Commonwealth Office, 2003;
the Twenty-Second Report of the UK Parliament House of Lords Select Committee on EU law, 2007-2008:
"The Commission acknowledges that there can be problems with the quality of drafting of legislation. It is taking steps to address this issue and the associated difficulties of operating in many languages. The issue of drafting quality should not be exaggerated: lack of clarity often arises not in the original proposal but from the changes introduced as a proposal goes through the legislative process. **The Commission should give serious consideration to the creation of a cadre of specialist legislative drafters" (**point 157, in bold in the original)
http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/150/15002.htm ;
the statement by Lord Mance on that report:
"The final stage of any proposal is its drafting. The committee has concerns about the drafting of some proposals. Drafting is done by commission lawyers handling the proposal. The legal service of the Commission is formally involved only at a late stage. The committee considers that consideration should be given to introducing a cadre of specialist legislative drafters along the lines of the United Kingdom's domestic parliamentary draftsmen. On 30 September, the Government wrote welcoming the committee's report and analysis and indicating broad agreement with many points we made. They regarded our proposal for a specialist cadre of drafters as interesting, and we await their response to our question about whether they will actively promote it";
http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/81212-0001.htm#08121251000325 ;
An exchange of letters between the Minister for Europe (30.9.2008) and the Chairman of the Select Committee (6.11.2008) confirmed that the UK government was following up the proposal.

[78] See Geoffrey Bowman, "The Art of Legislative Drafting", the Sir William Dale Memorial Lecture for 2005, http://www.cabinetoffice.gov.uk/media/190031/dale.pdf :
"The process of analysis and coming up with a workable policy is sometimes called an iterative one. It involves throwing ideas back and forth between the drafter and the instructing department, whose administrators and lawyers will contribute ideas of their own. This iterative process is not simply an intellectual game. The whole object is to arrive at something that withstands examination in Parliament and in the courts. It is better that the ideas are tested and refined at the drafting stage than that they are torn apart later".

To make that possible, the Commission should act to establish centres of drafting expertise in every DG which is involved in the legislative process. Native speakers of the language with legal training and drafting experience would produce better first drafts. Because of the difficulty of improving drafting quality at later stages in the EU legislative process, it is highly desirable that the Commission's drafts should be of the highest quality.

If drafting units cannot be fitted into the Commission structure, perhaps it is time to give the European Parliament responsibility for the quality of all EU legislation or to revisit the suggestion for the creation of an EU Legislative Drafting Office independent of the present institutions[79] but that would require fundamental institutional changes.

[79] See R. Bellis, "Implementation of EU legislation", a study for the UK Foreign and Commonwealth Office, 2003. Bellis refers also to an article by R. Wainwright in *Statute Law Review* Vol. 17 Number I, pp 7-14 (1996), "Technique of drafting European Community legislation: Problems of interpretation".

A survey of user attitudes to the use of aids to understanding in legislation

Peter Quiggin, PSM[1]

Overview

1 In this paper I review a recent survey of the attitudes of users to the aids to understanding that the Australian Office of Parliamentary Counsel (OPC) uses in legislation.

2 I would like to acknowledge the work of ORIMA Research, and in particular Mr Chris Sadler, who conducted the survey. Some sections of this paper that report on the survey reproduce the text of the report that ORIMA Research produced for OPC. The report from ORIMA Research is reproduced in full on our website at http://www.opc.gov.au/plain/docs.htm.

3 OPC has made substantial use of aids to understanding in legislation since the mid-1990s. This has been done on the basis that we believe that these aids make it easier for readers of legislation to comprehend it. Although the aids are generally easy to include in legislation and we strongly believe that they work, the use of such aids has not been adopted to any great extent by other Australian offices (or other offices outside Australia that we are aware of). In fact, in some drafting circles they have been derided as "gimmicks".

4 To obtain feedback from users of legislation on the aids, OPC engaged a professional survey firm to undertake a survey of a range of users of legislation to gauge their attitudes to the aids. The users included judges, barristers, private sector solicitors, public sector solicitors and prosecutors, public service staff who work with legislation and parliamentary staff who work with legislation.

5 In general, there was strong support for the use of the aids. There was a small number of aids that were not supported and we are now reconsidering the use of those aids.

6 The survey was a useful exercise and the first that we are aware of to survey this type of group on this particular subject.

Making legislation more readable

7 A strong movement came to prominence in the 1980s in Australia to make legislation more readable. In general, this movement went under the banner of "plain English". Similar movements occurred in many other countries.

8 The initial response to this by many legislative drafters in Australia was less than enthusiastic. However, by the end of the 1980s, OPC, along with other Australian drafting offices, was reviewing its style and seeking ways to improve it.

[1] First Parliamentary Counsel, Australian Office of Parliamentary Counsel

9 At that time, much of the focus was on language and structure. This is quite sensible as this was the most obvious area for improvement and is also the fundamental aspect that must be done well if a text is to be readable.

10 Despite the changes made by Australian drafting offices, there continued to be a strong demand for more to be done. The income tax law came in for particular criticism and it was decided in the early 1990s that it should be rewritten. Similarly, the government decided to rewrite the corporations law. Special teams were set up to undertake these projects. The teams included drafters, policy officers, private sector policy experts and private sector plain English experts.

11 The teams developed a number of new aids that were intended to improve the readability of the rewritten legislation. While some of the aids developed by the teams were the same or similar, others were unique.

12 At the same time, the other drafters in OPC were developing aids that they considered would improve the readability of legislation generally.

13 This period of innovation gave rise to a range of aids to understanding. Some of these were very short lived (such as the singular use of “they”) but many were adopted for use in OPC. OPC also published the Plain English Manual which remains an outstanding guide to drafting clearly.

The aids to understanding

14 It was decided that the survey should test as many of the aids to understanding as possible. However, it was very important that we could be sure that the survey respondents understood the aid that they were being asked to comment on. A small number were not included as it was considered that it would be too difficult to explain them in a way that would ensure that people understood the issue.

15 The aids that were covered in the survey were:

(a) commencement provisions;

(b) overviews;

(c) guides;

(d) decentralised tables of contents;

(e) objects provisions;

(f) examples;

(g) notes;

(h) using asterisks to identify words that have been defined;

(i) the use of tagging of concepts;

(j) headings in the form of questions;

(k) subsection headings;

(l) using tables to organise large amounts of information;

(m) diagrams;

(n) method statements;

(o) drafting legislation in the second person;

(p) the new format for Bills (introduced in 1996) including indenting conventions.

16 The main features of the new format for Bills are:

- wider left and right margins;
- greater line spacing between units;
- section numbers appearing before section headings;
- greater prominence given to section headings;
- standardised tables of contents for every Act;
- definitions appearing in bold, italicised font; and
- running headers on each page.

The range of users

17 There is of course a wide range of users of legislation. While the general public is potentially a user of legislation, I considered that it would be difficult to select an appropriate sample. We therefore decided not to include the general public in the survey.

18 The groups that we considered it would be useful, and practical, to survey were:

(a) Federal Court and Family Court judges;

(b) associates/research staff of Federal Court and Family Court judges;

(c) Federal Magistrates;

(d) associates/research staff of Federal Magistrates;

(e) Administrative Appeals Tribunal members;

(f) associates/research staff of Administrative Appeals Tribunal members;

(g) solicitors (with groups drawn from Sydney, Melbourne and Brisbane);

(h) barristers (with groups drawn from Sydney and Melbourne and from both junior and senior counsel);

(i) parliamentary Table Office staff;

(j) Australian Government Solicitor employees;

(k) employees of the Commonwealth Director of Public Prosecutions;

(l) Commonwealth Public Servants from instructing areas and advising areas in Departments.

19 To obtain actual respondents, we contacted the relevant courts and agencies, the bar associations and a number of large and medium firms and asked them to put forward the names of people who would be willing to respond to the survey.

20 We did not cull or edit the provided lists of respondents in any way. These names were then forwarded to ORIMA Research. As the survey results went directly to ORIMA, OPC was never aware of which particular people responded to the survey. Results were broken up into the groups set out above, although for a number of groups the results of similar groups were combined when the reports were provided to OPC.

Structure of survey

21 The survey asked respondents to rank how useful they consider a range of aids to be and to provide comments on the different aids.

22 The survey was done electronically with users logging on to a website to work through a series of examples and questions.

23 Excerpts from Acts that contain the aids were provided to the respondents. The excerpts were marked up to make the various aids obvious.

24 For some aids we produced provisions drafted in a number of different ways (e.g. using formulas compared to method statements).

25 The aim was to make the survey fairly easy to respond to while ensuring that respondents understood what they were being asked about. It is estimated that it took respondents about half an hour to respond to the survey. This is longer than we had aimed for, but was necessary to cover the broad range of aids.

26 Respondents were given space to add additional comments and provided with an option of requesting that OPC contact them to enable them to provide more detailed feedback on particular issues. The respondents included a large number of comments in the survey responses. These comments indicated a high level of understanding of the issues.

Responses to the survey

27 Responses were received from 224 out of the 378 users of legislation invited to take part in the survey. For reporting purposes, respondents were grouped by legislation user types, as shown in Table 1.

Table 1: Response Numbers and Rates, Grouped by Respondent Type

Group	Sample	Count of Responses	Response Rate
Judges/Magistrates	47	24	51%
Judges/Magistrates staff	40	23	58%
Private sector lawyers	120	64	53%
Parliament Table Office staff	16	8	50%
AGS/DPP employees	38	25	66%
Commonwealth Public Servants	117	80	68%
Grand Total	378	224	59%

28 I was very happy with this response rate and the fact that we got a good range of respondents. I consider that the sample was large enough to be representative of the groups that we surveyed.

Summary of Results

29 Most respondents were aware of the aids covered in the survey and generally find them useful in helping make legislation easier to read and understand, particularly for the lay reader. Most aids were found useful by over three-quarters of respondents.

30 Some respondents commented that the aids had been a great improvement. Although there was substantial support for nearly all of the aids, some respondents were concerned that the apparent over-simplification of legislation through the use of new aids could be inappropriate in some cases, as it may cause the lay reader to misinterpret the legislation, or miss subtle complexities of the law. Others emphasised that the focus needed to continue to be on the expression of the law.

31 The majority of aids rated very positively, with 12 of the 16 aids achieving a net balance satisfaction rate across all respondents of around 70% or more. In particular:

- The new form of commencement provisions and new format for Bills including indenting conventions were rated positively by a net balance of around 90% of respondents.
- Notes, use of tagging of concepts, subsection headings and use of tables were rated positively by a net balance of 80–85% of respondents.

32 For a few aids (use of asterisks, diagrams and method statements) the views were less positive, with a net balance of around 50%.

33 In the case of the use of the second person, the net balance result was close to zero, indicating that the proportion of respondents dissatisfied with the usefulness of the aid almost matched those satisfied with the aid. Indeed, the negative net balance results for the judges, magistrates and lawyers group indicates that a greater proportion of these respondents were dissatisfied than satisfied with this aid.

34 In general, Commonwealth public servants were more satisfied with the usefulness of the aids covered in the survey than the judges, magistrates and private lawyers.

- For a few aids (decentralised tables of contents, questions as headings and diagrams), the net balance results were almost identical across the two main survey groups.
- The greatest disparity in results was for examples and use of the second person, where the net balance results for Commonwealth public servants was around 25 percentage points higher than that for judges, magistrates and lawyers.

35 The more positive view of Commonwealth public servants compared to judges, magistrates and private sector lawyers was reflected in a number of general comments about OPC and its drafting.

36 For example, a Commonwealth public servant made the following comment:
"I think Commonwealth legislation is very good, especially considering the volume of it, the complexity required by Government, and the short time usually allowed for its drafting. Improvements in the last 10 to 20 years have been significant—better structures, better language. Long live OPC!"

37 In contrast, the following comment was made by a barrister:
"Where to start? I've always considered it to be awful, amateurish, obscure and therefore incompetently drafted. There, I've said it. Only creates work for lawyers and judges who can't write in simple, elegant English."

38 These comments are at the far ends of the spectrum but may indicate that the closer people work with the drafters and the legislative process the greater the understanding they have of the difficulties in producing clear and simple legislation. In some ways, this is similar to the way in which the outcomes of cases (often in criminal matters) are criticised by those who are not involved in court processes but supported by those who see the whole process.

39 An interesting feature of the responses to the survey was the mixed comparisons with the drafting of legislation in State and Territory jurisdictions. Most of the comments in this area were made by judges, magistrates and private sector lawyers. Some stated that Commonwealth legislation was clearly superior to State legislation whereas others considered that State legislation was superior to that of the Commonwealth.

Detailed results

40 The detailed results are available on the OPC website.[2] As these run for about 80 pages, they have not been reproduced in this paper.

Conclusions from the survey

41 The first conclusion is that nearly all of the innovations and aids to understanding that we are using do assist users. Therefore, we should continue to use them and other drafting offices should seriously consider whether they should adopt them.

42 The decision of all Australian jurisdictions to adopt a modern format for legislation has been strongly endorsed by this survey. Any overseas jurisdictions that have not updated the layout of their legislation should strongly consider adopting the main features which are set out earlier in this paper.

43 There has been substantial resistance in State and Territory drafting offices to a number of the other aids to understanding. A number of drafters from other offices have suggested to me that they are "gimmicks". I consider that this survey shows that they are valuable in assisting skilled users of legislation. I strongly believe that they would be of even greater assistance to less sophisticated users of legislation.

44 Particular aids that I think should be adopted generally are:

(a) commencement provisions in the form of a table that includes the actual date of the event and that explicitly sets out the commencement date of every provision;

(b) overviews, guides and objects provisions to give the reader contextual information that they can use when reading specific provisions;

(c) examples and notes in appropriate cases;

(d) subsection headings where sections contain more than, say, 4 subsections; and

(e) using tables to organise large amounts of information.

45 Some of the other aids that we use are probably only relevant for more complex legislation. Consequently, they may have less application in other drafting environments. These include decentralised tables of contents and method statements.

46 The second conclusion is that we need to reconsider the use of some of the aids that we have tried. In particular, the practice of drafting legislation in the second person drew substantial criticism. Comments included:

"I don't really like this. There are many readers of a statute other than the person to whom it is intended to apply and 'you' is too targeted. Is it dumbing down a bit too much? As a reader who is not the 'you' cited, I am distracted in my reading." (Comment by a public servant.)

"It's not neutral – it doesn't allow the legislation to be easily interpreted by people on both sides of the fence. That is, it assumes the reader is a member of the public, determining their entitlement to a benefit or licence, for example. It doesn't facilitate reading by a person, such as Government officers, who are trying to work out what they need to do for a person in a particular case." (Comment by a public servant.)

"Legislation is best read in the third person. Personalising it is confusing, and presupposes that the person reading it is subject to its provisions. Most often, it will be a legal practitioner, advising his or her client, so

[2] http://www.opc.gov.au/plain/docs.htm

first person language is inappropriate, comes across as overly directive or condescending, and ignores the reality of how and by whom the legislation is used." (Comment by a prosecutor.)

"While it is desirable that legislation should be capable of being understood by the man/woman in the street, I find the use of the second person annoying and patronising. I believe it also derogates form the precision of prescribing or proscribing designated acts or activities." (Comment by a judge.)

47 I was not surprised by this result as I have previously received feedback when at conferences and similar events that this approach is very unpopular with a wide range of expert users of legislation.

48 As a result of this feedback, OPC will not use this approach in new legislation. There are some Acts that are already drafted in this style and, generally, we will continue to use it in those Acts to maintain consistency.

49 The final conclusion that I have is that the survey was a worthwhile exercise. We got a substantial number of responses and it was clear from the responses that the people responding understood the issues and took the time to give considered feedback. I hope that we will be able to undertake further research in the future to assist us to improve the quality of our legislation.

50 OPC is continuing to look at ways of improving its legislation and is open to consider further innovations developed within OPC or by other drafting offices.

The three myths of plain English drafting

Daniel Greenberg[1]

Introduction

It is an enormous privilege to have been invited to contribute to this collection of articles in richly-deserved honour of Duncan Berry. I have chosen to write about plain English drafting both in the knowledge that it is a subject dear to Duncan's heart and also in the pleasurable expectation that he and everybody else will disagree with what I have to say about the subject.

The three myths

There are three widely-held myths about the use of plain English in legislative drafting: that it is a modern idea; that readers like it; and that it works. The reality is: that plain English as a dogma is as old as the hills; that nobody who really ought to matter seems to like it much; and that it doesn't work.

The myth of modernity

In every new generation of legislative drafters there arise a number of enthusiasts who are excited to discover that it is possible to draft legislation in more "ordinary" language than is generally in vogue in their jurisdiction at that time. Generally, they fasten upon a stream of criticism from Parliamentarians or others of the complexity of legislation and, either on their own or in partnership with people who have a vested interest in evangelising on the subject of clarity in legislation, they embark upon a campaign to bring light to the heathens.

In fact, however, any heathen who has been properly trained in legislative drafting will already have been exposed to the concept of plain language, not as a fad or luxury, but simply as part of the core tools of good drafting. Even a work as venerable and apparently dated as Sir Alison Russell's *Legislative Drafting and Forms*[2] includes concise and trenchant advice to draft in as simple and clear a style as possible. All the

[1] Parliamentary Counsel, Office of the Parliamentary Counsel (UK), 1991-2010; Parliamentary Counsel, Berwin Leighton Paisner LLP, 2010→; Editor, *Craies on Legislation*, *Stroud's Judicial Dictionary*, and *Jowitt's Dictionary of English Law*; General Editor, Annotated Statutes, Westlaw UK.
[2] London, 1920.

greatest exponents of the art of legislative drafting, notably Ilbert, Ram and Fiennes, have urged the importance of drafting clearly and concisely, and have consistently practised what they preached.

Sentence length and the theory of relativity

So there is nothing new about the concept of plain language drafting; nor is there anything new about any of the techniques presently espoused as keys to achieving a plain drafting style. In criticising the language of legislation, for example, much play is made of the length of particular sentences. It is certainly true that many impenetrable laws can be greatly improved simply by being broken up into a number of shorter propositions. But again, there is nothing new in that: the best exponents of the art of legislative drafting have always also been those who have drafted in a relatively staccato style.

In the last sentence, however, "relatively" is the key word. There is no objective gold standard of plain language either as to sentence-length or as to anything else: the standard is set by the ebb and flow of fashion in the natural use of language outside the legislative context. It is noticeable that the tolerance of English readers generally for sentence length has diminished greatly over the years. One hundred years ago it was not unreasonable to expect an average reader of fiction to navigate his or her way through a sentence running to between one hundred and two hundred words, and the most widely read writers of popular fiction did precisely that. By the same token, therefore, there would have been nothing undesirable about a legislative drafter of that time using a one hundred word sentence: it could still have qualified as "plain English". Now that general tolerance for sentence-length has changed, so too must the general standards of legislative drafting. It is not, however, that we have discovered a new technique of writing in short sentences: it is simply that what amounts to short or long by normal literary standards has changed.

The myth of popularity

One of the many problems of legislative drafters is that we spend too much time talking to other legislative drafters, or other people with particular and peculiar obsessions with the language and preparation of legislation. We and they are all enthusiastic, not to say sometimes obsessive, about whatever we think we have discovered as innovative methods of plain language drafting. We draw support from certain campaign groups that have also chosen to make their reputation, not to mention in some cases their living, by espousing the cause of plain language. And taking the two together we satisfy ourselves that the quest for plain language drafting is one that is both in the public interest and thoroughly supported by all.

It may be salutary to remind ourselves, therefore, that for most people this quest is rather less urgent and important than we like to think. Worse than that, while for some the question is simply a bit of a yawn, for others the trend towards plain language drafting is actually unwelcome.

I have suspected this for some time, but received the most concrete evidence of it when the Department for Environment, Food and Rural Affairs published in 2009 a draft Bill of mine about Floods and Water Management[3]. The consultation paper accompanying the draft Bill included, as an innovation, a short series of questions about the style of the draft, inviting readers to comment on whether the language used was appropriate (see Appendix). I had tried to draft the Bill in a clear and simple style, and to use plain language so far as possible, and this was noticed and approved by the more "legal" of readers, in particular the Law Reform Committee of the General Council of the Bar.

[3] http://www.official-documents.gov.uk/document/cm75/7582/7582.pdf

So those readers who might have been expected to be able to cope with a more complex and technical style enjoyed the simplicity of the draft. But those for whose comfort and convenience the style was particularly designed were apathetic at best and hostile at worst. In particular, in various places I had used "thinks" and "thing" in preference to words like "considers" and "substance", congratulating myself on avoiding archaic or legal language in favour of the kind of language that one would use naturally in the course of casual conversation. I told myself that I had lost nothing in meaning but gained in stylistic clarity and simplicity. Some of my readers, however, disliked the product for precisely the reason I had thought it praiseworthy: one consultee actually felt that more "legal" language would have been more appropriate, and the same feeling was voiced, less expressly, by a number of others. Analysing the responses informally by class, the further the reader was away from the legal profession the less he or she appeared to appreciate my well-meaning attempts to use simple language.

People like judges to look like judges, and law to read like law

The reality therefore appears to be that people like their law a little pompous, an element of pomposity being generally associated with authority. People like to see judges in wigs and gowns, and the pressures to make judges look more like "ordinary" people tend to come from people in or close to the legal profession who specialise in thinking that they know what "ordinary" people like. "The people", whoever they may be, like to think of the law as something a little distanced from them, and a spot of grandeur helps to preserve distance and imbue authority.

The same, apparently, applies to the language of the law. Lay-readers appear to relish a certain distance and weight in legislation, being uncomfortable with the idea that it should exactly reflect the language that they would choose for ordinary conversation. The law is not conversation, and it appears that attempts to present it as if it were do not find favour with those whom they are designed to please.

Nor is it only lay-readers who dislike the "dumbing-down" of legal language. For several years I did my best to replace what I saw as older and more pompous expressions such as "considers" and "is of the opinion" with the simple "thinks". Time and time again I encountered resistance from Parliamentarians who thought that "considers" sounded better – by which they appeared to mean simply that it sounded less like the kind of language one might use when talking to a friend in the pub. Sometimes I won, because I had a Minister on my side who wanted to modernise legislative language and the political stakes were relatively low; sometimes I was forced into ignominious retreat by way of amendment. I comforted myself with the thought that the more often I won the easier it would be to cite precedent to support the next attempt; but I wonder now whether the game was worth the candle or, to put it differently, whether I should have been playing that particular modernising game at all if it was pleasing neither the lay-readers nor their Parliamentary representatives.

The myth of efficacy

The really dangerous myth about the use of plain language in legislative drafting is the myth that it works. The reality is that for a variety of reasons legislation can never be presented in a fashion that makes it readily intelligible to a lay-reader, and the more it uses plain English the more danger there is that the lay-reader will be misled into believing that he or she has understood more of it than is actually the case.

The fundamental difficulty in writing legislation is that we are doing two things simultaneously and within a single document: we are making the law, and we are also communicating it. We have to fulfil the latter function using English (or another spoken language), and an English that as closely as possible matches how

people communicate in the real world. But the first part of the process can only be achieved by engaging the concepts of which the law is composed; concepts which are technical and complicated and for many of which demotic English does not provide an exact equivalent.

When a legal concept has no near equivalent in ordinary English, the problem is bad enough. So, for example, exercises in translating existing Acts into plain English routinely go somewhat as follows—

1. They take all the provisions which are pretty much intelligible anyway and turn them into a form of language which is either more or less elegant and pleasing than the original, depending on what you like.
2. As I say above, in that part of the process they will doubtless please themselves and their campaigning colleagues, but it is a moot point whether they will please as many of those whom they claim to be championing as they think.
3. In the process of beautifying the language they will probably destroy one or two subtleties, and perhaps make one or two unintended changes of minor policy without realising it.
4. Then after a subsection or two they come across a provision that is entirely engaging a technical legal concept and has no demotic near-equivalent – such as a provision to the effect that "A person may not be required under this section to answer a question that he or she could not be forced to answer in the course of civil proceedings"; which may be designed to apply the rules of legal professional privilege, the privilege against self-incrimination, or both.
5. Unable to render the concept into "plain English", the translator simply repeats it verbatim, and perhaps adds an acknowledgment that there are of course limits to what can be done in the way of plain English.

There are indeed very significant limits on what can be done by way of translating technical legal concepts into ordinary English, and they are sometimes of such an impact on the material as to render the entire process more or less pointless: what is gained by an "ordinary" reader being able to understand (or think that he or she has understood) subsections (1) to (6) easily, if a major restriction on the effect of those subsections is couched in such technical form that they cannot be sure whether or not the clause as a whole applies to them without obtaining expert professional advice?

Of course, there is no alternative to using technical legal concepts in this way. We cannot write out a fifty-page treatise on the law of evidence every time we impose a requirement to give information; and even if we could, it would be out of date as soon as written. The only way of making the law in an effective form is to engage a long-standing and constantly developing concept such as legal professional privilege. But although that is the right answer for process number 1 – making the law – it does not lend itself to any easy solution for process number 2 – communicating the law.

Oddly enough, the problem which we face when there is no near equivalent in ordinary English to a particular legal concept is less severe than the problem that we often face when there is. A good example of this is the use of the word "person", which appears many times in most Acts of Parliament. A non-expert reader who comes across the word "person" recognises it as a slightly formal or stilted, but still extant, word for human being. A legally qualified reader may congratulate himself or herself on recognising it as being used as a method of engaging the technical legal concept of something with legal personality. But they are both wrong – because the Interpretation Act 1978 provides that as used in legislation the concept includes both natural and unnatural persons, including bodies such as unincorporated associations that do not have legal personality. The result is that any reader unfamiliar with the technicalities of the 1978 Act is likely to think, wrongly, that they have understood the provision, whereas in fact they have been misled as a result of the word used having a similar, but not equivalent, use in "ordinary" English.

Attempts to make this easier for readers frequently make the problem worse.

A number of drafters of recent Acts, for example, have repeated the Interpretation Act 1978 definition as an express definition within another Act. But that creates a puzzle for readers of other similar Acts that do not repeat the definition, to try to decide whether those Acts that do repeat it are trying to override a contrary indication, and if so whether there is a similar, but non-overridden, contrary indication in those Acts that do not repeat it.

To take another example, a number of drafters have recently started to use "people" as a plural – the problem being that it is unclear whether it is merely being used as a spiritedly fashionable attempt at a plain English equivalent of "persons", or whether it is being used as a word that is naturally apt only for individuals, thereby amounting to a contrary indication to the inclusions in the Interpretation Act.

Conclusion

If plain language drafting doesn't work and our readers don't want it, should we abandon it and go back to two hundred-word sentences full of hereuntobefores and other antediluvian delicacies?

No.

The drafter who is punctilious about getting the law "right", in the sense of producing a draft that gives effect to the policy, but doesn't care how long it takes the reader to satisfy himself or herself to reach the same conclusion, is making two mistakes. First, he or she is performing only one of the two parts of our job – making the law, but not communicating it effectively. Worse, however, if the drafter is satisfied that the law "works", but nobody else finds it easy to discover whether they agree, then the law doesn't work: if the people at whom a legal duty is aimed cannot work out what they are meant to be doing, the law is not effective in practice, however perfect it may be in a theory that exists only in the drafter's mind.

So we should continue the search for ways of presenting law in a manner that makes it as easy as possible for the most likely target audience or audiences of each Act to understand what it is intended to mean, with as little recourse to extraneous explanatory material and advice, or to the courts, as possible.

But we need to conduct the search in a scientific way. In particular, we must resist the temptation to assume that as drafters we are in a position to know how easy our different target audiences will find it to assimilate and understand different stylistic approaches. There is no evidence that we are adequate predictors of what our readers like. In all other respects we demand solid evidence to underpin our work on legislation, and modernisation of style should be no different. Nor should we take our evidence on the matter from self-appointed campaign groups, unless there is a specific reason to accept a particular group as likely to be in a position to speak authoritatively for the intended target audience of a particular piece of legislation.

All of which points towards readers panels, drawn from "real users" of legislation, and representing different target audiences.

So, for example, a Finance Bill provision about the taxation of oil futures should be tested on specialist industry lawyers or accountants (preferably both) not purely for discussion of the policy and substance but also for confirmation that the legislative language engages the appropriate technical terms and jargon to reflect the language of the context within which the legislation will fall to be applied. There is no merit in using jargon for the sake of it; but nor is there merit in avoiding the use of jargon which is generally used and understood within a trade or profession, if the only alternative is to attempt to construct the same concept out

of “ordinary” words, an attempt which at its best will be unhelpfully inelegant and at its probable worst will simply be wrong.

A piece of legislation about regulating dogs in parks, however, should be tested on a panel composed of citizens with no particular expertise in law, but simply with a public-spirited willingness to assist us in framing legislation about everyday matters in a clear and simple way. In particular, it is important to use readers panels composed of people who have no financial or other vested interest in promoting a particular set of “plain English” approaches.

As we engage with our readers panels, we should also take the opportunity to explain and explore the limits of what we can do to make legislation accessible by modernising our language. As well as working on different kinds of explanatory materials and tools, we can also try to educate readers so that they are less likely to be misled into thinking that they have understood more than is actually the case.

Good legislative drafting is about a continual search for improvement, keeping step with changing fashions in the use and assimilation of language in other contexts. That search is not a new one, but from time to time it can take new turns by harnessing political or social emerging trends. The modern mania for consultation, although often not particularly useful, can be turned to good use in the context of legislative drafting if we take the opportunity to engage our target audiences’ experience and knowledge to inform and guide our attempts to help them, and consequently to enhance the rule of law by making legislation easier to understand.

Appendix

Drafting questions that accompanied Floods and Water Management Bill:

1. How far, in general, would you say that the draft legislation is written in a reasonably clear style that is likely to be understood by readers?
2. In general, do you think the individual clauses are too long, too short or about the right length? How far is their overall order in the draft legislation reasonably logical and easy to follow?
3. In general, do you think the individual sentences in the draft are too long, too short or about the right length and is their structure too complex, too simple or about right?
4. Please give examples of anything in the style of the draft legislation that you particularly liked or disliked. Please also give your reasons.
5. Please give examples of provisions that you thought helpfully simple or well expressed or ones that could be made simpler or otherwise improved. Please also give your reasons.
6. Are there any drafting techniques (such as cross-references to other provisions of the draft legislation) that you would like to see used more or less?
7. Please suggest any improvements to the way in which legislation is drafted that you think would make it easier to understand and apply.

It's Just Your Imagination – Some Thoughts on the Role of Parliamentary Counsel in Ensuring Practicability of Legislative Instruments

Sandra Markman[1]

Introduction

Although we legislative drafters do not have primary responsibility for the efficiency and effectiveness of the legislation we are asked to write, we should always be conscious of the workability of what we create. The drafter's role is not merely to translate drafting instructions into legislative language, but also to produce a legislative instrument that is "fit for purpose".

A drafter cannot maintain that instruments drafted are complete if they do not clearly "defin[e]…the obligations of the regulated target group … and [deal with]… the feasibility for these individual addressees of the legislation to spontaneously comply with their obligations as defined".[2]

This paper deals with three areas where drafters are especially well-placed to identify (and help resolve) workability issues: commencement provisions, transitional provisions and penal sanctions.

Commencement provisions

The policy development process typically does not focus much on the issue of when and how legislation is to come into effect. If the question of "when" comes up at all, the most common response is "yesterday", and if anyone thinks of how the new law is to come into force, "in the usual way" would probably be the leading answer.

Once government has finally come to a decision that a policy is to be implemented in a formal and binding way through legislation, it typically wants instructing officials to instruct, advisory counsel to advise and legislative counsel to draft as quickly as possible so that a Bill can be presented to the legislature immediately, if not sooner. Then, at a politically opportune time, the Bill can be passed, the government can announce that a new law has come into force and "Bingo!", another problem is solved.

The result is that during the planning and drafting stages, (and indeed during the piloting of the Bill through the legislature) the members of the drafting project team are often so caught up with producing an instrument

[1] Consultant Parliamentary Counsel, Office of Parliamentary Counsel, Dublin.
[2] European Union Network for the Implementation and Enforcement of Environmental Law/Network of the Heads of Environmental Protection Agencies, *Checklist to assess practicability and enforceability of legislation*, March 2010 http://impel.eu/wp-content/uploads/2010/04/IMPEL-and-NEPA-Better-Regulation-Checklist-FINAL.pdf (accessed on 19 December 2010).

that will, once in force, deal adequately with the policy issue that they lose sight of the practical obstacles to commencing the Act. The drafter therefore has a special responsibility to raise the practical issues around commencement.

One of the most important considerations is whether the primary legislation needs secondary legislation to complete it. Members of a drafting project team must understand the scope of the delegated legislation required to complete the legislative scheme, not only to ensure that there are sufficient powers in the Bill to allow all of the required secondary legislation to be made, but also to plan for drafting of those secondary instruments (whether they are to be drafted by the drafter of the Bill or someone else). Not having the secondary legislation ready is one of the most common reasons not to have an Act commenced as soon as it made.

Beyond the legislation itself, a number of practical administrative questions must be considered. Will forms, guidelines and other non-legally-binding documents be required for the legislation to be effective? Will there have to be personnel in place to deal with requests from people seeking to understand the new legislative scheme, or to apply for benefits under it? Are trained Government officials required to enforce the new scheme?

These practical questions are often not even conceived of by the members of the drafting team (who might be working on their first legislative file), let alone addressed by them. Drafters should be prepared to discuss these issues with the instructing officials and offer guidance as necessary.

The drafters' legal and practical expertise is also particularly valuable in understanding how to commence provisions and advising on the drafting of commencement orders.

A recent High Court case in Ireland[3] highlighted a situation that careful commencement drafting and planning could have avoided. A new scheme for assessment of persons with disabilities was enacted and the enabling provision allowed for phased-in commencement so that the relevant part of the Act was to "come into operation on such day or days as, by order or orders made by the Minister…may be fixed therefor either generally or with reference to persons of different ages…"[4] The commencement order stated that "The 1st June 2007 is hereby fixed as the day on which [the relevant provision] comes into operation in relation to persons under 5 years of age."[5]

The High Court was faced with conflicting views as to whether this order meant that applications could be made on behalf of children who were under the age of 5 years on 1 June 2007 (*i.e.*, that the right was frozen and the only people who could apply for an assessment were people born between 2002 and 2007) or that applications could be made, after 1 June 2007, on behalf of children who were under the age of 5 when the applications were made. Ultimately, it decided that "The right to an assessment of needs under s. 9 applies to all children under 5 as of 1 June 2007 and, thereafter, to all children under 5."

If the question had been thoroughly canvassed when the commencement order was being drafted, the desired policy could have been clarified and the commencement order drafted accordingly.

[3] Health Service Executive v Dykes et al, [2009] IEHC 540.
[4] s 1(3) of the Disability Act 2005 (No 14 of 2005).
[5] Disability Act 2005 (Commencement) Order 2007 (S.I. No 234/2007).

Transitional provisions

The members of a drafting project team are even less likely to think about the necessity or desirability of transitional provisions. A new legislative scheme should not trample on acquired rights or legitimate expectations but, as G. C. Thornton writes:

> Instructing officers are notoriously inadequate in the area of savings and transitional provisions, perhaps because they tend to be preoccupied with how a new scheme will operate in the future rather than the mechanics of the transition from the present to the future state of affairs.[6]

Sometimes the issue to be clarified is as simple as stating that an application to a body replaced in new legislation by another body continues with the new body and does not need to start over. Sometimes there is an issue about licences issued or registration completed under a former regime and how they are to be treated under the new system being enacted. Sometimes a government body is being closed down and provision must be made for the employees to be transferred elsewhere, for contracts to continue in the name of another body to which functions are being transferred, or to a Minister or Government Department, for legal proceedings to continue, *etc*.

Sometimes the matter is more complicated, as was the recent case where a question was certified as a matter of exceptional public importance and sent for direction to the Supreme Court of Ireland[7]. Legislation that amended the European Arrest Warrant Act 2003[8] removed the necessity for a European arrest warrant to provide that the person sought for extradition had fled the requesting state before commencing or completing sentence for the offence for which the extradition was being requested. The question for the Supreme Court was whether the removal of this condition could apply to permit the extradition of a person, without proof that he had fled, when the European arrest warrant was issued *before* the amendment but the hearing was taking place *after* the repeal of the requirement to prove that the person had fled.

Whatever the issue, it is unlikely that anybody other than the drafters will even recognize that the issue exists. It therefore falls to Parliamentary Counsel to encourage the other members of the drafting team to focus on how to move smoothly from the existing legal situation to the new regime.

Penal sanctions

As Paul Delnoy writes:

> Generally, the legislature—whatever the content of the norm it adopts—wants it to be effective and efficient, "effective" meaning that the norm produces effects, that it does not become a dead letter, and "efficient" in the sense that the norm should produce the desired effects, should not have perverse effects and should so guide conduct as to achieve the desired objective.[9]

There is no point in criminalizing behaviour if the sentencing regime in the legislative instrument does not deter people from engaging in the proscribed behaviour and enable judges to punish those who nevertheless do engage in it.

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[6] G.C. Thornton, *Legislative Drafting*, 4th edition, p 438.
[7] Minister for Justice, Equality and Law Reform v Jastrzebski [2010] IEHC 202.
[8] No 45 of 2003.
[9] The role of legislative drafters in determining the content of norms: http://www.justice.gc.ca/eng/pi/icg-gci/norm/index.html (accessed on 19 December 2010).

There are certainly studies that show that mandatory minimum sentences sometimes have the opposite effect from the "be tough on crime" deterrence they seek. Juries will not convict where they know that the effect would be a sentence they consider too harsh[10].

A recent report highlights an extreme example. An Arizona law required judges to impose mandatory consecutive sentences on persons convicted of possession of child pornography for each item possessed. This apparently resulted in a person being sentenced to 10 years for each of 20 items, or a total of 200 years. The report goes on to suggest that this would be a significantly more serious penalty than the penalty for actually molesting a child.[11]

I am not suggesting that legislative counsel can be experts on every area of the law. However, drafters do have a role to play in testing the policy. No one doubts that drafters should be asking questions such as: "Are you comfortable that your desired manner of expression differs from that currently used in the statute book in this jurisdiction to an extent that resourceful counsel could exploit to their clients' advantage?" What I am suggesting is that the value that drafters can add extends to raising questions of the desirability of the route chosen by instructing officials.

Conclusion

Drafters cannot be—and should not be—the guarantors of the soundness of the policy of the legislative instruments that they draft. But Parliamentary Counsel do have a responsibility to challenge assumptions and point out pitfalls in the way they are uniquely placed to do.

Tobias Dorsey suggests that without this support to policy there would not be a failure to communicate (which most people expect drafters to guard against) but rather a "failure to imagine" (which, I would suggest, is also an area where drafters' expertise could be put to good use).

The problem is not on the page and is invisible to the naked eye. The words look fine, but the thinking behind them is less than thorough. A failure to imagine cannot be cured by editing after the fact; it can be cured only by thinking through the policy.[12]

Helping governments think though their policy so that it can be communicated clearly to produce a workable and enforceable legislative instrument is the goal for every Parliamentary Counsel. Making full use of our imaginations is an essential element of our contributions to that end.

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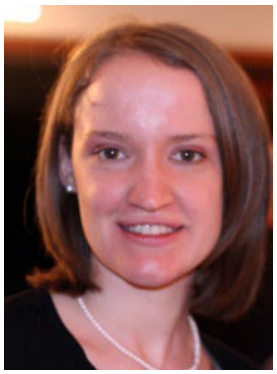
[10] http://www.policyalternatives.ca/publications/commentary/harpers-tough-crime-bills-costly-counterproductive
[11] http://www.eastvalleytribune.com/arizona/article_63e63880-07d2-11e0-8ce7-001cc4c002e0.html
[12] http://www.scribd.com/doc/19277090/Legislative-Drafters-Deskbook-A-Practical-Guide-by-Tobias-Dorsey

Commonwealth Association of Legislative Counsel: an annotated catalogue of publications



Nick Horn and Lauren Brennan[1]

The duty of CALC members

'Every member who refuses or fails to provide any news, paper, article or other information, related to legislative drafting, for publication in *The Loophole* is guilty of an offence and is liable to live with a guilty conscience.

This section has been added to emphasise the importance for the future of the Association and its healthy development that all members make a special effort to send material and news of general interest to the drafting community.'[2]

All we like sheep

'My more rural colleagues constantly tell me how valuable sheep are, and we have 60 million of those. By way of contrast, we have 8 Parliamentary Counsel. But they are the greater producers. I suspect that between them their output on average would fill half a woolsack or so every 2 sessions.'[3]

The spiritual dimension

'I have more insight than all my teachers, for I meditate on your statutes.

Your statutes are my heritage forever; they are the joy of my heart.'[4]

Introduction

This project celebrates the rich resource of writings on legislative drafting and related subjects generated by the Commonwealth Association of Legislative Counsel (CALC) since it was founded in 1983.

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[1] Nick Horn and Lauren Brennan are legislative drafters with the Australian Office of Parliamentary Counsel. They are grateful for the support of their Office to undertake this project, but the views expressed are their own and they take personal responsibility for any errors.

[2] Commonwealth Association of Legislative Counsel, 'Minutes of general meeting held 10 September 1986, Americana Hotel, Ocho Rios, Jamaica', *The Loophole*, Sept. 1987 (2.1), p 27.

[3] Lange, D, 'Speech Notes, Rt. Hon. David Lange CH, Attorney-General', *The Loophole*, Nov. 1990 (3.1), p 3 (CALC general meeting, Monday 16 April 1990, Waitemata Ballroom, Sheraton Hotel, Auckland, New Zealand).

[4] 'The Book of Psalms', 119:99; 119:111, *The Bible*, New International Version, qtd Lange, op cit, p 4.

Over the years, a significant amount of this literature has been generated, in one way or another, by CALC's current Secretary, Duncan Berry, and any celebration of such a resource is inevitably a tribute to his extensive contribution. Duncan contributed two articles to the first edition of *The Loophole* (the first two of 19 that are catalogued under his name; doubtless there are more unattributed contributions to the journal under his editorship) and he has made numerous attributed and unattributed contributions to *The Newsletter*. Evidence of his range and industry as an author is that of all the categories of contributions surveyed (14), he fails to appear in only two. Certainly he has contributed more than any other single author.

But Duncan Berry's contribution is most significant as editor of both publications. In December 1997, he edited his first edition of *The Loophole*, and between June 2000 and the most recent edition in August 2010, he has directly edited all but two editions of *The Loophole*, and all editions of the *Newsletter*.[5] It seems fitting to honour his 75th birthday with a record of these achievements.

This article is in 2 parts: some general remarks, followed by an annotated catalogue of the CALC publications organised by subject. In these general remarks, we offer a brief publication history of the CALC *Newsletter* and *The Loophole*, an explanation of the organisation of the catalogue and a brief overview.

A publication history of the CALC *Newsletter* and *The Loophole*[6]

The CALC Newsletter—first incarnation

The first official CALC publication was its *Newsletter* for members. *Newsletter* No. 1 was published in November 1983, and reported the founding of the Association, at a meeting on 21 September 1983 on the sidelines of the 7th Commonwealth Law Conference in Hong Kong. Setting the trend for later CALC publications, this contained thoughtful articles on the training of legislative drafters (a summary of a paper by Mr G Nazareth, Hong Kong Law Draftsman) and on the essential elements of an effective drafting service (a summary of a paper by Mr J Q Ewens, former First Parliamentary Counsel, Australia). It was also the vehicle for the minutes of that inaugural meeting (an aspect of the *Newsletters* that is not catalogued—see 'Method of selection' below).

That first *Newsletter* was followed by a run of 11 further issues (from No. 2 to a double-dose of No. 11s in May and July, 1986). They are a mix of discussions of serious drafting matters with notices of forthcoming CALC meetings (and other relevant events), internal business such as news about members, notices and minutes of meetings and exhortations for members to purchase CALC '*Loophole'* neckwear.

The Loophole

In September 1987, the *Newsletter* was given a name—*The Loophole*—and from that point took itself a little more seriously (justifiably, based on its contents); it also became more conscious of its appearance, with the first of a series of 5 distinctive designs appearing on its front page. The first edition was cryptically numbered 'volume 2, issue 1' (there is no volume 1),[7] with issues 2-6 of volume 2 following between February 1988 and

[5] That is, 11 *Loopholes* and 10 *Newsletters*. *The Loophole* of Oct. 2007 (2007.3) was edited by Janet Erasmus, and in Jan. 2010 (2010.1) the journal had a guest editor, John Mark Keyes (with Duncan Berry credited as editor-in-chief).
[6] All publications reviewed are listed at the front of the catalogue. Their full text is publically available, at no cost, on the CALC website, at http://www.opc.gov.au/calc/index.htm (accessed 8 November 2010). Incidentally, the Articles and Papers also listed on the site were all first published in *The Loophole* or the *Newsletter*.
[7] It appears odd to label the first of a series of publications 'volume 2'. One possible explanation is that the first *Loophole* appeared (in September 1987) after the *second* CALC meeting (1986, Ocho Rios, Jamaica), and so all issues were labelled 'volume 2' until the *third* CALC meeting (1990, Auckland, New Zealand). After the third meeting, all issues were labelled 'volume 3' until the *fourth* CALC meeting (1993, Nicosia, Cyprus), after which the volume-issue numbering system was abandoned.

March 1990. Volume 3 followed with issues 1, 2 and 4 between November 1990 and February 1993.[8] After this, volume numbering was abandoned. All editions of *The Loophole* have been identified by month and year (even those first 3 'volumes'), and since December 2001, also by issue numbers within a particular year.

In June 2000, *The Loophole* began to style itself as 'Journal of the Commonwealth Association of Legislative Counsel', two years before the re-launching of the *Newsletter* in August 2002. The last Loophole to describe itself as a *newsletter* was the edition of June 1999.

The CALC Newsletter reincarnated

With *The Loophole* firmly established as a respectable professional journal 15 years since its first publication, the *Newsletter* was re-launched in August 2002 as a separate publication. This has appeared irregularly in the intervals between the publication of *The Loophole*. The two publications have kept pace with each other, with 11 *Loopholes* and 10 *Newsletters* being published in the 10 years until August 2010.

The *Newsletter* of both periods contains news of forthcoming meetings and conferences and internal business and, in addition, includes substantial material in the form of case notes and commentaries (editorial and otherwise), summaries or republications of articles of interest from newspapers, journals and the internet, book reviews and notices about CALC members. A survey of this literature made it apparent that there is a significant amount of material of lasting value in all the *Newsletters* that should be made more accessible by recording in the catalogue.

Organisation of the catalogue

Some general comments are offered here on the organising principles used for this project. For more detailed comments on methodology, see the notes which preface the catalogue.

Method of selection

All issues of each publication were reviewed.[9] An item was selected for the catalogue if it was considered to constitute a discussion or news relating to drafting matters of more than ephemeral significance. Evidently, this has been a subjective process, but we have erred on the side of inclusion rather than exclusion in an effort to compensate for our individual prejudices.

A lot of quite short items in the *Newsletter* have been selected for their inherent interest. All items (however brief) relating to drafter honours, appointments, resignations, retirements and deaths are recorded under 4.1 (personalia) in the belief that this material is of particular interest to drafters and those interested in the history of Commonwealth drafting. Book reviews are listed, and notices of forthcoming books and other publications are also listed, whether or not there is any substantive material relating to their contents.

Systematically excluded from the catalogue are items relating purely to the internal life of CALC: minutes of general meetings; lists of members; notices of forthcoming meetings and conferences; items relating to drafting vacancies (or availability); advertisements for ties and scarves. However, summary reports (after the event) of CALC meetings and of other conferences of interest to drafters are recorded under 4.2 (conference reports).

[8] We could not locate any edition numbered volume 3, issue 3 (between Aug. 1991 (3.2) and Feb. 1993 (3.4)).
[9] Except the missing issue of *The Loophole* (volume 3, issue 3), if it exists.

Method of categorisation

The choice of subject matter categories is also inherently subjective, and is not based on any objective bibliographical system. It has been informed by the process of reviewing the material in the publications, and the list we started with was considerably modified by the end of the process.

The categories fall into three broad families: Principle (legal principle); Process (drafting process); and Product (legislation). Inevitably, a fourth family, the familiar Miscellaneous, is also required. In summary, here are the categories:

1. Principle
   - 1.1 Parliament, subordinate legislation and the rule of law
   - 1.2 Parliamentary counsel's role
2. Process
   - 2.1 Drafting offices and drafting process
   - 2.2 Information technology
   - 2.3 Multilingual drafting
   - 2.4 Drafter training
3. Product
   - 3.1 Drafting technique and theory
   - 3.2 Legislation case studies
   - 3.3 Plain language
   - 3.4 Statute book
   - 3.5 Statutory interpretation
4. Miscellaneous
   - 4.1 Personalia
   - 4.2 Conference reports
   - 4.3 Book reviews and publication notices

Some notes on the contents of each category are included below, with indications of subcategory relationships (for example, 3.2 (legislation case studies) and 3.3 (plain language) are subcategories of 3.1 (drafting technique and theory)) and other categorical cross-references showing family resemblances. Specific items are not cross-referenced here or in the catalogue.

1. Principle

1.1 Parliament, subordinate legislation and the rule of law.

The interaction between legislative drafting and the parliamentary process (for example, the impact of parliamentary scrutiny committee activity on drafting). Includes treatments of parliamentary process in particular jurisdictions.

Concerns about the increasing volume and significance of subordinate legislation and its impact on the rule of law (for example, the use of Henry VIII clauses and 'framework' primary legislation).

Subcategory: 1.2 (parliamentary counsel's role).

See also 2.1 (drafting process), for the relationship between policy and drafting, and the drafter's role.

For the relationship between the rule of law and access to law, see 3.3 (plain language) and 3.4 (statute book).

1.2 Parliamentary counsel's role.

The role played by the drafter in the legislative process (for example, the extent to which counsel contribute to the development of policy).

The drafter's role in a democratic society, as an upholder of the rule of law.

2. Process

2.1 Drafting offices and drafting process

Discussions of the organisation and practices of drafting offices in Commonwealth (and some other) jurisdictions.

Includes accounts of how particular drafting offices function, general issues such as quality control, costing of drafting services (including contracting out), and particular issues such as the working relationships between drafters and instructors.

Includes papers relating to CALC itself (see Berry, D (Jan 2009) and Engle, G (Sept. 1987)).

Subcategories: 2.2 (information technology), 2.3 (multilingual drafting) and 2.4 (training).

2.2 Information technology and drafting

The use of innovations in information technology to assist the drafting process.

See also 3.4 (statute book) for electronic consolidations and republications.

2.3 Multilingual drafting

Drafting for jurisdictions which give official status to legislation in more than one language (such as Hong Kong and Canada).

2.4 Drafter training

Includes items dealing with education and training on legislation generally (see Burrows, J (Aug. 2010) and 'Ugandan MPs' (Mar. 2003)).

3. Product

3.1 Drafting technique and theory

Discussions of particular drafting techniques (for example, incorporation of treaties into domestic law) as well as theoretical considerations (for example, drafting and linguistics).

Subcategories: 3.2 (legislation case studies) and 3.3 (plain language).

3.2 Legislation case studies

Discussions of particular drafting projects (for example, tax law redrafting projects).

See also 2.1 (drafting offices and drafting process)—discussions of drafting process in particular jurisdictions.

3.3 Plain language

Discussions about clarity and precision in legislative drafting. Includes discussion of the general topic of plain language as well as particular plain language style drafting techniques and accounts of reader testing.

See also 1.1 (parliament etc.) and 3.4 (statute book), particularly for access to law.

3.4 Statute book

Maintenance of, and access to, the statute book.

Particularly concerns the publication of legislation and the consolidation and republication of up-to-date laws.

See also 2.1 (drafting process) and 3.3 (plain language).

3.5 Statutory interpretation

Consideration of particular issues of interpretation, including notes on significant cases, as well as general discussions about interpretation and drafting.

See also 3.3 (plain language and access to law).

4. Miscellaneous

4.1 Personalia

Notices of honours, appointments, resignations, retirements and deaths of prominent or long-serving drafters and others associated with the profession.

4.2 Conference reports

Reports from CALC conferences and some other conferences of interest to drafters.

4.3 Book reviews and notices

Book reviews, and notices of publication, of drafting literature.

Overview

This project is undertaken for a practical purpose: it aims to make a significant resource more accessible to the international drafting community, and perhaps others with a broad interest in government and the law. However, some conclusions may be drawn from an overview of the catalogue, regarding an overall preference for the pragmatic and, on the topic of plain language, the range of views and their pragmatic focus.

A preference for the pragmatic

The number of records in each category (apart from category 4, miscellaneous) is as follows:

- Drafting offices and drafting practices (2.1)—37 records;
- Plain language (3.3)—33 records;
- Statute book (3.4)—26 records;
- Parliament, subordinate legislation and the rule of law (1.1)—22 records;
- Statutory interpretation (3.5)—18 records;
- Drafting technique and theory (3.1)—16 records;
- Information technology and drafting—15 records;
- Drafter training—11 records;
- Parliamentary counsel's role and legislation case studies—10 records each;
- Multilingual drafting—9 records each.

What does this tell us? Let us assume that the number of records bears some relationship to levels of interest in each topic in the Commonwealth drafting community. We can also draw a distinction between topics that

may be broadly described as pragmatic (practical or process-oriented), on the one hand, and principled (or strictly legal) concerns on the other. On that basis, although there seems to be a reasonable level of interest among the drafting community on each side, there is a clear preference for pragmatic over more principled or strictly legal concerns:

- *Pragmatic concerns*: drafting offices (37), statute book (26), information technology (15), drafter training (11), multilingual drafting (9), legislation case studies (10)—total 108 records;
- *Principled or strictly legal concerns*: plain language (33); parliament etc. (22); statutory interpretation (18); parliamentary counsel's role (10)—total 83 records;
- *Mixed*: drafting technique and theory—16 records.

Even principled or strictly legal concerns for drafters, such as the topics concerned with plain language or statutory interpretation, are generally dealt with in a very pragmatic way, with particular drafting techniques or case analyses forming the nucleus of discussion. This reinforces the valuable role played by CALC and its publications as a clearing house for professional concerns, one of its primary functions. It also helps to distinguish the role played by the CALC publications and that played by academic journals; drafters are not concerned with, say, the rule of law as such, but how the application of the rule of law affects, or should affect, their drafting practice (and vice versa).

A dramatic illustration of this point was unearthed by the literature survey. This is the article by Neil Adsett, 'A Brisbane lawyer inside a coup d'état'.[10] Mr Adsett was drafting legislation in Fiji at the time of Colonel Rabuka's coup in 1987. He vividly describes how he sought to apply principles relating to the rule of law in order to do what he could, as a professional drafter, to assist in the maintenance of legitimate order in the wake of the breakdown of regular government administration and processes.

On the other hand, a fine example of the way in which pragmatic drafting concerns can lead to a valuable principled contribution of general application is in Fung, SYC and A Watson-Brown.[11] The authors describe how a specific research project concerning the translation of English statutes into Chinese required them first to develop a theoretical understanding of common law drafting in the English tradition. Their account of this, here and in more extended form elsewhere, is of great interest to drafters in that tradition.[12]

Plain language

Over the period of the literature surveyed, the most prominent of issues in public discourse involving legislative drafting has been the plain language debate. As might be expected, this is also the topic that most attracts a variety of opinions in CALC discussion. Although there is little direct debate between contributors to the discussion, there is certainly a range of views, which can (very broadly speaking) be represented along the following spectrum):[13]

- *Cautious or defensive*: drafters set out the difficulties faced in achieving plain language in response to critics such as Robert Eagleson. For the first and liveliest example, see Geoff Kolts' engagement with the topic as it first rose to prominence in the mid-1980s.[14]

[10] Mar. 1989 (1.2, role of parliamentary counsel); republished from *The Proctor*.
[11] Feb. 1996 (3.1, drafting technique and theory).
[12] See the authors' *The Template*, cited in the catalogue entry, and 'Traditional Drafting in Common Law Jurisdictions', *Statute Law Review* 16.3 (1995), p 167.
[13] See also Horn, N (Mar. 2005) (2.1, drafting offices and drafting process) on the uptake of plain language style in drafting offices in Australia, New Zealand and Ontario.
[14] Kolts, G & Ors (Feb. 1985) and 'Drafting laws in plain English—a current issue in Australia', *Newsletter*, Dec. 1985 (No. 8) [presumably written by Mr Kolts as editor of the *Newsletter*]. See also Berry, D (Sept. 1987), Nazareth, G (Sept.

- *Practical implementation*: the catalogue records three influential articles by Ian Turnbull arguing strongly for policy complexity as a significant barrier to achieving plainer laws, but considering in practical terms how to improve their clarity; see also Fredrick Ruhindi's interesting paper.[15]
- *General advocacy*: at this end of the spectrum are items enthusiastically advocating the use of plain language, as seen in contributions by Mark Adler, Robert Eagleson, Joseph Kimble and others.[16]

This breakdown of views is not intended to suggest any permanently fixed division of opinion; indeed, in the case of Duncan Berry, it illuminates an indicative move from initial caution to relatively vigorous adoption.[17] For the most part, the pragmatic bent of legislative drafters again is seen to advantage, with the preponderance of material listed being concerned with issues of practical implementation, the second of the groups listed here. However, the catalogue puts these practical considerations into perspective in indicating, on the one hand, some relatively cautious attitudes, and on the other hand, some more enthusiastic endorsement and advocacy of plain language.

Conclusion

This overview is merely intended as an indication of some tentative (and doubtless disputable) conclusions that might be drawn from a review of the literature recorded in the catalogue. More importantly, it is hoped that the catalogue can help to publicise and make more easily available a range of important material on topics related to legislative drafting that has not previously been assembled in this way.

Over the years, Duncan Berry has been a champion for the cause of greater access to the law. In this special edition of *The Loophole* it seems appropriate to attempt, in a modest way, to honour him by providing greater access to the CALC archive.[18]

1987), Kelly, M (Mar. 1989), Jenkins, C (Dec. 1997) and Hull, D (June 2000). All of these are recorded in 3.3 (plain language).

[15] Turnbull, I (Feb. 1986, Aug 1991 and July 1995) and Ruhindi, F (June 2009) (3.3, plain language). To these may be added articles on aspects of plain language style or technique, for example (from 3.2, plain language), Barnes, J (June 2004), O'Brien, P (Mar. 2005) and Piper, B (July 2007) on examples and notes, and (from 3.2, legislation case studies) Erasmus, J (June 1999), McAra, E (Mar. 1997) and Jones, K (Oct. 1998) on rewriting tax laws. See also Berry, D (Mar. 1997 and June 2000) (3.3, plain language) on evaluating audience responses to legislation.

[16] Adler, M (Aug 2008); Eagleson, R (in Kolts, G & Ors (Feb. 1985); also Oct. 1989 and Mar. 1989); Kimble, J (Dec. 1997) (3.3, plain language).

[17] Contrast Duncan Berry's paper of Sept. 1987 with his articles of Mar. 1997 and June 2000 mentioned at note 14.

[18] Catalogues such as this lose significance very quickly unless they are freely accessible and properly maintained. In an attempt to avoid this fate, the catalogue itself will be made available directly via the CALC website, and we undertake to ensure that it is updated with each further CALC publication. Should we fail in this endeavour, we shall doubtless be convicted of the offence mentioned in the first quotation at the head of this article, and punished with guilty consciences!

Catalogue of CALC publications

Contents

CALC publications catalogued[19]

The Loophole	*Newsletter (first series)*
September 1987 (volume 2, issue 1)	November 1983, No. 1
February 1988 (volume 2, issue 2)	June 1984, No. 2
September 1988 (volume 2, issue 3)	November 1984, No. 3
March 1989 (volume 2, issue 4)	February 1985, No. 4
October 1989 (volume 2, issue 5)	June 1985, No. 5
March 1990 (volume 2, issue 6)	November 1985, No. 6
November 1990 (volume 3, issue 1)	November 1985, No. 7
August 1991 (volume 3, issue 2)	December 1985, No. 8
February 1993 (volume 3, issue 4)	February 1986, No. 9
July 1995	April 1986, No. 10
February 1996	May 1986, No. 11 [issue 1]
March 1997	July 1986, No. 11 [issue 2]
December 1997	
October 1998	***Newsletter (second series)***
June 1999	August 2002
June 2000	March 2003
December 2001 (2001, issue 1)	October 2003
June 2004 (2004, issue 1)	June 2005
March 2005 (2005, issue 1)	August 2006
March 2007 (2007, issue 1)	August 2007
July 2007 (2007, issue 2)	April 2008
October 2007 (2007, issue 3)	February 2009
August 2008 (2008, issue 1)	April 2009
January 2009 (2009, issue 1)	March 2010
June 2009 (2009, issue 2)	
October 2009 (2009, issue 3)	
January 2010 (2010, issue 1)	
August 2010 (2010, issue 2)	

[19] Lists all publications reviewed for the catalogue; however, not all publications are represented by items in the catalogue.

Notes on method

Citation generally

For each record, an author is listed if possible. If no author is given, the listing is by title; unauthored records may be presumed to be editorial contributions (but if the editor is specifically named, the listing is by the editor's name). Australian Government recognised citation methods are the basis for the style used.[20] Where possible, citations of source material are given for republished articles (some of these are incomplete, however).[21]

The Loophole and the *Newsletter* are cited principally by month and year, as this element of their citation is common to all issues of both publications. Within each series of publications, however, some different citation conventions have been used at different times, as follows.

Citation of The Loophole

- From 1987 until 1993, a month-year citation was coupled with a volume-number system. To reflect this, for example, the August 1991 issue, volume 3, issue 2, is cited in the catalogue as *The Loophole*, Aug. 1991 (3.2).
- From July 1995 until June 2000, only a month-year citation was used in the journal. To reflect this, for example, the July 1995 issue is cited in the catalogue as *The Loophole*, July 1995.
- From December 2001 until the present, a month-year citation has been used together with a year-issue citation indicating the issue number within the cited year. To reflect this, for example, the August 2010 issue, issue 2 of 2010, is cited in the catalogue as *The Loophole*, Aug. 2010 (2010.2).

Citation of Newsletters

- From 1983 to 1986 (the first series of the *Newsletter* mentioned in section 1 above), the issues were numbered consecutively, accompanied by a month-year citation. To reflect this, for example, the first issue, Number 1 of November 1983, is cited as *Newsletter*, Nov. 1983 (No. 1).
- In 1986, a *Newsletter* was issued in May and July, each numbered as No. 11. These are distinguished in the catalogue as *Newsletter*, May 1986 [11.1] and *Newsletter*, July 1986 [11.2].
- The second series of the *Newsletter*, from August 2005 until March 2010, is cited by month and year only. To reflect this, for example, the issue of March 2010 is cited as *Newsletter*, Mar. 2010.

Page numbers

For economy, only the first page number of the relevant item is cited (not the last number of the range). Some of the earlier issues of the *Newsletter* and *The Loophole* did not have continuous (or any) through-numbering, however, so the following conventions are applied:

- If each article in the issue is numbered from page 1 (or if there is no page number), no page number is indicated in the citation.
- If items are through-numbered, but the numbering is discontinuous, this is indicated by the initial 's' after the number, for example, 'p 12s' ('s' stands for 'special section', and is the standard abbreviation used, for example, to cite articles in a separately numbered section of a newspaper).[22]

[20] See Commonwealth of Australia, *Style Manual*, 6th ed, rev Snooks & Co., Wiley 2002.
[21] These are indicated by an abbreviated note 'repub. from…', or (if edited) 'repub. and ed. from…'.
[22] *The Loophole*, Nov. 1990 (3.1), a very rich source of material for the catalogue, is a special case. There are two sections, one reflecting the internal business of the CALC meeting in April 1990 (Auckland, NZ), (including some items

Summary notes, categorisation and cross-references (lack of)

A brief summary note is made of the contents of each article. We try to indicate the content and flavour of the article in a few lines. However, we recognise that these thumbnail sketches may not always give an accurate impression. There could also be a legitimate dispute concerning our categorisation decisions. For any such inaccuracies and misjudgments, and any errors, we apologise. We would be very happy to consider future corrections to the catalogue. Assuming the catalogue is posted on the CALC website, these can be incorporated without waiting for republication in print.

The categories inevitably overlap, as indicated in the accompanying article (see the notes on the categories). Moreover, individual articles deal with matter that comes under more than one category. In the time available, we have not been able to cross-reference the catalogue. We hope this task may be undertaken in a future edition.

Arrangement of records

Records in the categories in groups 1, 2 and 3 are listed in alphabetical order by author (or title, if no author is given in the original).

Records in the categories in group 4 (miscellaneous) are arranged as follows:

- In section 4.1 (personalia), records relating to drafters (etc.) are listed alphabetically by the name of the drafter (etc.) who is the subject of the record.
- In section 4.2 (conference reports), conference reports are listed in chronological order, from the earliest to the latest.
- In section 4.3 (book reviews and notices), book reviews and notices of book publications are listed alphabetically by the author of the book concerned.

We would, however, be interested to know whether users of the catalogue would prefer that the records in the categories in groups 1, 2 and 3 were listed chronologically, by reference to publication rather than author (or whether it is worth generating an alternative listing arranged in this way). This could be the subject of reconsideration in a future edition.[23]

1 Principle

1.1 Parliament, subordinate legislation and the rule of law

Argument, S, 'Legislative counsel and pre-legislative scrutiny', *The Loophole*, Jan. 2010 (2010.1), p 61.

- Legislative counsel undertake a form of pre-legislative scrutiny, in the sense that they draft with one eye on future parliamentary scrutiny of their drafts. The paper concentrates on parliamentary scrutiny and on the important relationship between legislative counsel and legislative scrutiny committees.

that are catalogued), the other including all the papers given at the meeting. Each section is through-numbered in the original, from p 1. Items from the first section are recorded in the catalogue after the fashion 'p 16s'. For most of the second section, the original offers a choice of through-numbers: one typed, the other handwritten. The alternatives are recorded in the catalogue after the fashion 'p 3/5s'.

[23] The records have been prepared for this first edition using conventional techniques. If the data in the catalogue were entered into a flexible database system, the system could generate reports based on either criteria (or others). This could also be considered in preparing a future edition.

——, 'Straddling a barbed wire fence: reflections of a gamekeeper, turned poacher, turned gamekeeping poacher', *The Loophole*, Oct. 2007 (2007.3), p 66.

- The paper offers the author's perspective as a scrutineer, instructor and drafter. The author considers that drafters are the first bulwark of legislative scrutiny. Scrutiny of bills committees are an important bulwark against various types of legislative 'nasties' but drafters have the opportunity to weed some of them out before they get to scrutiny committees.

Bates, SJ, 'The legislative process in the Isle of Man', *The Loophole*, Feb. 1996, p 5.

- An outline of the process for making the laws of the Isle of Man. The Isle of Man is a UK Crown dependency that has its own parliament (the 'Tynwald').

Berry, D, 'Legislative and Regulatory Reform Act 2006 (UK)', *The Loophole*, Mar. 2007 (2007.1), p 64.

- The paper discusses the Legislative and Regulatory Reform Act 2006 (UK) which purports to cut 'red tape' by purporting to give Government Ministers new powers to strip away statutory regulations.

——, 'When does an instrument made under primary legislation have "legislative effect"?', *The Loophole*, Mar. 1997, p 14.

- The paper deals with how to enhance measures for parliamentary accountability in relation to subordinate legislation, and offers suggestions for addressing the uncertainty of determining when a subordinate instrument has legislative effect.

'The birth of a new baby: the Asian Association of Legislative Counsel', *Newsletter*, Aug. 2006, p 34.

- Note on the formation of a new regional grouping of legislative counsel.

Buttimore, J, 'Developments in the delegation of legislative powers in Ireland', *The Loophole*, June 2004 (2004.1), p 71.

- The paper discusses the evolution and guiding principles on the powers that may be delegated by the legislature to ministers by the way of secondary legislation.

Canadian Government Privy Council, 'Cabinet directive on law-making' (Mar. 1999), *The Loophole*, June 2000, p 49.

- The full text of the Privy Council's Cabinet Directive is reproduced. This covers all aspects of the Canadian Government legislative and parliamentary processes, including Constitutional considerations, bilingual and bijural law-making, the management of the legislative process and the drafting of Bills.

Crabbe, VCRAC, 'Shorter parliamentary enactments and longer executive regulations—pros and cons', *The Loophole*, Sept. 1987 (2.1), p 67.

- Justice Crabbe sets out his views on the limits that should be placed on executive legislative power.

Engle, G, 'The legislative process today', *The Loophole*, Sept. 1987 (2.1), p 78.

- A consideration of the challenges provided by the growth in the volume of legislation to be considered by Parliament, including the question of delegated legislation (and its scrutiny by the parliament) and the benefits of the traditional common law detailed approach to drafting legislation.

Goldsmith, 'Government and the rule of law in the modern age', *Newsletter*, Aug. 2006, p 35 (transcript of speech at the LSE, 22 Feb. 2006).

- Lord Goldsmith was at the time the Attorney-General of the United Kingdom. The speech was given in the context of the passage of the UK Constitutional Reform Act, establishing the new British Supreme Court and reshaping the office of Lord Chancellor. The author discusses the continuing importance of the rule of law.

Hudson-Phillips, KT, 'A case for greater public participation in the legislative process', *The Loophole*, Sept. 1987 (2.1), p 83.

- The author proposes a number of measures to get the public involved in the law-making process. These include civic education; requirements for parliamentary candidates to publish their legislative program; popular referenda; opening up the committee stage of Parliament; and reform of the law relating to statutory construction.

Keyes, JM, 'Democratic reform and private members' business: shifting sands or paradigms?', *The Loophole*, Mar. 2007 (2007.1), p 8.

- The paper deals with the role of elected Members of Parliament in making laws, in particular Private Members. It provides an overview of the role of Private Members in law-making and the steady progress they have made towards making this role more meaningful. The author provides suggestions for those, whether within or outside government, who may be involved in the enactment of Private Member Bills.

——, 'Required rule-making: when do you have to make delegated legislation?', *The Loophole*, June 2004 (2004.1), p 49.

- This paper considers whether a power to make regulations (or any other form of delegated legislation) is ever required to be exercised.

—— & A Mekkunnel, 'Traffic problems at the intersection of parliamentary procedure and constitutional law', *The Loophole*, June 1999.

- The authors discuss the Canadian Supreme Court decision in *Re Eurig Estate* and the introduction of a private members Bill imposing a tax into the Canadian Senate at the time of the decision. In what circumstances can a taxation power be delegated by parliament? What are the respective powers of the courts and the Speakers of the Parliament to deal with the relevant constitutional issues?

Ma, J, 'Scrutiny of legislative drafting by the legislature: the role of the legal advisers of the Hong Kong Legislative Council', *The Loophole*, Jan. 2010 (2010.1), p 41.

- An account of the Hong Kong legislative scrutiny process, and the role played by legal advisers of that legislature. The author highlights some unique features of the Hong Kong system and describes the hands-on experience of his team of legal advisers in operating in a bilingual context under the new constitutional regime established by the Basic Law instituted in 1997.

Morris, D, 'Does legislation have to be published?', *The Loophole*, Dec. 1997, p 29.

- The paper considers the common law requirement (if any) for the publication of legislation.

——, 'Henry VIII clauses: their birth, a late 20th century renaissance and a possible 21st century metamorphosis', *The Loophole*, Mar. 2007 (2007.1), p 14.

- The paper discusses the history of the use of Henry VIII clause in the UK.

——, 'Parliament cannot delegate its legislative power: a British constitutional reality or myth?', *The Loophole*, Dec. 2001 (2001.1), p 11.

- This paper discusses whether or not there is any British constitutional principle that would prevent the British Parliament from enacting a hypothetical Henry VIII clause.

——, '"Union" Jack and the GM beanstalk—a European Union fable', *The Loophole*, June 2004 (2004.1), p 78.

- A satirical view of the regulatory environment in England and Europe under the EU regime.

Pear, R, 'Legal group says Bush undermines law by ignoring select parts of Bills', *Newsletter*, Aug. 2006, p 42 (repub. from New York Times, 24 July 2006).

- Report on the practice by US President Bush of reserving approval of specified parts of Bills (called 'signing statements') when signing assent.

Rudman, D, 'Delegation by Parliament of its legislative powers: a South African perspective', *The Loophole*, Aug. 2008 (2008.1), p 45.

- The paper provides a South African perspective on the drafting of enabling provisions in Acts of Parliament. Parliament's supervisory role relating to subordinate legislation is examined and some reforms are suggested.

1.2 Parliamentary counsel's role

Adsett, N, 'A Brisbane lawyer inside a coup d'état', *The Loophole*, Mar. 1989 (2.4) (repub. from *The Proctor*, May 1988, p 6).

- A drafter's experience of the Fiji coup of 16 May 1987. The author describes the legal advice given to Col. Rabuka about the maintenance of the rule of law in the wake of the coup. This involved the use of the royal prerogative powers to enable rule by executive decree under the doctrine of State necessity.

Berry, D, 'Do communications between parliamentary counsel and their "clients" attract legal professional privilege?', *Newsletter*, Mar. 2010, p 14.

- A case note on an Australian federal court case, *State of New South Wales v Betfair Pty Ltd* (2009), concerning the role of parliamentary counsel in giving legal advice by, or in the course of, drafting legislation.

Finn, M, 'Opening speech—at the conference marking the 25th anniversary of the OPC in Canberra 1995' (edited transcript), *The Loophole*, Oct. 1998, p 47.

- Justice Finn (Federal Court of Australia) offers her observations and experience with the role of parliamentary counsel.

Havers, M, 'A Message from the Rt Hon Sir Michael Havers, QC, MP, Attorney General for England, Wales and Northern Ireland', *Newsletter*, June 1985 (No. 5).

- Sir Michael encourages CALC members to attend the forthcoming CALC meeting in Jamaica, September 1986. The role and importance of legislative counsel in maintaining the rule of law are emphasised.

Hull, D, 'The role of legislative counsel: wordsmith or counsel?', *The Loophole*, Aug. 2008 (2008.1), p 35.

- The paper argues that drafters are neither wordsmiths nor administrators but specialist legal counsel. It suggests engaging in dialogue with senior politicians and senior officials to explain what is involved in the preparation of legislation as a way of overcoming resource constraints within both counsel and client departments.

Keyes, JM, 'Professional responsibilities of legislative counsel', *The Loophole*, Oct. 2009 (2009.3), p 38.

- This paper considers the nature and content of professional responsibilities of legislative counsel from three standpoints. The first is as members of the legal profession. The second is as public sector employees. The third relates to the functions they typically perform as legislative counsel.

Lange, D, 'Speech Notes, Rt. Hon. David Lange CH, Attorney-General', *The Loophole*, Nov. 1990 (3.1), p 2s (CALC general meeting, Monday 16 Apr. 1990, Waitemata Ballroom, Sheraton Hotel, Auckland, New Zealand).

- The opening address by the Attorney-General of New Zealand to the CALC meeting. Emphasises the importance of parliamentary counsel in upholding the rule of law.

Laws, S, 'The role of legislative counsel: wordsmith or counsel?', *The Loophole*, Aug. 2008 (2008.1), p 39.

- The author argues that UK legislative drafters are both wordsmith and counsel.

Rama Devi, VS, 'The importance of legislative drafters', *The Loophole*, July 1995, p 8.

- Law is the instrument through which social engineering is expected to be achieved. The legislative drafter's importance arises from the drafter's role in framing laws to shape the developmental process in a country.

United Kingdom Office of Parliamentary Counsel, 'Role of United Kingdom Counsel in relation to policy-making', *Newsletter*, Feb. 2009, p 39.

- Reprint of guidelines for UK parliamentary counsel on limits to counsel involvement in policy-making.

2 Process

2.1 Drafting offices and drafting process

Bergeron, R, 'Legislation Section: 50 years of legislative drafting in Ottawa', *The Loophole*, Dec. 1997, p 25.

- A history of the office that drafts primary legislation for the Canadian Government.

Berry, D, 'CALC's Silver Jubilee', *The Loophole*, Jan. 2009 (2009.1), p 4.

- A short history of the Commonwealth Association of Legislative Counsel by the editor of *The Loophole*.

——, 'Why legislative drafting services should not be privatised', *The Loophole*, Mar. 1997, p 52.

- The paper explains the advantages of keeping legislative drafting services as a centralised system.

Bowman, G, 'President's after-dinner speech', *Newsletter*, Aug. 2006, p 17.

- Transcript of speech reflecting on the links between Commonwealth lawyers and drafters.

Colagiuri, D, 'Address on the organisation of drafting offices', *The Loophole*, July 2007 (2007.2), p 6.

- Comment on a range of issues that impact on office organisation, including whether to have an independent drafting office and issues relating to legislation publication and drafters.

'Commonwealth Secretariat survey of terms and conditions of service of legislative drafters', *Newsletter*, Nov. 1984 (No. 3), p 9 (report of survey by D Hull, Commonwealth Law Bulletin, July 1984).

- The survey records continuing and substantial shortages of drafters in developing countries, with a definite correlation between shortages and poor salary relativity of principal drafters compared with other senior government lawyers and judges.

'Drafting laws in Sri Lanka', *Newsletter*, June 2005, p 21.

- Description of Sri Lankan drafting and parliamentary legislative processes.

DuPerron, R, 'The legislative paralegal: the role of the legislative editor in Canada', *The Loophole*, Dec. 1997, p 20.

- The paper outlines the role of the Legislative Editing Office in Canada.

Elliott, D, 'How to prepare drafting instructions for legislation—Canadian style', *The Loophole*, June 1999.

- A pamphlet guide for instructors.

Engle, G, 'Retrospectively: the formation and subsequent progress of the Commonwealth Association of Legislative Counsel', *The Loophole*, Sept. 1987 (2.1), p 19.

- The President of CALC gives a brief account of the formation (in 1983) and history (to May, 1986) of the Association, its activities and the benefits it has provided for its members.

Erasmus, J, 'Legal briefs and lawful shorts—are they for you?', *The Loophole*, Mar. 2007 (2007.1), p 82.

- The author explains the British Columbia Office of Legislative Counsel's experience with producing a legal *Newsletter*.

—— & A McLean, 'Confidential review of draft legislation by members of private bar', *The Loophole*, Mar. 1997, p 48.

- The paper describes British Columbia's experience in having Bar Association members review draft legislation confidentially.

Horn, N, 'Legislative drafting in Australia, New Zealand and Ontario: notes on an informal survey', *The Loophole*, Mar. 2005 (2005.1), p 55.

- The results of an informal survey of nine Australian legislative drafting offices, the New Zealand Office of Parliamentary Counsel and the Ontario Office of Legislative Counsel, covering their institutional roles, management structures, arrangements for legislative publishing and drafting styles (in particular, the take-up of 'plain language style').

Iles, W, 'The department solicitor and the parliamentary counsel office', *The Loophole*, Feb. 1988 (2.2), p 33.

- The paper discusses the role of the departmental solicitor (that is, the instructor) and parliamentary counsel in preparing legislation.

Laws, S, 'Consistency versus innovation', *The Loophole*, Oct. 2009 (2009.3), p 25.

- The United Kingdom Office of the Parliamentary Counsel was set up in 1869 to produce 'a common and consistent approach to the production of legislation'. There is a tension between consistency and innovation and a balance has to be struck.

'Legislative draftsmen: some thoughts on how to provide an effective service', *Newsletter*, Nov. 1983 (No. 1), p 4 (summary of paper by JQ Ewens, Australian Law Journal, Oct. 1983).

- What are the conditions for an effective drafting service? The right sort of people, training, instructions and the proper tools of the trade.

Leigh, M, 'Australian Office of Parliamentary Counsel's quality assurance processes for Bills', *The Loophole*, Jan. 2009 (2009.1), p 33.

- The paper outlines the Australian Office of Parliamentary Counsel's quality assurance processes. It recommends implementing automated checking processes as an adjunct to the checking of Bills by parliamentary counsel and trained editorial checkers.

Levert, L, 'Supporting legislative drafting in Bangladesh', *The Loophole*, June 2004 (2004.1), p 25.

- A discussion of the technical legal assistance that is currently being offered by the Canadian Department of Justice to the Bangladesh Ministry of Law, Justice and Parliamentary Affairs in the area of legislative drafting.

Ludchen, I, 'Quality control measures in the legislative services branch of the Canadian Department of Justice', *The Loophole*, Jan. 2009 (2009.1), p 28.

- The paper outlines the quality control measures applying to Canada's federal drafting office.

McCluskie, J, 'Expert evidence, adultery and legislative drafting', *Newsletter*, Aug. 2006, p 11 (ed. transcript of speech given at a reception hosted by the Scottish Parliamentary Counsel's Office, CALC conference, London 2005).

- The speech concerned Donald Crawford, former UK draftsman and Legal Secretary to the Lord Advocate.

McMillan, I & C Webster, 'The legislation process course run by the Australian Commonwealth Office of Parliamentary Counsel', *The Loophole*, Dec. 2001 (2001.1), p 18.

- The paper provides details about a course run for instructors by the Australian Office of Parliamentary Counsel.

Murphy, D, 'Bill review—a question of quality', *The Loophole*, Feb. 1996, p 11.

- An overview of the New South Wales Parliamentary Counsel's Office Bills review process. This is aimed to provide quality control and to bring the collective experience and expertise of the Office to bear in as many Bills as possible.

Office of the Queensland Parliamentary Counsel, 'A guide for effective legislative drafting instructions', *The Loophole*, Dec. 2001 (2001.1), p 53.

- A guide for instructors prepared by the Parliamentary Counsel's Office in Queensland, Australia.

Penfold, H, 'Costing drafting services—what does a drafting office really do?', *The Loophole*, June 2000, p 38.

- A good drafting office provides the Government with more than just draft legislation. Any assessment of how much it costs to have legislation produced by a drafting office rather than by contract drafters must also recognise the incidental products of a drafting office.

Ray, D, 'Queensland's OPC and responsibility for fundamental legislative principles', *The Loophole*, June 2000, p 26.

- This paper considers the impact of the *Legislative Standards Act 1992* (Queensland, Australia). The Act establishes Queensland's Office of Parliamentary Counsel, and makes the OPC responsible for the drafting and publishing of the legislative program and for ensuring the quality of the Queensland's statute book. High level 'fundamental legislative principles' are required to be considered in drafting legislation.

Reid, T, 'Opening speech—at the conference marking the 25th anniversary of the OPC in Canberra 1995', *The Loophole*, Oct. 1998, p 50 (ed. transcript).

- The Australian Second Parliamentary Counsel surveys the history of Australian office of parliamentary counsel and offers some anecdotes about parliamentary counsel in Australia and in the UK.

Robinson, W, 'Polishing what others have written: the role of the European Commission's legal revisers in drafting European Community legislation', *The Loophole*, Mar. 2007 (2007.1), p 71.

- The paper outlines the European Community legislative process. It provides suggestions for practical steps for improving the drafting quality of Community legislation.

Simamba, B, 'Managing increasing government expectations with respect to legislation while maintaining quality: an assessment of developing jurisdictions', *The Loophole*, Jan. 2009 (2009.1), p 7.

- The challenge of producing quality legislation at a pace satisfactory to governments is particularly acute in developing countries and small jurisdictions. The author provides suggestions for producing the optimum quantity and quality of legislation.

Strokoff, S, 'How US federal laws are made: a ghost writer's view', *Newsletter*, Mar. 2003, p 23 (repub. and ed. from *The Philadelphia Lawyer*, Philadelphia Bar Association Quarterly Magazine, 59.2 (Summer 1996)).

- A description of the role of the Office of Legislative Counsel, USA, in drafting legislation for the US Congress.

Van Wierst, A, 'Drafting from a blueprint', *The Loophole*, Oct. 1998, p 33.

- The author describes an approach requiring the drafter and instructors to work out a detailed conceptual 'blueprint' for a proposed law, to an advanced stage, before the drafter starts to draft the law.

Wilson, C, 'Managing increasing government expectations with respect to legislation while maintaining quality', *The Loophole*, Jan. 2009 (2009.1), p 21.

- The paper explains how Scotland has sought to meet the challenges of delivering the Scottish Government's annual programme of legislation over the 8 years since the establishment of the Scottish Parliament.

——, 'Drafting against a background of differing legal systems: Scots law and the UK statute book', *The Loophole*, July 2007 (2007.2), p 70.

- This paper discusses the working relationships between the three UK drafting offices. In particular, it mentions the need to ensure, for Scots statutes, that they are effective as Scottish law while properly adapted for inclusion in the UK statute book.

Wilson, J, 'Challenges of drafting in a developing country', *The Loophole*, July 2007 (2007.2), p 36.

- The paper discusses the challenges and rewards of drafting in developing countries, outlining the physical challenges, organisational challenges, the lack of scrutiny and the role of drafter.

——, '"Prince Splendid and the dream machine"—a fairytale for legislative counsel', *The Loophole*, Dec. 2001 (2001.1), p 24.

- A humorous account of the drafting process (particularly in Hong Kong), with an emphasis on the role of the instructor, in the form of a modern fairytale.

——, 'The law draftsman's song', *The Loophole*, Dec. 1997, p 79.

- A parody of a Gilbert and Sullivan song, describing the daily life of a legislative drafter in Hong Kong.

——, 'Full circle: Whose law is it really?', *Newsletter*, Mar. 2010, 27.

- The author relates his experience as a peripatetic legislative drafter.

——, 'Solomon Islands: John Wilson's reminiscences as a legislative counsel', *Newsletter*, Aug. 2006, p 18.

- The author's experiences as a drafter in the Solomon Islands and elsewhere.

2.2 Information technology and drafting

Bertrand, G, 'Electronic aids in legislation: computer hardware', *The Loophole*, Sept. 1987 (2.1), p 54.

- The paper discusses Canada's use of electronic aids in legislation.

Bromley, M, 'Whose Law is it?—Accessibility through LENZ: opportunities for the New Zealand public to shape the law as it is made', *The Loophole*, Oct. 2009 (2009.3), p 14.

- This paper focuses on how internet technology, and specifically New Zealand's LENZ system, facilitates public access to information about draft laws as they work their way through the New Zealand parliamentary process.

Calcutt, G, 'Database systems for legislation—developments in Western Australia', *The Loophole*, Nov. 1990 (3.1), in 'Papers', p 48/50s.

- A history of the Western Australian database project.

Colagiuri, D & M Rubacki, 'The long march: pen and paper drafting to E-publishing law', *The Loophole*, Aug. 2010 (2010.2), p 43.

- The authors discuss the development of one-stop legislative drafting and publishing offices in New South Wales and Australasia, exploring changing technologies and policies that have affected drafting offices over the last 30 years. Their paper deals with public access to law, the status of paper versus online documents, as well as resource requirements and the combined roles of data creator, manager and publisher.

Duncan, DJS, 'Paper for the morning CALC session', *The Loophole*, Sept. 1987 (2.1), p 74.

- A discussion of the application of 'legal informatics' to statute law in the UK. The author discusses a system designed by legislative drafters for legislative drafters to make the production of draft legislation more efficient.

Hicks, E, 'One giant leap—the ultimate legislation system, available now', *The Loophole*, June 2009 (2009.2), p 70.

- 'It is now possible to make one giant leap — to go from wherever your legislation system is now to the ultimate legislation system. And to do so in an economically viable way.' The paper provides a starter list of features of an ultimate legislation system and indicates how to value them.

Keating, J, 'Electronic publication of New Brunswick legislation—yesterday, today and tomorrow', *The Loophole*, July 2007 (2007.2), p 31.

- The paper discusses the integrated system for drafting legislation used by New Brunswick and the relationship between legislative counsel and the Queen's Printer.

Macpherson, D, 'Instant Bills: the impact of information technology (IT) on legislative drafting in Canada', *The Loophole*, Mar. 2005 (2005.1), p 32.

- The paper describes how information technology has become embedded in the Bill-drafting process in Canada and how it has changed the legislative counsel's job and the way it is performed.

Pagano, P, 'Electronic aids in legislative drafting: creation of data bases and other publications', *The Loophole*, Sept. 1987 (2.1), p 103.

- The paper deals with using databases to store legislative and other drafting resources, as an aid to legislative drafting.

Quiggin, P, 'Notes on the information technology system (IT) used in the Australian Commonwealth Office of Parliamentary Counsel', *The Loophole*, Mar. 2005 (2005.1), p 20.

- An introduction to the IT system used in the Australian Office of Parliamentary Counsel.

Roger, A, 'BLIS: a searchable database of the bilingual laws of Hong Kong', *The Loophole*, Dec. 1997, p 35.

- An overview of the modernisation of the Bilingual Laws Information System (BLIS) in Hong Kong.

——, 'Electronic aids in legislative drafting and publishing: electronic typing and typesetting', *The Loophole*, Sept. 1987 (2.1), p 119.

- The paper outlines the most dramatic ways in which the use of electronic aids (such as word processors) can affect the drafting and publication process.

——, 'Hong Kong's bilingual database and computer system', *The Loophole*, Nov. 1990 (3.1), in 'Papers', p 85/87s.

- An overview of Hong Kong's new system.

Rubacki, M, 'The Information Technology Forum', *The Loophole*, Oct. 1998, p 43.

- The paper discusses the purpose and scope of the Information Technology Forum and its benefits for drafting offices.

——, 'The year 2000 problem—a New South Wales perspective', *The Loophole*, Oct. 1998, p 30.

- An overview of the Year 2000 project by the Parliamentary Counsel's Office in NSW, Australia, to address the problem of inaccurate Year 2000 date processing in its IT systems.

2.3 Multilingual drafting

Berry, D, 'The effect of poorly written legislation in a bilingual legal system', *The Loophole*, Mar. 2007 (2007.1), p 88.

- The paper proposes that the English versions of older Hong Kong statutes and regulations could be rewritten in plain, modern language that would be much easier to understand and would facilitate the creation of easier to understand Chinese versions of those statutes and regulations.

Cuerrier, M, 'Drafting against a background of differing legal systems: Canadian bijuralism', *The Loophole*, July 2007 (2007.2), p 50.

- This paper discusses new Canadian interpretation rules that clarify the interaction between federal legislation and provincial private laws. These arise from the harmonization of federal legislation initiative. The author also examines Canadian bijuralism and outlines important differences between the common law and the civil law systems.

Levert, L, 'Bilingual drafting in Canada', *The Loophole*, July 1995, p 39.

- A discussion of the federal Canadian approach to drafting bilingual laws.

Levert, L, 'Legislative bijuralism in a bilingual context: meeting the challenge', *The Loophole*, Feb. 1996, p 42 (trans. from French, paper given at the Colloque International de Moncton sur le Français Juridique et la Science du Droit).

- A discussion of the methods of drafting bijural legislation in a bilingual context, and their advantages and disadvantages.

Poirier, L, 'Whose law is it? A jurilinguistic view from the trenches', *The Loophole*, Jan. 2010 (2010.1), p 50.

- An explanation of the relatively new field of jurilinguistics and the role of the jurilinguist in the Canadian Government. The author focuses on the difficulties posed by bilingual legislative texts and the ways jurilinguists can help legislative counsel.

Revell, D, 'Multilingualism and the authoring of laws', *The Loophole*, June 2004 (2004.1), p 36.

- The paper examines the reasons why Nunavut, a Canadian Territory, has not moved quickly to adopt the broadest possible use of Inuit languages in the law and the wider implications of these issues for multilingualism.

Suen, WC, 'Bilingual legislative texts and the problem of textual ambiguities', *The Loophole*, Dec. 1997, p 62.

- The paper discusses issues in preparing Chinese versions of English laws, in particular the temptation to improve the law even where errors or mistakes are obvious.

Yen, T, 'Bi-lingual drafting in Hong Kong', *The Loophole*, Aug. 2010 (2010.2), p 65.

- A discussion of Hong Kong's experience in drafting bilingual legislation and how that experience affects the way Hong Kong now drafts its law.

——, 'One law, two languages', *The Loophole*, Dec. 1997, p 4.

- A history of the Hong Kong Government's commitment to bilingual legislation, from the Official Languages (Amendment) Ordinance (Hong Kong) in 1987 to complete bilingualism in 1997.

2.4 Drafter training

'Assisting developing countries', *Newsletter*, June 1985 (No. 5).

- A note on the Australian Government program for on-the-job training in Australia for legislative drafters from the Pacific region (to commence early in 1986). Other ways of assisting developing countries by provision of the services of experienced drafters are discussed.

Berry, D, 'Developing the training function in a parliamentary counsel office', *The Loophole*, Nov. 1990 (3.1), in 'Papers', p 104s.

- The author urges a reconsideration of their current training policies and the introduction of a program of formal training for their new legal staff.

——, 'Legislative drafting training in the Hong Kong Department of Justice', *The Loophole*, Mar. 2005 (2005.1), p 13.

- While there is still a place for the master and apprentice approach, there is also room for a formal program to help novice counsel to develop drafting skills, and to acquire relevant knowledge and experience more quickly, so that they become more efficient and productive earlier than they would otherwise.

Burrows, J, 'The difficulties of teaching legislation to students', *The Loophole*, Aug. 2010 (2010.2), p 24.

- The author observes that students are more at home with common law than with statute law. He sets out a framework for the comprehensive teaching of legislation (including drafting and interpretation) to undergraduate law students.

Himsworth, CMG, 'Letter to Peter J Pagano', *The Loophole*, Sept. 1988 (2.3), p 7.

- A letter sent by CMG Himsworth (Department of Constitutional and Administrative Law, University of Edinburgh) to Mr Pagano, Chief Legislative Counsel, Alberta, Canada about a one-year programme in Legislative Drafting leading to the award of a LLM degree offered by the University of Edinburgh.

'How not to train legislative draftsmen: "The Legislative Drafting (Training) Course Bill, 1987"', *The Loophole*, Feb. 1988 (2.2), p 39.

- A Bill composed, tongue-in-cheek, by trainees to show their appreciation to Justice VCRAC Crabbe, course director of a legislative drafting course sponsored by the Commonwealth Fund for Technical Cooperation.

'Legislative draftsmen: their training and retention', *Newsletter*, Nov. 1983 (No. 1), p 2 (summary of paper by GP Nazareth, Commonwealth Law Minister's meeting, Feb. 1993).

- The paper discusses steps taken to deal with shortages of drafters in Commonwealth countries over the previous 10 years. Topics covered include training (formal and in-service); recruitment and retention; and sharing of drafting resources between countries.

Pope, JD, 'Letter to all CALC members', *The Loophole*, Sept. 1988 (2.3), p 9.

- An open letter by JD Pope (Director, Legal Section, Commonwealth Secretariat, London) to all CALC members requesting comments on a proposal for a correspondence course leading to a postgraduate diploma in legislation drafting, possibly to be managed under the aegis of the Institute for Advanced Legal Studies (University of London).

'Qualifications and status of drafters', *Newsletter*, June 1984 (No. 2), p 10.

- A discussion of issues surrounding the appointment as legislative drafters of lawyers (or others) not entitled to practise law.

Quiggin, P, 'Training and development of legislative drafters', *The Loophole*, July 2007 (2007.2), p 14.

- This paper looks at the training and development of drafters, considering what skills a drafter requires, the system that the Australian Office of Parliamentary Counsel uses, how well that system works and what other systems can be used.

'Ugandan MPs to train in legislative drafting', *Newsletter*, Mar. 2003, p 20 (repub. from allafrica.com website).

- A report of a course aimed at equipping MPs with legal knowledge relevant to drafting laws.

3 Product

3.1 Drafting technique and theory

'Avoidance of "sexist" language in legislation', *The Loophole*, Nov. 1990 (3.1), in 'Papers', p 87/89s (repub. from Commonwealth Law Bulletin (1985) 11 CLB 590). See also *Newsletter*, Nov. 1984 (No. 3), p 4.

- An announcement by the Australian Attorney-General of the Australian government policy on avoiding the use of masculine personal pronouns and other gender specific drafting practices, indicating the techniques canvassed and the approaches to be adopted by drafters.

Berry, D, 'The importance of getting savings and transitionals right: two contrasting cases', *The Loophole*, Dec. 2001 (2001.1), p 41.

- The paper discusses two cases from two different jurisdictions relate to the substitution of statutory offences for common law offences.

Bowman, G, 'Legislation and explanation', *The Loophole*, June 2000, p 5.

- This paper discusses the use of purposive or explanatory material in the Bill. The author concludes that legislative text should be confined to what is essential to change the law. Purposive provisions should be treated with caution. The paper also discusses whether the reader can be helped by material outside the legislative text and in this context considers *Pepper v Hart*.

Flintoff, F, '"From time to time"', *The Loophole*, Oct. 1998, p 45.

- The paper discusses the use, and over-use, of the phrase 'from time to time'.

Fung, SYC & A Watson-Brown. 'The template: a guide for the analysis of complex legislation', *The Loophole*, Feb. 1996, p 25.

- An outline of the authors' research project for analysing the legislative sentence and legislative style. The purpose of the project was to provide a general theoretical framework as a foundation for the task of translating Hong Kong laws from English to Chinese. The project resulted in the publication of a monograph by the authors: The Template: a guide for the analysis of complex legislation, Research Working Papers, Institute of Advanced Legal Studies (University of London), 1994.

Horn, N, 'Show don't tell! A graphic approach to amendment of legislation', *The Loophole*, Oct. 1998, p 3.

- The paper proposes an approach to amending legislation that shows amendments graphically by using the device of struck-through text and underlining rather than the language of omission and substitution.

Jamieson, N, 'Linguistics and legislation', *The Loophole*, Dec. 1997, p 17.

- Extreme linguistic theories are sometimes applied to legislative composition. This paper deals with some of the difficulties in applying principles of linguistics generally to a study of legal language.

Mendis, DL, 'The current practices and problems in drafting legislation relating to multilateral treaties: Commonwealth experience', *The Loophole*, Nov. 1990 (3.1), in 'Papers', p 35/37s.

- The paper provides a comparative assessment of the practice and problems associated with treaty transformation.

——, 'The legislative transformation of treaties', *The Loophole*, Feb. 1996, p 13.

- This paper discusses drafting and parliamentary procedural issues relating to the transformation of treaties into national law in the UK and Commonwealth countries.

Moran, E, 'Enforcement mechanisms (including alternatives to criminal penalties)', *The Loophole*, June 2009 (2009.2), p 12.

- The legislature has a choice as to whether to use criminal procedures or civil procedures for ensuring compliance with an enacted behavioural rule. The paper discusses the use of civil penalties and infringement notice regimes as enforcement mechanisms.

Parliamentary Counsel's Office, NSW, 'A which hunt: that and which', *The Loophole*, Feb. 1996, p 28 (extract from internal drafting circular).

- When to use 'that' and when to use 'which' in drafting legislation.

'Strict and absolute liability in creating offences: some principles for legislative counsel', *Newsletter*, Mar. 2010, p 10 (summary of paper by K Reid, Statute Law Review 29(3) (2008), p 173).

- The paper discusses common law principles for determining whether strict or absolute liability applies to an offence, and the consequences for criminal law drafting.

Uniform Law Conference of Canada, 'Drafting conventions of the Uniform Law Conference of Canada', *The Loophole*, Aug 1991 (3.2).

- The full text is reprinted of drafting conventions adopted by the Uniform Law Conference of Canada (a group consisting of federal and provincial legislative counsel heads of office).

United Kingdom Office of Parliamentary Counsel, 'Recommendations and policies on legislative drafting matters', *Newsletter*, Apr. 2009, p 43.

- A document prepared by the UK Office of Parliamentary Counsel Drafting Technique Group. It includes detailed rules and guidelines on words and expressions, numbering, order of provisions, use of conjunctions etc.

Wilson, J, 'Law-drafting master class at the 2007 CALC Conference: report and commentary', *The Loophole*, June 2009 (2009.2), p 27.

- A series of presentations of alternative ways of solving a drafting problem set by Janet Erasmus of Canada.

Woodger, J, 'Linguistics and legislation: some comments', *The Loophole*, Oct. 1998, p 12.

- The author responds to Nigel Jamieson's paper 'Linguistics and legislation' in *The Loophole*, Dec. 1997 (q.v.) about the relationship between linguistics and legislative drafting.

3.2 Legislation case studies

Appiah, E, 'The consultative process in social policy legislation: the experience of Ghana in the Property Rights of Spouses Bill', *The Loophole*, Aug. 2010 (2010.2), p 16.

- The paper examines Ghana's experience in developing a unified law to regulate the property rights of spouses, to apply regardless of different customary law.

Erasmus, J, 'The B.C. statute revision experience: "tax law rewrite on a shoestring"', *The Loophole*, June 1999.

- A key area of demand for clearer legal language has been for improved tax laws. The paper discusses the international move to plain language, tax language and the revision of the Social Service Tax Act (British Columbia, Canada).

Jones, K, 'Rewriting Australia's income tax law', *The Loophole*, Oct. 1998, p 19.

- The paper outlines the Australian project to rewrite income tax law in a simplified form.

Leigh, M, 'Problems in drafting anti-terrorism laws in Australia', *The Loophole*, June 2009 (2009.2), p 5.

- The amorphous nature of terrorism can create problems in drafting anti-terrorism offences. Traditional drafting techniques, which rely on some degree of certainty, might not be appropriate. By bringing an awareness of the political context to the drafting of anti-terrorism laws, and by aiming for as much clarity as is achievable in the circumstances, drafters can help draft anti-terrorism laws that withstand the media spotlight.

McAra, E, 'Plain language in New Zealand tax legislation', *The Loophole*, Mar. 1997, p 54.

- A case study on the project to rewrite the *Income Tax Act 1976* (NZ) in plain language.

Orpwood, M, 'Drafting the New South Wales Duties Act 1997', *The Loophole*, Oct. 1998, p 15.

- A drafter's experience in drafting a significant and extended piece of tax law.

Stark, J, 'Lessons for statutory drafters from the Florida election dispute', *The Loophole*, Dec. 2001 (2001.1), p 5.

- The paper draws lessons from the certain techniques used or eschewed in the drafting of statutes reviewed by the Florida Supreme Court in the election dispute.

Wainwright, J, 'Some aspects of compliance with UN Security Council Resolution 1373', *The Loophole*, Mar. 2005 (2005.1), p 6.

- This paper presents some observations arising out of the work during 2002 of the Counter-Terrorism Committee and its Report Assessment Team.

Wilson, J, 'The commencement conundrum: how the Fiji Islands banking system was brought to a standstill', *The Loophole*, Dec. 2001 (2001.1), p 11.

- The paper discusses the author's experience in advising on a commencement provision which caused a crisis in the Fiji Islands banking system.

'Workshop on "Drafting evidence-based legislation: the case of the health sector in the East African Community"', *Newsletter*, Mar. 2010, p 8.

- A report of a workshop at Arusha, Tanzania, Jan. 2010.

3.3 Plain language

Adler, M, 'In support of plain law: an answer to Francis Bennion', *The Loophole*, Aug. 2008 (2008.1), p 15.

- A rebuttal of criticism of the plain language movement in FR Bennion's 'Confusion over plain language law', The Commonwealth Lawyer (16-2007), p 63.

——, 'Legalese and plain language', *The Loophole*, Jan. 2010 (2010.1), p 74.

- This paper considers how the Appropriation Act 2008 (UK), s 4(1) might be converted into plainer language. This subsection is typical of legalese: the style is convoluted; it is based on an old precedent, but is regularly reused; and it has additional material bolted on without adequate redrafting.

Barnes, J, 'Shining examples', *The Loophole*, June 2004 (2004.1), p 8.

- Examples are seen as one of the markers of plain English styles. The author analyses the functions of examples in contemporary Australian legislation.

Berry, D, 'Audience analysis in the legislative drafting process', *The Loophole*, June 2000, p 61.

- The author argues that if the needs of the varied audiences of legislation are to be met, legislative counsel need to focus on those audiences more than they have in the past. One way this might be achieved is by specific analysis of these audiences and their needs. Three approaches are suggested.

——, 'Legislative drafting: could our statutes be simpler?', *The Loophole*, Sept. 1987 (2.1), p 30.

- The paper discusses the problems of achieving simplicity in legislation in the light of the proposal by the Attorney General for Victoria, Australia for new rules to simplify the language and structure of Victorian legislation, including a requirement to have regard to the Flesch Reading Index.

——, 'Reducing the complexity of legislative sentences', *The Loophole*, Jan. 2009 (2009.1), p 37.

- The paper discusses a number of aspects of legislative sentences where communication difficulties arise.

——, 'Techniques for evaluating draft legislation', *The Loophole*, Mar. 1997, p 31.

- This paper advocates selective usability testing of draft legislation and canvasses various methods by which testing might be carried out.

Canadian Law Information Council, 'What is the Plain Language Centre?', *The Loophole*, Sept. 1988 (2.3), p 2.

- The paper provides information on the Plain Language Centre and a bibliography of plain language resources.

Carr, S, 'Is there any difference in writing for print and for the web?', *Newsletter*, Apr. 2009, p 37 (repub. and ed. from Pikestaff 24 2009, http://www.clearest.co.uk/*Newsletter*/\.php?id=31, Plain Language Commission, accessed 22 October 2010).

- The paper sets out guidelines for plain language writing for internet publication.

'Drafting laws in plain English—a current issue in Australia'. *Newsletter*, Dec. 1985 (No. 8).

- The author (presumably Mr G Kolts, editor of the *Newsletter*) discusses criticisms of legislative drafters in Australia for drafting laws that cannot easily be understood by the general public. Barriers to drafting in plain English noted are: policy complexity; the need to address multiple audiences; the difficulty of obtaining clear instructions; the state of the existing law; and time constraints.

Duckworth, M, 'Closure of the Centre for Plain Legal Language', *The Loophole*, Dec. 1997, p 75.

- A history of the Centre for Plain Legal Language based at the University of Sydney Law School.

Dykstra, G, 'Plain language, legal documents and forms: background information', *The Loophole*, Feb. 1988 (2.2), p 4.

- The paper explains the need for plain language and the types of forms and documents that are most frequently rewritten in plain language. It discusses problems encountered in Canada's attempt to use plain language and how the Canadian Law Information Council proposes to solve these problems.

Eagleson, R, 'Efficiency in legal drafting', *The Loophole*, Oct 1989 (2.5) (repub. from David St L Kelly, ed. Essays on legislative drafting: in honour of JQ Ewens, CMG, CBE, QC, Adelaide Law Review Association, 1988, p 13).

- The author argues that the most efficient language for legal drafting is plain language. The paper surveys a number of ways in which the efficiency of legal writing can be improved by the use of plain language.

——, 'Legislative lexicography', *The Loophole*, Mar. 1989 (2.4) (repub. from E G Stanley and T F Hoad (eds), Words: for Robert Burchfield's sixty-fifth birthday, London: D S Brewer, 1988, p 81).

- This paper discusses the use of definitions in legislation from the point of view of a lexicographer. The author highlights some of the positive and negative ways in which definitions are used in legislation and argues that lexicography has much to offer to legislative drafters on this topic.

'First plain-language rewrite of US federal Civil Court Rules in 70 Years', *Newsletter*, Aug. 2007, p 15.

- Striking differences are noted between previous US Federal Civil Court Rules and the rewritten version. Joseph Kimble, associate CALC member, assisted the project as drafting consultant.

Greenberg, D, 'Access to legislation—the legislative counsel's role', *The Loophole*, Oct. 2009 (2009.3), p 7.

- As legislation increases in volume and complexity, it becomes increasingly important for governments and legislative counsel to explore new ways of making the law easily accessible to citizens.

Hull, D, 'Drafters' devils', *The Loophole*, June 2000, p 15.

- The first part of the paper considers the role of the drafter in shaping policy concepts. The second part of the paper assesses the merits of plain language arguments for greater clarity in legislation.

Jenkins, C, 'The language of legislation', *The Loophole*, Dec. 1997, p 9.

- The author argues that drafting clear and simple legislation is not easy. Impediments include the complexity of policy, the pressure of time under which legislation is prepared, and the constraints imposed by the Parliamentary process.

Kelly, M, 'The drafter and the critics', *The Loophole*, Mar. 1989 (2.4) (repub. from Law Institute Journal, Oct. 1988, p 963).

- The author argues that the quest for straightforward drafting is not new. How keenly it is pursued is closely related to fashions in language. He criticises the 'plain English lobby' for various heresies and misconceptions, and advocates evolutionary rather than revolutionary change to legislative drafting practice.

Kimble, J, 'Clarity and precision in legislative drafting: are they mutually exclusive goals?', *The Loophole*, Dec. 1997, p 12 (repub. from The Scribes Journal of Legal Writing, vol. 5 (1994-95), p 53).

- The author answers critics who claim that the drafter has to choose between plain language and precision. He argues that the substance of the law can actually be made more precise by applying plain language principles. The endorsement of plain language by drafting offices and law reform bodies internationally, and instances of plain language drafting projects, are cited in support.

Kolts, G & ors, [correspondence on plain English], *Newsletter*, Feb. 1985 (No. 4) (includes 'A quasi-call to ditch legalese', repub. from Sydney Morning Herald, 1 Jan. 1985).

- Letters to the editor of the SMH and correspondence between Mr Kolts and Professor Robert Eagleson on the topic of plain English drafting are reproduced in this issue of the *Newsletter*. In addition, the issue includes an exchange of correspondence between Mr Kolts and Mr Peter Wilenski (Chairman of the Australian Public Service Board) on using 'they' and 'their' as gender-neutral 3rd person singular forms.

Nazareth, G, 'Legislative drafting: could our statutes be simpler?', *The Loophole*, Sept. 1987 (2.1), p 96.

- Justice Nazareth argues against the adoption, in common law countries, of the civil law statutory drafting system (general principles, fleshed out by the courts). He goes on to canvass some detailed suggestions about simpler drafting by reference to the Renton report and various commentators.

O'Brien, P, 'Use and misuse of examples', *The Loophole*, Mar. 2005 (2005.1), p 47.

- The author outlines his views on the use and misuse of examples, concentrating on the question of when should examples be used.

Piper, B, 'What, how, when and why—making laws easier to understand by using examples and notes', *The Loophole*, July 2007 (2007.2), p 74.

- The author argues that it is no longer necessary for drafters to labour under prescribed forms that cannot be adapted for the law's audiences. By using notes and examples, drafters can now illustrate

the intended effect of what they do, and can make laws far more accessible to legislative users, be they judges, bureaucrats or citizens.

'Plain Language Act reintroduced', *Newsletter*, Apr. 2009, p 30.

- Notice is given of the reintroduction of a Bill for a Plain Language Act 2009 into the US House of Representatives, 10 Feb. 2009.

'Plain language versions of UK Parliamentary Bills', *Newsletter*, Aug. 2006, p 44.

- A comment on an innovation in the Coroner Reform Bill (UK) incorporating a plain language 'translation' of each provision of the Bill.

Ruhindi, F, 'The need for simplicity in legislation and challenges in its attainment', *The Loophole*, June 2009 (2009.2), p 18.

- This paper examines the need for simplicity in legislation and a number of factors that affect its attainment, with a focus on developing countries.

'The Swedish approach to clear legislation', *Newsletter*, Aug. 2002, p 7 (repub. and ed. from Ministry of Justice, Stockholm 2002, 'The Swedish Government promotes clear drafting').

- A discussion of plain language legislative drafting practice, and processes to implement this, in Sweden.

Turnbull, I, 'Clear legislative drafting: new approaches in Australia', *The Loophole*, Aug. 1991 (3.2).

- In this paper, the Australian First Parliamentary Counsel describes the approach taken by his office to the problem of complex statute law. Detailed recommendations and examples of drafting practice are included.

——, 'Plain language and drafting in general principles', *The Loophole*, July 1995, p 25.

- A discussion of three styles of drafting—traditional drafting, plain language drafting and drafting in general principles. The author argues that these three styles can be regarded as on a continuous spectrum, or progression, of readability. However, the degree to which legal precision (or certainty) is obtained differs for each style, and there is no strict relationship between certainty and simplicity (or readability).

——, 'Problems of legislative drafting', *Newsletter*, Feb. 1986 (No. 9) (repub. and ed. from paper given at a conference of Australian Law Reform Agencies, Brisbane, 1985).

- The author discusses the problems of achieving simplicity in legislative drafting; problems with purpose clauses; difficulties drafting legislation to give effect to treaties; and techniques for drafting legislation more clearly.

Watson-Brown, A, 'Shall revisited', *The Loophole*, Feb. 1996, p 31.

- An assessment of the arguments about the use of 'shall' in legislative drafting. The author endorses an approach advocated by Reed Dickerson for avoiding the use of 'shall'.

Wilson, J, 'Brevity = obloquy', *Newsletter*, Oct. 2003, p. 36.

- Note of judicial criticism in three cases of both surplusage and brevity in drafting style.

3.4 Statute book

'Access to the statute law currently in force', *Newsletter*, Nov. 1984 (No. 3), p 11.

- A discussion of practices of consolidation and republication across Commonwealth countries, with reference to the recent experience in Hong Kong.

Adsett, N, 'Aspects of law revision in the Commonwealth', *The Loophole*, Oct. 2007 (2007.3), p 18.

- The paper focuses on the smaller, less sophisticated Commonwealth jurisdictions and the ways in which they keep their bodies of statute laws organised and under review.

——, 'Law revision in the Pacific region', *The Loophole*, Nov. 1990 (3.1), in 'Papers', p 70/72s.

- The paper discusses the problems faced in the Pacific Region in knowing with certainty what the existing law is and readily finding that law in order to reform it.

Berry, D, 'Ignorance of the law is no excuse, but what if you can't access it?', *Newsletter*, Mar. 2010, p 19.

- A note on two cases: *R v Chambers* (House of Lords, 1997-2008), with a comment by Tolson LJ on the inaccessibility of legislation; and an Irish case, *Quinlivan v. O'Dea* (June 2009), decided on the misapprehension that an Act was still in force though it had been repealed 16 years before.

——, 'Keeping the statute book up-to-date—a personal view', *The Loophole*, Oct. 2007 (2007.3), p 33.

- If legislation is not kept up-to-date, the task of researching it is unnecessarily difficult and mentally demanding, and requires much time, resources and energy. The problem is alleviated in those jurisdictions where indexes and annotations of statutes are maintained. In recent years, the publication in most common law jurisdictions of electronic versions of statutes and statutory rules also makes it easier to access legislation.

Elliot, D, 'Comparative experience', *The Loophole*, Mar. 1989 (2.4) (repub. from Law Commission of New Zealand, Preliminary paper no. 8—legislation and its interpretations, p 106).

- The author describes how other jurisdictions, notably England and Canada, have attempted to keep their statute law accessible.

Engle, G, 'Statutes in Force: the United Kingdom's official revised edition of the statutes', *The Loophole*, Sept. 1987 (2.1), p 81.

- The paper provides a history and discussion of developments in the UK's publishing of Statutes in Force.

Erasmus, J, 'Keepers of the statute book: lessons from the space-time continuum', *The Loophole*, Jan. 2010 (2010.1), p 7.

- The author evaluates the development of counsel's responsibility for maintaining the legal and linguistic coherence of the statute book. She considers the change in volume of the statute book over time and the longevity of Acts within the current statute book.

——, 'Statute Revision in British Columbia: recent developments from a jurisdiction with a long history of statute revision', *The Loophole*, Oct. 2007 (2007.3), p 50.

- The paper discusses the following themes: the historical development of statute revision in British Columbia; the key concepts and choices that went into the current BC Statute Revision Act; the organisation and techniques used in the 1996 general statute revision in BC, and now being applied to its ongoing statute revision process; and how BC is now using the innovative 'limited revision' authority, with its potential for never again needing a full statute revision.

'Guernsey's legal resources go on-line', *Newsletter*, Apr. 2009, p 29.

- Note about accessing the laws of Guernsey (UK). See http://www.guernseylegalresources.gg/ccm/portal/—accessed Oct. 2010.

Iles, W, 'The printing of legislation: recent developments in New Zealand', *The Loophole*, Nov. 1990 (3.1), in 'Papers', p 16/18s.

- The paper discusses the experience of New Zealand in the transfer of many of the duties of the Government Printer to Chief Parliamentary Counsel.

Ip, F, 'Compilation, consolidation and revision of the laws of Hong Kong', *The Loophole*, Dec. 1997, p 57.

- A history of the compilation, consolidation and revision of the laws of Hong Kong.

'Isle of Man secondary legislation now available on-line', *Newsletter*, Apr. 2009, p 29.

- Note about accessing the subordinate law of the Isle of Man (UK). See http://www.gov.im/infocentre/acts/—accessed Oct. 2010.

'Jersey statutes revised and updated', *Newsletter*, June 2005, p 18.

- Note about accessing the laws of Jersey (UK). See http://www.jerseylaw.je/Law/LawsInForce—accessed Oct. 2010.

Johnson, P, 'Revised Statutes of Canada, 1985', *The Loophole*, Nov. 1990 (3.1), in 'Papers', p 92/94s.

- An account of the preparation of the Revised Statutes of Canada, 1985 (the 6th such revision since confederation in 1867).

Law Commission of New Zealand, 'Access to the statute law—the consolidation and revision of legislation', *The Loophole*, Mar. 1989 (2.4) (repub. from Preliminary paper no. 8—legislation and its interpretations, p 105).

- A summary of the development by the New Zealand Parliamentary Counsel's Office of new methods of distribution to make legislation more readily accessible.

Martin, EH & ABS Pierce, 'Publication, consolidation and revision—the Hong Kong experience: new books for old', *The Loophole*, Sept. 1987 (2.1), p 87.

- The paper discusses Hong Kong's consideration of whether to use a loose leaf or loose booklet system for its legislative consolidations.

Murphy, D, 'The printing of legislation: recent developments in New South Wales', *The Loophole*, Nov. 1990 (3.1), in 'Papers', p 3/5s.

- The paper considers the implications of the closure of the Government Printing Office of New South Wales, Australia, for the preparation and printing of legislation in that State.

'On-line access to NSW legislation', *Newsletter*, Aug. 2002, p 5.

- Note about accessing the law of New South Wales (Australia). See www.legislation.nsw.gov.au—accessed 22 October 2010.

'Online legal and legislative information databases: the Global Legal Information Network', *Newsletter*, Mar. 2010, p 24.

- A note about a new US-based legal and legislative database, the Law Library of US Congress. See http://www.glin.gov/—accessed 22 October 2010.

Patchett, K, 'Consolidation of statutes in small Commonwealth states', *The Loophole*, Sept. 1987 (2.1), p 112.

- The paper considers how to make the statute book accessible in small states in the Commonwealth. Revised consolidations are relatively more important in such a State than in a more developed country. The author proposes 'regional law units' to service a number of small countries as a way of pooling resources and achieve economies of scale in the production of consolidations.

Rassmussen, M, 'Finding the statute law', *Newsletter*, Feb. 1986, No. 9.

- The author writes about the difficulties of access to statute law, particularly that of Saskatchewan, Canada.

Roger, A, 'Hong Kong's looseleaf laws', *The Loophole*, Nov. 1990 (3.1), in 'Papers', p 64/66s.

- A discussion of Hong Kong's plan to adopt a loose leaf format through adapting British Columbia's system.

'Tasmanian legislation website', *Newsletter*, June 2005, p 19.

- Note about accessing the law of Tasmania, Australia. See http://www.thelaw.tas.gov.au/index.w3p—accessed 22 October 2010.

Tian, KE, 'The printing of statutes in Singapore', *The Loophole*, Nov. 1990 (3.1), in 'Papers', p 11/13s.

- A discussion of Singapore's experience of the conversion of the Government Printing Office into a commercial enterprise.

Wainwright, J, 'Keeping the statute book up to date — a self-help guide', *The Loophole*, June 2009 (2009.2), p 55.

- Some practical suggestions for maintaining the statute book without resort to proprietary IT solutions or resource-intensive programs of law revision.

3.5 Statutory interpretation

‘Anomalies in Child Support Regulations—Smith v Smith and Another’, *Newsletter*, June 2005, p 23.

- The author describes a case on the ambiguity of the definition of ‘earnings’ in these UK regulations.

Arden, M, ‘The impact of judicial interpretation on legislative drafting’, *The Loophole*, Aug. 2008 (2008.1), p 4.

- Lady Justice Arden discusses the way judges approach the task of interpreting statutes. Two models are presented: an ‘agency model’ where the judge seeks to find the intention of Parliament as expressed in the language Parliament has used; and a ‘dynamic model’ where the judge is a guardian of constitutional norms, including human rights.

——, ‘Statutory interpretation and human rights’, *The Loophole*, July 2007 (2007.2), p 40.

- Lady Justice Arden’s perspective on the interpretation of statutes which legislate for human rights. The author argues that it is clear, even from recent UK domestic law developments, that having regard to human rights requires a fresh approach to some of the established ideas and concepts of statutory interpretation. There is plenty of scope for the courts to develop further their approach to the interpretation of legislation where human rights are affected.

Bennion, F, ‘Hansard—help or hindrance? A draftsman’s view of Pepper v Hart’, *The Loophole*, July 1995, p 12.

- In this case, the House of Lords decided that the courts can use Hansard when construing legislation. The author is critical of its consequences for drafters and others.

Berry, D, ‘Are judges retreating from adopting a purposive approach to judicial interpretation?’, *Newsletter*, June 2005, p 20.

- A case note on the Australian High Court case, *Palgo Holdings Pty Ltd v Gowans* (source: *Sydney Morning Herald*, 26 May 2005). The author reports Justice Michael Kirby’s comments (in dissent) on the definition of ‘pawnbroker’ in legislation from New South Wales, Australia.

Bokhary PJ, ‘Legislative drafting: a judicial perspective’, *The Loophole*, Jan. 2010 (2010.1), p 26.

- Justice Bokhary considers statutory construction from the different perspectives of legislative counsel and the judiciary, and the contribution of both these parties to the rule of law.

‘Case Report—Attorney General v Shimizu Corp (formerly known as Shimizu Construction Co Ltd) (No 2)’, *The Loophole*, Dec. 1997, p 71.

- A report of a case from the Hong Kong Court of Appeal that turned on the interpretation of a Hong Kong Ordinance. The case involved consideration by the court of conflicting indications given by legislative history (slightly different drafting of an analogous UK law) and local legislative context (the previous section of the same Ordinance).

Douglas, W, ‘Statutory interpretation: the role of the judiciary’, *The Loophole*, Sept. 1987 (2.2), p 72.

- The Chief Justice of Barbados argues that judges should take into account the subject matter of legislation in the process of statutory interpretation.

Greenberg, D, 'The nature of legislative intention and its implications for legislative drafting', *The Loophole*, Oct. 2007 (2007.3), p 6.

- The paper examines one of the most ancient principles of the law of England and Wales: that in applying legislation the courts and any other reader should aim to construe the law 'according to the intent of them that made it'.

Gunter, J, 'HKSAR v MA: the Basic Law "shall be" given a purposive interpretation', *The Loophole*, Dec. 1997, p 38.

- The paper discusses the first important judicial decision concerning Hong Kong's new mini-constitution, the Basic Law of the Hong Kong Special Administration Region.

Markham, S, 'The curious case of the perfectly clear scheme', *Newsletter*, Mar. 2010, p 21.

- A case note on an Irish decision, *Dunnes Stores v. The Central Statistics Office and the Minister for State at the Department on An Taoiseach*. The 'clear meaning' rule led the court to an interpretation that made the law in question difficult to implement.

Moloney, J, 'Statutory interpretation [in] the European Court of Justice—Sturgeon v. Condor Flugdienst Gmbh, Bock v. Air France SA', *Newsletter*, Mar. 2010, p 13.

- A note on the way principles of interpretation were applied by the European Court of Justice in this case, and the relevance of statutory context.

Orr, P, 'Speaker's corner: who then in law is a public servant's neighbour?', *Newsletter*, Apr. 2009, p 34 (repub. from Law Times, 24 Feb. 2009).

- The author claims that two Ontario Court of Appeal cases involve an apparent denial of the clear meaning and intention of a statute. The cases decided that no private law cause of action had been granted by the repeal of Crown immunity from suit.

Payne, J, 'On Loopholes', *Newsletter*, Aug. 2007, p 16 (repub. from The Legislative Lawyer, XX.3 (2006)).

- A discussion of 'loopholes' in tax law, and how the concepts of tax evasion and tax avoidance have been interpreted.

Scully, P, 'Extrinsic materials as an aid to statutory interpretation—a Hong Kong view', *The Loophole*, Dec. 1997, p 47.

- An examination of the 1997 Hong Kong Law Reform Commission report, *The use of extrinsic materials as an aid to statutory interpretation.*

Upham, A, 'Purposive approach nets raft fishermen', *The Loophole*, Dec. 1997, p 32.

- The paper discusses the interpretation of the Immigration Ordinance (Hong Kong), s 19 in *R v Tse Hing San and Others* and *AG v Li Ah-sang*.

'Use of explanatory notes to legislation as an aid to interpretation', *Newsletter*, Mar. 2003, p 20.

- A case note on Westminster *City Council v. National Asylum Support Service* (House of Lords, 2002). Explanatory notes—an accompanying separate booklet published by the Executive—may be used to

indicate the 'objective setting or contextual scene' of the relevant statute and the 'mischief at which it is aimed' without any textual ambiguity.

'Use of extrinsic materials in interpreting legislation—developments in Australia', *Newsletter*, June 1984 (No. 2), p 5.

- A discussion of s 15AB of the *Acts Interpretation Act 1901* (Commonwealth of Australia), which permits access to extrinsic materials in interpreting legislation. The *Interpretation Act, 1960* (Ghana), s 19(1) is also mentioned.

4 Miscellaneous

4.1 Personalia

Bacon, Edward William Delany ('Lany')

'News of members', *The Loophole*, Mar. 2005 (2005.1), p 4.

Morris, D, 'Lany Bacon SC—grand master of legislative drafting', *Newsletter*, June 2005, p 16.

- Former Chief Parliamentary Draftsman, Republic of Ireland.
- Obituaries.

De Barros Botelho, Henrique Alberto

Scott, J, 'Colonel Henrique Alberto de Barros Botelho, MBE, ED 1906-1999', *The Loophole*, June 2000, p 74.

- Former Commissioner for Law Revision, Hong Kong.
- Obituary.

Bertrand, Gérard QC

'Marginal notes', *The Loophole*, Sept. 1987 (2.1), p 25.

- Chief Legislative Counsel, Canada.
- Resignation.
- Appointment as Chairman, Ontario French Language Services Commission.

Bergeron, R, 'Vale Gérard Bertrand and Vincent Grogan', *The Loophole*, Dec. 1997, p 69.

- Obituary.

Bowman, Geoffrey

'Congratulations [and other personal notices]', *The Loophole*, June 2004 (2004.1), p 7.

- First Parliamentary Counsel, United Kingdom; President of CALC.
- Appointment as Knight Commander of the Order of the Bath.

'Sir Geoffrey Bowman, QC, KCB', *Newsletter*, Aug. 2006, p 22.

- First Parliamentary Counsel, United Kingdom; President of CALC.
- Retirement.

Buluma, Arthur

Caldwell, E, 'Secretary's notes: Mr Arthur Buluma', *The Loophole*, July 1995, p 2.

- Chief Parliamentary Counsel, Kenya.
- Obituary.

Calcutt, Greg

'News of members', *The Loophole*, Mar. 2005 (2005.1), p 4.

- Parliamentary Counsel, Western Australia.
- Appointment as Senior Counsel and Member of the Order of Australia.

'Retirement of prominent Australian Parliamentary Counsel', *Newsletter*, Feb. 2009, p 37 [with photograph showing current and former chief parliamentary counsel from almost all Australian jurisdictions, New Zealand and Hong Kong].

'Other news from Australia', *Newsletter*, Apr. 2009, p 30.

- Parliamentary Counsel, Western Australia.
- Retirement.

Caldwell, Edward

'Sir Edward Caldwell, KCB', *Newsletter*, Aug. 2006, p 23.

- Former First Parliamentary Counsel, United Kingdom.
- Retirement from the UK Law Commission.

Carter, Godfrey

'Two stalwarts of legislative drafting—Edward Sainsbury and Godfrey Carter', *Newsletter*, Oct. 2003, p 37 (repub. and ed. from London Times).

- Former Parliamentary Counsel, Office of Parliamentary Counsel, United Kingdom.
- Obituary.

Clifford, John

'John Clifford—ACT Parliamentary Counsel', *Newsletter*, Apr. 2009, p 30.

- Parliamentary Counsel, Australian Capital Territory.
- Retirement.

Dale, William

Xanthaki, H, 'Sir William Dale KCMG', *The Loophole*, June 2000, p 69.

- Director, Government Legal Advisors Course; first Director, Centre for Legislative Studies (now the Sir William Dale Centre for Legislative Studies), Institute for Advanced Legal Studies, London; member of CALC.
- Obituary.

Dawson, Mary

'Marginal notes', *The Loophole*, Sept. 1987 (2.1), p 25.

- Associate Chief Legislative Counsel, Canada.
- Appointment as Assistant Deputy Minister (Public Law), Department of Justice, Ottawa.

Driedger, Elmer

'Death of Elmer Driedger', *Newsletter*, Nov. 1985 (No. 7), p 2.

- Former Chief Legislative Counsel, Canada, author of influential texts on legislative drafting and statutory interpretation and founder of the Masters course in legislative drafting at the University of Ottawa.
- Obituary.

Erasmus, Janet

'New Chief Legislative Counsel in British Columbia', *Newsletter*, Apr. 2009, p 36.

- Chief Legislative Counsel, British Columbia, Canada.
- Appointment.

Ewens, John Q.

Kirby, M, 'Obituary—Mr J Q Ewens, CMG, CBE, QC', *The Loophole*, Feb. 1993 (3.4), p 2 (repub. from Australian Law Journal vol. 66 (Dec. 1992), p 870).

- Former First Parliamentary Counsel, Australia (first holder of that office).
- Obituary.

Finemore, John Charles

Wade, J, 'John Finemore—wise counsel of legislative reform', *The Loophole*, June 2000, p 71.

- Former Chief Parliamentary Counsel, Victoria, Australia.
- Obituary.

Fraser, James

Christensen, J, 'Sir James Fraser, former First Parliamentary Counsel, Papua New Guinea—Tribute', *Newsletter*, Aug. 2007, p 23.

- Former First Parliamentary Counsel, Papua New Guinea.
- Obituary.

Georges, Sandra

'Other news from Australia', *Newsletter*, Apr. 2009, p 30.

- Parliamentary Counsel, Australian Capital Territory.
- Appointment to replace John Clifford.

Griffey, Roy

'Members' movements', *The Loophole*, Dec. 1997, p 67.

- Legislative drafter, Law Drafting Division, Hong Kong.
- Retirement.

Grogan, Vincent

'Vale Gérard Bertrand and Vincent Grogan', *The Loophole*, Dec. 1997, p 69.

- Legislative counsel, Parliamentary Draftsman's Office, Ireland.
- Obituary.

Hackett-Jones, Geoff

'Geoff Hackett-Jones, QC', *Newsletter*, Aug. 2006, p 24.

- Former Parliamentary Counsel, South Australia.
- Resignation.
- Appointment as Parliamentary Counsel, Northern Territory, Australia.

'Geoff Hackett-Jones', *Newsletter*, Apr. 2009, p 38.

- Parliamentary Counsel, Northern Territory, Australia.
- Retirement.

Horton, Sydney

'Sydney Horton (Yukon, Canada)', *Newsletter*, Apr. 2009, p 34.

- Former Chief Legislative Counsel, Yukon, Canada.
- Obituary.

Hull, David

'David Hull', *Newsletter*, Aug. 2006, p 24.

- Head of legislative drafting office, Jersey, UK.
- Retirement.

Hurrell, Ian

'Ian Hurrell', *Newsletter*, Aug. 2006, p 25.

- Former New Zealand Parliamentary Counsel.
- Obituary.

Iles, Walter

'Walter Iles, QC, CMG', *Newsletter*, Aug. 2006, p 24.

- Former Chief Parliamentary Counsel, New Zealand.
- Retirement as a legislative drafter.

Ilyk, Peter

'News about drafters', *The Loophole*, Nov. 1990 (3.1), in 'Minutes', p 16s.

- Assistant manager, drafting unit, Civil Aviation Authority, Australia.
- Appointment (with other staff members, Messrs McMilland and Sansoni).

Johnson, Peter

'Marginal notes', *The Loophole*, Sept. 1987 (2.1), p 25.

- Chief Legislative Counsel, Canada.
- Appointment.

Maurais, D, 'Tribute to Peter Johnson', *The Loophole*, Dec. 1997, p 70.

- Chief Legislative Counsel, Canada.
- Retirement.

Jones, Kenneth

'Retirement in Northern Ireland', *Newsletter*, Apr. 2008, p 33.

- Legislative drafter with the Office of the Legislative Counsel, Northern Ireland.
- Retirement.

Keyes, John Mark

'Chief Legislative Counsel of Canada', *Newsletter*, Apr. 2008, p 33.

- Chief Legislative Counsel, Canada.
- Appointment (after acting in that capacity for 2 years).

Kolts, Geoff

'"Translation" of Geoff Kolts', *Newsletter*, July 1986 [No. 11.2], p.3.

- First Parliamentary Counsel, Australia.
- Resignation.
- Appointment as Commonwealth Ombudsman, Australia.

Koursoumba, Leda

'News of members', *The Loophole*, Mar. 2005 (2005.1), p 4.

- Parliamentary Counsel, Cyprus.
- Appointment as Cyprus Law Commissioner.

Laws, Stephen

'Stephen Laws CB', *Newsletter*, Aug. 2006, p 22.

- First Parliamentary Counsel, United Kingdom.
- Appointment to replace Sir Geoffrey Bowman.

Leahy, John

'John Leahy, SC', *Newsletter*, Aug. 2006, p 24.

- Parliamentary Counsel, Australian Capital Territory.
- Retirement.
- Appointment as head of legislative drafting office, Qatar.

Levert, Lionel

Caldwell, E, 'Secretary's notes: Mr Lionel Levert, QC', *The Loophole*, July 1995, p 2.

- Chief Legislative Counsel, Canada.
- Appointment to replace Peter Johnson QC.

'Lionel Levert QC', *Newsletter*, Aug. 2006, p 21.

- Retirement from Department of Justice, Canada.

Marsh-Smith, Lucy

'New appointments in the Isle of Man and Jersey', *Newsletter*, Apr. 2008, p 32.

- Resignation from legislative drafting office, Jersey.
- Appointment to head the legislative drafting office, Isle of Man.

Martin, Ken

'News about drafters', *The Loophole*, Nov. 1990 (3.1), in 'Minutes', p 16s.

- Parliamentary Counsel, Queensland, Australia.
- Appointment.

Maurais, Donald

Levert, L, 'Vale—Donald Maurais', *The Loophole*, June 2004 (2004.1), p 87.

- Deputy Chief Legislative Counsel, head of the Legislation Section, Department of Justice, Canada, 1995-2002.
- Obituary.

McCluskie, John

'News about drafters', *The Loophole*, Nov. 1990 (3.1), in 'Minutes', p 16s.

- Parliamentary Draftsman, Scotland.
- Appointment to replace N J Adamson, CB, QC.

'John McCluskie QC, KCB', *Newsletter*, Aug. 2006, p 23.

- First Scottish Parliamentary Counsel.
- Retirement.

Mcintosh, Hilton

Dawson, M & L Levert, 'Obituary—Hilton Mcintosh', *The Loophole*, Dec. 2001 (2001.1), p 75.

- Former Assistant Deputy Minister Legislative Services, Department of Justice, Canada; previously head of the regulations drafting unit.
- Obituary.

Meldazy, Deborah

'Marginal notes', *The Loophole*, Sept. 1987 (2.1), p 25.

- Chief Legislative Counsel, Northwest Territories, Canada.
- Resignation to undertake revision of the Ordinances of the Northwest Territories.

Miller, S

'News about drafters', *The Loophole*, Nov. 1990 (3.1), in 'Minutes', p 16s.

- Chief Parliamentary Counsel, Trinidad and Tobago.
- Appointment.

Moran, Eamonn

'New Law Draftsman in Hong Kong; new Chief Parliamentary Counsel in Victoria (Australia)', *Newsletter*, Apr. 2008, p 32.

- Chief Parliamentary Counsel, Victoria, Australia.
- Resignation.
- Appointment as Law Draftsman, Department of Justice, Hong Kong.

Morris, David

'News of members', *The Loophole*, Mar. 2005 (2005.1), p 4.

- Deputy Law Draftsman, Hong Kong.
- Retirement.

Berry, D, 'Dennis Morris—legal draftsman extraordinaire', *Newsletter*, Apr. 2009, p 29.

Collins, J, 'Memories of Dennis Morris', *Newsletter*, Apr. 2009, p 32.

Mooney, K, 'Dennis Morris: an Irish and Kingstown memory', *Newsletter*, Apr. 2009, p 30.

- Legislative drafter, Parliamentary Draftsman's Office, Ireland and the Law Drafting Division, Hong Kong.
- Obituaries.

Munyard, Walter

'Other news from Australia', *Newsletter*, Apr. 2009, p 30.

- Parliamentary Counsel, Western Australia.
- Appointment to replace Greg Calcutt AM, SC.

Noble, David

'New Zealand Chief Parliamentary Counsel', *Newsletter*, Apr. 2008, p 32.

- Chief Parliamentary Counsel, New Zealand.
- Appointment to replace George Tanner.

Orpwood, Michael

'Congratulations [and other personal notices]', *The Loophole*, June 2004 (2004.1), p 7.

- Deputy Parliamentary Counsel, New South Wales, Australia.
- Retirement.

'Michael Orpwood, QC', *Newsletter*, Aug. 2006, p 25.

- Former Deputy Parliamentary Counsel, New South Wales, Australia.
- Obituary.

Penfold, Hilary

'Former Parliamentary Counsel appointed to Supreme Court', *Newsletter*, Apr. 2008, p 32.

- Former First Parliamentary Counsel, Australia.
- Appointment to the Supreme Court of the Australian Capital Territory.

Pepper, Miles

'News about drafters', *The Loophole*, Nov. 1990 (3.1), in 'Minutes', p 16s.

- Chief Legislative Counsel, Northwest Territories, Canada.
- Appointment.

Levert, L, 'Miles Pepper', *Newsletter*, Apr. 2008, p 35.

- Former Chief Legislative Counsel, Manitoba, Canada, and Director, Legislation Division, Department of Justice, Northwest Territories, Canada.
- Obituary.

Quiggin, Peter

'Congratulations [and other personal notices]', *The Loophole*, June 2004 (2004.1), p 7.

- First Parliamentary Counsel, Australia.
- Appointment.

Ray, Dawn

'New Parliamentary Counsel in Australia's Northern Territory', *Newsletter*, Apr. 2009, p 39.

- Parliamentary Counsel, Northern Territory, Australia.
- Appointment.

Renton, David

'Lord Renton—advocate of plain language in the law', *Newsletter*, Apr. 2008, p 33.

- Author of the Renton report on The Preparation of Legislation (1975).
- Obituary.

Revell, Donald L

'Marginal notes', *The Loophole*, Sept. 1987 (2.1), p 25.

- Senior Legislative Counsel, Ontario, Canada.
- Appointment.

'News of members', *The Loophole*, Mar. 2005 (2005.1), p 4.

- Chief Legislative Counsel, Ontario, Canada.
- Retirement.

Roger, Allen

'Marginal notes', *The Loophole*, Sept. 1987 (2.1), p 25.

- Chief Legislative Counsel, British Columbia, Canada.
- Resignation to take up a contract in Hong Kong.

Sainsbury, Edward

'Two stalwarts of legislative drafting—Edward Sainsbury and Godfrey Carter', *Newsletter*, Oct. 2003, p 37 (repub. and ed. from London Times).

- Former Commissioner for Revision of the Laws of Hong Kong.
- Obituary.

Sherriff, Jan

Munyard, W & G Calcutt, 'Jan Sherriff—former WA Deputy Parliamentary Counsel', *Newsletter*, Mar. 2010, p. 9.

- Former Deputy Parliamentary Counsel, Western Australia.
- Obituary.

Stone, Arthur N

'Marginal notes', *The Loophole*, Sept. 1987 (2.1), p 25.

- Senior Legislative Counsel, Ontario, Canada.
- Retirement.

Tanner, George

'Members' movements', *The Loophole*, Dec. 1997, p 67.

- Chief Parliamentary Counsel, New Zealand.
- Appointment.

'New Zealand Chief Parliamentary Counsel', *Newsletter*, Apr. 2008, p 32.

- Chief Parliamentary Counsel, New Zealand.
- Retirement.
- Appointment to New Zealand Law Commission.

Turnbull, Ian

'Marginal notes', *The Loophole*, Sept. 1987 (2.1), p 25.

- First Parliamentary Counsel, Australia.
- Appointment.

Varley, Gemma

'New Law Draftsman in Hong Kong; new Chief Parliamentary Counsel in Victoria (Australia)', *Newsletter*, Apr. 2008, p 32.

- Chief Parliamentary Counsel, Victoria, Australia.
- Appointment to replace Eamonn Moran.

Waddington, Matthew

'New appointments in the Isle of Man and Jersey', *Newsletter*, Apr. 2008, p 32.

- Legislative drafter, Cyprus.
- Appointment to replace Lucy Marsh-Smith in legislative drafting office, Jersey.

Willis, Tom

Murphy, D, 'Tom Willis—Former New South Wales Deputy Parliamentary Counsel', *Newsletter*, Mar. 2010, p 8.

- Former Deputy Parliamentary Counsel, New South Wales, Australia.
- Obituary.

Wilson, Colin

'Colin Wilson', *Newsletter*, Aug. 2006, p 24.

- First Scottish Parliamentary Counsel.
- Appointment to replace John McCluskie, QC, KCB.

Wright, Eric

'Eric Wright', *Newsletter*, Aug. 2006, p 25.

- Former Second Parliamentary Counsel, Australia.
- Obituary.

Wong, May

'Members' movements', *The Loophole*, Dec. 1997, p 67.

- Deputy Law Draftsman, Hong Kong.

- Retirement.

Ibrahim, Zaharah

'News of CALC members', *Newsletter*, June 2005, p 6.

- Former head of the legislative drafting office, Malaysia.
- Appointment as Judicial Commissioner, High Court of Malaysia.

4.2 Conference reports

Berry, D, 'CALC Conference and meeting—Melbourne, Australia, Apr. 2003', *Newsletter*, Oct. 2003, p 2.

- General notes about the April 2003 CALC conference.

——, 'CALC Conference and meeting—Nairobi, Kenya, September 2007', *Newsletter*, Apr. 2008, p 4.

- Report of 2007 CALC conference in Nairobi. Themes included judicial interpretation of statutes, quality control in drafting offices, the role of legislative counsel and plain language and access to law.

Butt, P, 'Report on recent Clarity—Statute Law Society joint conference', *Newsletter*, Aug. 2002, p 3.

- Conference on the theme of 'The language of legislation' (London, 12-14 July 2002). Justice Michael Kirby (High Court of Australia) gave a keynote address on 'Statutes and contracts: towards a grand theory of interpretation'. Other topics included the purpose, users and production of legislation and plain language drafting style.

'CALC conference and general meeting: 8 and 9 September 2005', *Newsletter*, Aug. 2006, p 2.

- The conference was held in London. Topics included drafting office organisation and information technology; drafter training; legislative intention; drafting in a developing country; consolidation of legislation; the Human Rights Act 1998 (UK); and drafting for multiple legal systems.

O'Brien, P, D Morris & D Berry, 'Conference Impressions—CALC 2009', *Newsletter*, Apr. 2009, p 3.

- Report of 2009 CALC conference in Hong Kong on the topic of 'Whose law is it?'. Themes of the conference included multilingualism, teaching legislative drafting and interpretation and legislative drafting.

Penfold, H, 'Hilary Penfold's speech at the official dinner', *Newsletter*, Oct. 2003, p 13 (transcript of speech given on 16 April 2003 at the official dinner for the CALC conference, Melbourne, Australia, April 2003).

- The speaker takes a humorous look at judicial attitudes to legislative drafting, among other things.

'Second United Kingdom Forum of Legislative Counsel: 18 September 2009, Tŷ Hywel, Cardiff Bay, Wales', *Newsletter*, Mar. 2010, p 7.

- Conference report: topics included bilingualism, ways of working and legislative software.

4.3 Book reviews and notices

Atre, BR, *Legislative drafting: principles and techniques*, (Universal Law Publishing Co, Delhi).

- Krishna Iyer, VR, review, *The Loophole*, Mar. 2007 (2007.1), p 93, repub. from The Hindu, 12 Feb. 2002.

Beaupré, R Michael, *Interpreting Bilingual Legislation*, (2nd ed.), Carswell.

- 'Bilingual legislation', notice, *Newsletter*, July 1986 [No. 11.2], p. 2.

Bennion, F, *Understanding common law legislation*, (Oxford University Press, Oxford).

- [Notice,] *The Loophole*, Dec. 2001 (2001.1), p 77.

Blake, M, *Plain language and the law: an inquiry and a bibliography*, Department of Justice of Canada, 1986.

- 'Citations', notice, *The Loophole*, Sept. 1987 (2.1), p 26.

Butt, P & R Castle, *Modern legal drafting—a guide to using clearer language*, (Cambridge University Press, Cambridge).

- [Notice,] *The Loophole*, Dec. 2001 (2001.1), p 76.

Department of Justice of Canada, *The federal legislative process in Canada*, 1987.

- 'Citations', notice, *The Loophole*, Sept. 1987 (2.1), p 26.

Law Reform Commission of Victoria, *Legislation, legal rights and plain English, Discussion Paper No. 1*.

- 'Citations', notice, *The Loophole*, Sept. 1987 (2.1), p 26.

Mcleod, I, *Principles of legislative and regulatory drafting*, (Hart 2009).

- [Notice,] *The Loophole*, Oct. 2009 (2009.3), p 83.
- Moloney, J, review, *The Loophole*, Aug. 2010 (2010.2), p 75.

Pierce, A, *Cheung Chau Dog Fanciers' Society*, (Soho, 2002).

- Winchester, R, review, *The Loophole*, Dec. 1997, p 74, [repub. from HK Magazine, Metro Radio]. A novel written by a former Deputy Law Draftsman in the Law Drafting Division in Hong Kong.

Posesorski, A, *Indexing to improve access to legal information: the activities of the Canadian Law Information Council*.

- 'Citations', notice, *The Loophole*, Sept. 1987 (2.1), p 26.

Salembier, P, *Legal and legislative drafting*, (Lexis Nexis Canada Inc.).

- Levert, L, review, *The Loophole*, Aug. 2010 (2010.2), p 72.

Simamba, B, *The legislative process: a handbook for public officials*, (AuthorHouse).

- Marsh-Smith, L, review, *The Loophole*, Aug. 2010 (2010.2) p 70.